STATE OF NEBRASKA, APPELLANT, V. CINDI S. GOREHAM, APPELLEE.

418 N.W.2d 234

Filed January 22, 1988. No. 87-894.

Motions to Suppress: Appeal and Error: Time. An application for review, as provided in Neb. Rev. Stat. §§ 29-824 et seq. (Reissue 1985), must be filed within the time set in the trial court's order setting the time within which the application must be filed, and the time set in that order may not exceed 30 days.

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

Ronald L. Staskiewicz, Douglas County Attorney, and Michael J. Haller, for appellant.

Thomas M. Kenney, Douglas County Public Defender, and Lawrence E. Barrett, for appellee.

GRANT, J.

Defendant-appellee, Cindi S. Goreham, was charged with knowingly or intentionally possessing with intent to deliver a controlled substance, cocaine, in violation of Neb. Rev. Stat. § 28-416(1)(a) (Cum. Supp. 1986). The district court sustained defendant's motion to suppress all evidence seized pursuant to a search warrant issued which authorized the search of

> 1804 Dodge Street, Apt. #506, Omaha, Douglas County, Nebraska, a beige brick multi-story, multi-unit apartment complex known as the Logan Apartments, AND/OR the person of Raymond Haywood, black male, light skin, 5'9", 150 lbs., approximately 22 years old, Cindy Goreham, white female, 5'4", 125 lbs., age 20, curly hair, John and/or Jane Doe.

The "Cindy Goreham" named in the search warrant is defendant herein, and is the "named and described female" referred to in *State v. Warren*, 226 Neb. 810, 415 N.W.2d 152 (1987).

The State has appealed to a single judge of this court, pursuant to Neb. Rev. Stat. § 29-824 (Reissue 1985), alleging that the trial court erroneously invalidated the entire search warrant because the warrant purported to authorize the search of persons not named or described in the warrant, to wit, "John

and/or Jane Doe," as well as the designated premises and named persons, "Raymond Haywood [Warren and] Cindy Goreham . . . ."

The facts concerning the issuing and service of the search warrant in this case are those set out in *State v. Warren, supra*. I hold, based on the single-judge opinions in *State v. Warren, supra*, and *State v. Smith*, 226 Neb. 419, 411 N.W.2d 641 (1987), that the evidence seized from the designated premises should not have been suppressed and may be used against defendant Goreham. I adopt the rulings of law set out in those two cases.

In the instant case, defendant raises an additional question concerning the procedure followed by the State in its appeal under Neb. Rev. Stat. §§ 29-824 et seq. (Reissue 1985). Section 29-825 provides in part:

> The application shall be filed with the Clerk of the Supreme Court within such time as may be ordered by the district court, which in fixing such time shall take into consideration the length of time required to prepare the necessary transcript, and shall also consider whether the defendant is in jail or whether he is on bail, but in no event shall more than thirty days be given in which to file such application.

Section 29-826 provides:

> In making an order granting a motion to suppress and to return property, the district court shall in such order fix a time, not exceeding ten days, in which the county attorney or other prosecuting officer may file a notice with the clerk of such court of his intention to seek a review of the order. Upon the filing of such notice the district court shall fix the time in which the application for review shall be filed with the Clerk of the Supreme Court, and shall make an appropriate order for custody of the property pending completion of the review.

In the case at bar, on September 28, 1987, the trial court entered its order suppressing the physical evidence seized pursuant to the search warrant. In the same order, the court granted the county attorney 10 days within which to file, with the clerk of the district court, a notice of his intention to appeal.

The county attorney filed his notice of appeal by an appropriate document dated October 5 and filed October 6, 1987. On October 5, 1987, the trial court entered its "Order Setting Appellate Filing Date." That order stated, in part, "IT IS THEREFORE, ORDERED that the Application for Review shall be filed with the Clerk of the Supreme Court on or before Nov. 4, 1987." The application for review was filed in this court on November 2, 1987.

Defendant contends that § 29-825 must be construed to require that the application for review must be filed with the Clerk of the Supreme Court within 30 days of the date the suppression order is entered. The State contends the 30-day time period set out in § 29-825 does not require the filing of the application for review in the Supreme Court until the time set by the trial court in an order to be entered "[u]pon the filing of such notice [i.e., the notice of appeal filed in the district court]" and that the time set in that order may not exceed 30 days.

I agree with the State's position and hold that an application for review, as provided in §§ 29-824 et seq., must be filed within the time set in the trial court's order setting the time within which the application must be filed, and the time set in that order may not exceed 30 days, as set out in § 29-825.

In this case, the State has complied with the statutes. The notice of appeal was filed on October 6, 1987, a date within 10 days of the September 28 suppression order, and the application for review was filed prior to the November 4, 1987, date set out in the district court's order setting that date.

The order of the district court sustaining the defendant's motion to suppress was erroneous. The judgment is reversed.

REVERSED.

HELEN NOWAK, APPELLEE, V. BURKE ENERGY CORPORATION AND BURKE ENERGY (MIDWEST) CORPORATION, APPELLANTS.

418 N.W.2d 236

Filed January 29, 1988. No. 85-712.

1. **Contracts: Promissory Notes.** In an action on a promissory note or other written agreement, a contemporaneous contract, connected therewith by direct reference or by necessary implication, is admissible as part of the transactions involved, and will be construed as a single contract.
2. **Contracts.** In the absence of anything to indicate a contrary intention, instruments executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction are, in the eyes of the law, one instrument, and will be read and construed as if they were as much one in form as they are in substance.
3. _____. Acts of the parties and their practical interpretation of contracts while engaged in their performance before any controversy has arisen are among the best indications of their true intent and meaning, and should be given great, if not controlling, influence; the courts should ordinarily enforce such construction.
4. **Contracts: Parol Evidence.** The parol evidence rule does not prohibit evidence regarding the interpretation given contracts by the parties themselves.

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

Richard E. Gee, for appellants.

Michael L. Johnson of Luebs, Dowding, Beltzer, Leininger, Smith & Busick, for appellee.

BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and BRODKEY, J., Retired, and COLWELL, D.J., Retired.

BRODKEY, J., Retired.

Defendant, Burke Energy Corporation and Burke Energy (Midwest) Corporation, collectively, appeals to this court from a judgment entered against it in the district court for Hall County, Nebraska, in an action brought in said court by the plaintiff and appellee herein, Helen Nowak, against said defendant, to recover installments of principal and interest alleged to be due and unpaid under a certain promissory note and agreement for the sale of a business accompanying the same. Following a trial to the court on June 3, 1985, the court, on July 15, entered judgment against defendant for $22,656.60

principal and $3,868.99 interest, for a total judgment of $26,525.59, the court further providing that the judgment represents the principal and interest payments due to the plaintiff by said defendant up to June 3, 1985, and further providing that the defendant was legally obligated to make all future payments that come due on the contract between the parties, stating that the court did not have jurisdiction to enter a judgment for said amount "at this time."

The only assignment of error contained in the brief of the appellant is that it was error for the lower court to admit extrinsic evidence to the note itself to prove that the parties intended the note to be an interest-bearing note.

The factual background, as set out in the record filed in this court, appears to be that on March 15, 1979, the appellee herein, individually and as personal representative of the estate of Robert Nowak, doing business as Propane Gas and Appliance, entered into an agreement with a firm named Nebraska Propane, Inc., to sell a propane gas business located in St. Paul, Nebraska. The agreement contains the following provisions for the payment of the purchase price:

> 3. Payment. The purchase price for all of the business and property shall be paid by Buyer to Seller as follows:
>
> (a) $40,677.06 upon the execution of this Agreement, the receipt of which is hereby acknowledged by Seller;
>
> (b) An amount equal to 25 per cent of the total purchase price less the amount paid upon the execution of this purchase agreement shall be paid by certified check by Buyer to Seller on the date of the transfer set out herein.
>
> (c) Seller agrees to finance the balance of the purchase price to be evidenced by a negotiable purchase money promissory note in a form approved by Seller to be amortized in equal monthly installments for over a period of seven (7) years bearing interest at the rate of nine per cent (9%) per annum, said note to be secured by a security agreement and financing statement to be executed contemporaneously therewith granting to Seller a prior lien on all of said personal property covered by this Agreement. Said note and security agreement and financing statement to comply with the requirements of

the Uniform Commercial Code of the State of Nebraska and to contain provisions for Seller to retake the property secured by said security agreement in case of default of any payment for thirty (30) days.

Under the above agreement, the first installment was payable April 15, 1979, and, as shown by an amortization schedule furnished the seller, the final installment would be payable on March 15, 1986.

On the same date the agreement was entered into, March 15, 1979, Nebraska Propane, Inc., signed an "Installment Note for Use with Security Agreement," which, it appears from the evidence, was stapled together with the agreement. Although appellant in its brief expresses doubt whether they were originally so stapled, the answer is not material, as there is no requirement that a sales agreement and installment note separately executed must necessarily be stapled together. However, appellee testified that they were so stapled. The foregoing installment note, as signed by Ronald D. Clemens, executive vice president of Nebraska Propane, Inc., is in words and figures as follows:

> The undersigned promises to pay to the order of Helen Nowak, individually and as Personal Representative of the Estate of Robert Nowak the sum of $122,031.19 Dollars in equal monthly installments of $1,963.37 each, the first installment being payable on April 15th, 1979 and the remaining installments on the same date in each successive month thereafter until this note has been paid in full. The Maker at its option may make prepayments on the principal of this note. Prepayments shall be applied to the installments of principal due on this note in the order of maturity.
>
> This note is secured under a security agreement made by the Maker with the payee of this note and the holder thereof is entitled to the benefit of the security described therein.

It appears from defendant's answers to interrogatories propounded by counsel for the plaintiff, Helen Nowak, that Nebraska Propane, Inc., subsequently sold the business to a firm called Wilson Propane Wholesale Company. One of the

interrogatories submitted by counsel for plaintiff to defendant was: "Did Burke Energy (Midwest) Corporation assume the debts and obligations of Nebraska Propane, Inc.?" The defendant answered that interrogatory as follows:

> Yes. On June 30, 1981, Burke Energy (Midwest) Corporation, f/k/a Petroleum Products, Inc., assumed certain debts of Wilson Propane Wholesale Company. Wilson had purchased Nebraska Propane, Inc. on December 29, 1979. One of such debts was the Promissory Note dated March 15, 1979 in the amount fo [sic] $122,031.19. Burke's accountants did not review the terms of the Note and the Note payments were assumed under the assumption that interest was owed under the Note. Burke believes that all payments have been made under the Note since the Note does not provide for interest.

It appears that after assuming the debt in question, defendant continued to make the installment payments until May 15, 1984.

Appellant now contends that since the promissory note does not provide for the payment of interest, it is relieved from further installment payments because it has paid the entire principal balance without interest. Appellant further contends that although the agreement accompanying the note does provide for interest at the rate of 9 percent per annum thereon, the court could not read the two statements together because it would be a violation of the parol evidence rule, arguing that it was error to admit evidence extrinsic to the note itself to prove that the parties intended the note to be an interest-bearing note.

The issue in this case is whether the agreement and the promissory note together provide for the accrual of interest. The appellant apparently argues that only the note may be considered and that parol evidence may not be received to vary or add to the terms of a written agreement, citing *Traudt v. Nebraska P. P. Dist.*, 197 Neb. 765, 251 N.W.2d 148 (1977), and *Hornstein v. Cifuno*, 86 Neb. 103, 125 N.W. 136 (1910). Appellant admits in its brief, however, that the general rule is that in the absence of anything to indicate a contrary intention, instruments executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction are

legally one instrument and will be construed together as if they were as much one in form as they are in substance. *Bando v. Cole*, 197 Neb. 722, 250 N.W.2d 651 (1977); 11 Am. Jur. 2d *Bills and Notes* § 70 (1963). While it is clear that the parol evidence rule would exclude evidence, whether parol or otherwise, of antecedent understandings and negotiations and would not permit the admission of same for the purpose of varying or contradicting the written contract (see J. Calamari & J. Perillo, The Law of Contracts § 40 (1970)), yet in this case the appellee does not rely on parol evidence of antecedent understandings and negotiations, but, rather, appellee relies on the written agreement dated March 15, 1979, between appellee and Nebraska Propane, Inc.

We conclude in the instant case that the agreement may be examined to determine whether the promissory note bears interest. The law in Nebraska is well settled with reference to the question before us, and is ably summarized in Wilson, *The Parol Evidence Rule in Nebraska*, 4 Neb. L. Bull. 115 (1925). In the section of the article entitled "Separate Instruments Constituting One Contract," the author of the article, after examining approximately 20 Nebraska opinions, cited therein, on the problem, states as follows:

> The effect of the parol evidence rule, in its exclusion of extrinsic written documents, is very limited, in view of the universally accepted proposition that instruments executed at the same time, as a part of the same transaction, and intended by the parties as one contract, will be so construed. Under this rule it is held that a note, together with a mortgage securing it, will be construed together as one contract. It is obvious that no rule can be formulated by which it can be determined when the several instruments will be deemed one transaction, this depending entirely upon the intent of the parties as disclosed by the instruments themselves or extrinsic evidence.

Id. at 142.

In *Seieroe v. First Nat. Bank of Kearney*, 50 Neb. 612, 70 N.W. 220 (1897), the court at that time issued the opinion cited above, holding that in an action on a promissory note or other

written agreement, a contemporaneous contract, connected therewith by direct reference or by necessary implication, is admissible as part of the transactions involved. The case above-cited involved a note and a mortgage given in connection therewith. The court stated at 613, 70 N.W. at 221:

> The first contention of plaintiff in error is that the two instruments are, for the purpose of determining the question of their liability in this action, to be construed as a single contract. That proposition is obviously sound and rests upon a principle distinctly recognized by this court in *Polo Mfg. Co. v. Parr*, 8 Neb., 379, and *Grimison v. Russell*, 14 Neb., 521. See, also, 1 Randolph, Commercial Paper, sec. 198, and cases cited.

More recent Nebraska cases have also held that in the absence of anything to indicate a contrary intention, instruments executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction are, in the eyes of the law, one instrument, and will be read and construed as if they were as much one in form as they are in substance. *Lauritzen v. Davis*, 214 Neb. 547, 335 N.W.2d 520 (1983); *Bando v. Cole, supra; Northland Mortgage Co. v. Royalwood Estates, Inc.*, 190 Neb. 46, 206 N.W.2d 328 (1973); *Cedars Corp. v. H. Krasne & Son, Inc.*, 189 Neb. 220, 202 N.W.2d 205 (1972). The agreement in question and the promissory note are obviously part of the same transaction since both were executed March 15, 1979, and the documents were stapled together.

We have previously pointed out that the agreement between the parties provides that 25 percent of the purchase price shall be paid on the date of the transfer of the business, and further provides that

> Seller agrees to finance the balance of the purchase price to be evidenced by a negotiable purchase money promissory note in a form approved by Seller to be amortized in equal monthly installments for over a period of seven (7) years bearing interest at the rate of nine per cent (9%) per annum . . . .

An "Exhibit A" attached to the agreement in question reflects a total purchase price of $162,708.25. This agreement

reflects that the downpayment is $40,677.06. The balance of $122,031.19 under the agreement is the amount reflected on the promissory note. If $122,031.19 is amortized over 7 years at 9 percent per year, consistent with the provisions of the agreement, the monthly payment is $1,963.37. This is the amount of the monthly installment in the promissory note. It is clear from reading the agreement and the promissory note together that the promissory note provides for the payment of the principal in the amount of $122,031.19, together with interest at the rate of 9 percent per year, in 84 monthly installments of $1,963.37. Since the first installment was payable April 15, 1979, the installments would continue the 15th day of each month until the final payment on March 15, 1986.

Appellant suggests that the agreement and promissory note may not have been stapled together. This argument has no merit for two reasons. First, appellee testified that the documents were stapled together at the time of execution, and there is nothing in the record which rebuts the testimony of appellee. Second, there is no requirement that the agreement and promissory note be stapled together. All that is required is that the documents were part of the same transaction. Appellant has not suggested that the agreement and promissory note were not part of the same transaction. It is evident that they were because they were both executed on March 15, 1979. This issue by appellant is not relevant.

Appellant suggests in its brief that the "agreement" seems to contemplate a note different from the one in evidence in this case. It points out that the note is entitled "Installment Note for Use with Security Agreement" but that the second document is not called a "Security Agreement" but, rather, is an "Agreement"; and, further, that the note does not have attached to it the amortization schedule, which is exhibit 18 in the action.

Appellant further points out that there is little similarity between the note that is in evidence in this case as exhibit 1 and the note contemplated by the provision in the contract which has heretofore been set out in some detail. The note, appellant argues, makes no reference to "7 years," or 84 months; 84

payments of $1,963.37 each do not add up to $122,031.19; the note does not provide for 9 percent interest, or any interest at all; and, further, there is no evidence of a "financing statement." We are of the opinion that the fact that the parties failed to completely comply in every respect with the contract by executing a security agreement and financing statement is not relevant to the issue of whether the promissory note bears interest. Appellant argues that 84 installments of $1,963.37 do not total the principal of $122,031.19. Obviously, they do not. If the sum of the monthly installments were equal to the principal amount, then appellant would be correct in its argument that the promissory note bears no interest. Rather, the amount of $122,031.19 represents the present value of 84 monthly installments of $1,963.37 discounted at 9 percent. This was precisely the agreement of the parties, as evidenced by the agreement and the practical examination of the promissory note.

Appellant refers also to trial exhibit 19, the same being a letter from Burke Energy to Helen Nowak dated February 1, 1984, in which reference is made to clarifying the records of the company by asking her to confirm the note involved represents the entire agreement for the monthly payments, and, if so, to sign the letter or acknowledgment and return to the company; below the signature of the writer is typed "AGREED: By:," and the letter was signed by Helen Nowak on February 13, 1984. Notwithstanding the statement by appellee in exhibit 19 that the entire agreement consisted of the note in question, it is clear from the evidence that the agreement was entered into between the appellee and Nebraska Propane, Inc., and that the two should be read together. The interpretation of the promissory note is clear when read in connection with the agreement.

Even when read alone, the promissory note evidences an intent that the promissory note bear interest. The note provides: "The Maker at its option may make prepayments on the principal of this note. Prepayments shall be applied to the installments of principal due on this note in the order of maturity." It would seem obvious that the promissory note bears interest; otherwise, there would be no reason for specific references to prepayment of principal.

Our conclusion is that the agreement and the promissory note are part of a single transaction. When read together, the agreement and the promissory note clearly indicate the intent of the parties that the principal balance of $122,031.19 remaining under the agreement would be amortized over 84 months at 9 percent per year and would be paid in monthly installments of $1,963.37. We conclude that the parol evidence rule does not prohibit an examination of the agreement in connection with the note in question.

One further aspect of this case must be considered at this point. Among the evidence received by the trial court during the trial of this case are numerous documentary exhibits in various forms, all showing or demonstrating the practical interpretation of the contract given by the parties themselves. It is well-established law in this state that the interpretation given to a contract by the parties themselves while engaged in the performance of it is one of the best indications of true intent and should be given great, if not controlling, influence. See, for example, *Lauritzen v. Davis*, 214 Neb. 547, 335 N.W.2d 520 (1983); *DeFilipps v. Skinner*, 211 Neb. 801, 320 N.W.2d 737 (1982); *Strayer v. City of Omaha*, 209 Neb. 734, 311 N.W.2d 510 (1981); *Lovelace v. Stern*, 207 Neb. 174, 297 N.W.2d 160 (1980); *Nebraska State Bank v. Dudley*, 198 Neb. 132, 252 N.W.2d 277 (1977).

With regard to the amortization schedule previously referred to, the evidence is overwhelming that the parties interpreted the note to be in a principal sum of $122,031.19, amortized over 84 monthly installments at 9 percent per year, and payable in 84 installments of $1,963.37. The amortization schedule in evidence reflects a principal amount of $122,031.19, an interest rate of 9 percent per year, a term of 84 months, and monthly payments of $1,963.37.

Also in evidence in this case are forms 1099-INT for the years 1979, 1980, and 1983, showing interest income. These forms are required to be filed in connection with federal income taxes so that the government may be informed of interest paid and to whom paid, for the purpose of checking income tax matters. This is inconsistent with the position of the appellant that the promissory note did not bear interest. Also in evidence in this

case are check stubs from the appellant and Nebraska Propane, Inc., the same being payments on the promissory note to the appellee herein; each of the check stubs in evidence shows an allocation of the payment between interest and principal. Also in evidence is correspondence from the appellant to the appellee in which appellant admits that the note in question bears interest. One letter specifically refers to the interest rate of 9 percent per year, and also to the maturity date of March 1986. The parol evidence rule does not prohibit evidence regarding the interpretation given contracts by the parties themselves, and the evidence above referred to gives clear indication of how the parties interpreted the note and contract in question. The district court properly examined the acts of the parties and the interpretation of the agreement and the promissory note by the parties themselves, as evidenced by the contract.

From what we have stated above, we conclude that the decision of the district court was correct, based upon the applicable law and the evidence, and that said judgment should be, and hereby is, affirmed.

AFFIRMED.

MYRON J. YOUNGBLOOD, PERSONAL REPRESENTATIVE OF THE ESTATE OF LILLIAN A. RICE, DECEASED, APPELLEE, V. THE AMERICAN BIBLE SOCIETY ET AL., APPELLANTS, ORAL ROBERTS ET AL., APPELLEES.

418 N.W.2d 554

Filed January 29, 1988. No. 86-142.

1. **Wills: Contracts.** A contract between a husband and wife to make reciprocal or mutual wills may be valid and enforceable; however, the execution of such wills, without more, does not bar their subsequent modification or revocation.
2. _____: _____. Evidence to support a contention that a will is enforceable by reason of a contractual obligation must be clear, satisfactory, and unequivocal.
3. **Wills: Joint Tenancy.** Property owned in joint tenancy passes by reason of the nature of the title to the surviving joint tenant upon the death of the other and does not pass by virtue of the provisions of the will of the first joint tenant to die.
4. **Wills: Intent.** A patent ambiguity must be removed by interpretation according

to legal principles, and the intention of the testators must be found in the will.

5. **Wills: Intent: Presumptions.** In searching for the intention of the testators of a joint and mutual will, we must examine the entire will, consider each of its provisions, give words their generally accepted literal and grammatical meaning, and indulge in the presumption that the testators understood the meaning of the words used.
6. **Wills: Intent.** When there are definite and unambiguous expressions in a will, other expressions that are capable of more than one construction must be construed, if reasonably practicable, so as to harmonize with the plain provisions of the will.

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

William M. Connolly of Conway, Connolly & Pauley, P.C., for appellants.

Michael L. Johnson of Luebs, Dowding, Beltzer, Leininger, Smith & Busick, for appellee Youngblood.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

COLWELL, D.J., Retired.

Plaintiff-appellee brought this declaratory judgment action under Neb. Rev. Stat. § 25-21,152 (Reissue 1985), for directions in making distribution under a will executed by Lillian A. Rice on November 1, 1978 (1978 will), and codicil executed June 11, 1980, pending formal probate in the county court for Adams County, Nebraska, and to declare that the terms of a joint and mutual will executed by Wesley A. Rice and Lillian A. Rice, husband and wife, on October 10, 1952 (1952 will), have no effect on those distributions.

Wesley died December 4, 1960; thereafter, the 1952 will was admitted to probate as his will in Yuma County, Colorado. Those probate proceedings were settled and closed in 1962. Lillian died in 1984.

Plaintiff contends that upon Wesley's death, Lillian, as surviving joint tenant, became sole owner of five tracts of real estate in Colorado which Wesley and Lillian owned as joint tenants. At that time the real estate had a total value of approximately $43,000. Lillian sold all the tracts in December 1978 for $300,000; a part of that selling price is traceable to a

$225,000 note as an estate asset held by plaintiff. In the inventory, final report, and final decree filed in Wesley's estate in Yuma County, the jointly owned property was not included as an asset in the probated estate.

Appellants were named as residuary beneficiaries in the 1952 will. By their cross-petition they claim that the 1952 will was a contract between the testators, that the 1952 will was dispositive of all the testators' property including jointly owned property, and that a constructive trust should be imposed for their benefit upon the assets in the Lillian A. Rice estate.

Both parties filed motions for summary judgment. Judgment was entered for plaintiff, including these findings: There was no contract, the 1952 will did not apply to the property owned by Wesley and Lillian as joint tenants at the time of Wesley's death, and plaintiff could distribute the assets in the Lillian A. Rice estate according to her 1978 will and the codicil.

The appellants assign eight errors that we consolidate and discuss in these three issues: (1) The 1952 will was an irrevocable contract between the testators; (2) the 1952 will disposed of all of the testators' property, including joint tenancy property; and (3) a constructive trust should be imposed upon the property held by plaintiff in favor of the residuary beneficiaries under the 1952 will.

First, appellants contend that the 1952 will was a written memorandum of an irrevocable contract between Wesley and Lillian to distribute all of their property as provided in that will. When the 1952 will was executed, Wesley was a resident of Colorado and Lillian was a resident of Nebraska. "A claim that a subsequent revoking will is a breach of an agreement for the making of irrevocable reciprocal wills may properly be asserted in a court of equity, but not in the probate court by contesting the later will or by objection to a decree of distribution." (Syllabus of the court.) *Kimmel v. Roberts*, 179 Neb. 25, 136 N.W.2d 217 (1965).

In this jurisdiction a contract between a husband and wife to make reciprocal or mutual wills may be valid and enforceable; however, the execution of such wills, without more, does not bar their subsequent modification or revocation. *McKinnon v.*

Baker, 220 Neb. 314, 370 N.W.2d 492 (1985).

Evidence to support a contention that a will is enforceable by reason of a contractual obligation must be clear, satisfactory, and unequivocal. *McLaughlin v. Heath*, 164 Neb. 511, 82 N.W.2d 533 (1957). The intent of the testators is a primary consideration.

> In searching for the intention of the testators of a joint and mutual will, we must examine the entire will, consider each of its provisions, give words their generally accepted literal and grammatical meaning, and indulge in the presumption that the testators understood the meaning of the words used.

(Syllabus of the court.) *In re Estate of Corrigan*, 218 Neb. 723, 358 N.W.2d 501 (1984).

Where such a contract is established, "equity will impress a trust upon the property, which trust will follow it into the hands of the personal representatives of the promisor or into the hands of a grantee who has not given consideration for the conveyance." *Allen v. Mayo*, 203 Neb. 602, 608, 279 N.W.2d 617, 620 (1979); *Blanchard v. White*, 217 Neb. 877, 351 N.W.2d 707 (1984).

Appellants rely on *Geiger v. Geiger*, 185 Neb. 700, 178 N.W.2d 575 (1970), as authority supporting their contract theory. In *Geiger* it was held that there was a contract as shown by the recitation in the reciprocal will of John Geiger, and a like recitation in the will of Frances Geiger, " 'My wife, Frances Geiger, and myself have made these mutual wills as of the date this will bears, after an agreement between us that we would divide our property as hereinbefore provided.' " *Id.* at 701, 178 N.W.2d at 576. Also, John made this notation on the will of Frances, " 'Dec 22/54. I agree to these mutual wills. John Geiger.' " *Id.* These facts are distinguishable from the 1952 will and its execution.

Other than recitals common to mutual wills that the testators intend the instrument to be their joint and mutual will, the strongest language in the 1952 will appears as a recital in the introductory paragraph:

> and do each consent to the making of this Will by the other and accept hereunder, and do each hereby agree and

> consent to this Will leaving to the other more or less than the one-half of his or her property to which he or she would otherwise be entitled, and declare that this Will *cannot be changed or varied by either, without the consent in writing by the other.*

(Emphasis supplied.)

A provision similar to the above recital, "without the consent in writing by the other," has been held to be a limitation upon the testators during the lifetime of the one first to die. See, *Sheldon v. Watkins*, 188 Neb. 599, 198 N.W.2d 455 (1972); *McKinnon v. Baker, supra.*

From a reading of the whole 1952 will, we can find no supporting evidence of an intention on the part of the testators that the 1952 will was a contract between them to dispose of all of their property, including jointly owned property, according to the terms of that 1952 will.

Next, appellants contend that by the terms of the 1952 will the testators intended that the 1952 will was dispositive of the jointly owned property owned by the testators.

Property owned in joint tenancy passes by reason of the nature of the title to the surviving joint tenant upon the death of the other, and does not pass by virtue of the provisions of the will of the first joint tenant to die. *Sheldon v. Watkins, supra.*

Appellants contend that there is a patent ambiguity in paragraph II of the 1952 will which, by interpretation, establishes the intent of the testators to include testators' jointly owned property as a part of the residuary estate. Paragraph II recites:

> All of our estate and property, of any kind or nature whatsoever, and wheresoever situate, both real and personal, whether now owned or hereafter acquired (*not held in joint tenancy and not in tenancy in common*), we give, devise and bequeath to the survivor of us for his or her sole use and benefit for and during his or her natural life, together with full power to use, enjoy and dispose of the same; and upon the death of such survivor, we make, give and bequeath the following specific pecuniary legacies, to-wit:
>
> [Here followed six separate bequests of $1 each.]

All the rest, residue, and remainder of said property and estate then remaining, as well as any and all other estate and property of any kind or nature whatsoever, then owned by such survivor, we give, devise and bequeath to the following named charitable institutions or organizations, in the following shares and proportions, to-wit:

To Friends University, of Wichita, Kansas, one-fourth (1/4th);

To The Salvation Army, one-eighth (1/8th);

To The American Bible and Tract Society, one-eighth (1/8th);

To The Board of Foreign Missions of the Methodist Church, one-fourth (1/4th);

To The Womans' Christian Temperance Union, one-eighth (1/8th);

To The American Temperance League, one-eighth (1/8th).

(Emphasis supplied.)

" ' "A patent ambiguity must be removed by interpretation according to legal principles and the intention of the testator must be found in the will. . . ." ' " *In re Testamentary Trust of Criss*, 213 Neb. 379, 395-96, 329 N.W.2d 842, 852 (1983).

Paragraph III is enlightening:

We are aware that all or most of the property and estate which we may own or may hereafter own is owned or will be owned by us in joint tenancy, and not in tenancy in common, and we understand that in the event that either of us shall survive the other, then and in that event, the title and interest of the one of us who shall first depart this life in and to said property owned in joint tenancy as aforesaid, *will pass to the survivor of us, and it is not our purpose or intention by this Last Will and Testament to alter or interfere with such passing or vesting of such jointly owned property*; but in the event that our deaths shall occur simultaneously or approximately so, or in the same common accident or calamity, or under circumstances causing doubt as to which of us survived the other, then we hereby give, devise and bequeath all of our

> title and interest in and to such jointly owned property to the beneficiaries, and in the manner and shares set forth in paragraph II hereof; and in the event of such simultaneous death, any other property or estate which we or either of us may own at the time of such deaths, shall likewise pass to said beneficiaries, and in the manner and shares as set forth in said paragraph II hereof.

(Emphasis supplied.)

Concerning the last part of paragraph III relating to the possible contingency of simultaneous death, that provision was not operative, since Lillian died several years after Wesley. Further, that provision indicates that the testators were aware that a special provision was necessary to overcome the general rule that their jointly owned property was not subject to the dispositions made in their 1952 will.

"When there are definite and unambiguous expressions in a will, other expressions that are capable of more than one construction must be construed, if reasonably practicable, so as to harmonize with the plain provisions of the will." *Anderjaska v. Anderjaska*, 216 Neb. 527, 529, 344 N.W.2d 478, 479 (1984).

We conclude that the parenthesized reference in the beginning of paragraph II, "not held in joint tenancy . . .," is clearly and fully explained in paragraph III, that the testators were aware of their ownership of jointly owned property, that in the event of the death of one of the joint owners the title to such jointly owned property vested in the survivor, and that it was their intention that the will was not to be interpreted as changing that transfer of title by operation of law.

Lastly, in consideration of the foregoing findings, appellants' claim that a constructive trust should be imposed was unsupported in the evidence, and it is without merit.

The judgment of the trial court should be affirmed.

AFFIRMED.

ALAN H. KIRSHEN, APPELLANT, V. SHIRLEY H. KIRSHEN, APPELLEE.

418 N.W.2d 558

Filed January 29, 1988. No. 86-239.

Due Process: Notice. Due process requires that adjudication be preceded by notice and an opportunity to be heard which is fair in view of the circumstances and conditions existent at the time.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Reversed and vacated.

James L. Rold of Rold, Peppard & Long, P.C., for appellant.

Jerome J. Ortman, for appellee.

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

PER CURIAM.

The district court entered orders purporting to both interpret and modify its earlier decree dissolving the marriage of the petitioner-appellant husband, Alan H. Kirshen, and the respondent-appellee wife, Shirley H. Kirshen, and to quash certain garnishments the husband had caused to be issued. In this appeal the husband asserts 16 assignments of error, which can be summarized as claiming (1) that the procedures employed by the district court deprived him of his due process rights under U.S. Const. amend. XIV, § 1, and Neb. Const. art. I, § 3, and (2) that, in any event, the orders are not supported by the record. The husband's due process claims being meritorious, we reverse and vacate the orders of the district court and hold them for naught, and overrule the husband's motion for an attorney fee.

So far as is pertinent to the issues before us, the aforesaid decree, which was summarily affirmed by this court in *Kirshen v. Kirshen*, 214 Neb. 631, 335 N.W.2d 303 (1983), places custody of the two minor children of the parties in and with the wife, requires that the husband pay the sum of $100 per month per child in support, and finds that each of the parties be responsible for the debts each incurred after a stated date,

> except that [the wife] shall be responsible for one-half ($5,050.00) of the [husband's] loan in his own name at the [Norwest Bank, Omaha, Nebraska] in the present amount of $10,100.00. She will be responsible for no further increases in the principal amounts due on said loan nor will she be responsible for the accumulation of interest thereon.

The decree did not enjoin either party from disturbing the peace of the other.

The controversy presently before us began with the wife's letters to the judge who rendered the decree, complaining that the husband was harassing her and removing money from various accounts in which she had an interest or to which she had access. Upon receipt of the second of those letters, dated 9 days apart, the judge issued an order directing the husband to appear before him the following day "and show cause why he should not be held in contempt of Court for abuse of process in the institution of garnishment proceedings . . . ."

At the hearing held pursuant to the show cause order, the judge recused himself from considering and determining whether the husband was in contempt; in view of that fact and the disposition of this matter, we need not concern ourselves with the manner in which the proceedings now before us commenced. Notwithstanding the fact the judge recused himself from considering the only matter noticed for hearing, he entertained evidence touching upon a number of issues and rendered orders which purported to, among other things, interpret the interest provisions of the decree relating to the Norwest debt, define for the first time the maturity date of the wife's obligation on that debt, double the husband's child support obligation, impose monetary penalties in the event he failed to timely meet that increased obligation, and quash all garnishments the husband had caused to be issued in an apparent effort to collect on the wife's obligation on the Norwest debt as specified in the decree as originally entered (at least one of which was pending before the district court in and for a county other than Douglas). While it is true, according to the discussions of counsel, that there was pending a motion filed by the husband seeking an interpretation of the decree,

that motion is not contained in the portions of the record submitted to us. Moreover, there is nothing which suggests there were pending any applications seeking modification of the decree with respect to the Norwest debt, child support, or any other matter; and nothing to suggest there were any applications pending which sought to quash any garnishments, unless the wife's letters to the judge can be so characterized—a matter we need not and do not decide, for, as the analysis which follows demonstrates, what was or was not pending with respect to the matters acted upon by the judge is immaterial. The dispositive fact is that once the judge recused himself on the contempt matter, there was nothing before the court which had been noticed for hearing.

U.S. Const. amend. XIV, § 1, provides that no state shall deprive any person of property "without due process of law." Neb. Const. art. I, § 3, affords the same protection in like language. Due process has been held to require that adjudication be preceded by notice and an opportunity to be heard which is fair in view of the circumstances and conditions existent at the time. See, *Armstrong v. Manzo*, 380 U.S. 545, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965); *Black v. Black*, 223 Neb. 203, 388 N.W.2d 815 (1986).

Accordingly, in *State ex rel. Douglas v. Schroeder*, 212 Neb. 562, 324 N.W.2d 391 (1982), we held that one who appeared on motions to dismiss and for summary judgment could not be compelled to proceed to hearing on pending requests for the production of documents. In *Tuch v. Tuch*, 210 Neb. 601, 316 N.W.2d 304 (1982), we held that the court had no power to modify the terms of its earlier support order during the course of contempt proceedings arising from defendant's claimed arrearages in child support payments. *Howard v. Howard*, 207 Neb. 468, 299 N.W.2d 442 (1980), held the district court erred in modifying its earlier decree by adding an alimony obligation during the course of contempt proceedings arising from the failure to pay debts, without granting a hearing for that purpose.

It was a fundamental deprivation of due process to summon the husband in this case to explain why he should not be found in contempt for causing garnishments to be issued and then

enter myriad rulings dealing with a variety of other issues. So far as the order to show cause reflected, the only issue to be considered was whether the husband had in some way put himself in contempt of court by causing the issuance of garnishments, not whether the garnishments ought be quashed, whether he was in arrears in the payment of child support, whether the child support obligation should be increased and what should follow if he failed to timely meet that obligation, what the terms of any portion of the decree as originally entered meant, nor whether the debt relationship between himself and the wife should be altered. Accordingly, the orders interpreting and modifying the original decree and quashing the garnishments are nullities and have no force or effect.

This resolution makes it unnecessary for us to review the inappropriateness of a motion seeking an interpretation of a judgment which has become final, *Neujahr v. Neujahr*, 223 Neb. 722, 393 N.W.2d 47 (1986), or to consider the second category of assignments.

While judicial frustration with the conduct of any party provides no basis for suspending constitutional rights, the record suggests the presence in this case of such immature and mean-spirited conduct as would try the patience of the most deliberative of jurists. Accordingly, the husband's motion for the award of an attorney fee is overruled; each party is to pay any fee he or she incurred and bear the costs of his or her own making.

REVERSED AND VACATED.

STATE OF NEBRASKA, APPELLEE, V. CHARLES SCHON, APPELLANT.

418 N.W.2d 242

Filed January 29, 1988. No. 86-1011.

1. **Sexual Assault: Corroboration.** After the victim has testified to the commission of the offense, it is competent to prove in corroboration of that testimony as to the main fact that, within a reasonable time after the alleged assault, the victim made complaint to a person to whom a statement of such an occurrence would naturally be made.

2. **Convictions: Appeal and Error.** A judgment of conviction will not be reversed by the Supreme Court on appeal unless the evidence is so lacking in probative force that it is insufficient as a matter of law.

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

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

Robert M. Spire, Attorney General, and Mark D. Starr, for appellee.

BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and BRODKEY, J., Retired, and COLWELL, D.J., Retired.

COLWELL, D.J., Retired.

Charles Schon, defendant, appeals a Douglas County Court conviction of third degree sexual assault, Neb. Rev. Stat. § 28-320 (Reissue 1985), which, on appeal, was later affirmed by the district court. The only assigned error is that the evidence was insufficient to sustain the conviction; particularly, that there was a lack of independent corroboration. We affirm.

The alleged assault occurred on February 4, 1986, when defendant, age 31 years, was living in Omaha, Nebraska, with his wife, Pamela, and her 6-year-old daughter, M.G., the victim. Sometime after 10:20 that night, when Pamela was working away from the family home, the defendant was babysitting M.G. and entertaining two friends, a female, described as "practically" a prostitute, and a male friend. M.G. testified that defendant pulled her nightgown up, held her legs, and "[k]issed [her] down there," with "down there" later described as her genitals. Defendant then used vile language in threatening physical punishment to M.G. if she ever told anyone about the incident. M.G. reacted by becoming afraid of the defendant. Defendant described the threats as a means of teasing. Pamela testified that following February 4, she noticed changes in M.G.'s behavior, such as bad dreams and bedwetting. About 10 days after the incident, Pamela moved to her mother's house in Omaha, taking M.G. with her. Shortly thereafter, M.G. related the details of the February 4 incident to Pamela, who notified the Omaha police. Officer Mary Bruner

conducted an official police investigation.

Defendant was the only witness for his defense. He admitted being present at the time and place charged. He denied the alleged assault. The evidence shows that defendant was a heavy drug user at the time and that he had three prior felony convictions. Pamela, M.G., and Police Officer Mary Bruner testified for the State. Following his conviction, the defendant was sentenced to serve 180 days in confinement.

Section 28-320 provides:

> (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.
>
> . . . .
>
> (3) Sexual assault shall be in the third degree and is a Class I misdemeanor if the actor shall not have caused serious personal injury to the victim.

The review on appeal by the district court was limited to an examination of the record for error. Neb. Rev. Stat. § 29-613 (Reissue 1985); *State v. Smith*, 199 Neb. 368, 259 N.W.2d 16 (1977).

"In a sexual assault case, the victim need not be independently corroborated on the particular acts constituting sexual assault, but must be corroborated on the material facts and circumstances tending to support the victim's testimony about the principal fact in issue." (Syllabus of the court.) *State v. Wounded Arrow*, 207 Neb. 544, 300 N.W.2d 19 (1980). After the victim has testified to the commission of the offense, it is competent to prove in corroboration of that testimony as to the main fact that, within a reasonable time after the alleged assault, the victim made complaint to a person to whom a statement of such an occurrence would naturally be made, especially if the victim is afraid and ashamed of what has happened. *Id.*

Where a trial court has entered a judgment of conviction in a criminal case, that judgment will not be set aside on appeal for

insufficiency of the evidence if the evidence sustains some rational theory of guilt. A judgment of conviction will not be reversed by the Supreme Court on appeal unless the evidence is so lacking in probative force that it is insufficient as a matter of law. *State v. Painter*, 224 Neb. 905, 402 N.W.2d 677 (1987).

Bearing in mind that this court on appeal neither resolves conflicts in the evidence nor passes on the credibility of the witnesses, *State v. Jackson*, 222 Neb. 384, 383 N.W.2d 794 (1986), the evidence shows that the victim's descriptions of the assault and the surrounding circumstances that she related to her mother, to the investigating officer, and during her incourt testimony, were direct and consistent in establishing the sexual assault charged in the complaint. The corroboration of the material facts and circumstances of the assault was shown by the changes in the victim's habits, crying, and fear of the defendant, followed by the report to the police that was made within a reasonable time after the assault.

The evidence here is not unlike *State v. Aby*, 205 Neb. 267, 287 N.W.2d 68 (1980), where the victim, age 10 years, did not report the assault for more than 3 months after the event. There, we found that the record as a whole supplied corroboration and supported the conviction.

AFFIRMED.

WHITE, J., concurs in the result.

SHANAHAN, J., concurring.

While there is sufficient evidence to sustain Schon's conviction and, therefore, I concur in the majority's conclusion that Schon's conviction must be affirmed, this court continues to cling to an anachronistic evidential requirement, namely, the requirement of corroboration for a victim's testimony in a prosecution for the crime of sexual assault—a rule judicially fashioned long before safeguards, both constitutional and procedural, were impressed on the current criminal justice system. Longevity of a rule of law does not necessarily indicate the rule's soundness, for, as observed by Holmes:

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply

> persists from blind imitation of the past.
>
> Address by O.W. Holmes, 10 Harv. L. Rev. 457, 469 (1897).

Although not laid down in the 14th or 15th century during the time of Henry IV, the requirement of corroboration for testimony from a victim of a sexual assault apparently germinated in the 17th century, as reflected in the writings of Sir Matthew Hale, Lord Chief Justice of the Court of King's Bench from 1671 to 1676. According to Hale, a conviction for rape must be sustained only with "concurrent evidence to make out the fact," because rape or any sexual assault "is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent." See *People v. Rincon-Pineda*, 14 Cal. 3d 864, 874, 538 P.2d 247, 254, 123 Cal. Rptr. 119, 126 (1975).

Hale's corroboration rule originated in an era without constitutionally guaranteed due process, including the fundamental presumption of innocence and basic burden on the State to prove an accused's guilt beyond a reasonable doubt, as well as the constitutionally protected rights to present witnesses, by compulsory attendance if necessary, and, not the least, to have effective assistance of counsel to cross-examine the accuser. See, *People v. Rincon-Pineda, supra; Arnold v. United States*, 358 A.2d 335 (D.C. 1976). Some 200 years after Hale, Nebraska adopted Hale's corroboration rule, see *Mathews v. State*, 19 Neb. 330, 27 N.W. 234 (1886), which, by this court's action today, is still alive, notwithstanding its jurisprudential infirmity.

As pointed out in *State v. Cabral*, 122 R.I. 623, 627, 410 A.2d 438, 441 (1980):

> The requirement for independent corroboration in sex-offense cases has been the subject of ever increasing criticism. Contemporary empirical studies suggest that the factors employed to support the corroboration requirement do not justify the rule. There is a great reluctance to report a rape. [Citations omitted.] Juries generally tend to view rape charges with skepticism and suspicion, especially when there is a suggestion of willingness or agreement on the part of the victim [citations omitted], and convictions, in the absence of

aggravating circumstances, are the exception rather than the rule.

Neb. Evid. R. 601 (Neb. Rev. Stat. § 27-601 (Reissue 1985)) provides: "Every person is competent to be a witness except as otherwise provided in these rules." However, the Nebraska Evidence Rules neither specifically refer to a sexual assault victim's competency or credibility as a witness nor implicitly contain a corroboration requirement in sexual assault cases. Required corroboration, therefore, reflects a rather unsubtle judicial predetermination that a victim in a sexual assault case presumptively and inherently lacks credibility. Consequently, it is indeed ironic that Nebraska permits a defendant's first degree murder conviction to be "supported by the uncorroborated testimony of an accomplice," *State v. Joy*, 220 Neb. 535, 537, 371 N.W.2d 113, 115 (1985), but a defendant's sexual assault conviction is not supported by the uncorroborated testimony of the victim. As exemplification of the evidential incongruity involving sexual assault cases, under existing Nebraska law a person who has been kidnapped and later sexually assaulted by the abductor may testify concerning both crimes, but the victim's uncorroborated testimony is insufficient to sustain a conviction on the sexual assault charge, whereas no corroboration of the victim's testimony is required to sustain a conviction on the kidnap charge. In the foregoing illustration, reconciliation of the different standards for sufficiency of the evidence is impossible, and justification for such difference is nonexistent.

Although present Nebraska practice prohibits a trial judge from commenting on the evidence submitted to a jury, the outdated and discriminatory corroboration rule is most assuredly a derogatory comment about a victim's testimony in a sexual assault case. As a result of the corroboration rule, the sexual assault victim comes into the court stigmatized as untrustworthy, because the victim is one in a class of witnesses whose credibility is suspect and who are not entitled to the same credibility otherwise accorded a victim testifying about a crime other than a sexual assault. Accordingly, so long as the corroboration requirement exists for a sexual assault case, there is a somewhat hollow ring to the principle that this court, in its

appellate review, does not pass "on the credibility of the witnesses." A jury, given appropriate judicial instruction on the factors affecting a witness' credibility (NJI 1.41), is capable of determining whether a witness, including a sexual assault victim, conveys credence.

When this court last considered and reaffirmed the requirement of corroboration for testimony of victims in sexual assault cases, namely, *State v. Daniels*, 222 Neb. 850, 388 N.W.2d 446 (1986), it appeared that two jurisdictions—the District of Columbia and Nebraska—retained the judicially originated rule of corroboration for a victim's testimony to convict a defendant on a charge of sexual assault, although in the District of Columbia the rule was restricted to cases involving sexual assault of a child. However, in *Gary v. United States*, 499 A.2d 815 (D.C. 1985), the corroboration rule was entirely abolished in the District of Columbia, when the court stated:

> The constitutional protections provided the defendant are adequate in a sex case and the corroboration requirement no longer serves a useful purpose. [Citations omitted.] The asserted purpose of the corroboration requirement was to support and test the credibility of the complaining witness. There is no reason to distinguish between a mature female and a mature male sex offense victim. Nor is there any logical reason to raise barriers to the jury evaluation of the credibility of a minor in a sex offense where we do not require it in other situations. Courts have too long "discounted reports of sexual attacks by children." [Citations omitted.]
>
> . . . .
>
> . . . We conclude "[i]t is long past the time that this court should follow the example of most of the jurisdictions in this country and totally eliminate the last vestiges of this outdated, discriminatory rule." [Citation omitted.]

499 A.2d at 833-34.

Why the State does not advocate abolition of the corroboration requirement is an enigma. Nevertheless, the judicially created corroboration rule in Nebraska should be judicially abolished. While some might believe that our

retention of the corroboration rule is steadfast dedication, others might view our position as clutching a rule without a reason. By retaining the antiquated and unnecessary corroboration rule regarding a victim's testimony in sexual assault cases, this court has never been more alone than today, when we are wholly alone, and, thus, have realized Garbo's wish.

STATE OF NEBRASKA, APPELLEE, V. CINDY ROBERTS, APPELLANT.

418 N.W.2d 246

Filed January 29, 1988. No. 87-165.

1. **Convictions: Circumstantial Evidence.** Circumstantial evidence is sufficient to convict a defendant where the evidence and reasonable inferences from the evidence establish the defendant's guilt beyond a reasonable doubt.
2. **Motions for New Trial: Juror Misconduct: Appeal and Error.** A motion for new trial for alleged juror misconduct is addressed to the sound discretion of the trial court, and a ruling thereon will not be disturbed unless an abuse of discretion is shown.
3. **Verdicts: Juries.** Neb. Rev. Stat. § 27-606(2) (Reissue 1985) controls inquiries into the validity of a verdict reached by a jury.

Appeal from the District Court for Garfield County: RONALD D. OLBERDING, Judge. Affirmed.

James G. Egley of Moyer, Moyer, Egley & Fullner, for appellant.

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

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

GRANT, J.

This is an appeal from the district court for Garfield County, Nebraska. After trial to a jury, the defendant was found guilty of threatening the use of explosives, in violation of Neb. Rev.

Stat. § 28-1221 (Reissue 1985), a Class IV felony. After a hearing was held on defendant's motion for new trial, the motion for new trial was denied. Defendant was sentenced to 2 years' probation. Defendant timely appealed, and assigns as error that there was insufficient evidence to support the verdict and that the trial court erred in overruling defendant's motion for a new trial "in that a juror used information obtained outside the evidence to reach her verdict and such evidence was prejudicial to the defendant." We affirm.

The record shows the following. On March 10, 1986, at approximately 10:30 a.m., Lloyd Lamb, the administrator of Burwell Elementary School, opened an envelope addressed to the school after picking up the mail at the local post office. Inside the envelope was a note with a message in printed letters of various sizes and shapes. The letters appear to have been cut out of magazines and were attached to the paper with Scotch tape. The message read, "The bomb will go off today no one is safe Loyd [sic]." Lamb then called city hall. A police officer arrived at the school at 1:30 p.m., and the school was subsequently evacuated. A search for the bomb was conducted, but no bomb was ever found.

The defendant, a second grade teacher in the Burwell school system, was charged with threatening the use of explosives, in violation of § 28-1221, which provides in part:

> Any person who . . . maliciously conveys to any other person false information knowing the same to be false, concerning an attempt or alleged attempt being made or to be made to kill, injure, or intimidate any individual or unlawfully to damage or destroy any building . . . by means of any explosive material or destructive device commits the offense of threatening the use of explosives.

Trial was held on December 2 and 3, 1986. Evidence adduced at trial showed that a fingerprint of defendant's forefinger was on the sticky side of one of the pieces of tape located on the front of the note. Comparison was made with defendant's fingerprints, which were on file with the Burwell Police Department because of a burglary investigation in her home in September of 1985. Other testimony showed that the defendant had expressed feelings of resentment toward Lamb after, at the direction of

the school board, he had sent her a letter criticizing her teaching skills. A witness testified that the defendant had stated that she "hated" Lamb. Other testimony showed defendant had expressed similar feelings toward a school board member.

Defendant explained the presence of her fingerprint on the Scotch tape and testified that she had a nervous habit of rolling Scotch tape around her finger while teaching. Defendant testified that the core and roll of tape from her tape dispenser had been missing from her school desk since January or February of 1986. Defendant further testified that she had not sent the note and was not guilty of the crime.

On December 3, 1986, the jury found the defendant guilty. Defendant filed a motion for a new trial. At the evidentiary hearing on the motion, an affidavit signed by a juror was offered into evidence in support of the motion by defendant, and received without objection. The affidavit, signed by the juror, stated that the juror "did in fact hear and/or see reports of the alleged bomb threats to the elementary school in Burwell, Nebr. prior to being placed on the jury"; that the juror "had also either read, or had talked to others to wit . . . a sister in-law who expressed knowledge and information concerning the bomb threat and other information about Cindy Roberts"; and that the juror "did use this information and comments from [her sister-in-law] to make her decision about Cindy Roberts being guilty." This typewritten affidavit was signed on January 13, 1987, before a notary public, Hollis Compton, a private investigator who had prepared the statement.

During the defendant's voir dire questioning before the trial, the juror was asked whether she had heard anything about the case. The juror responded as follows:

> [Juror]: Just what I heard and read in the paper.
>
> [Defense counsel]: Did you form an opinion in this case?
>
> [Juror]: No.
>
> [Defense counsel]: You have an open mind at this point?
>
> [Juror]: Yes.

The juror in question testified in a hearing on defendant's motion for new trial on February 18, 1987. On direct

examination, the juror stated that an investigator had visited her at her home twice and that she had signed the affidavit on the second visit. Although the juror acknowledged that she had signed the affidavit, she testified at the hearing that what she had heard from her sister-in-law did not influence her vote in the case and that she had considered only the evidence presented at trial. The juror stated that the conversation with her sister-in-law had taken place a year before and that her sister-in-law had indicated to her that "she just thought a person was sorta out of their mind to do — pull such a stunt."

The court then questioned the juror, who stated that she had been confused by the affidavit and that she signed the affidavit because she thought "it was something that all the jurors were doing." The investigator testified that the juror had told him that she had the information obtained from her sister-in-law in her head at the time of jury deliberations. The court overruled the motion for a new trial, stating that he found the juror testified truthfully at the hearing when she said she did not use any prior knowledge in her deliberations.

With regard to defendant's first assignment of error concerning the sufficiency of the evidence, we have held that direct evidence of a crime is not essential for a conviction and that one may be convicted on the basis of circumstantial evidence if, taken as a whole, the evidence establishes guilt beyond a reasonable doubt. *State v. Eggers*, 220 Neb. 862, 374 N.W.2d 36 (1985); *State v. Buchanan*, 210 Neb. 20, 312 N.W.2d 684 (1981). Circumstantial evidence is sufficient to convict a defendant where the evidence and reasonable inferences from the evidence establish the defendant's guilt beyond a reasonable doubt. *State v. Donnelson*, 225 Neb. 41, 402 N.W.2d 302 (1987). The jury could find that the defendant's fingerprint was found on the tape on the note and that the defendant had made statements concerning a possible motive. If the jury so found, that evidence was sufficient to support the jury's verdict. The trial court was correct in denying defendant's motion for new trial based on the sufficiency of the evidence.

With regard to defendant's other assignment of error, that the court erred in overruling the defendant's motion for a "new trial in that a juror used information obtained outside the

evidence to reach her verdict and such evidence was prejudicial to the defendant," we also determine that the trial court was correct. Neb. Rev. Stat. § 27-606(2) (Reissue 1985) controls inquiries into the validity of a verdict reached by a jury. Since this case does not involve jury misconduct or jury deliberations, but only the effect of the actions of one juror, the provisions of § 27-606(2) applicable to this case provide:

> Upon an inquiry into the validity of a verdict . . . a juror may not testify as to . . . the effect of anything upon his . . . mind or emotions as influencing him to assent to or dissent from the verdict . . . or concerning his mental processes in connection therewith, except a juror may testify on the question . . . whether any outside influence was improperly brought to bear upon any juror.

The question before us, then, is to first determine whether "any outside influence was improperly brought to bear upon" the juror in question.

At the hearing on defendant's motion for new trial, the juror testified that "[t]he only discussions was when, when she [the juror's sister-in-law] told me that a year ago or thereabouts, otherwise the case was never discussed." The juror testified that the incident had been discussed "right after it happened" and that the sister-in-law "thought a person was sorta out of their mind to do — pull such a stunt." The statement was not based on any knowledge that the sister-in-law had, but was her opinion. During the voir dire examination the juror had informed counsel that she had "heard and read in the paper" about the incident. The inquiry was not further pursued. There is no contention that the juror was untruthful in her responses on voir dire examination.

Defendant called the investigator as a witness at the hearing on the motion for new trial. The investigator testified that the juror in question

> advised me at that time that she had conversation with . . . her sister-in-law, had advised her that she had known this Cindy Johnson or Cindy Roberts-Johnson and had been involved in a similar instance at an earlier date and knew that she was guilty of this. And also thought that she was somewhat crazy.

It is clear that the evidence does not suggest there was ever any contact or conversation, improper or otherwise, between the juror and her sister-in-law during the time the juror was acting as a juror. There was no evidence presented at the hearing on the motion for new trial even tending to show that an "outside influence was improperly brought to bear upon" the juror in question. As noted above, § 27-606(2) provides "a juror may not testify as to . . . the effect of anything upon his . . . mind or emotions as influencing him to assent to or dissent from the verdict . . . ." The affidavit was not admissible since it did not show, in any way, that any outside influence was brought to bear on the juror in question while serving as a juror. Other portions of the affidavit were inadmissible as attempting to show the effect of a year-old conversation on a juror's mind or emotions.

Although the juror's affidavit was not objected to at the hearing on the motion for new trial, the trial court should not have considered it, since it obviously violated the terms of § 27-606(2). Although the court did consider it, it held that the juror had not acted improperly and denied defendant's motion for new trial. We have said that a motion for new trial for alleged juror misconduct is addressed to the sound discretion of the trial court, and a ruling thereon will not be disturbed on appeal unless an abuse of discretion is shown. *State v. Robbins*, 207 Neb. 439, 299 N.W.2d 437 (1980); *Ellis v. Far-Mar-Co*, 215 Neb. 736, 340 N.W.2d 423 (1983). The trial court properly denied defendant's motion for new trial.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GREGORY MCCOY, APPELLANT.

418 N.W.2d 250

Filed January 29, 1988. No. 87-366.

Witnesses: Words and Phrases. A witness, for the purpose of Neb. Rev. Stat. § 28-919 (Reissue 1985), is one who has knowledge of a relevant fact or occurrence sufficient to testify in respect to it.

Appeal from the District Court for Lancaster County: DALE E. FAHRNBRUCH, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Robert G. Hays, for appellant.

Robert M. Spire, Attorney General, and Jill Gradwohl Schroeder, for appellee.

BOSLAUGH, CAPORALE, and GRANT, JJ., and MULLEN, D.J., and COLWELL, D.J., Retired.

CAPORALE, J.

Following a jury trial, defendant, Gregory McCoy, was found guilty of tampering with a witness by attempting to induce him to testify falsely, in violation of Neb. Rev. Stat. § 28-919 (Reissue 1985), and was sentenced to imprisonment for a period of not less than 18 months nor more than 2 years. In this appeal defendant assigns as error the district court's (1) finding the evidence sufficient to sustain the conviction and (2) failure to properly instruct the jury concerning the elements of the crime charged. We affirm.

At approximately 5:15 p.m. on July 17, 1986, a then unknown intruder knocked on the door of a room occupied by two university students, Soon Ang and Kim Sun Loh, in Schramm Hall, a dormitory on the University of Nebraska-Lincoln campus. Neither student responded to the knocks. A couple of seconds later, the unlocked door was opened and the intruder walked into the room. Upon seeing the occupants, the intruder asked, "Is Mark home?" then immediately left. No one by the name of Mark lived in the room.

Ang became suspicious and went to look for the intruder. As Ang walked down the hallway, he saw a person, wearing clothing of a color matching that worn by the intruder, "sliding" into the laundry room. Ang then called the residence hall director and reported the incident.

About the same time, Deborah Larkin, an officer with the university police department, received a radio message regarding a man who had been unlawfully in the residence hall. Larkin pulled into the Schramm Hall parking lot and saw a man

standing there who matched the radio description of the intruder. Larkin began a casual conversation with the man, who turned out to be McCoy. When Larkin asked McCoy why he was standing in the Schramm Hall parking lot, he stated he was waiting for an acquaintance, one Bill Benner. McCoy denied having been in Schramm Hall.

In the meantime, another university police officer had been interviewing Ang, who then went out into the parking lot and identified McCoy as the intruder. The officer passed that information on to Larkin. McCoy was then arrested and charged with first degree criminal trespassing.

Benner, with whom McCoy had been living for approximately the last 10 days in July, became aware of the trespassing charge against McCoy by seeing the citation for the offense. When asked about the citation, McCoy responded, according to Benner, that "the cops of Lincoln were out to get him" and that "they would do anything to get rid of him from this town."

McCoy moved out of Benner's apartment and returned 3 days later, on August 4, 1986, to report that he, McCoy, was in trouble, that the "cops" were after him, and that at a hearing in connection with the trespassing charge, he had stated that he spent the evening with Benner. McCoy then asked Benner to testify that they had been together, offering to pay Benner $20 to so do. Benner had in fact not been with McCoy, refused McCoy's request, and reported the conversation to the university police.

The statute under which McCoy was convicted, § 28-919, reads in relevant part: "(1) A person commits an offense if, believing that an official proceeding or investigation of a criminal matter is pending or about to be instituted, he attempts to induce or otherwise cause a witness . . . to: (a) Testify or inform falsely . . . ."

McCoy claims the evidence is insufficient to sustain the conviction because Benner was not a witness within the meaning of the term as used in the foregoing statute. In so claiming, he places heavy reliance upon *Gandy v. State*, 77 Neb. 782, 110 N.W. 862 (1906), wherein the accused offered to pay one Fisher to give false testimony in a civil action in which the

accused was a party and to steal a document from one involved in the case as a witness. Fisher was not told what he was to say when offered the money, being told instead that he would be given that information later. The accused was charged with violating a statute which then made it a crime to " 'attempt to corrupt or influence any . . . witness, either by promises, threats, letters, money, or any other undue means, either directly or indirectly . . . .' " *Id.* at 783, 110 N.W. at 863. In ruling that while the accused had attempted to suborn perjury he was not guilty of the crime with which he was charged, the court noted that Fisher had never heard of the case, did not know the parties, knew no fact relating to the matter, and never intended to testify, and thus was not a witness, such being "one who has knowledge of a fact or occurrence sufficient to testify in respect to it." *Id.* at 785, 110 N.W. at 864. The fact must, of course, be relevant to the case concerning which the witness is approached.

In affirming a conviction for tampering with a witness, a Texas court recently observed that witness-tampering statutes cover the broad spectrum of all persons who pose a threat to a criminal defendant because of what they know. *Morlett v. State*, 656 S.W.2d 603 (Tex. App. 1983). Also, the language of § 28-919 is substantially similar to that found in Model Penal Code § 241.6 (1980). The American Law Institute comment to § 241.6 explains that the "critical question is whether the defendant attempts to influence another's behavior as a witness. If he does, it is no defense that the other person has not yet been subpoenaed or does not intend to testify." § 241.6 note on status of section at 167-68.

While we bear in mind that criminal statutes must be strictly construed, *Loewenstein v. Amateur Softball Assn., ante* p. 454, 418 N.W.2d 231 (1988); *State v. Burke*, 225 Neb. 625, 408 N.W.2d 239 (1987), we must nonetheless conclude that Benner was a "witness" as the term is used in § 28-919.

The situation presently before us is different from that presented in *Gandy*. In *Gandy*, the person asked to testify falsely knew absolutely nothing about the subject matter of the litigation. In the present case Benner knew that the claim McCoy had made during the investigation of the trespassing

charge and at a court proceeding in connection with that charge was untrue. Thus, Benner did possess knowledge of a relevant fact sufficient to testify to it should McCoy persist in his claim that he had been with Benner at the time of the trespass. There is no question, therefore, that McCoy attempted to influence Benner's behavior as a witness. By falsely claiming he was with Benner at the time of the trespass, McCoy set Benner apart from the rest of the universe and thus put Benner in the position of being able to contradict McCoy's false claim; McCoy had in effect identified Benner as a potential witness. As a consequence, when McCoy asked Benner to testify falsely, he was attempting to influence Benner's behavior as a witness. There is therefore no merit to McCoy's first assignment of error.

Defendant next urges the trial court erred by failing to instruct the jury that the State had the burden of proving beyond a reasonable doubt that Benner was a witness.

The jury was instructed that the material elements "the State must prove by evidence beyond a reasonable doubt" included that McCoy "intentionally did attempt to induce [Benner] to testify falsely" in favor of McCoy. Thus, while the instruction did not use the word "witness," it defined what a witness does, namely, testify. Thus, McCoy's second claim is as meritless as his first.

The record failing to sustain either of McCoy's assignments of error, the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ARTHUR C. PATRICK, APPELLANT.

418 N.W.2d 253

Filed January 29, 1988. No. 87-446.

1. **Convictions: Appeal and Error.** In resolving a challenge to the sufficiency of the evidence to sustain a conviction in a criminal case, 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.

2. **Sentences: Appeal and Error.** Absent an abuse of discretion, this court will not reduce a sentence imposed by the trial court if the sentence is within statutory limits.
3. **Sentences: Evidence.** Evidence as to the defendant's life, character, and previous conduct may be considered in determining the propriety of the sentence.

Appeal from the District Court for Lancaster County: DALE E. FAHRNBRUCH, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Michael D. Gooch, for appellant.

Robert M. Spire, Attorney General, and Jill Gradwohl Schroeder, for appellee.

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

BOSLAUGH, J.

The defendant, Arthur C. Patrick, was convicted of two counts of sexual assault of a child and sentenced to imprisonment for 1 to 2 years on each count, the sentences to run consecutively. He has appealed and contends that the evidence was insufficient to sustain the verdicts and that the sentences which were imposed are excessive.

In resolving a challenge to the sufficiency of the evidence to sustain a conviction in a criminal case, 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. *State v. Richardson, ante* p. 274, 417 N.W.2d 24 (1987); *State v. Charron*, 226 Neb. 871, 415 N.W.2d 474 (1987). The verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Patman, ante* p. 206, 416 N.W.2d 582 (1987); *State v. Thomte*, 226 Neb. 659, 413 N.W.2d 916 (1987). A jury verdict of guilty will not be overturned on appeal unless it is based on evidence so lacking in probative force that it can be said as a matter of law that the evidence is insufficient to support the verdict. *State v. Coffman, ante* p. 149, 416 N.W.2d 243 (1987); *State v. Joy*, 220 Neb. 535, 371 N.W.2d 113 (1985).

The victims in this case were sisters, 7 and 11 years old. The

record shows that the older girl had an arrangement with the defendant whereby she would work in his kitchen doing dishes, for which he would pay her $1 per day. Although she usually performed the duties unassisted, her mother and sisters were often at the defendant's home while she worked.

The older girl testified that she was at the defendant's home on July 22 or 23, 1986, after having been swimming with her sisters, her mother, and a cousin, R.J., at Pawnee Lake. Before arriving at the defendant's house, the mother dropped off all of the children except the older girl and her cousin at an uncle's house. She then proceeded to the defendant's home, where the older girl was going to wash dishes for the defendant. After dropping her off, the mother stated that she would return after taking R.J. home.

Upon arrival, the older girl noticed more dishes than usual, and as she began washing the dishes she found there was not enough counterspace for the dirty dishes, so she asked the defendant to come to the kitchen and tell her where to put the dishes. She testified that while she was standing in front of the sink with her back toward the defendant, the defendant touched her; "he came over behind me, and he put his hand up my pants." At the time of the incident she was wearing a pair of shorts over her swimming suit. She also stated that the defendant entered her shorts "[f]rom the front up my — by the bottom of the pants, shorts . . . in the back." Again, she stated, he "[p]ut his hand in like from the front, and after he put his hand under my shorts, he put it in my swimming suit," where he touched her vagina. She felt "[u]ncomfortable" and moved away from the defendant, at which time he returned to the living room and she completed the dishes.

When her mother returned, after about 30 minutes, she did not tell her mother of the incident because she was scared. She then left with her mother and two sisters and returned to their own home.

After returning home, the mother was warned by a neighbor that someone had tried to break into their apartment. The mother and children then returned to the defendant's home, asking if they could spend the night at his apartment, which was an efficiency. The defendant agreed, and placed an extra

mattress on the floor next to his bed in the living room for the mother and three daughters, while he slept on his own bed.

The group watched a movie in the living room, and at some point, the older girl stated that she needed a drink. The defendant assisted her in the kitchen, at which time he kissed her on her lips, again making her feel uncomfortable. She and the defendant then returned to the living room, where the defendant asked her to sit on his bed and watch TV with him, which she did. The defendant then touched her right buttock, on top of her clothes. She moved away, but again did not tell her mother of these episodes out of fear that the defendant would hurt her. The defendant did not touch her again in an offensive manner the remainder of that day.

As the mother and the daughters attempted to settle onto the mattress to sleep, they found the mattress crowded, and the girls began fighting over space. When the defendant asked if anyone wanted to share his bed, the younger girl accepted his offer. The younger girl testified that while she was pretending to sleep on the bed with the defendant, the defendant stuck his hand under the covers, placed his hand on the outside of her bathing suit, and touched her vagina. She then began to move around, and the defendant stopped. The defendant did not repeat the offense that night, but she testified that she had had touching problems with the defendant prior to this incident, and described their frequency as "almost every time when we went over there." She had never told anyone of these incidents, because of fear.

While she was at a slumber party on July 26, the older girl told a friend that she had been touched by the defendant. Several days later she told another friend, whose mother then became aware of the situation and informed the older girl's mother, who then notified the police.

After reporting the incidents, the older girl did not return to the defendant's home to perform kitchen duties. She testified that she had experienced touching problems with the defendant a few months after first knowing him, and that such incidents had continued for over a year. She had told the younger sister about the problem soon after it started, and then learned that the younger sister had experienced similar problems, although

not noticed by the older girl.

The older girl testified that some of the touching problems occurred toward the end of her fifth grade school year, near the time when she had watched a special program at school entitled "Kidability," which addressed the matter of "touching problems." From that program, she learned that she should report touching problems, which she did when they occurred that summer. The younger girl, upon learning that her older sister had told of the touching incidents by the defendant, then came forward and reported to her mother the sexual contacts that she had experienced with the defendant.

Although the victims' mother apparently did not witness any of the "touching" incidents, her testimony was corroborative of the other events of the day, as related by the two girls. She testified that on July 23, she did take her daughters and nephew swimming at Pawnee Lake, that on their way home they stopped at her brother-in-law's house, that she and the older girl proceeded to the defendant's house, and that the older girl was alone with the defendant when she went to pick her up. She further testified that the older girl attended a slumber party several days after July 23 and that after the party, she learned of the sexual assaults.

In regard to the younger girl, the mother corroborated the fact that the younger girl was sleeping on the bed with the defendant when she awoke, the following morning. The older girl testified that the younger girl moved from the mattress on the floor to the bed with the defendant and slept the entire night there with him.

The defendant denied engaging in inappropriate sexual conduct, denied touching either girl, and denied kissing the older girl.

The evidence which has been summarized was sufficient to permit the jury to find the defendant guilty beyond a reasonable doubt on both counts. The direct testimony by the two victims described the sexual assaults. The testimony of the mother provided corroborating evidence which, with the direct testimony of the victims, was sufficient evidence to support the verdicts.

Each offense is a Class IV felony. Neb. Rev. Stat.

§ 28-320.01 (Reissue 1985). A person convicted of a Class IV felony is subject to the following penalties upon conviction: "Maximum-five years imprisonment, or ten thousand dollars fine, or both"; "Minimum-none." Neb. Rev. Stat. § 28-105 (Reissue 1985).

We have repeatedly held that absent an abuse of discretion, this court will not reduce a sentence imposed by the trial court if the sentence is within statutory limits. *State v. Miller*, 226 Neb. 576, 412 N.W.2d 849 (1987); *State v. Schreck*, 226 Neb. 172, 409 N.W.2d 624 (1987); *State v. Nearhood*, 223 Neb. 768, 393 N.W.2d 530 (1986). "[E]vidence as to a defendant's life, character, and previous conduct is highly relevant," *Schreck, supra* at 176, 409 N.W.2d at 627, and may be considered in determining the propriety of the sentence. *State v. Dobbins*, 221 Neb. 778, 380 N.W.2d 640 (1986).

The sentences imposed by the trial court were well within statutory limits and do not appear to have been the product of an abuse of discretion. The evidence supports a finding that the defendant has displayed sexual tendencies toward the victims for more than 1 year. Sexual advances and assaults on minor children are serious offenses. "The punishment for a criminal act should in all circumstances be commensurate with the offense." *State v. Foutch*, 196 Neb. 644, 646, 244 N.W.2d 291, 292 (1976); *State v. Kowalski*, 214 Neb. 48, 332 N.W.2d 678 (1983). We find no abuse of discretion.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ALVIE CARLSON, APPELLANT.
418 N.W.2d 561

Filed January 29, 1988. No. 87-458.

Sentences: Appeal and Error. A sentence imposed within the statutory limits will not be disturbed on appeal in the absence of an abuse of discretion.

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

Frank J. Skorupa, for appellant.

Alvie Carlson, pro se.

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

HASTINGS, C.J., WHITE, and GRANT, JJ., and BRODKEY, J., Retired, and CORRIGAN, D.J.

BRODKEY, J., Retired.

On January 20, 1987, the county attorney of Platte County, Nebraska, filed an amended information against the defendant-appellant herein, Alvie Carlson, charging him in two counts with the commission of two felonies. The charge in count I was attempted first degree sexual assault, in violation of Neb. Rev. Stat. §§ 28-201(1)(b) and 28-319(1)(a) (Reissue 1985); and in count II the defendant was charged with burglary, under Neb. Rev. Stat. § 28-507 (Reissue 1985). On that same date the defendant, after a full and exhaustive explanation of his rights, pled guilty to both of the above charges, both of which are Class III felonies carrying authorized sentences of imprisonment of a maximum of 20 years and a minimum of 1 year.

Defendant was sentenced on both charges on April 20, 1987, and we set out below the exact language of the court, so far as pertinent, in imposing the sentences:

> The overriding consideration that I have in this matter is that you stand before me, this is the third time — you've been twice before in the Penal Complex — this is the third time before the Court, or maybe more. I'm trying to recall from the presentence, but at least I can recall two sentencings. I can also recall a case where you were acquitted.
>
> . . . .
>
> On Count I, the attempted first degree sexual assault, I sentence you to a minimum of six and two-thirds, maximum twenty years in the Nebraska Penal and

> Correctional Complex. As to the burglary charge, Count II, inasmuch as you have pled guilty and admitted your guilt in this matter, I am going to sentence you to a term of four years maximum — four years minimum, twelve years maximum. Both of these counts are to be served concurrently. Or consecutively. Excuse me, consecutively.

In his brief on appeal to this court, counsel for defendant makes three assignments of error: (1) The district court's attempt to impose a different maximum sentence after pronouncing a sentence was error; (2) the district court's attempt to impose a consecutive sentence after pronouncing that the sentence was to be served concurrently to the first sentence was error; and (3) the sentences imposed by the district court were excessive and an abuse of discretion.

It is to be noted from the language of the judge in sentencing the defendant that the judge corrected his inadvertent statement almost immediately, at least milliseconds after the words came from his mouth, and practically in the middle of a sentence. We believe it is clear, under the facts of this case, that the judge did not intend to change a sentence or had not finished pronouncing a sentence. In support of his allegations, counsel for defendant relies upon the case of *State v. Cousins*, 208 Neb. 245, 302 N.W.2d 731 (1981). The *Cousins* case is the only case in support of this proposition cited by defendant, and we have been unable to discover any other Nebraska cases even remotely similar to the facts of the case at bar.

In *Cousins*, the court had pronounced sentence and the appellant had left the courtroom. Approximately 6 minutes later, the judge called the appellant back into the courtroom. The court then advised the appellant that it had misspoken and intended to sentence appellant to consecutive and not concurrent sentences as was earlier pronounced by the court. This court held that the trial court's attempt to correct the sentence was ineffective.

In making the determination in *Cousins*, this court referred to the case of *State v. Snider*, 197 Neb. 317, 248 N.W.2d 342 (1977). The facts as stated in *Snider, supra*, were that "[i]mmediately after the court imposed the sentence the defendant left the courtroom and slammed the door behind

him 'almost breaking the glass.' The sentencing judge then immediately ordered the defendant brought back into the courtroom, informed him that he was a 'most unruly prisoner,' and resentenced him . . . ." 197 Neb. at 319, 248 N.W.2d at 343. This court held that the attempted change of sentence was a nullity.

In the case at issue here, the time which elapsed between the judge's words in sentencing was practically nonexistent. The "change" in the sentence is an obvious correction of a misstatement on the part of the judge. It is all part of one sentence, and not a case of imposition of a subsequent sentence. The fact that the judge in this case corrected himself immediately should be indicative of the fact that it was part of the sentence and not the imposition of a subsequent sentence. It is true that *Cousins* does enunciate the rule that a sentence validly imposed takes effect from the time it is pronounced. The question then presents itself as to what constitutes the pronouncement of a sentence, and when does a sentence take effect. Admittedly, in cases such as *Cousins, supra*, and *Snider, supra*, as well as *State v. Brewer*, 190 Neb. 667, 212 N.W.2d 90 (1973), where a period of minutes or days elapsed between the pronouncement of sentences, some ambiguity might exist. In reviewing the record an appellate court might well discover disparate sentences in separate parts of a bill of exceptions. However, the record in this case is neither piecemeal nor confusing.

In his oral argument to this court, counsel for defendant inquired of the court as to what the correct rule should be so far as time in which a judge who misspeaks can correct himself in sentencing a defendant. He asks: Should it be a sentence, a paragraph, a day, a week, a month, or longer? We concede the difficulty in setting a hard-and-fast rule on this question, as each case must depend upon its particular facts. We do not intend to lay down such a rule in this case, but only hold that under the facts of this particular case it should be clear to any reasonable person that the judge, in correcting his language, did not intend to enhance or increase the sentence in any manner.

Neb. Rev. Stat. § 83-1,105 (Reissue 1981), the indeterminate sentencing act, provides, among other things:

> Except where a term of life is required by law, in imposing an indeterminate sentence upon the offender, the court may:
>
> (1) Fix the minimum and maximum limits of the sentence, but the minimum limit fixed by the court shall not be less than the minimum provided by law nor more than one-third of the maximum term, and the maximum limit shall not be greater than the maximum provided by law.

The sentences on the respective counts in this case clearly comply with the above provisions of the statute, and, unless the sentences imposed were excessive or constituted an abuse of discretion as claimed by the defendant, they should be affirmed.

We now examine defendant's claim that such sentences were excessive and an abuse of discretion. Defendant, in his brief, argues that the sentences in this case were excessive because they are more harsh than certain other sentences in cases cited by him in his brief. Both of the charges against the defendant involved in this case are Class III felonies. In such cases the sentence is left to the sound discretion of the trial court, and there is no requirement that the court compare the defendant's case with all other similarly charged Class III felonies prior to imposing sentence. However, the court may take into consideration a variety of factors in determining the type of punishment and sentence to be given to the guilty defendant. In this case it is clear that the court did so consider such evidence, and the probation report received in evidence during the hearing in this case is very enlightening as to the defendant's activities and character, none of which are impressive. Defendant has a long history of illegal activity, dating back to the age of 16. On three prior occasions the defendant had been convicted of assault, and his work record for the last 6 years is, at best, sporadic, and in some cases unconfirmed. The trial court is in the best position to judge the facts, as well as the demeanor of the defendant, in each particular case.

In pronouncing sentence, the court stated:

> There are a number of factors the Court has to consider when dealing with a sentencing of an individual on any

> criminal offense. One of those is punishment, another one is a chance for rehabilitation of the defendant, factors as to the effect on society a certain sentence would have . . . .

The court dismissed deterrence as one of the factors it was considering in pronouncing sentence, and stated:

> We have the effect of the punishment, the effect on society, and the effect upon you.
>
> The overriding consideration that I have in this matter is that you stand before me, this is the third time — you've been twice before in the Penal Complex — this is the third time before the Court, or maybe more.

The mere fact that defendant's sentences differ from those which may have been issued from other courts in other instances does not make the imposition of defendant's sentences in this case an abuse of the court's discretion.

In his brief on appeal to this court at 4, counsel for defendant states: "The abuse of discretion is evident in the fact that the judge imposed the absolute maximum sentence that could be handed down by setting the minimum sentence at one-third of the maximum sentence allowed under a Class III Felony." In this connection we call attention to the case of *State v. McMullen*, 195 Neb. 796, 240 N.W.2d 844 (1976), in which case the defendant pled guilty to embezzlement, and after considering the presentence investigation report, the district court sentenced the defendant to a term of 7 years in the Nebraska Penal and Correctional Complex. The defendant's sole contention on appeal was that the sentence was excessive. This court affirmed the judgment and sentence of the district court, saying at 796, 240 N.W.2d at 845: "The sentence imposed, *although the maximum*, was within the statutory limits and will not be disturbed on appeal in the absence of an abuse of discretion. State v. Allen, *ante* p. 560, 239 N.W.2d 272." (Emphasis supplied.) The court continued, stating, "We point out that under the terms of section 83-1,105, R. S. Supp., 1974, and our decision in State v. Hedglin, 192 Neb. 545, 222 N.W.2d 829, the defendant's sentence under the law is an indeterminate sentence of 1 to 7 years." 195 Neb. at 796, 240 N.W.2d at 845.

It is clear that in the instant case, as well as in other

indeterminate sentence cases, it does not follow that the convicted defendant will have to serve the maximum possible sentence. There is always the opportunity that he will be discharged earlier, depending upon his conduct. In its opinion in *McMullen*, the court points out that the defendant had committed many other continuous embezzlements, although for small amounts, and that he spent $50 to $100 per day on the horseraces, spent money by living beyond his means, gambled on football games, and made trips to Las Vegas. The court stated:

> This repetitive and continuous felonious conduct, combined with the lack of mitigating circumstances in the disposition of the embezzled funds, clearly demonstrates that the sentence imposed in this case is not an abuse of discretion. The record supports, as in most embezzlement cases, that there is not much danger of the defendant committing a violent crime. But the serious and continuous offenses committed and the conduct of the defendant in the community give weight to a determination that a lesser sentence would depreciate the seriousness of the defendant's crime and promote disrespect for the law.

195 Neb. at 797, 240 N.W.2d at 845.

In the instant case the probation officer's report and the evidence adduced at the hearing in which the defendant pleaded guilty, including pictures of the injuries done to the victim, clearly, in our opinion, justify the sentences imposed.

After the filing of the appellee's brief in this court on August 6, 1987, the defendant, Alvie Carlson, acting pro se and not through an attorney, filed an additional brief on August 31, 1987, entitled "Amended [sic] To Brief Of Appellant." In the brief he does not further argue any of the points discussed in the appellant's and appellee's briefs filed herein but, on the contrary, requests certain action or relief which is inappropriate for consideration in this direct appeal to the Supreme Court, and we will not discuss it further.

In view of what we have stated above, we conclude that the sentences of the district court were correct in all respects and should be sustained.

AFFIRMED.

MARION G. CURLILE, APPELLEE, V. DAVID R. LINDNER, APPELLANT.

418 N.W.2d 256

Filed January 29, 1988. No. 87-479.

Appeal and Error. It has long been the rule in an action at law, where a jury has been waived and the evidence is in conflict, this court, in reviewing the judgment, will presume that the controverted facts were decided by the trial court in favor of the successful party, and those findings will not be disturbed on appeal unless clearly wrong. It is not within the province of this court to resolve conflicts in or reweigh the evidence.

Appeal from the District Court for Custer County: RONALD D. OLBERDING, Judge. Affirmed.

Sennett & Roth, for appellant.

David W. Pederson and Terrance O. Waite of Murphy, Pederson, Piccolo & Pederson, for appellee.

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

WHITE, J.

This is an appeal from the district court for Custer County. The district court, on appeal, affirmed the judgment of the Custer County Court which was entered following a bench trial. Plaintiff-appellee, Marion G. Curlile, obtained a judgment against defendant-appellant, David R. Lindner, as a result of an automobile accident between the two parties at an uncontrolled intersection in Broken Bow, Nebraska. The district court affirmed the judgment after finding that although there was a conflict in testimony, there was no clear error on the record.

The accident occurred on August 18, 1986, at the intersection of 11th and C Streets. The evidence establishes that appellee Curlile was southbound on 11th Street. Appellant Lindner was eastbound on C Street. As the cars approached the intersection, appellant was to the right of appellee. There were no other witnesses to the accident.

Testimony at trial indicates that both parties agree that appellant Lindner's vehicle struck Curlile's pickup truck on the right rear area, behind the right rear tire. They also agree that

Curlile's pickup was at least partially through the intersection, on the southwest side, at the time of the collision. The intersection was clear and open, with no one's view being obstructed.

Curlile alleges that the accident was the direct and proximate result of Lindner's negligent operation of his vehicle. Curlile testified that he was almost completely through the intersection before he was hit. In short, Curlile alleged that he was properly within the intersection first, that Lindner failed to yield to him because he was not keeping a proper lookout, and that Lindner was operating his vehicle at an excessive speed.

Lindner alleged that Curlile failed to yield the right-of-way to him, as required, since Lindner was to the right of Curlile as they approached the intersection. Lindner also counterclaimed in the suit for damages sustained by his vehicle.

Appellant relies on this court's decision in *Kendall v. Hongsermeier*, 217 Neb. 109, 347 N.W.2d 855 (1984), in asserting that the district court erred in sustaining the trial court's order. He alleges that appellee is barred from recovery as a matter of law because Curlile violated Neb. Rev. Stat. § 39-635(1) (Reissue 1984), which provides: "When two vehicles approach or enter an intersection from different roadways at approximately the same time, the driver of the vehicle on the left shall yield the right-of-way to the vehicle on the right."

This court in *Kendall, supra*, reiterated its rule expressed in *Gernandt v. Beckwith*, 160 Neb. 719, 721, 71 N.W.2d 303, 304 (1955), which states:

> [The right-of-way statute] does not mean that drivers of motor vehicles are permitted to race or to gamble on which vehicle may enter the intersection a few feet ahead of the other. When a collision occurs in the ordinary city or country intersection, unless there is evidence that one of the vehicles was traveling at a very much greater rate of speed than the other, it is self-evident that the vehicles were reaching the intersection "at approximately the same time."

As stated in the above rule from this State's case law, "unless there is evidence that one of the vehicles was traveling at a very

much greater rate of speed than the other," plaintiffs in a position such as appellee's herein will likely find it difficult to prove negligence on the part of a driver with the right-of-way at an intersection. At trial appellee presented some evidence that appellant may have been going faster than his testimony indicated. Evidence was presented which established that appellant's vehicle left approximately 30 feet of skid marks prior to impact. In addition, testimony revealed that appellee's pickup was hit with such force that it was turned nearly in the opposite direction as appellee had been driving. In sum, there was competent evidence to support a conclusion that appellant's vehicle was traveling at an excessive speed.

It has long been the rule in an action at law, where a jury has been waived and the evidence is in conflict, this court, in reviewing the judgment, will presume that the controverted facts were decided by the trial court in favor of the successful party, and those findings will not be disturbed on appeal unless clearly wrong. It is not within the province of this court to resolve conflicts in or reweigh the evidence. *Kracl v. Aetna Cas. & Surety Co.*, 220 Neb. 869, 374 N.W.2d 40 (1985).

We agree with the district court that although there was conflicting testimony, there is no clear error on the record.

AFFIRMED.

IN RE INTEREST OF G.B., M.B., AND T.B., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, DEPARTMENT OF SOCIAL SERVICES, APPELLANT, V. M.J.B., APPELLEE.

418 N.W.2d 258

Filed January 29, 1988. No. 87-543.

1. **Statutes: Appeal and Error.** In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning; the Nebraska Supreme Court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.

2. **Constitutional Law: Legislature.** The Legislature has plenary legislative authority limited only by state and federal Constitutions, and restrictions to legislative power are not to be inferred unless clearly implied.
3. _____: _____. Control of the purse strings of government is the supreme legislative prerogative, indispensable to the independence and integrity of the Legislature, and not to be surrendered or abridged save by the Constitution itself.
4. **Constitutional Law: Juvenile Courts: Minors.** The provision of Neb. Rev. Stat. § 43-284 (Reissue 1984) which provides that the "Department of Social Services shall have the authority to determine the care, placement, medical services, psychiatric services, training, and expenditures on behalf of each child committed to it" by a juvenile court, does not contravene the distribution of powers clause contained in Neb. Const. art. II, § 1.

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

Robert M. Spire, Attorney General, Royce N. Harper, and Marie C. Pawol, for appellant.

Lisa C. Lewis of Byrne, Rothery, Lewis, Bedel, Tubach & Zielinski, guardian ad litem, and Thomas V. Van Robays, for appellee.

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

CAPORALE, J.

Following a June 3, 1987, review hearing, the separate juvenile court of Douglas County continued temporary custody of the subject juvenile, M.B., in and with the appellant, Nebraska Department of Social Services; found it to be necessary and in the juvenile's best interests that she be placed at the Maridell treatment center at Austin, Texas; directed the department to so place the juvenile; directed the juvenile's parents (notwithstanding the fact the court had not acquired jurisdiction of the juvenile's father) to pay any insured costs; and directed the department to bear the remaining costs. The department asserts the juvenile court erred in directing the department to make a specific placement. The department's assignment of error being meritorious, we reverse, vacate, and hold the order of the juvenile court for naught.

This matter first came to the attention of the juvenile court

on November 4, 1981, when a petition was filed alleging that the subject juvenile lacked "proper parental care by reasons of the faults or habits" of her natural mother, thus being a juvenile within the meaning of then Neb. Rev. Stat. § 43-202(2)(b) (Reissue 1978). Effective July 1, 1982, that statute was superseded by Neb. Rev. Stat. § 43-247(3) (Cum. Supp. 1982), which, to the extent material to this case, confers jurisdiction to the juvenile court in language identical to that of § 43-202(2)(b); the subsequent changes in § 43-247 (Reissue 1984 & Cum. Supp. 1986) contain no relevant amendments.

Neb. Rev. Stat. § 43-284 (Reissue 1984) provides in part:

> When any juvenile is adjudged to be under subdivision (3) of section 43-247, the court . . . may make an order committing the juvenile to the (1) care of some suitable institution, (2) care of some reputable citizen of good moral character, (3) care of some association willing to receive the juvenile . . . (4) care of a suitable family, except that under subdivision (1), (2), (3), or (4) of this section upon a determination by the court that there are no private or other public funds available for the care, custody, education, and maintenance of a juvenile, the court may order a reasonable sum for the care, custody, education, and maintenance of the juvenile to be paid out of a fund which shall be appropriated annually by the county where the petition is filed until suitable provisions may be made for the juvenile without such payment, or (5) care and custody of the Department of Social Services. . . . The Department of Social Services shall have the authority to determine the care, placement, medical services, psychiatric services, training, and expenditures on behalf of each child committed to it.

Section 43-284 has recently been amended, but these amendments are not relevant to the issue presently before us. See § 43-284 (Supp. 1987).

In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning; this court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *In re Interest of Richter*, 226 Neb. 874, 415

N.W.2d 476 (1987); *Lawson v. Ford Motor Co.*, 225 Neb. 725, 408 N.W.2d 256 (1987).

The parties to this appeal do not claim § 43-284 is ambiguous; indeed, the words used in the statute are plain, direct, and unambiguous, and the plain and ordinary meaning of this language is clear: The juvenile court may commit a child adjudged to fall within the purview of § 43-247(3) to a variety of placements in accordance with the juvenile's best interests. If, however, the placement is other than in and with the department, the county in which the petition was filed is responsible for costs which cannot be borne otherwise. On the other hand, if the court commits a child to the department, the department, as the entity which must pay the costs not otherwise borne, has the sole authority to determine the child's care and placement. Without specifically claiming that the questioned portion of § 43-284 violates the distribution of powers provision contained in Neb. Const. art. II, § 1, the juvenile in the present case contends the statute

> contradicts the very nature of the reasoning behind the separation of powers, and it would be ludicrous to think that the Juvenile Court would have to abide by a decision of the Nebraska Department of Social Services regarding the care of a child, even if the Court knew that such care was not in the best interest of that child.

Brief for Appellee at 9.

Ignoring for now the epistemological question implicit in the juvenile's contention, and indeed in the very existence of separate juvenile courts, it is sufficient to note that the statute in question does not restrict the court in the manner the juvenile contends. Under the statute, if the juvenile court finds that the placement selected by the department is not in a child's best interests and that some other placement would better serve those interests, the court is free to remove the child from the custody of the department and place the child wherever the court concludes best meets the child's needs. Of course, if the court elects to do so, the county in which the petition was filed will have to bear any costs not otherwise borne. This is not an impermissible constraint on the authority of the court but, rather, a rational method of allocating costs hand-in-glove with

authority, and one which the Legislature is clearly permitted to indulge. See, *Lenstrom v. Thone*, 209 Neb. 783, 311 N.W.2d 884 (1981) (which, in approving a legislatively adopted scholarship program, observed that the Legislature has plenary legislative authority limited only by state and federal Constitutions and that restrictions to legislative power are not to be inferred unless clearly implied); *State ex rel. Meyer v. State Board of Equalization & Assessment*, 185 Neb. 490, 176 N.W.2d 920 (1970) (which, in approving a legislatively imposed ceiling on annual personal service expenditures, quoted with approval the statement that control of the purse strings of government is the supreme legislative prerogative, indispensable to the independence and integrity of the Legislature, and not to be surrendered or abridged save by the Constitution itself).

As § 43-284 does not offend the distribution of powers provision of this state's Constitution, and we find no constitutional language which either expressly or by implication clearly restricts the power of the Legislature to allocate costs commensurate with authority as it did in the statute in question, the order of the separate juvenile court is a nullity.

REVERSED AND VACATED.

TANYA A. NIEDBALSKI, APPELLEE, V. BOARD OF EDUCATION OF SCHOOL DISTRICT NO. 24 OF PLATTE CENTER, APPELLANT.

418 N.W.2d 565

Filed February 5, 1988. No. 85-945.

1. **Schools and School Districts: Appeal and Error.** In a proceeding in error, the district court, as well as this court, reviews the school board's decision to determine (1) whether the board acted within its jurisdiction and (2) whether the evidence is sufficient as a matter of law to support its decision.
2. **Appeal and Error.** A review by petition in error is conducted solely on the record made by the tribunal whose action is being reviewed, and no new facts or evidence can enter into the consideration of the court.
3. _____. In a proceeding in error, if the tribunal acted within its jurisdiction and its findings are sustained by some competent evidence, its action must be

sustained.

4. **Statutes: Legislature: Intent.** In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning. It is not within the province of this court to read a meaning into a statute which is not warranted by the legislative language.
5. **Evidence: Contracts.** When an instrument consists partly of written and partly of printed form, the former controls the latter, where the two are inconsistent. Neb. Rev. Stat. § 25-1216 (Reissue 1985).
6. _____: _____. Typewriting is writing within the contemplation of the statute providing that when an instrument consists partly of written and partly of printed form, the writing controls the printed form, where the two are inconsistent.
7. **Contracts.** The construction of a contract, if needed, is a question of law for the court.

Appeal from the District Court for Platte County: JOHN C. WHITEHEAD, Judge. Reversed and remanded with directions.

Kelley Baker and Jerry Pigsley of Nelson & Harding, for appellant.

Robert R. Steinke of Allphin & Steinke, for appellee.

Mark D. McGuire of Crosby, Guenzel, Davis, Kessner & Kuester, for amicus curiae Nebraska State Education Association.

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

PER CURIAM.

This is an appeal in a proceeding in error to review the decision of the board of education of School District No. 24 of Platte Center, terminating the employment of the plaintiff, Tanya A. Niedbalski, at the close of the 1984-85 contract year.

The facts are largely undisputed. The plaintiff had been employed as a teacher by the defendant school district for approximately 5 years.

On March 12, 1985, a teacher's renewal contract was delivered to the plaintiff by Ernie Schmidt, the president of the board of education of the district. The terms and conditions of the renewal contract were contained in 11 paragraphs, paragraphs 9 and 10 of which specifically stated as follows:

NINTH: Hereafter, this contract may be continued by a

separate, annual written "Renewal Agreement" which shall incorporate all the provisions hereof by reference, except as stated on such Renewal Agreement. Renewal Agreements or renewal contracts must be executed by the Teacher and delivered to the Superintendent of Schools or the Secretary of the Board of Education of the District within fifteen (15) calendar days of receipt thereof from the district. Said Renewal Agreement or renewal contract shall not be offered to the Teacher prior to March 15. Contract renewal amendment, termination or cancellation shall also be subject to the requirements of Sections 79-12,111 through 79-12,114 R.R.S. (1982 Supp) and any other applicable state statutes.

TENTH: The failure to return a signed copy of the contract or renewal agreement to the Secretary of the Board of Education of the District on or before March 19, 1985 shall constitute a rejection by the Teacher of the offer of employment.

The date of "March 19, 1985," in paragraph 10 was typed in the printed agreement in the provided space and was of larger type size than the printed portion. Schmidt testified that he pointed out that return date to the plaintiff when he delivered the renewal contract to her. The plaintiff testified that she did not recall Schmidt's telling her that the contract had to be returned by March 19, 1985. However, she also testified that she signed the renewal contract on March 19 and intended to return the contract to school officials on that day. At various times during the day of March 19 she thought about returning the contract, but forgot to do so. At 11 that evening she remembered that she had left the contract on her desk. She immediately told her husband about her failure to return the contract that day, and they discussed the possibility of calling a member of the board of education to indicate that she would be returning the contract. They decided that since it was late in the evening she would not call and disturb anyone, and would return the contract the next morning. She returned the contract the next morning around 7:30 a.m. by placing it in the school board's mailbox in the office.

Schmidt testified that the plaintiff admitted to him that the

contract was being returned late and explained her reasons for doing so. Schmidt agreed with her that it was late and took the contract. The plaintiff recalled telling Schmidt her reasons for returning the contract on March 20, but does not remember using the word "late."

On April 12, 1985, the board of education notified the plaintiff that it was considering terminating her employment contract at the close of the 1984-85 school year due to her failure to return the contract on or before March 19, 1985. The letter cited Neb. Rev. Stat. § 79-12,112 (Cum. Supp. 1984), which provides in pertinent part that a school board may terminate a permanent certificated employee's contract for

> (3) failure of the certificated employee upon written request of the school board or the administrators of the school district to accept employment for the next school year within the time designated in the request, except that the certificated employee shall not be required to signify such acceptance prior to March 15 of each year . . . .

The letter also notified the plaintiff of the procedure to follow if she wished to have a hearing on the matter. The plaintiff responded by written request on April 12, 1985, that she wished to have a hearing. In a letter dated April 22, 1985, the board of education notified her of the date, time, and place of the hearing, the reason for considering termination of her employment, the statutory authority for such termination as set out in § 79-12,112(3), the name of the witness who would testify, the substance of his testimony, and the identity of each document to be introduced.

The hearing by the board of education was held on May 1, 1985, and the testimony described above was given by Schmidt and the plaintiff. Subsequently, the board of education adopted a resolution terminating the plaintiff's contract at the end of the 1984-85 contract year for the reason that she failed to sign and return the renewal contract on or before March 19, 1985.

The trial court found generally for the plaintiff and against the defendant, reversed and vacated the resolution purporting to terminate employment of the plaintiff, and ordered that she be restored to her teaching position and her salary reinstated. The defendant has appealed from that judgment.

In its first assignment of error the defendant contends that the district court failed to apply the correct standard of review.

In a proceeding in error, the district court, as well as this court, reviews the school board's decision to determine (1) whether the board acted within its jurisdiction and (2) whether the evidence is sufficient as a matter of law to support its decision. *Nuzum v. Board of Ed. of Sch. Dist. of Arnold, ante* p. 387, 417 N.W.2d 779 (1988); *Meier v. State, ante* p. 376, 417 N.W.2d 771 (1988); *Eshom v. Board of Ed. of Sch. Dist. No. 54*, 219 Neb. 467, 364 N.W.2d 7 (1985).

A review by petition in error is conducted solely on the record made by the tribunal whose action is being reviewed, and no new facts or evidence can enter into the consideration of the court. *Flood v. Keller*, 214 Neb. 797, 336 N.W.2d 549 (1983). If the tribunal acted within its jurisdiction and its findings are sustained by some competent evidence, its action must be sustained. *Flood v. Keller, supra.*

In this case the defendant acted within its jurisdiction. Section 79-12,112(3) authorizes the board to terminate a permanent, certificated teacher's contract for

> (3) failure of the certificated employee upon written request of the school board or the administrators of the school district to accept employment for the next school year within the time designated in the request, except that the certificated employee shall not be required to signify such acceptance prior to March 15 of each year . . . .

The plaintiff argues that the intent of the statute was to prevent a teacher from undue prejudice that would be imposed by a school board's demanding acceptance of a renewal contract prior to March 15 of each year, and to prevent a school board from undue prejudice that would result from a teacher who refused to indicate acceptance of a contract until a very late date. The plaintiff argues that in order for the defendant to terminate her contract, it must have been prejudiced by the late return. However, there is no language in the statute which limits the school board's right to terminate a teacher for the late return of a renewal contract to situations in which the school board is prejudiced by the late return.

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 . . . thus, in the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning. . . . 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 . . . .

(Citations omitted.) *Lawson v. Ford Motor Co.*, 225 Neb. 725, 727-28, 408 N.W.2d 256, 258 (1987).

The second issue is whether the evidence was sufficient as a matter of law to sustain the school board's decision. The evidence is sufficient as a matter of law if the board could reasonably find the facts as it did on the basis of the evidence before it. *Nuzum, supra.* Based on the evidence adduced at the hearing, there was sufficient evidence as a matter of law for the board to terminate the plaintiff's contract due to its late return. Paragraph 10 of the renewal contract stated that it was to be returned to the secretary of the board of education on or before March 19, 1985. The plaintiff admits that she did not return the contract until March 20, 1985. Under the terms of paragraph 10 the contract was clearly late.

The question then becomes whether, in light of the language in paragraph 9, the contract was ambiguous as to the return date. The defendant contends, in its second and third assignments of error, that the trial court erred in finding that the contract was ambiguous and in failing to give effect to the clear intent of the parties in construing the contract.

As this court stated recently in *Luschen Bldg. Assn. v. Fleming Cos.*, 226 Neb. 840, 847, 415 N.W.2d 453, 458 (1987):

> [I]t is the law of Nebraska that the construction of a contract, if needed, is a question of law for the court as well as a duty that rests upon the court, and there can be no ambiguity unless and until an application of pertinent rules of interpretation leaves it really uncertain which of two or more possible meanings represents the true intention of the parties.

The provision in paragraph 9 is that the renewal contract must be executed by the teacher and delivered "within fifteen (15) calendar days of receipt thereof from the district." The

provision in paragraph 10 is that the failure to return a signed copy of the contract "on or before March 19, 1985," shall constitute a rejection by the teacher of the offer of employment.

The two paragraphs must be read together. Each provision establishes a deadline. Since March 19, 1985, was within 15 calendar days of the date of receipt, March 12, 1985, both conditions would be satisfied by a return of a signed copy of the contract on or before March 19, 1985.

But even if the two provisions are considered to be conflicting, the provision in paragraph 10 is controlling because it was written, while the provision in paragraph 9 was printed.

When an instrument consists partly of written and partly of printed form, the former controls the latter, where the two are inconsistent. Neb. Rev. Stat. § 25-1216 (Reissue 1985).

In *Spencer-O'Neill House, Inc. v. Denbeck*, 196 Neb. 456, 243 N.W.2d 767 (1976), we held that a provision written in longhand controlled typewritten provisions of the contract.

> Writings in longhand in a contract control printed portions of such contract where there is a conflict between the printed and the written portions of the instrument. Nebraska Wesleyan University v. Estate of Couch (1960), 170 Neb. 518, 103 N.W.2d 274.
>
> Typewriting is writing within the contemplation of the statute providing that when an instrument consists partly of written and partly of printed form, the writing controls the printed form where the two are inconsistent. Flower v. Coe (1923), 111 Neb. 296, 196 N.W. 139.

196 Neb. at 459, 243 N.W.2d at 769.

Although the plaintiff contends that she had a right to return the contract after March 19, 1985, the evidence shows that she understood the signed contract was to be returned not later than March 19, 1985. On cross-examination the plaintiff testified:

> Q- But you did intend to return it on the date the board set for you?
>
> A- Yes, I did.
>
> Q- And did you know that it was the Board of Education that directed that you return it on March 19th?
>
> A- Yes.
>
> Q- And you would have returned it, but you were busy

and forgot on March 19th?

A- Yes.

The evidence shows that both parties understood the final return date was March 19, 1985. It was only after the plaintiff was threatened with termination that she relied on the language in paragraph 9.

The judgment of the district court is reversed and the cause remanded with directions to enter a judgment in conformity with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

WHITE, J., dissents.

EQUILEASE CORPORATION, APPELLANT, V. NEFF TOWING SERVICE, INC., APPELLEE.

418 N.W.2d 754

Filed February 5, 1988. No. 85-998.

1. **Principal and Agent: Words and Phrases.** Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and the consent of the other to so act.
2. _____: _____. A subagent is a person appointed by an agent to perform some or all of the business relating to his agency.
3. **Principal and Agent.** An agent appointed for a specific duty is not authorized to appoint subagents for the transaction of the business of his principal, but may delegate to a subagent the execution of merely mechanical, clerical, or ministerial acts involving no judgment or discretion, and such acts of the subagent so authorized are regarded as the acts of the agent who authorized them and are binding on the principal.
4. **Principal and Agent: Presumptions.** It is the duty of an agent to communicate to his principal all the facts concerning the service in which he is engaged that come to his knowledge in the course of his employment, and this duty, in a subsequent action between his principal and a third person, he is conclusively presumed to have performed.
5. **Evidence: Appeal and Error.** Where there is conflict in the evidence, this court will consider the fact that the trial court saw and heard the witnesses and observed their demeanor while testifying, and will give great weight to the trial court's judgment as to credibility.
6. **Contracts.** Where services are furnished to a party and knowingly accepted by

him, the law implies a promise on his part to pay the reasonable value of the services.

7. **Judgments: Appeal and Error.** In a law action where a jury was waived, the findings and disposition by the trial court have the effect of a jury verdict, and the judgment will not be disturbed unless clearly wrong.

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

Kirk E. Brumbaugh of Thompson, Crounse, Pieper & Quinn, for appellant.

Michael W. Pirtle of Walentine, O'Toole, McQuillan & Gordon, and Michael McCormack of McCormack, Cooney, Mooney & Hillman, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

COLWELL, D.J., Retired.

These proceedings originated as a replevin suit brought by plaintiff, Equilease Corporation (Equilease), to recover two utility refrigerated trailers withheld by defendant, Neff Towing Service, Inc. (Neff Towing), for nonpayment of a claimed artisan's lien, Neb. Rev. Stat. § 52-201 (Reissue 1984). A jury was waived. Judgment was entered for Neff Towing on its counterclaim against Equilease for $10,254. Equilease appeals. We affirm.

Equilease assigns five errors: (1) The lower court erred in finding James McCann to be an agent of Equilease; (2) the lower court erred in finding that notice of the location of the trailers was communicated to Equilease; (3) the lower court erred in finding that Equilease requested Neff Towing's services or offered payment to Neff Towing directly or by implication; (4) the lower court erred in finding that Neff Towing was entitled to a full 2 years' storage fees under quantum meruit; and (5) the lower court erred in dismissing Equilease's petition in replevin.

In a law action where a jury was waived, the findings and disposition by the trial court have the effect of a jury verdict, and the judgment will not be disturbed unless clearly wrong. *Schmode's, Inc. v. Wilkinson*, 219 Neb. 209, 361 N.W.2d 557

(1985); *Ford v. Jordan*, 220 Neb. 492, 370 N.W.2d 714 (1985).

Equilease, headquartered in New York City, is in the business of owning and leasing heavy equipment. It leased four 1979 utility refrigerated trailers and a Kenworth truck tractor to James Otto of Omaha, Nebraska. Otto soon defaulted on payments. The whereabouts of the equipment was unknown to Equilease. In July 1980, Equilease engaged the legal services of Douglas Quinn of the law firm of Thompson, Crounse and Pieper, of Omaha, Nebraska, to recover this equipment, with authority to take whatever steps were necessary, including a replevin suit. Quinn hired James McCann of Omaha, Nebraska, a specialist in repossessing cars, to locate the equipment. On July 17, 1980, McCann orally reported to Quinn the location of one trailer in nearby Council Bluffs, Iowa. Quinn instructed McCann to have the trailer towed to Nebraska, which was done at McCann's request by defendant, Neff Towing, which then placed the trailer in its Omaha storage lot. McCann notified Quinn by telephone concerning the repossession and the place of storage. On July 20, 1980, McCann located another trailer in Council Bluffs, and, pursuant to Quinn's instructions, McCann had the second trailer towed by Neff Towing from Iowa to its storage lot in Omaha. McCann again notified Quinn about this procedure. Neff Towing billed McCann for the services performed. Neff Towing never did notify Equilease concerning the storage of the trailers.

The record is silent concerning the two trailers until January 1982, when Quinn apparently notified Equilease of their location and the claim of Neff Towing for towing and storage. A replevin suit was filed and a subsequent temporary order in replevin was entered on April 19, 1982. Neff Towing filed a counterclaim for towing and storage. By stipulation of the parties and the posting of a $10,000 bond on May 25, 1982, by Equilease, the two trailers were released to Equilease.

The first three assigned errors are considered together.

Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and the consent of the other to so act. *Reeves v. Associates Financial*

Services Co., Inc., 197 Neb. 107, 247 N.W.2d 434 (1976).

It is clear from the evidence that Quinn was the agent of Equilease to do whatever was necessary to locate and recover possession of the two trailers and that Quinn was not expected to act as its investigator to locate the equipment. The location of the trailers is not an issue here; rather, the issue is the recovery, towing, and storage of the two trailers.

That leads us to the relationship between McCann, Quinn, and Equilease, and the nature of McCann's authority to have the trailers towed and stored for Equilease. "A subagent is a person appointed by an agent to perform some or all of the business relating to his agency." 2A C.J.S. *Agency* § 35 at 599 (1972).

> An agent appointed for a specific duty is not authorized to appoint subagents for the transaction of the business of his principal, but may delegate to a subagent the execution of merely mechanical, clerical, or ministerial acts involving no judgment or discretion, and such acts of the subagent so authorized are regarded as the acts of the agent who authorizes them, and are binding upon the principal.

(Syllabus of the court.) *Wilken v. Capital Fire Ins. Co.*, 99 Neb. 828, 157 N.W. 1021 (1916).

Equilease contends that McCann was an independent contractor and not its agent.

> The factors to be considered in determining whether one acting for another is an agent or independent contractor are, among other things, (1) the extent of control which, by the agreement, the employer may exercise over the details of the work, (2) whether the one employed is engaged in a distinct occupation or business, (3) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision, (4) the skill required in the particular occupation, (5) whether the employer or the one employed supplies the instrumentalities, tools, and the place of work for the person doing the work, (6) the length of time for which the one employed is engaged, (7) the method of payment, whether by the time

or by the job, (8) whether the work is a part of the regular business of the employer, (9) whether the parties believe they are creating an agency relationship, and (10) whether the employer is or is not in business.

Herman v. Bonanza Bldgs., Inc., 223 Neb. 474, 479-80, 390 N.W.2d 536, 541 (1986).

Although McCann testified that in his business he considered himself to be an independent contractor, we look to the record for the facts to determine his status. He was a specialist in locating and repossessing vehicles. In fact, in mid-1980, Equilease had hired McCann to locate the same equipment. That arrangement was terminated about June 20, 1980. When Quinn engaged McCann's services, no instructions were given concerning the main task of locating the trailers; McCann was probably an independent contractor while performing the location task. That status ended when McCann located the two trailers in Council Bluffs and followed Quinn's further instructions regarding their disposition.

There is conflict in the evidence concerning McCann's testimony that he notified Quinn of the location, towing, and storage. Quinn testified that he could not recall having received such telephone calls from McCann. Where there is conflict in the evidence, this court will consider the fact that the trial court saw and heard the witnesses and observed their demeanor while testifying, and will give great weight to the trial court's judgment as to credibility. *Bahm v. Raikes*, 200 Neb. 195, 263 N.W.2d 437 (1978).

From the record the court could find that McCann gave notice to Quinn by telephone, first, that the trailers had been located and, next, that the trailers had been towed from Council Bluffs and placed in storage at Neff Towing in Omaha. After Quinn was notified that the first trailer was in Council Bluffs, McCann requested, received, and followed the instructions of Quinn, who wanted the trailers returned from Iowa to Nebraska (Omaha). Quinn instructed McCann to perform ministerial acts and duties as his subagent to arrange for the necessary towing and the storage of the trailers in Omaha. McCann performed these duties by engaging the local

available services of Neff Towing. Quinn exercised complete control of McCann's services after the trailers were located, and McCann only performed services as a subagent as directed by Quinn.

It is the duty of an agent to communicate to his principal all the facts concerning the service in which he is engaged that come to his knowledge in the course of his employment, and this duty, in a subsequent action between his principal and a third person, he is conclusively presumed to have performed. This is the foundation of the doctrine that notice to an agent is notice to the principal. See *City of Gering v. Smith Co.*, 215 Neb. 174, 337 N.W.2d 747 (1983). The evidence supports a finding that Equilease had notice of the location, recovery, towing, and storage of the two trailers.

McCann had used the services of Neff Towing on many prior occasions. From the nature of McCann's business, McCann had apparent authority on which Neff Towing could rely to order the towing and storage of the trailers on behalf of Quinn, whether Quinn's identity was known or unknown. Quinn, acting through his subagent, McCann, acted within the scope of his authority to do whatever was necessary to recover the trailers, *J. R. Watkins Co. v. Wiley*, 184 Neb. 144, 165 N.W.2d 585 (1969); Quinn's authority was traceable to Equilease, *Draemel v. Rufenacht, Bromagen & Hertz Inc.*, 223 Neb. 645, 392 N.W.2d 759 (1986); Quinn's broad authority included engaging and accepting the services in fact performed by Neff Towing; and the acts of Quinn and the requested services performed by Neff Towing were binding on Quinn's principal, Equilease.

The fourth assignment goes to the amount of damages. "Where services are furnished to a party and knowingly accepted by him, the law implies a promise on his part to pay the reasonable value of the services." *Ruzicka v. Petersen*, 213 Neb. 642, 645, 330 N.W.2d 913, 914 (1983).

The record supports the finding of the trial judge that the reasonable value of the towing and storage services was $50 for each towing and $7.50 per day storage for each trailer.

Equilease is charged with the reasonable value of the services performed for it by Neff Towing. Any inconvenience and

damage to Equilease caused by the delayed notice and long storage term resulted from the breakdown of responsibility and communication between principal and agent, which is not an issue here.

Lastly, the fifth assignment is not addressed by Equilease in its brief. Consideration of a case on appeal to this court is limited to errors assigned and discussed. See, Neb. Ct. R. of Prac. 9D(1)d (rev. 1986); *Beatty v. Davis*, 224 Neb. 663, 400 N.W.2d 850 (1987); *State v. Bonczynski, ante* p. 203, 416 N.W.2d 508 (1987).

The judgment of the trial court was not clearly wrong.

AFFIRMED.

ALPHOMEGA, INC., ET AL., APPELLANTS, V. COLFAX COUNTY BOARD OF EQUALIZATION, APPELLEE.

418 N.W.2d 570

Filed February 5, 1988. No. 86-083.

1. **Taxation: Valuation: Appeal and Error.** Any taxpayer may appeal from an order of a county board of equalization which sustains another taxpayer's complaint that the latter's property has been overassessed.
2. _____: _____: _____. A taxpayer who has not first filed a protest with the county board of equalization may not appeal to the district court a claimed overassessment of his or her own property.

Appeal from the District Court for Colfax County: JOHN M. BROWER, Judge. Appeal dismissed.

Donn K. Bieber of Otradovsky, Bieber & Westadt, for appellants.

L.J. Karel, Colfax County Attorney, for appellee.

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

PER CURIAM.

Plaintiff John W. DeCamp appealed to the district court and plaintiff Alphomega, Inc., purported to appeal to that court

the refusal of the defendant-appellee, Colfax County Board of Equalization, to reduce the 1983 valuation of certain improved real estate, alleging that the board overvalued the property and, further, taxed it nonuniformly and disproportionally to other real property in the county. The district court dismissed their petition on the merits, and the plaintiffs appealed to this court, assigning errors we do not reach because we, as did the district court, lack jurisdiction. Accordingly, we dismiss the appeal.

The petition alleges plaintiff Alphomega is a Nebraska corporation; the record, however, contains neither proof nor the board's admission that Alphomega is in fact a corporation organized or existing under and by virtue of the laws of this or any other state. Moreover, while the petition asserts Alphomega is the owner of the property in question, plaintiff DeCamp testified that "for practical purposes" he is the owner, either by virtue of owning the property "directly" or as the result of being the "owner of the stock of Alphomega"; he did not know how the matter was treated "on [his] income tax." The historical record of the property maintained by the assessor's office lists the "owner of record" as "Professionals Investments." In short, the record fails to establish who owns the property in question.

Whoever is the owner, it is clear from the record that only DeCamp filed a protest with the board.

Neb. Rev. Stat. § 77-1502 (Reissue 1981) requires that a board of equalization sit "for the purpose of reviewing and deciding . . . protests," which are to be "filed with the board" within a specified time limit not relevant to this inquiry. Neb. Rev. Stat. § 77-1510 (Reissue 1981) provides that "[a]ppeals may be taken from any action of the county board of equalization to the district court" and prescribes the manner of taking such appeals.

Thus, while any taxpayer may appeal from an order of a county board of equalization which sustains another taxpayer's complaint that the latter's property has been overassessed, *Ryan v. Douglas County Board of Equalization*, 199 Neb. 291, 258 N.W.2d 626 (1977), a taxpayer who has not first filed a protest with the county board of equalization may not appeal to the district court a claimed overassessment of his or her own

property. See, *Olson v. County of Dakota*, 224 Neb. 516, 398 N.W.2d 727 (1987); *Riha Farms, Inc. v. Dvorak*, 212 Neb. 391, 322 N.W.2d 801 (1982); *Jones v. Valley County Board of Equalization*, 208 Neb. 559, 304 N.W.2d 396 (1981); *Power v. Jones*, 126 Neb. 529, 253 N.W. 867 (1934).

If Alphomega is the owner, it could not appeal to the district court, because it failed to file a protest with the county board of equalization. DeCamp's effort to appeal fails notwithstanding the fact he filed a protest with the board, because the record fails to establish he is the owner and thus fails to establish he is the taxpayer. See *Leech, Inc. v. Board of Equalization*, 176 Neb. 841, 127 N.W.2d 917 (1964), observing that it is a taxpayer who has the right to test the actual value of his property or show that it has not been properly equalized.

We must therefore dismiss the appeal.

APPEAL DISMISSED.

IN RE ESTATE OF HERMAN F. DETLEFS, DECEASED. LAVERNE QUADHAMER ET AL., APPELLANTS AND CROSS-APPELLEES, V. JOHN L. CRAIG, PERSONAL REPRESENTATIVE OF THE ESTATE OF HERMAN F. DETLEFS, DECEASED, ET AL., APPELLEES AND CROSS-APPELLANTS.

418 N.W.2d 571

Filed February 5, 1988. No. 86-224.

1. **Decedents' Estates: Taxation: Appeal and Error.** Supreme Court review of apportionment proceedings under Neb. Rev. Stat. §§ 77-2108 et seq. (Reissue 1986) is de novo on the record.
2. **Decedents' Estates: Taxation.** Neb. Rev. Stat. § 77-2108 (Reissue 1986) does not require that allowances be made for credits given by the IRS against estate and gift taxes.
3. **Decedents' Estates: Taxation: Interest.** Interest imposed by the IRS on estate tax is part of the "tax" to be apportioned pursuant to Neb. Rev. Stat. § 77-2108 (Reissue 1986).
4. **Equity: Decedents' Estates: Taxation: Interest.** Principles of equity require that if the county court finds that it is inequitable to apportion interest and penalties because of special circumstances, it may direct apportionment thereon in the

manner it finds equitable.

5. **Decedents' Estates: Taxation: Interest: Negligence.** If the county court finds that the assessment of penalties and interest assessed in relation to the tax is due to delay caused by negligence of the personal representative, the court may charge the personal representative with the amount of the assessed penalty and interest.
6. **Decedents' Estates: Taxation: Final Orders: Appeal and Error.** County court apportionment orders entered pursuant to Neb. Rev. Stat. §§ 77-2108 and 77-2112 (Reissue 1986) are final, appealable orders.
7. **Decedents' Estates: Taxation: Interest.** County courts may allow interest on each apportioned share as established by Neb. Rev. Stat. § 77-2108 (Reissue 1986), as may be equitable and just under all the circumstances of the case. Such interest may be charged from the date the apportionment order is entered by the county court.

Appeal from the District Court for Franklin County: WILLIAM G. CAMBRIDGE, Judge. Affirmed in part, and in part remanded for further proceedings.

Patrick J. Nelson of Jacobsen, Orr, Nelson & Wright, P.C., and Douglas M. Deitchler of Baylor, Evnen, Grimit & Witt, for appellants.

Charles E. Wright of Cline, Williams, Wright, Johnson & Oldfather, Jesse T. Adkins of Adkins and Wondra, and Rodney A. Osborn of Person, Dier, Person & Osborn, for appellees Craig and University of Nebraska Foundation.

BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

WHITE, J.

This is an appeal from the district court for Franklin County. The district court upheld an order of the county court for Franklin County which apportioned federal estate taxes, and interest thereon, among persons interested in the estate of Herman F. Detlefs.

Appellants, LaVerne Quadhamer, Shirley Quadhamer, and Wayne Kile, assign three errors. First, appellants challenge the method used by the trial court to compute apportionment shares of the estate tax. Second, it is alleged that the trial court erred in apportioning interest due on the federal estate tax among the interested parties. Finally, appellants allege that the county court lacked jurisdiction to enter a money judgment,

with interest thereon, for the amounts of federal estate tax and interest apportioned to each interested party.

This case comes before this court with a 10-year history of conflict involving the parties. Herman Detlefs' attempts to dispose of his estate, by will and through inter vivos land transfers, have been fraught with years of court battles involving several distinct issues. In 1978 Detlefs deeded two parcels of real estate to his friends (appellants in this case) the Quadhamers and Wayne Kile. Detlefs retained a life estate in both parcels of land. Within 2 weeks, on advice of attorneys, Detlefs requested appointment of a conservator. The request was granted, and John L. Craig, Detlefs' banker, was appointed. Within a few months the conservator filed an action in equity in the separate district courts where each parcel of land was located to have the deeds set aside due to undue influence and lack of mental capacity.

Detlefs died on February 4, 1980, prior to any determination on the validity of the land transfers. The actions were revived by John Craig, as personal representative of Detlefs' estate. With the land transfer litigation pending, court battles began, involving the probate of Detlefs' wills. The personal representative attempted to probate Detlefs' 1979 will. Detlefs' heirs, as well as the Quadhamers and Kile in a separate action, objected to the probate of the 1979 will. The Quadhamers and Kile filed for formal probate of Detlefs' 1975 will, which included two codicils. The county court overruled the objections and admitted the 1979 will to formal probate. In July and August of 1980, both Detlefs' heirs and the Quadhamers and Kile, in separate actions, appealed the county court's order to the district court.

On September 25, 1981, the district courts for Kearney and Franklin Counties upheld the land transfers and deeds from Detlefs to the Quadhamers and Kile. The estate's personal representative then appealed to the Supreme Court. This court affirmed the district courts' decisions by upholding the land transfers in *Craig v. Kile*, 213 Neb. 340, 329 N.W.2d 340 (1983).

Amidst the controversies surrounding Detlefs' land transfers and his will loomed one of the two certainties in life: taxes. Neither Detlefs nor his conservator filed a gift tax return on the

land transfers to Quadhamers and Kile during Detlefs' lifetime. After Detlefs' death, the estate and the transferees were at odds over who was liable for payment of gift taxes if, in fact, the inter vivos transfers were upheld.

The facts pertinent to the estate taxes are of particular importance to the case at bar. A federal estate tax return, if required, must be filed within 9 months after death. I.R.C. § 6075 (1982). There are provisions for an extension if such is necessary. I.R.C. § 6081 (1982). The record in this case reveals that the attorney for the estate's personal representative filed a U.S. estate tax return (form 706) in November of 1981, 1 year 9 months after Detlefs' death. The attorney's testimony indicates that two extensions were obtained prior to the filing. The return filed by the estate declared that no estate taxes were due the IRS. According to the testimony, the "return was filed on the basis that the . . . transfers [of land to Quadhamers and Kile] would be voided and all of that property would pass to the residuary beneficiaries, being the 11 charities [mentioned in Detlefs' 1979 will]."

Shortly after this court's decision in *Craig v. Kile, supra*, upholding Detlefs' inter vivos land transfers, the IRS audited the federal estate tax return submitted by the personal representative. In June 1983, the IRS notified John Craig of an adjustment in the estate's tax liability. The audit resulted in an increase from $0 due to $412,487.61 due. The estate was notified of its right to appeal this assessment, either within the IRS or in a court proceeding. The personal representative, along with counsel for one of the charitable residuary beneficiaries, chose to appeal the assessment within the IRS. Pursuant to this reassessment, the estate tax liability decreased to $223,332.25, not including interest. This final assessment was dated October 2, 1984. On October 22, 1984, the estate paid the estate tax, as well as the gift tax due on the land transfers. On or about November 1, 1984, the estate paid the interest due on the gift tax and the estate tax. The final assessments paid by the personal representative amounted to $223,332 in estate tax and $115,163 in interest thereon. The gift tax totaled $98,680, and $68,251 in interest.

The record reveals that shortly after the first IRS audit

resulting in an increased estate tax liability, the personal representative petitioned the county court for apportionment of federal estate taxes and determination of Nebraska inheritance tax. The Quadhamers and Kile, as well as Detlefs' heirs, filed separate objections to the petition for apportionment. The parties objected to the apportionment as premature due to the pending appeals in district court challenging the probate of Detlefs' 1979 will, alleging that the gift tax issue remained unsettled and asserting that the personal representative was still negotiating with the IRS as to the amount of estate tax due. In August of 1983 the county court upheld the objections and stated that the action "should be continued until the testacy or intestacy of the decedent has been determined."

In January 1984, Detlefs' heirs withdrew their district court appeal challenging the probate of the 1979 will. This action was pursuant to a settlement agreement which was filed with and approved by the county court in March of 1984. Following the October 1984 final assessment of federal estate and gift tax, and payment of that tax by the estate, the personal representative filed an amended application for apportionment of federal estate tax. The amended application was filed in January of 1985. In June 1985, the Franklin County Court entered an order which determined Nebraska inheritance taxes due, apportioned the federal estate tax and the interest among the parties interested in the estate, and held that the gift tax and interest thereon was a debt of the estate and thus not subject to apportionment among the transferees (Quadhamers and Kile). Appellants herein, Quadhamers and Kile, appealed the county court order to the district court. On January 30, 1986, the district court upheld, with some modification, the order of the county court, and this appeal followed.

Prior to addressing appellants' assigned errors, it is necessary to establish this court's scope of review in estate tax apportionment appeals. This issue has not been directly addressed in this court's prior decisions concerning Nebraska's apportionment statute, Neb. Rev. Stat. § 77-2108 (Reissue 1986).

Appellees allege that this appeal is governed by the

provisions of Neb. Rev. Stat. § 24-541.06 (Reissue 1985). Thus, the standard of review with respect to apportionment proceedings would be limited to error appearing on the record. It is true that in probate proceedings, as well as in determination of inheritance tax appeals, § 24-541.06 applies, and the Supreme Court's scope of review is limited to error appearing on the record. See, *In re Estate of Massie*, 218 Neb. 103, 353 N.W.2d 735 (1984); Neb. Rev. Stat. § 77-2023 (Reissue 1986). However, for reasons which follow, we do not agree that this court's review in apportionment cases should be limited to error appearing on the record, but, rather, we hold that it is de novo on the record.

First, it is clear that county courts, in exercising exclusive original jurisdiction over estates, may apply equitable principles to matters within probate jurisdiction. *In re Estate of Steppuhn*, 221 Neb. 329, 377 N.W.2d 83 (1985); *In re Estate of Layton*, 207 Neb. 646, 300 N.W.2d 802 (1981). Further, Neb. Rev. Stat. § 24-517 (Reissue 1985) provides that county courts shall have "[a]ll other jurisdiction heretofore provided and not specifically repealed by Laws 1972, Legislative Bill 1032, and such other jurisdiction as hereafter provided by law." County courts have been granted apportionment jurisdiction pursuant to Neb. Rev. Stat. § 77-2112 (Reissue 1986). That statute provides that the "county court of the county wherein the estate of the decedent is being probated shall have jurisdiction *in the probate proceedings* to hear and determine the apportionment and proration of such tax as set out in section 77-2108." (Emphasis supplied.) An apportionment proceeding thus becomes a "matter within [the] probate jurisdiction" of the county court, to which equitable principles may be applied. We are not saying that estate tax apportionment is a probate proceeding; it is merely an ancillary proceeding within the county court's probate jurisdiction as granted by § 77-2112, and thus equitable principles may be applied by the county court to apportionment proceedings. Clearly, Nebraska's apportionment statute envisioned such action by the county courts. Section 77-2108 states that "estate tax . . . shall be *equitably* apportioned and prorated among the persons interested in the estate."

Given that apportionment proceedings are governed by principles of equity, we hold that review of such matters in this court must be de novo on the record.

Appellants' first assigned error alleges that the county court erred in making an apportionment of federal estate taxes without taking into consideration the basis and source of the various credits to which the estate was entitled. Discussion of this issue necessitates a review of the facts relating to the IRS calculations which determined the amount of federal estate tax due.

The IRS audit of 1983 resulted in the fair market value of Detlefs' land transfers to appellants being included in the decedent's gross estate, pursuant to I.R.C. §§ 2031, 2035, and 2036 (1982). On appeal from this audit, the IRS then allowed the $98,680 in gift tax as a schedule K claim (a debt or liability of the estate) pursuant to I.R.C. § 2053 (1982). That same amount was then listed as a credit against the tentative tax figure, presumably in accordance with I.R.C. § 2001(b) (1976), although this point is somewhat unclear. In any event, the gift tax on the prior transfers was explicitly listed as a "credit." It is this credit that appellants seek to their sole benefit.

The county court clearly followed the language of § 77-2108 in computing the proper share to be apportioned to each interested party. The statute provides that "apportionment and proration shall be made in the proportion as near as may be that the value of the property, interest, or benefit of each such person bears to the total value of the property, interests, or benefits received by all such persons interested in the estate . . . ." The county court correctly computed each interested person's share as follows:

$$\frac{\text{Value of Property Received by Interested Person}}{\text{Total Value Received by All Such Persons}} \times \text{Federal Estate Tax} = \text{Apportioned Share of Estate Tax.}$$

Appellants allege that this computation is inequitable in this case because the county court did not consider the source of the estate tax credits allowed by the IRS against the total estate tax liability. They argue that equity requires that interested parties receiving gifts or legacies giving rise to credits on the estate tax

payable should receive the benefit of the credits attributable to their gifts. We do not agree.

As the district court stated on appeal, § 77-2108 requires only that "allowances shall be made for . . . exemptions granted by the act imposing the tax and for any deductions . . . allowed by such act for the purpose of arriving at the value of the net estate." Nowhere does the statute require allowances for *credits* given by the IRS in computing the estate tax liability. Exemptions, deductions, and credits are three separate and distinct statutory creations. Nebraska's apportionment statute does not require courts to allow for credits no matter which property, interest, or benefit generated that credit.

The New York courts have addressed an identical claim to that asserted herein. The New York statute in effect at the time was the model used by Nebraska in drafting our apportionment statute, and contains identical language. The New York courts have held that donees of inter vivos gifts made in contemplation of death are not entitled to have gift tax credits apportioned solely to them. *Matter of Blumenthal*, 182 Misc. 137, 46 N.Y.S.2d 688 (1943), *aff'd mem.* 267 A.D. 949, 47 N.Y.S.2d 652 (1944), *aff'd mem.* 293 N.Y. 707, 56 N.E.2d 588 (1944). As the New York court pointed out, when inter vivos transfers are included in the decedent's gross estate, "the amount of the taxable estate will be increased and the burden of the additional share of taxes at higher rates will be cast upon persons who derive no benefit from such *inter vivos* transfers." 182 Misc. at 141, 46 N.Y.S.2d at 692. In that case, as in the case at bar, the gift tax was paid as a general liability of the estate. "Under these circumstances equity requires that the credits should redound to the advantage of the entire group of parties charged with the burden of the tax and not be confined to the donees only." *Id.*

Appellants seek to benefit from a credit for gift tax which was paid by the estate as a debt of the donor, Detlefs. They argue that their *receipt* of Detlefs' gifts gave rise to this gift tax credit. In reality, gift tax is imposed due to the donor's act of transferring his property by gift during his lifetime. Detlefs' lifetime transfers ultimately increased the estate tax burden on all interested persons liable under Nebraska's apportionment statute. Any credit for taxes due on these lifetime transfers

should be shared by all those persons who are made to bear the burden of the estate taxes. Neither law or equity requires that appellants alone should benefit from a credit given for gift tax liability.

Appellants' second assignment of error alleges that the county court erred in apportioning the interest due on the estate tax among the interested parties. The question that must be answered is whether this interest is part of "any estate tax levied or assessed . . . under the provisions of any estate tax law of the United States heretofore or hereafter enacted," which is subject to apportionment under § 77-2108.

There has long been a split of authority in this country's case law on whether state statutes directing apportionment of estate "tax" also include the interest due on such tax. See, Annot., 71 A.L.R.3d 247 (1976); 42 Am. Jur. 2d *Inheritance, etc., Taxes* § 390 (1969). This court has not directly addressed the issue, but certain inconsistencies become apparent if one compares our apportionment statute's history with case law on a similar issue. As mentioned previously, this state's apportionment statute was patterned after New York's original act. Therefore, it is of some value to consult New York case law which has interpreted the statute. New York courts have held that "[p]enalty interest is not a part of the tax but is something in addition to the tax." *In re Manville's Will*, 102 N.Y.S.2d 530, 532 (1950), *aff'd mem.* 278 A.D. 954, 105 N.Y.S.2d 979 (1951). Thus, absent a direction in decedent's will to the contrary, "the source of payment of penalty interest would be determinable under general equitable principles . . . ." 102 N.Y.S.2d at 532. Generally, New York courts interpreted the original apportionment statute (prior to its amendment by 1950 N.Y. Laws ch. 822) as giving no authority to apportion interest due on estate taxes. (See Annot., 71 A.L.R.3d, *supra*.)

On the other hand, this court has addressed a similar question and reached a result contrary to that of the New York courts. In *Reller v. Hays*, 192 Neb. 354, 220 N.W.2d 228 (1974), appellants were the beneficiaries of a trust created by will and were challenging, as in the case at bar, the trial court's order apportioning estate and inheritance taxes plus interest. Appellants alleged that the trial court erred in charging to

principal the interest on taxes. This court held that "estate and inheritance taxes, including interest and penalties, levied in respect of a trust . . . should be charged against principal . . . ." *Id.* at 357, 220 N.W.2d at 230.

While the facts differ between *Reller* and the case at bar, the impact of that prior decision remains. This court found no reason to separate the interest from the estate tax for purposes of apportioning that burden among the interested parties.

In addition, the Internal Revenue Code provides that "[a]ny reference in this title . . . to any tax imposed by this title shall be deemed also to refer to interest imposed by this section on such tax." I.R.C. § 6601(e)(1) (1982). Although federal interpretation of what constitutes "tax" is not dispositive of Nebraska's legislative intent under § 77-2108, it is at least a guidepost on this issue.

We are inclined to agree with appellees in this case, who argue that interest imposed on estate tax is part of the "tax" to be apportioned under § 77-2108. The original purpose of apportionment statutes was " 'to carry out principles of equitable contribution so that the person who receives the property which has created a tax will be required to bear the burden of the tax.' " Wright, *The Nebraska Apportionment Act*, 32 Neb. L. Rev. 517, 520 (1953). See, also, 42 Am. Jur. 2d, *supra* at § 392. Most importantly, the statutes were enacted to "circumvent instances of hardship and injustice resulting from the common-law rule prevailing in some jurisdictions that the entire estate tax burden, in the absence of a contrary direction in a will, must be borne by the residuary estate . . . ." *Id.* at 606. As a general rule, logic and equity seem to dictate that the purposes of and intent behind the enactment of apportionment statutes are best achieved by classifying interest as part of the "tax" to be apportioned. This is particularly true where, as in this case, the residue of the estate is to be distributed to charities, and, thus, the value of the residuary estate in no way added to the creation of the tax burden ultimately imposed.

We are not, however, willing to allow this "interest as tax" rule to be applied in a hard-and-fast fashion. The Uniform Estate Tax Apportionment Act adequately states the rule which could alleviate possible inequities which we envision may flow

from a strict application of the "interest as tax" rule. The act provides:

> (b) If the [Probate Court] finds that it is inequitable to apportion interest and penalties in the manner provided in this Act because of special circumstances, it may direct apportionment thereon in the manner it finds equitable.
>
> . . . .
>
> (d) If the [Probate Court] finds that the assessment of penalties and interest assessed in relation to the tax is due to delay caused by the negligence of the fiduciary [or personal representative], the court may charge the fiduciary [or personal representative] with the amount of the assessed penalties and interest.

Unif. Estate Tax Apportionment Act § 3, 8A U.L.A. 293-94 (1964).

Cases such as that before us necessitate adoption of the rule set forth in the Uniform Estate Tax Apportionment Act. After a thorough review of the facts in this case, we are troubled by situations where a personal representative could delay or avoid payment on estate and gift taxes for years, as interest continues to build, all the while knowing that all of this liability will eventually be apportioned among persons other than himself. We do not intend to imply that the personal representative in this case was, in fact, negligent, or that he acted improperly. We simply do not find adequate evidence in the record to support such a conclusion.

However, we do question the propriety of the personal representative's actions when he filed a federal estate tax form 706 in November of 1981 "on the basis that the . . . transfers [to Quadhamers and Kile] would be voided and all of that property would pass to the residuary beneficiaries, being the 11 charities." The record shows that the district courts *upheld* these transfers in September 1981. No doubt the personal representative's wishful thinking in November was a pleasant surprise to everyone concerned because, as filed, there were no estate taxes due. One cannot help but wonder, however, whether the ultimate burden of estate tax plus interest could have been considerably less had the original filing been based on the "worst possible scenario," i.e., that the land transfers were, in

fact, valid, as the district courts had held.

The Internal Revenue Code does make provisions for refunds or credits in the event of an overpayment. I.R.C. §§ 6401 to 6407 (1982). This court is not unmindful of the time limitations applicable to filing for such refunds. I.R.C. §§ 6511 to 6515 (1982). Such limitations may become one factor for a court to consider in scrutinizing the actions of a personal representative, but should not be used as an excuse for negligence or breach of a fiduciary duty.

The record in this case does not contain adequate evidence for this court to determine whether the personal representative acted improperly, given the facts of this case. Appellants had no control over the personal representative's decisions as to filing the necessary federal tax returns, but did stand to bear a substantial burden once an apportionment action was instituted. For this reason, equity compels this court to remand this cause on the issue of apportionment of interest, in order that evidence may be introduced as to the propriety of the personal representative's actions and its bearing on the amount of interest accrued. These proceedings and the decision of the lower court shall be in conformity with the rules of law as set forth above.

Appellants' final assigned error alleges that the trial court had no jurisdiction to enter a money judgment, with interest thereon, and therefore the order for interest on the amounts apportioned is void. This court's determination of the issue presented necessitates an interpretation of § 77-2112, which addresses the jurisdictional aspects of Nebraska's apportionment act.

In reality, § 77-2112 is a poorly drafted piece of legislation which creates considerable confusion. The statute first grants the county courts with jurisdiction "to hear and determine the apportionment and proration" of estate tax as set out in § 77-2108. The legislation then goes further, for reasons which are not readily apparent, and states that the "district court . . . shall have jurisdiction of an action in equity for an accounting and contribution after the apportionment and proration have been determined by the county court."

At first blush it might appear that a county court's order of

apportionment is only a first step in the process, and thus not a final order. Obviously, this raises a question as to the propriety of this court's even considering this appeal. Despite the inference raised by the lack of clarity of § 77-2112, we are not willing to hold that these county court apportionment orders are not final orders and thus are nonappealable. This court has previously held that an order is final and appealable when the substantial rights of the parties to the action are determined, even though the cause is retained for the determination of matters incidental thereto. *In re 1983-84 County Tax Levy*, 220 Neb. 897, 374 N.W.2d 235 (1985). For reasons which follow, we hold that county court apportionment of estate tax orders are final, appealable orders.

Our holding rests primarily on the language used within § 77-2112 in granting partial jurisdiction to the district courts. The statute grants district courts jurisdiction "of an action in equity for an accounting and contribution" and states that this action will come "*after* the apportionment and proration have been determined by the county court." An "action in equity for accounting and contribution" presumes that an underlying liability exists which necessitates such an action. (See, *National Crane Corp. v. Ohio Steel Tube Co.*, 213 Neb. 782, 332 N.W.2d 39 (1983); 1A C.J.S. *Accounting* § 36 (1985).) In apportionment cases such as this one, that underlying liability is created by the county court order apportioning the federal estate tax. The district court "action in equity" contemplated by § 77-2112 is not a reevaluation of the apportionment order. That can be done only by appealing the apportionment order, the course of action pursued by appellants herein.

Appellants allege that the county court entered a "money judgment" against the interested parties. This characterization of the county court's order is not particularly accurate and appears to be only a method to bootstrap their argument that interest cannot be awarded on each party's apportioned share.

As mentioned earlier in this opinion, the county court apportionment proceedings are governed by principles of equity. Admittedly, as appellants assert, the apportionment statute does not refer to imposing such interest. However, this court has held that interest is sometimes allowed by courts of

equity, in the exercise of sound discretion, when it would not be recoverable at law. " ' "These courts . . . in their discretion, allow or withhold interest as, under all the circumstances of the case, seems equitable and just, except in cases where interest is recoverable as a matter of right." ' " *Newton v. Brown*, 222 Neb. 605, 617, 386 N.W.2d 424, 432 (1986).

We can find no abuse of discretion by the county court in ordering interest to be paid by each interested party on each one's respective share of the estate tax, except with respect to the date from which the interest was to run. Ultimately, the estate tax apportionment action is to benefit the residuary legatees, whose funds have borne the burden of the taxes. As we previously pointed out, state apportionment acts were passed to protect the residuary estate from the common-law rule which often depleted its funds. Consequently, courts of equity must strive to carry out that intent.

We cannot agree with the county court that such interest on each apportioned share shall run from the date on which the personal representative paid the federal estate tax and interest. The district court properly modified the county court's order when it held that "the personal representative of the estate is entitled to interest upon the advances of estate tax and interest thereon . . . from the date the apportionment order was entered . . . ." To impose interest from any date prior to the apportionment order would be grossly inequitable because appellants' liability for the tax cannot begin until apportionment pursuant to § 77-2108 is decreed by the court.

For the above-stated reasons, we affirm the district court's judgment which upheld the county court's order as to estate taxes due from appellants. We remand the cause to the district court with instructions to remand to the county court for further proceedings as to the issue of apportionment of interest on the estate tax liability. Finally, we affirm the district court's decision ordering interest to be paid on each apportioned share as modified to impose such interest from the date the county court apportionment order was entered.

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

STATE OF NEBRASKA, APPELLEE, V. ARTHER L. EICHELBERGER, APPELLANT.

418 N.W.2d 580

Filed February 5, 1988. No. 86-1103.

1. **Criminal Law: Intent: Words and Phrases.** In the context of a criminal statute, "intentionally" means willfully or purposely, and not accidentally or involuntarily.
2. **Criminal Law: Intent.** Intent may be inferred from the words or acts of the defendant and from the circumstances surrounding the incident.
3. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to sustain a criminal conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence; such matters are for the finder of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
4. **Trial: Judges.** A court should refrain from commenting on the evidence or making remarks prejudicial to a litigant or calculated to influence the minds of the jury.
5. **Criminal Law: Constitutional Law.** When a court suspects manipulation on the part of a criminal defendant, it must balance the need for the efficient administration of the criminal justice system against the defendant's rights.
6. **Criminal Law: Judicial Notice: Records.** In a criminal case a court may take judicial notice of its own records in the case under consideration.
7. **Criminal Law: Motions for Continuance: Appeal and Error.** A motion for continuance in a criminal case is addressed to the sound discretion of the trial court, and that court's ruling will not be disturbed on appeal absent a showing of abuse of discretion.
8. _____: _____: _____. Where a criminal defendant's motion for continuance is based upon the occurrence or nonoccurrence of events within the defendant's own control, denial of such motion is no abuse of discretion.
9. **Criminal Law: Right to Counsel.** Where a criminal defendant is financially able to hire an attorney, he or she may not use his or her neglect in hiring one as a reason for delay.
10. _____: _____. The requirement of Neb. Rev. Stat. § 29-1804.05 (Reissue 1985) is that before counsel is provided at public expense for a criminal defendant, there must be a reasonable inquiry to determine the defendant's financial condition.
11. _____: _____. In determining whether a criminal defendant is indigent as the term is used in Neb. Rev. Stat. § 29-1804.04 (Reissue 1985), a court is to consider the seriousness of the offense; the defendant's income; the availability of 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.
12. _____: _____. Exercise of the right to assistance of counsel is subject to the necessities of sound judicial administration.

13. **Criminal Law: Right to Counsel: Waiver.** A criminal defendant's course of conduct may operate as a waiver of the right to counsel.
14. **Criminal Law: Right to Counsel.** Criminal defendants are not permitted to utilize the constitutional right to counsel to manipulate or obstruct the orderly procedure in the courts or to interfere with the fair administration of justice.

Appeal from the District Court for Lancaster County: DALE E. FAHRNBRUCH, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Michael D. Gooch, for appellant.

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

BOSLAUGH, CAPORALE, and GRANT, JJ., and MULLEN, D.J., and COLWELL, D.J., Retired.

CAPORALE, J.

Pursuant to the jury's verdict, defendant, Arther L. Eichelberger, was adjudged guilty of two counts of criminal nonsupport in violation of Neb. Rev. Stat. § 28-706(1) (Reissue 1985) and sentenced to concurrent terms of imprisonment for a period of not less than 18 months nor more than 3 years on each count. In this appeal Eichelberger assigns as error the district court's (1) finding that the evidence is sufficient to sustain the convictions, (2) abandonment of "a neutral and unbiased role," (3) failure to properly instruct the jury, (4) failure to grant a continuance, (5) failure to appoint counsel, and (6) finding Eichelberger waived his right to be represented by counsel. The record failing to support any of the foregoing assignments of error, we affirm.

Eichelberger's assignments of error involve two discrete sets of facts: Resolution of the first assignment of error depends upon the facts adduced at trial upon which proof of the offenses depends; resolution of the remaining assignments of error depends upon the facts concerning the procedures followed in this case. As the procedural record grew quite lengthy, largely at Eichelberger's instance, we, for the sake of clarity, detail these two sets of facts separately and consider the relevant assignments of error seriatim within the context of those facts.

FACTS RELATING TO OFFENSES

Eichelberger was married to Jo Slama on April 21, 1983. The couple's only child was born on December 28, 1983. Slama separated from Eichelberger on June 19, 1984, and on September 1, 1984, while Eichelberger was physically present and represented by counsel, a temporary child support order was entered requiring Eichelberger to pay $225 per month in child support. A decree dissolving the marriage was entered on April 4, 1985, which ordered Eichelberger to pay $100 per month in child support starting on April 1, 1985. Once again, Eichelberger was present in court when the decree was announced and was also represented by counsel. Count I of the information alleges that Eichelberger intentionally failed to pay support under the temporary child support order, and count II that he intentionally failed to pay under the terms of the decree.

Eichelberger was employed by the Missouri Pacific Railroad during his marriage to Slama, but worked irregularly due to injuries received in an automobile accident which occurred prior to the marriage. Eichelberger received $550 per month in insurance benefits and $225 every 2 weeks from the Railroad Retirement Board until he returned to work with the railroad. Shortly after returning to work, Eichelberger broke his foot, resulting in another period of disability.

Eichelberger filed separate claims through a Lincoln attorney for both the automobile accident injury and the broken foot. On December 20, 1984, Eichelberger received and subsequently negotiated a check from his injuries attorney in the amount of $6,190.05 in partial settlement of the foot injury claim. In July 1985 Eichelberger received and subsequently negotiated another check from his injuries attorney in the amount of $42,669.19 as part of the settlement of the automobile accident claim. In addition, Eichelberger received disability payments from January 1985 through July 17, 1985, totaling $5,145.15, and railroad retirement benefits from October 1984 through April 1985, totaling approximately $3,500.

Child support records maintained by the clerk of the district court reflect that Eichelberger made no payments at all under the temporary support order and made only a $10 payment

under the decree. Neither Slama nor the child received any other type of support directly from Eichelberger. At the time of trial Eichelberger owed approximately $3,800 in arrearages under both support orders; $1,800 under the temporary support order and $2,083.51 under the decree.

Eichelberger introduced no evidence at all at trial, although in pretrial, posttrial, and other proceedings out of the presence of the jury, he made occasional references to surgery he thought he might need at some indeterminate time in the future, at a cost which he could not estimate.

Sufficiency of Evidence

Section 28-706(1) provides: "Any person who intentionally fails, refuses, or neglects to provide proper support which he knows or reasonably should know he is legally obliged to provide to a spouse, minor child, minor stepchild, or other dependent, commits criminal nonsupport." If the failure to support violates a court order, as is charged in each count in the present case, the offense constitutes a Class IV felony, § 28-706(6), which may be punished by imprisonment for up to 5 years and a fine of up to $10,000. Neb. Rev. Stat. § 28-105 (Reissue 1985).

The State proved unequivocally the court's temporary child support order and decree and Eichelberger's failure to make payments as required. The essence of Eichelberger's first assignment of error is his contention that the State failed to prove his ability to pay under those orders. He argues that if he was unable to pay, his failure to pay was not "intentional," within the meaning of § 28-706(1).

In the context of a criminal statute, "*[i]ntentionally* means willfully or purposely, and not accidentally or involuntarily." (Emphasis in original.) *State v. Schott*, 222 Neb. 456, 462, 384 N.W.2d 620, 624 (1986). Intent may be inferred from the words or acts of the defendant and from the circumstances surrounding the incident. *State v. Pence, ante* p. 201, 416 N.W.2d 581 (1987). It is true that in *Halverson v. Halverson*, 189 Neb. 489, 492, 203 N.W.2d 452, 454 (1973), a civil support case, this court stated:

> When plaintiff rested defendant moved to dismiss the citation on the grounds that there was no proof beyond a

> reasonable doubt that the defendant had the ability to pay the support required of him. The plaintiff adduced no evidence on that question. There was no showing as to whether or not the defendant had the ability to work or whether out of earnings or profits he was able to make the payments required. Defendant's motion should have been sustained at that stage.

Eichelberger urges that, like the plaintiff in *Halverson, supra*, the State failed to meet its burden by failing to prove Eichelberger's debts, and he asks this court so to hold as a matter of law. Eichelberger's argument widely misses the mark. The State proved that Eichelberger had resources with which he might have paid his past-due child support many times over. Eichelberger offered no evidence to overcome the inference that those resources were available to him had he wished to comply with the support orders.

As we have often noted and recently reaffirmed, in determining the sufficiency of the evidence to sustain a criminal conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact. The verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Lee, ante* p. 277, 417 N.W.2d 26 (1987); *State v. Richardson, ante* p. 274, 417 N.W.2d 24 (1987); *State v. Patman, ante* p. 206, 416 N.W.2d 582 (1987); *State v. Pence, supra; State v. Dwyer*, 226 Neb. 340, 411 N.W.2d 341 (1987). Under the state of the evidence, the determination of whether Eichelberger had the ability to pay was one of fact properly left to the jury.

In this regard Eichelberger's case seems more reminiscent of *State v. Reuter*, 216 Neb. 325, 343 N.W.2d 907 (1984), than of *Halverson, supra*. In *Reuter*, we said:

> The evidence establishes that defendant was capable of working, was employed, and earned at least $1,000 per month. In support of defendant's argument that his ability to support his children was not established, he claims that his debts exceeded his income. . . . The support of one's children is a fundamental obligation which takes

> precedence over almost everything else . . . .
>
> . . . .
>
> The fact of the matter is the evidence is sufficient to support defendant's conviction of felony nonsupport of his children. It establishes as well that he deliberately elected to ignore his obligations as a father . . . .

216 Neb. at 328-29, 343 N.W.2d at 910-11.

FACTS RELATING TO PROCEDURAL HISTORY

This brings us to a consideration of those aspects of the procedural history of this case which bear upon the remaining assignments of error.

Defendant was charged on December 17, 1985. The county court record contains the following entry dated June 16, 1986:

> Def. appears pro se. Insists to court that he has funds to hire private counsel and does not want public defender. Has visited with [names of two attorneys] and lack of funds is not the reason that he hasn't retained them.
>
> Court reviews finances and offers def. assistance of public defender office. Mr. Eichelberger refuses.

Highlights of Eichelberger's subsequent hegira through the district court include the following.

On July 3, 1986, Eichelberger appeared for arraignment in the district court and advised the court he had an attorney and that although the attorney, who was not Eichelberger's injuries attorney, was not present, he wanted to proceed, as the attorney told him to enter a plea. Eichelberger pled not guilty, and the trial judge clearly explained the possible penalties Eichelberger faced.

On August 20, 1986, a hearing was conducted on the State's motion to amend the information. The trial judge asked Eichelberger if he had money to hire a lawyer, and Eichelberger replied that he did. The court continued the hearing on the State's motion to amend the information, in deference to Eichelberger's asserted lack of notice.

On September 15, 1986, at the continuation of the hearing originally commenced on August 20, Eichelberger complained that he could not hire a lawyer because he did not have access to his money while in jail. The trial judge administered an oath to Eichelberger for the purpose of adducing testimony regarding

Eichelberger's indigency. Eichelberger, however, refused to discuss his assets, stating that he had sufficient money to hire a lawyer but that the money was somewhere in Missouri. Eichelberger requested a bond reduction so he could go get his money. The judge refused to grant a reduction in Eichelberger's bond, but remarked on the availability of a power of attorney through which an attorney or relative might retrieve Eichelberger's money. Eichelberger indicated he was unwilling to give anyone such a power.

On October 24, 1986, prior to commencement of trial and outside the presence of the jury, the trial judge engaged Eichelberger in the following colloquy:

> [Judge]: . . . Mr. Eichelberger has indicated to the court that he desires to represent himself in this matter, which he has the right to do. He will, however, be held to the same standards as if he were represented as far as evidence and other matters are concerned.
>
> The court has asked and is appointing Mr. Gooch of the Public Defender's Office to be standby for you so that if you have any questions of a legal nature that he will be available to answer these for you. He will not be sitting at the counsel table, but he will be available. And you're ready to proceed this afternoon, I take it, at 2 o'clock?
>
> [Eichelberger]: Yes, Your Honor.
>
> [Judge]: Do you have any questions?
>
> [Eichelberger]: No, Your Honor.
>
> [Judge]: Okay. And Mr. Gooch will be available if you need to ask anything about legal matters that you did not understand or something of that nature. You understand that?
>
> [Eichelberger]: Yes, Sir.
>
> [Judge]: And that is correct, that you want to proceed pro se; is that right?
>
> [Eichelberger]: Yes, Your Honor.

Michael Gooch was in fact present as standby counsel throughout the remainder of the trial. At trial, Eichelberger requested a continuance to gather more information. The judge denied this oral motion, but observed that the trial would go on into the following week and that Eichelberger would have the

weekend to gather information prior to the following Monday; in fact, no testimony was taken in the case against Eichelberger until that Monday.

On October 27, 1986, in his pro se opening statement to the jury, Eichelberger asserted that he never said he would represent himself, and he promised to stand mute at trial. In the presence of the jury the trial judge noted that "[t]he record reflects that the defendant did waive or indicated to the court that he did want to represent himself." The court also noted the presence of Gooch as standby counsel for Eichelberger.

At his first opportunity to cross-examine, Eichelberger restated his intention not to participate in the trial, but nonetheless participated to the extent of indicating he had no objection to the admission into evidence of the divorce decree, the district court clerk's child support account sheet, and an exemplar of his handwriting. During recess, out of the presence of the jury, the judge again reviewed the record and again noted that Eichelberger had earlier expressed his desire to represent himself.

At the conclusion of the State's case in chief, out of the presence of the jury, the judge inquired whether Eichelberger had any motions to present. Eichelberger responded by complaining, for the first time, of lack of access to the jail law library, and renewed his motion for a continuance. Eichelberger was unwilling to say how long a continuance he would need, but indicated that any continuance would be for the purpose of enabling him to better prepare his pro se defense. The judge offered Eichelberger a 2-day continuance. After consulting with Gooch for nearly half an hour, Eichelberger testified but failed to address the motion for continuance, instead asserting that he was taking several kinds of medication. He did not, however, assert that the medication caused him any difficulty in conducting his defense. The court subsequently overruled the motion for continuance, explained in some detail Eichelberger's constitutional rights to testify on his own behalf or to refrain from doing so, and, still outside the presence of the jury, noted findings of fact for the record to the effect that Eichelberger had, in dealings with the court up to that time, appeared not to have been adversely affected by any medication he might be

taking.

On October 27, 1986, in the course of an instruction conference, the trial judge noted his intention to take judicial notice of the court's own record regarding continuances already requested and granted.

On October 28, 1986, during the last day of trial and out of the presence of the jury, the trial judge sustained the State's objection to Eichelberger's request that Gooch give Eichelberger's closing argument, noting:

> Mr. Gooch has been appointed by the court as standby counsel only and that does not mean he can participate. He's there to answer any legal questions for you. You have money to hire a lawyer. You indicated that previously and to the court yesterday again. And for those reasons the request is denied.

The trial concluded that day, and after the verdicts of guilty were returned, the trial judge seemingly invited a motion for new trial based on Eichelberger's asserted lack of access to the jail law library.

On October 30, 1986, while Gooch was still present as standby counsel, Eichelberger accepted the trial judge's invitation and moved for a new trial. He offered his own testimony that he was denied access to the jail law library. On cross-examination by the State's attorney, Eichelberger admitted he had never complained to the court about denial of access to the law library. The judge again, on his own motion, took notice of the court's files and records in Eichelberger's case. Upon redirect examination Eichelberger asserted: "[A]t the time of my preliminary hearing, I didn't — I did say that I didn't want a public defender, but I also asked the judge to let the record show that I wasn't refusing counsel, that I was able to get my own counsel."

Eichelberger also stated that his brother visited from Kansas City, Missouri, a few days before September 8; Eichelberger did not state why his brother did not bring any of Eichelberger's money with him, but Eichelberger later indicated he would not, in any event, have trusted his brother nor any of the attorneys he had dealt with to do this for him.

Eichelberger also testified that an attorney (other than his

injuries attorney or Gooch) had negotiated a plea bargain on his behalf with the county attorney's office, but he, Eichelberger, found it unacceptable and refused. Eichelberger also testified that he offered a $500 wage assignment in settlement of the case, but the county attorney refused. The trial judge then questioned Eichelberger as follows:

> [Judge] You understand that you could have given a power of attorney to get $1,000 or something of that nature?
>
> [Eichelberger] Yes. My basic point was if I could work the problem out, why get $1,000, Your Honor. Just try to resolve the problem so I can basically get back to my job.

On recross-examination Eichelberger testified that he was being represented by counsel in another action pending at the same time and had paid in advance for that representation. The court continued the hearing on Eichelberger's motion for new trial, ordering the county attorney to investigate the facts surrounding access to law library materials at the county jail.

On November 18, 1986, with Gooch still present as standby counsel, the State adduced evidence that Eichelberger requested use of the jail law library three times during the last week of September, all of which requests were granted. In October, Eichelberger requested use of the law library 12 times and was denied use for cause 3 times. In addition, Eichelberger had been allowed to make undocumented use of the law library upon verbal request. The judge again continued the hearing to give Eichelberger time to retrieve some documents.

On November 21, 1986, with Gooch still present as standby counsel, Eichelberger adduced testimony through several witnesses, including Gooch, the prosecuting attorney, several jail inmates, and himself. The State called one witness in rebuttal, whom Eichelberger cross-examined. Following closing arguments by both parties, the judge once again took judicial notice of the court's files in the case. The judge subsequently denied Eichelberger's motion for new trial.

On December 1, 1986, the trial judge, with Lancaster County Public Defender Dennis Keefe present as standby counsel, offered to continue sentencing 1 day to allow Gooch to be present. Eichelberger declined that offer, saying he had

reviewed the presentence report prior to this hearing and had no objection to its contents. The judge pronounced sentence and advised Eichelberger of, among other things, his right to appeal to this court.

Judicial Role

Eichelberger's second assignment of error asserts the trial court "abandoned a neutral and unbiased status and role in order to testify and otherwise adduce evidence during the trial."

The record reveals that the trial judge questioned no witnesses before the jury and therefore cannot be said to have "adduce[d] evidence" in connection with the guilt-innocence phase of the trial. The record also demonstrates that the trial judge made no statement at all to the jury which may be characterized as "testimony," nor even any comment on the evidence. The sole comment to the jury to which Eichelberger's assigned error may by some leap of imagination be taken to refer is the court's accurate notation for the record, following Eichelberger's erroneous assertion to the contrary, that "[t]he record reflects that the defendant did waive or indicated to the court that he did want to represent himself. . . . The record should further reflect that Mr. Gooch is here as standby counsel."

It is, of course, axiomatic that a court should refrain from commenting on the evidence or making remarks prejudicial to a litigant or calculated to influence the minds of the jury. *State v. Bideaux*, 219 Neb. 718, 365 N.W.2d 830 (1985). See, also, *Pitt v. Checker Cab Co.*, 217 Neb. 600, 350 N.W.2d 507 (1984). In this case, however, it is clear that no such remarks were made. The comments the judge made outside the presence of the jury dealt with matters concerning the progress of the case and were made necessary by Eichelberger's obvious attempt to manipulate and thwart the judicial process. As noted in *U.S. v. Padilla*, 819 F.2d 952 (10th Cir. 1987), speaking in the context of a request for a substitution of counsel, when a court suspects manipulation on the part of a criminal defendant, it must balance the need for the efficient administration of the criminal justice system against the defendant's rights. The trial judge in this case correctly struck that balance.

To the extent Eichelberger may be understood to complain

that the trial judge took judicial notice of the record in this case, it is a well-established principle that in a criminal case a court may take judicial notice of its own records in the case under consideration. *State v. Coffen*, 184 Neb. 254, 166 N.W.2d 593 (1969).

Eichelberger's hyperbolic characterization of the trial judge's statements as abandonment of proper judicial demeanor borders dangerously on misrepresentation of the record.

Jury Instruction

In his third assignment of error Eichelberger claims the trial judge erred in not instructing the jury, as required by Neb. Rev. Stat. § 27-201(7) (Reissue 1985), that it might but was not required to accept as conclusive any adjudicative fact which was judicially noticed. The fallacy in Eichelberger's position is that no judicially noticed adjudicative fact was put to the jury.

Denial of Continuance

In his fourth assignment of error Eichelberger claims the trial judge abused his discretion by refusing to continue the trial so he could obtain counsel.

A motion for continuance in a criminal case is addressed to the sound discretion of the trial court, and that court's ruling will not be disturbed on appeal absent a showing of abuse of discretion. *State v. Mecum*, 225 Neb. 293, 404 N.W.2d 431 (1987); *State v. Sluyter*, 224 Neb. 768, 401 N.W.2d 480 (1987). This court's prior cases support the proposition that where the criminal defendant's motion for continuance is based upon the occurrence or nonoccurrence of events within the defendant's own control, denial of such motion is no abuse of discretion. See, e.g., *State v. Carter*, 226 Neb. 636, 413 N.W.2d 901 (1987); *State v. Sluyter, supra; State v. Polyascko*, 224 Neb. 272, 397 N.W.2d 633 (1986); *State v. Lynch*, 223 Neb. 849, 394 N.W.2d 651 (1986); *State v. Fleming*, 223 Neb. 169, 388 N.W.2d 497 (1986); *State v. Richter*, 221 Neb. 487, 378 N.W.2d 175 (1985); *State v. Broomhall*, 221 Neb. 27, 374 N.W.2d 845 (1985); *State v. Keithley*, 218 Neb. 707, 358 N.W.2d 761 (1984); *State v. Otey*, 205 Neb. 90, 287 N.W.2d 36 (1979), *cert. denied* 446 U.S. 988, 100 S. Ct. 2974, 64 L. Ed. 2d 846 (1980). Eichelberger repeatedly assured the courts below that he had the funds to hire an attorney, yet he steadfastly declined the trial judge's

admonitions to do so. It was clearly within Eichelberger's power to engage an attorney. Where a criminal defendant is financially able to hire an attorney, he or she may not use his or her neglect in hiring one as a reason for delay. *State v. Richter, supra, after remand* 225 Neb. 837, 408 N.W.2d 717 (1987). Further, Eichelberger failed to comply with the requirements of Neb. Rev. Stat. § 25-1148 (Reissue 1985), which requires that motions for continuance be submitted in writing. *State v. Carter, supra.* In any event, it was not an abuse of discretion to deny Eichelberger a continuance once he had made his unwillingness to engage counsel expressly and abundantly clear.

Failure to Appoint Counsel

In his fifth assignment of error Eichelberger insists the trial judge abused his discretion by failing to appoint counsel to represent him.

Neb. Rev. Stat. §§ 29-1804.04 through 29-1804.07 (Reissue 1985) provide for the appointment of the public defender or other counsel to represent indigent defendants in criminal proceedings. As this court recently noted, the requirement of § 29-1804.05 is that before counsel is provided at public expense for a criminal defendant, there must be a reasonable inquiry to determine the defendant's financial condition. *State v. Richter, supra.* In determining whether a criminal defendant is indigent as the term is used in § 29-1804.04, a court is to consider the seriousness of the offense; the defendant's income; the availability of 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. Masilko*, 226 Neb. 45, 409 N.W.2d 322 (1987); *State v. Richter, supra.*

In *State v. Richter, supra*, the trial court made an inadequate effort to assess the defendant's ability to retain counsel. In the case now before us, however, the trial judge made every effort to assess Eichelberger's ability to retain counsel, but that effort was frustrated by Eichelberger's refusal to disclose his financial condition. As the trial judge correctly noted, "I'm trying to find out whether or not you're entitled to have the court appoint a lawyer for you. If you have the money to hire a lawyer, then I have no authority to appoint a lawyer for you. . . .

I can't assume that you're indigent."

Exercise of the right to assistance of counsel is subject to the necessities of sound judicial administration. *State v. Richter, supra.* Criminal defendants are not permitted to use their constitutional right to counsel to manipulate or obstruct orderly procedure in the courts or to interfere with the fair administration of justice. *State v. Clark*, 216 Neb. 49, 342 N.W.2d 366 (1983). It was no abuse of discretion for the trial judge to refrain from appointing counsel for Eichelberger at public expense.

Waiver of Right to Counsel

Finally, in his sixth assignment of error Eichelberger claims the trial judge erred in finding he waived his right to be represented by counsel. In this regard the facts of the present case are reminiscent of those recited in *State v. Tharp*, 224 Neb. 126, 395 N.W.2d 762 (1986). In *Tharp* this court noted:

> [T]he defendant was advised of his right to counsel at his initial appearance . . . and was advised of his right to request appointed counsel at his arraignment . . . . Defendant chose to appear without counsel on repeated occasions. We hold that once a defendant has been informed of his right to retained or appointed counsel, . . . his conduct in appearing without counsel may result in a waiver of counsel. The course of conduct defendant chose to follow in this case operated as a waiver of counsel.

Id. at 128-29, 395 N.W.2d at 765. As we have already noted, criminal defendants are not permitted to utilize the constitutional right to counsel to manipulate or obstruct the orderly procedure in the courts or to interfere with the fair administration of justice. *State v. Clark, supra.* It is clear that Eichelberger waived his right to counsel.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. TERRELL L. WALTON, APPELLANT.

418 N.W.2d 589

Filed February 5, 1988. No. 87-124.

1. **Juries: Discrimination: Proof.** In the selection of a jury, once the defendant makes a prima facie showing of racial discrimination, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors. A neutral explanation need not rise to the level justifying the exercise of a challenge for cause.
2. **Trial: Juries: Discrimination: Appeal and Error.** The trial court's determination that the State's peremptory challenges were not motivated by intentional discrimination should not be reversed on review by this court unless that determination is clearly erroneous.

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

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

Robert M. Spire, Attorney General, and Mark D. Starr, for appellee.

BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and BRODKEY, J., Retired, and COLWELL, D.J., Retired.

GRANT, J.

Defendant, Terrell L. Walton, appeals his convictions in the district court for Douglas County of first degree assault, attempted robbery, and the use of a firearm during the commission of each felony. After conviction on each count, defendant was sentenced to consecutive terms of imprisonment. During selection of the jury, the prosecutor used three of his six peremptory challenges to strike the only three blacks on the jury panel. Defendant, who is black, appeals. He contends that under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), which, pursuant to the equal protection clause of U.S. Const. amend. XIV, forbids the prosecutor from challenging potential jurors solely on account of their race, his motion for mistrial should have been granted by the district court. We affirm.

At the trial, evidence was adduced showing the following.

On August 1, 1986, at approximately 4:45 a.m., Kelly McBride was walking to work in downtown Omaha. At this time, defendant had brought his automobile to a stop near a downtown intersection. In the passenger seat was another black male. As McBride crossed the intersection, defendant pulled in front of her, pointed a sawed-off shotgun at her, and demanded her purse. When she refused, he shot her, causing a severe wound to her abdomen.

Two men witnessed defendant's car drive away at a high rate of speed. When the police arrived moments later, these men provided them with a description of the car and a nearly exact license plate number. Within minutes, police officers identified the car, its owner, and its owner's address. Meanwhile, at approximately 5 a.m., a young man who lived across the street from the car owner's north Omaha address saw defendant and his companion back the automobile into the car owner's driveway. Defendant fled on foot, hid in some bushes behind the car owner's house, and was there apprehended by police. Police also found the sawed-off shotgun in the shrubbery 10 feet from where defendant was found.

At trial, defendant did not deny he was present at the shooting and attempted robbery, but testified that he had not done the actual shooting and that at that time he did not know the correct name of the person he was with, nor that that person was going to commit such acts.

Defendant's trial commenced on January 12, 1987. A jury panel of 24 prospective jurors was assembled. Of this panel, three were black. Pursuant to Neb. Rev. Stat. § 29-2005 (Reissue 1985), the attorney prosecuting on behalf of the State is entitled to a peremptory challenge of six jurors when the offense is punishable by imprisonment for a term exceeding 18 months and less than life. Following voir dire, the prosecutor used three of his six peremptory challenges to exclude the three black jurors.

Defendant's attorney then moved for a mistrial, outside the presence of the jury, stating, "Your Honor, at this time I'd make a motion for a mistrial based on the recent Supreme Court case dealing with the exclusion of black jurors without articulated reasons why certain black jurors were excluded."

The trial judge called upon the State to "articulate on the record what the reasons were for the exercise of the challenges with respect to [the three excluded black jurors]."

The prosecutor provided the following explanation:

> With respect, Your Honor, to . . . juror #16, the State felt because she was unemployed, because she was single, because she lived at 3725 Franklin, that she would not have the ties to the community that would show the stability that The State would be hoping to have in a juror of this kind; and she was struck for that reason together with juror #2, who happens to be a white male.
>
> With respect to juror #4, [the juror] in my opinion, I believe, is the mother or related to possibly a defendant . . . who, I believe, was prosecuted by our office. And while I did ask each and every juror if they had been associated with our office, she didn't indicate any knowledge or anything along those lines because possibly of embarrassment or at least in my own mind because of that, because she lived in the general area of North 41st Street. Those are the reasons I struck [the juror].
>
> And finally, [the juror], who was the third black, is married to a Douglas County Social Services individual. Because of that and his general locale on Belvedere Boulevard, I feel that it's in our best interests to leave him out. Those are the three reasons why those three individuals were in fact struck.

Defendant's sole assignment of error is that the trial court erred in overruling defendant's motion for a mistrial after the prosecutor struck all the black prospective jurors from the jury panel.

In April of 1986, the U.S. Supreme Court, in *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), held that a state criminal defendant could establish a prima facie case of racial discrimination violative of the 14th amendment based on the prosecution's use of peremptory challenges to strike members of the defendant's race from the jury panel. Once the defendant made a prima facie showing of racial discrimination, the burden shifted to the prosecution to come forward with a neutral explanation for those challenges.

Although the trial court judge did not state on the record that defendant had met his burden of proving a prima facie case, he did so impliedly when he asked the State to articulate its reasons for striking the three black venirepersons. *Batson, supra*, held that "a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial." 476 U.S. at 96.

> "To establish such a case, the defendant first must show that he is a member of a cognizable racial group . . . and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race." *Id.* at 1722-23. Then, "the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used [peremptory challenges] to exclude the veniremen from the petit jury on account of their race." *Id.* at 1723. These "relevant circumstances" may include a pattern of peremptorily striking black jurors, the prosecution's questions and statements during *voir dire*, and the prosecution's statements and actions in exercising his peremptory strikes.

United States v. Mathews, 803 F.2d 325, 329 (7th Cir. 1986), citing *Batson v. Kentucky, supra*. The trial court apparently determined that sufficient evidence existed to establish a prima facie case of racial discrimination, thus shifting the burden to the State to set forth neutral explanations. The State does not contest that determination. Our inquiry, then, is limited to scrutinizing the trial court's holding with regard to the State's neutral explanations.

In *Batson*, 476 U.S. at 97, the Supreme Court stated:

> Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors. Though this requirement imposes a limitation in some cases on the full peremptory character of the historic challenge, we emphasize that the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause. See *McCray v. Abrams*, 750 F.2d, at 1132; *Booker v. Jabe*, 775

> F.2d 762, 773 (CA6 1985), cert. pending 85-1028. But the prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption—or his intuitive judgment—that they would be partial to the defendant because of their shared race.

This court's scope of review is similar to that enunciated by the seventh circuit.

> For purposes of review on appeal, *Batson* reminds us that " 'a finding of intentional discrimination is a finding of fact' entitled to appropriate deference by a reviewing court," and that, "[s]ince the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference." *Id.* at 1724 n. 21. Thus, we may only reverse the trial judge's determination that the prosecution's peremptory challenges were not motivated by intentional discrimination if that determination is clearly erroneous.

United States v. Mathews, supra at 330, citing *Batson v. Kentucky, supra.*

In *State v. Alvarado*, 226 Neb. 195, 200, 410 N.W.2d 118, 121-22 (1987), we held that "the trial court's determination regarding the existence of purposeful discrimination in the prosecutor's use of his peremptory challenges is a factual determination which this court will reverse only if clearly erroneous." The same rule is to be applied in reviewing the trial court's determination as to the adequacy of the State's "neutral explanation" of its challenges. Therefore, the trial court's determination that the State's peremptory challenges were not motivated by intentional discrimination should not be reversed on review by this court unless that determination is clearly erroneous.

In a similar case, the U.S. Court of Appeals for the Eighth Circuit held that "the trial court's determination that the government has rebutted the defendant's *prima facie* case should be given great deference . . . ." *U.S. v. Love*, 815 F.2d 53, 55 (8th Cir. 1987). See, also, *U.S. v. Cloyd*, 819 F.2d 836 (8th Cir. 1987).

Once the burden was shifted to the State, the prosecutor was required to articulate a "neutral explanation" for striking the three black venirepersons. The explanations set forth above were provided.

The neutral explanation given by the prosecutor for striking juror No. 16 was that she was unemployed, single, and lived at 3725 Franklin and that she did not have the ties to the community that would show the stability the State sought. The trial court held that the explanation was sufficient. We agree. The court took notice of the fact that juror No. 2, who was unemployed and white, was also struck by the State. In addition, the court noted that unemployment is one of the discretionary considerations that a prosecutor can use in exercising his or her peremptory challenges.

The prosecutor explained that juror No. 4 was struck because the prosecutor felt that she was possibly related to an individual who was prosecuted by the prosecutor's office. After inquiry by the court, the prosecutor satisfied the court's question by identifying the prosecution he referred to. The trial court held that explanation was adequate.

The court held that the prosecutor's explanation was adequate to explain his challenge of the third black prospective juror. The prosecutor explained that the potential juror was married to a "Douglas County Social Services individual." The trial judge accepted this explanation, noting that he felt there is a tendency on the part of people engaged in social services to blame others than the individual involved after a wrongful act is done. A peremptory strike based on a trial attorney's explanation that he would prefer not to have jurors who work in the social services area, or their spouses, is not a racially discriminatory use of a peremptory challenge. The effect of the prosecutor's "neutral explanation" was that his peremptory challenge was based not on the prospective juror's race, but on the nature of the employment of the juror's wife. A white juror could be challenged on the same reasoning. In so stating, we note that the trial court need not determine if the explanation is reasonable, but only that it is nondiscriminatory and is constitutionally permissible.

The U.S. Supreme Court recognized in *Batson v. Kentucky*,

476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), that often peremptory challenges are based on the intuitive judgment of the prosecutor. However, the Court held that once a defendant establishes a prima facie case of racial discrimination, the prosecutor may not rebut the defendant's case by merely denying that he had a discriminatory motive or by merely affirming his good faith in individual selection. *Batson v. Kentucky, supra.* See, also, *State v. Alvarado*, 226 Neb. 195, 410 N.W.2d 118 (1987).

Batson also stated that the neutral explanation need not rise to the level of that required to justify a challenge for cause. A constitutionally permissible neutral explanation therefore lies somewhere on a spectrum bounded by the explanation required for a "cause" strike, on one end, and a mere denial that the prosecutor had a discriminatory motive, on the other end. We cannot say that the trial court, in the exercise of its factfinding function, did not have sufficient evidence before it to support its determination. The trial court could well find that the prosecutor's explanations fell within the boundaries set out above. While the explanations provided in the instant case would not be sufficient to justify a "for cause" challenge, they were not so lacking in any basis so as to constitute a mere denial of discriminatory motive.

We conclude that the trial court did not err in accepting the State's neutral explanations and in denying defendant's motion for mistrial.

AFFIRMED.

KATHLEEN KUTICKA, APPELLANT, V. UNIVERSITY OF NEBRASKA-LINCOLN, STATE OF NEBRASKA, APPELLEE.
418 N.W.2d 593

Filed February 5, 1988. No. 87-319.

Workers' Compensation: Appeal and Error. The findings of fact made by the Workers' Compensation Court after rehearing have the same effect as a jury verdict in a civil case and will not be set aside unless clearly wrong.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Law Offices of Cobb & Hallinan, P.C., for appellant.

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

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

WHITE, J.

In this appeal from a three-judge panel of the Workers' Compensation Court denying appellant compensation, the sole issue is whether the expert testimony of the only medical witness as to causation is binding on the court.

Appellant was employed as a police officer on January 13, 1984, for the University of Nebraska at Lincoln, when an incident occurred which appellant claims caused an injury giving rise to her disability.

A decision favorable to appellant was made at the one-judge hearing. The decision was reversed on rehearing.

In its order, the three-judge panel held in part:

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> Although we believe that on or about January 13, 1984, the plaintiff was thrown to a mat while participating in some training, we do not believe that she suffered an injury which has caused her to incur medical and hospital expense or suffer any disability. Although Dr. Yeakley has expressed an opinion that the injury related by the plaintiff in her history was "probably the instigating cause in her present complaints" (Exhibit 5, 20:5-6) the Court is not bound by such opinion. *Scott v. State,* 218 Neb. 195. The Court simply does not accept the opinion of Dr. Yeakley. We note, as previously mentioned, that the plaintiff missed no time from her employment as a claimed result of her alleged accident until September 12, 1985. This is approximately 20 months after the event. In the meantime, the plaintiff was both a cruiser officer and a foot patrol officer and had attended the Grand Island Police Academy in June and July of 1984, attending all

training. Furthermore, the plaintiff related that in early September of 1985, she was unable to rise after picking weeds in her garden, and it was this event which prompted her to see Dr. Styner. All in all, the plaintiff has simply failed to persuade the Court by a preponderance of the evidence that the events of January 13, 1984, have caused her to incur any expense or have caused her any disability. The petition of the plaintiff should be dismissed.

The findings of fact made by the Workers' Compensation Court after rehearing have the same effect as a jury verdict in a civil case and will not be set aside unless clearly wrong. *Thom v. Lutheran Medical Center*, 226 Neb. 737, 414 N.W.2d 810 (1987).

In its evaluation of the basis of Dr. Yeakley's opinion, the compensation court attached weight to the timelag between the incident and the onset of symptoms severe enough to prompt medical attention. This it is entitled to do as a weigher of facts. The judgment is not clearly wrong and is therefore affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT LOFQUEST, APPELLANT.

418 N.W.2d 595

Filed February 5, 1988. No. 87-439.

1. **Criminal Law: Constitutional Law: Prosecuting Attorneys: Miranda Rights.** Vague and imprecise prosecutorial references to a defendant's silence, which possibly includes a post-*Miranda* timeframe, violate the principles of *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976).
2. **Criminal Law: Constitutional Law: Prosecuting Attorneys: Witnesses: Miranda Rights.** Violations of the principles of *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976), are rarely harmless error in cases where it becomes the word of a defendant against the word of a key prosecution witness, and the importance of the defendant's credibility is so significant that prosecutorial error attacking that credibility cannot be harmless beyond a reasonable doubt.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Reversed and remanded for a new trial.

Robert Lofquest, pro se.

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

HASTINGS, C.J., WHITE, SHANAHAN, and FAHRNBRUCH, JJ., and HANNON, D.J.

WHITE, J.

This is an appeal from the district court for Dodge County. The district court order denied appellant's request for postconviction relief after an evidentiary hearing. That hearing was held pursuant to an order of this court in *State v. Lofquest*, 223 Neb. 87, 388 N.W.2d 115 (1986), wherein the district court's denial of postconviction relief was reversed and remanded for further proceedings.

The facts of this case are adequately set forth in *State v. Lofquest, supra*. The issue to be addressed in this case is whether appellant's due process rights under the 14th amendment were violated by the prosecutor's remarks at trial regarding appellant's postarrest silence. This court had ordered the evidentiary hearing to ascertain when appellant's *Miranda* rights were given and to establish the nature of the prosecutor's remarks.

After reviewing the record, it is obvious that the police officers involved and the appellant are not in agreement on whether the *Miranda* warnings were ever given to appellant by any officer. The record does show, quite clearly, that appellant was informed of his constitutional rights, including the right to remain silent, on August 18, 1983, by Dodge County Court Judge Haslam at arraignment. This came 1 day after appellant's first police contact relating to this charge and 2 days after the assault with which he was charged took place.

As this court pointed out in *State v. Lofquest, supra*, the case at bar is governed by the principles of *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976), and *Fletcher v. Weir*, 455 U.S. 603, 102 S. Ct. 1309, 71 L. Ed. 2d 490 (1982). *Doyle* stands for the proposition that the due process clause of the 14th amendment forbids prosecutors from using a defendant's postarrest, post-*Miranda* silence for impeachment purposes.

The Supreme Court limited the *Doyle* rule in *Fletcher*, when it held that a prosecutor's remarks referring to postarrest, pre-*Miranda* silence do not necessarily violate a defendant's due process rights. The Court stated that "[i]n the absence of the sort of affirmative assurances embodied in the *Miranda* warnings, we do not believe that it violates due process of law for a State to permit cross-examination as to postarrest silence when a defendant chooses to take the stand." *Fletcher v. Weir, supra* at 607.

The dispositive factor in this case becomes the nature of the prosecutor's remarks at appellant's trial. Specifically, which period of silence did the prosecutor refer to at trial? After Lofquest had given his story on direct examination, the prosecutor on cross-examination began to ask a series of questions, over defense counsel's objection, regarding Lofquest's lack of statements to the police officer regarding this story. After the defense objection, the prosecutor addressed the court, with the jury present, and stated, "I think it affects his credibility if he gave no statements to the officers prior to this time." The objection was overruled, and the prosecutor continued. Toward the end of this litany the prosecutor asked appellant, "As a matter of fact, the first time you've told this story to anyone in law enforcement is today?" He continued and asked, "Do you understand, Mr. Lofquest, that had you told any of these officers where you were that they would have gone to that scene and looked for tire tracks, looked for cigarette butts, compared them with your vehicle. They would have done what they could to prove your statement?" Lofquest responded by saying, "Probably. I don't know that for sure what they do. I do not know police procedures exactly."

During closing arguments, the prosecutor stated that Lofquest said,

> "It wasn't me." But, who does he tell that story to? Did he tell it to the police? No. He admitted to you this morning that he knew that if he told the police where he was, the police would go out and they would look for tire tracks and they'd look for cigarette butts; they'd be trying to verify his story. He said he knew that. And he didn't tell them anything.

He later continued by saying, "Now, I want to think that if you were picked up by the police for a crime that you didn't do and you had an explanation that you were — you didn't do it and you had gone some place else; wouldn't you tell them? I would."

This line of questioning and the remarks as to what the police *might* have done had Lofquest told his story as he "*should*" have prior to trial invited jurors to speculate about an investigation that might as easily not have taken place. More importantly, these generalized questions and comments make it nearly impossible to discern, for purposes of a *Doyle* inquiry, what period of silence the prosecution was referring to, pre-*Miranda* or post-*Miranda*. It seems to us that the prosecutor's remarks could be construed as referring to appellant's silence from the first police contact through the moment before Lofquest told his story at trial. Given this construction, the prosecutor clearly violated the rule set forth in *Doyle*, because we know that Lofquest was given "the sort of affirmative assurances embodied in the *Miranda* warnings," *Fletcher*, 455 U.S. at 607, when he appeared before the county court judge on August 18, the day he was arrested on the felony assault charge.

In a case such as this where a pre-*Miranda* and post-*Miranda* timeframe may exist, difficulties arise when general references are made to a defendant's silence, which a reasonable juror could construe as including the post-*Miranda* silence period. We cannot allow prosecutors to sidestep the *Doyle* protections by skirting the edge of the law with vague and imprecise references to a defendant's silence. For these reasons we conclude that appellant's constitutional right to due process of law was violated.

The conclusion that there was a violation of the principles of *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976), in this case does not end the inquiry. The State, in this case, asserts that even if a constitutional error took place, the error was harmless beyond a reasonable doubt. As noted in a recent U.S. Court of Appeals for the Seventh Circuit case, *United States ex rel. Miller v. Greer*, 789 F.2d 438, 442 (7th Cir. 1986), "The circuits universally apply this 'harmless beyond a

reasonable doubt' standard to *Doyle* violations." We see no reason to depart from that rule.

After a careful review of the record in this case, we are unable to conclude that the constitutional error was harmless beyond a reasonable doubt.

It has been held that in cases that come "down to a one-on-one situation, *i.e.*, the word of a defendant against the word of the key prosecution witness . . . the importance of the defendant's credibility becomes so significant that prosecutorial error attacking that credibility cannot be harmless beyond a reasonable doubt." *Velarde v. Shulsen*, 757 F.2d 1093, 1095 (10th Cir. 1985), citing *United States v. Polsinelli*, 649 F.2d 793 (10th Cir. 1981).

The testimony in this case indicates that there were no eyewitnesses to the attack on the victim. This was certainly a case where the defendant's credibility as a witness played a major role in the jury's evaluation of the veracity of his story. The prosecutor's comments during trial and in closing could not be said to constitute an inconsequential passing remark regarding appellant's silence. The jury was allowed to consider these comments fully, after a defense objection which was overruled, and obviously no curative instruction was given. (See *Greer v. Miller*, ____ U.S. ____, 107 S. Ct. 3102, 97 L. Ed. 2d 618 (1987), where a single question, an immediate objection, and two curative instructions did not constitute a *Doyle* violation, and such attempted *Doyle* violation was harmless beyond a reasonable doubt.)

Federal circuit court cases have noted, "Because the nature of a *Doyle* error is so egregious and so inherently prejudicial, reversal is the norm rather than the exception." *Williams v. Zahradnick*, 632 F.2d 353, 363 (4th Cir. 1980), cited in *Alston v. Garrison*, 720 F.2d 812 (4th Cir. 1983). For the above-stated reasons, we hold that the *Doyle* violations in this case were so egregious and prejudicial that they were not harmless beyond a reasonable doubt, and a reversal is required.

REVERSED AND REMANDED FOR A NEW TRIAL.

STATE OF NEBRASKA, APPELLEE, V. DOUGLAS M. SCHOLL, APPELLANT.

419 N.W.2d 137

Filed February 5, 1988. No. 87-481.

1. **Criminal Law: Habitual Criminals.** In order to warrant the enhancement of the penalty under the Nebraska habitual criminal statute, the prior convictions, except the first conviction, must be for offenses committed after each preceding conviction, and all such prior convictions must precede the commission of the principal offense.
2. **Postconviction.** Generally, when a motion for postconviction relief and the files and records show that a defendant is not entitled to relief, no evidentiary hearing is required.
3. _____. One seeking postconviction relief has the burden of establishing the basis for such relief.
4. **Postconviction: Appeal and Error.** The findings of the district court in denying postconviction relief will not be disturbed on appeal unless they are clearly erroneous.
5. **Postconviction.** An evidentiary hearing on a motion for postconviction relief is usually advisable to avoid protracted litigation.
6. _____. Generally, where the facts alleged, if true, would justify relief, or when a factual dispute arises as to whether a constitutional right is being denied, an evidentiary hearing must be granted. If the record is silent respecting those allegations, the district court is bound to hear the petitioner's evidence.
7. **Plea Bargains.** Generally, the law does not require that a plea bargain have a specifically stated value to a defendant. The only requirement is that if there is a value it must be clearly and accurately stated to the defendant and be placed on the record. As long as the defendant knows in advance that the plea bargain has no value or knows that the value is questionable or minimal, the plea bargain is not illusory.
8. **Pleas.** As a general rule, a plea of guilty must represent an intelligent and voluntary choice among the alternative courses of action open to a criminal defendant.
9. **Pleas: Plea Bargains.** Ordinarily, if the facts of a case indicate that a plea is voluntary, regardless of whether the defendant received consideration in return, the plea will be upheld.
10. **Right to Counsel: Effectiveness of Counsel.** A defendant is entitled not only to counsel, but to the effective assistance of counsel.
11. **Effectiveness of Counsel: Proof.** Where a claim of ineffective assistance of counsel is made, the defendant must show how or in what manner the alleged inadequacy prejudiced him or her. Prejudice in that sense means a reasonable probability that but for the attorney's error, the result of the case would have been different.
12. **Effectiveness of Counsel: Waiver: Pleas.** A lawyer is not required to be infallible. When a defendant waives his or her state court remedies and admits guilt, that defendant assumes the risk of ordinary error in either his or her or the attorney's assessment of the law and facts.

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

Arthur C. Toogood of Toogood and McGath, for appellant.

Robert M. Spire, Attorney General, and Steven J. Moeller, for appellee.

HASTINGS, C.J., WHITE, SHANAHAN, and FAHRNBRUCH, JJ., and HANNON, D.J.

HASTINGS, C.J.

Defendant has appealed from an order of the district court which denied his motion for postconviction relief without an evidentiary hearing. In his motion he alleges that he "was denied his right to effective assistance of Counsel as guaranteed by the Sixth Amendment of the United States Constitution" in that his counsel informed him that he "was very likely to face on [sic] enhanced sentence by virtue of the Habitual Criminal Act"; that "he would have to plea bargen [sic] or the County Attorney would make it very hard on him"; and that "Defendant entered said plea after being informed by his attorney that part of the plea bargain was that Defendant would not be charged as the Habitual Criminal," when in fact the "Defendant did not have the required prior convictions" to permit such a charge. The trial court, by its order, found that from the files and records of the case, the defendant was entitled to no relief.

On September 13, 1985, defendant pled guilty to a July 16, 1985, burglary and was sentenced to a term in the Nebraska Penal and Correctional Complex. That conviction was affirmed by this court without opinion in *State v. Scholl*, 222 Neb. xxiii (case No. 85-798, Feb. 19, 1986), where the only issue raised was the severity of the sentence.

During the arraignment proceedings at which defendant entered his plea, the trial court conducted an exhaustive examination of the defendant as to his rights and fully and fairly explained them to him in detail. In ascertaining that there was a factual basis for a guilty plea, the court detailed the elements of the crime charged and the defendant agreed that he had committed the offense. The colloquy then continued:

Q- Would you tell me what you did, Mr. Scholl?

A- On about July 16th, 1985, I, myself, and Bob Feaseman, broke into Terry Beitner's house at approximately nine o'clock, 9:30 in the morning and stole money, food, clothing, liquor out of the house and then went back down to the river.

. . . .

Q- And how did you break in; did you force in?

A- We forceably broke in the front door.

Q- How did you do that?

A- By kicking it.

Earlier in the proceedings, the following exchange occurred between the court and the two attorneys:

THE COURT: Have there been any plea negotiations in this case, Mr. Kristensen, and if so, what have they been?

MR. KRISTENSEN [prosecutor]: Yes, Your Honor, there have been some plea negotiations in this case. They are as follows: That there was an original complaint filed for burglary, a Class III felony, and also for theft, misdemeanor theft, that being a Class I. The negotiations entered into were as follows: That if he would waive his preliminary hearing on the burglary and upon entry of a plea of guilty in this Court, that the State would dismiss the misdemeanor theft upon entry of that plea.

THE COURT: Thank you. Is that your understanding of the plea negotiations, Mr. Wondra?

MR. WONDRA [defense counsel]: Yes, Your Honor. I would like to make a couple of minor additions. One, that the County Attorney of Kearney County would not file an habitual criminal complaint on this matter at any time.

MR. KRISTENSEN: Yes, that's correct, Your Honor.

MR. WONDRA: And also that he would not object to our request for concurrent sentencing at the sentencing hearing in this matter.

THE COURT: All right.

MR. WONDRA: He would not stand mute, he said, but he would not object to our request, I believe was stated.

MR. KRISTENSEN: Yes, Your Honor, that's correct.

I'm not sure that there's an habitual criminal there, but I agree in any event not to file that and that I would not object to those, but I will not stand mute in sentencing, but I will not object to their request for those things.

THE COURT: All right, is that your understanding, then?

MR. WONDRA: Yes, Your Honor, it is.

(Emphasis supplied.)

There is nothing in the record that discloses any information on earlier felonies which the defendant might have committed. However, the presentence report, which indicates a birth date of May 6, 1967, reveals several juvenile offenses, an August 5, 1985, sentence of 2 to 5 years for a May 25 escape from the Youth Development Center-Kearney, and a September 11, 1985, sentence of 1 to 3 years for a July 15 escape from the Buffalo County detention center. The sentence in the present case, 3 to 5 years, was imposed on September 13, to run concurrently with the other two sentences.

In *State v. Ellis*, 214 Neb. 172, 176, 333 N.W.2d 391, 394 (1983), this court stated: "[I]n order to warrant the enhancement of the penalty under the Nebraska habitual criminal statute . . . the prior convictions, except the first conviction, must be for offenses committed after each preceding conviction, and all such prior convictions must precede the commission of the principal offense." Thus, under *Ellis*, on the basis of the facts presented to us, there appeared to be no opportunity to charge the defendant herein under the habitual criminal statute. *Ellis* was a 4-to-3 decision, which in turn had overruled *State v. Pierce*, 204 Neb. 433, 283 N.W.2d 6 (1979), also a 4-to-3 decision, which interpreted the habitual criminal statute in such a way that Scholl could have been so charged in this case.

Defendant assigns as his only error the fact that the trial court refused to grant him an evidentiary hearing on his verified motion for postconviction relief.

Generally, when a motion for postconviction relief and the files and records show that a defendant is not entitled to relief, no evidentiary hearing is required. *State v. Jackson*, 226 Neb. 857, 415 N.W.2d 465 (1987). One seeking postconviction relief

has the burden of establishing the basis for such relief. *State v. Jackson, supra.* The findings of the district court in denying postconviction relief will not be disturbed on appeal unless they are clearly erroneous. *State v. Broomhall, ante* p. 341, 417 N.W.2d 349 (1988).

Defendant's principal complaint raised in his motion for postconviction relief centers around ineffective assistance of counsel in that a plea bargain was "sold" to him by his lawyer which involved abstention from being prosecuted as a habitual criminal, when such could not have been possible under the facts and law of this case.

Although we have said in *State v. Leadinghorse*, 192 Neb. 485, 222 N.W.2d 573 (1974), that an evidentiary hearing on a motion for postconviction relief is usually advisable to avoid protracted litigation, there is an abundance of support for the denial of any such hearing under certain circumstances, as earlier reflected in the cited opinion in *Jackson*. However, we have also said that where the facts alleged, if true, would justify relief, or when a factual dispute arises as to whether a constitutional right is being denied, an evidentiary hearing must be granted. *State v. Lofquest*, 223 Neb. 87, 388 N.W.2d 115 (1986). If the record is silent respecting those allegations, the district court is bound to hear the petitioner's evidence. *State v. Stranghoener*, 212 Neb. 203, 322 N.W.2d 407 (1982).

The fact of the matter is that the State fully performed on its part the essentials of the plea bargain. A misdemeanor theft charged was dismissed. A concurrent sentence was not opposed. The State did not, and stated that it would not, attempt to file a habitual criminal charge.

Something was done in open court by the prosecutor to correct any misapprehensions the defendant may have had regarding the habitual criminal aspect of his bargain. The record itself does not indicate that the defendant pled with an exaggerated belief in the value of his plea; yet, the defendant submits that his plea was the product of an illusory bargain.

It is important to note that at the time the plea bargain discussion took place, the plea had not yet been accepted by the court. The instant case is similar to *People v Peter Williams*, 153 Mich. App. 346, 395 N.W.2d 316 (1986), where the

defendant was aware, before the taking of his plea, that the plea bargain agreement under which the State waived its right to file a supplemental habitual offender violation possibly had no value. Yet, Williams chose to plead guilty in spite of that knowledge. The court found that the defendant was not misinformed of the actual value of the bargain, and therefore the plea was made voluntarily and intelligently. Focus was placed on the defendant's *knowledge* of the value of the plea bargain, not the value itself.

> We find nothing in the law that requires a plea bargain to have a specifically stated value to a defendant. The only requirement is that if there is a value it must be clearly and accurately stated to the defendant and be placed on the record. A defendant may wish to plead guilty merely because he is guilty and wants to avoid the hardship of trial. As long as the defendant knows in advance that the plea bargain has no value or knows that the value is questionable or minimal, the plea bargain is not illusory.

Id. at 350, 395 N.W.2d at 318.

Williams relied upon *People v Peete*, 102 Mich. App. 34, 301 N.W.2d 53 (1980), *appeal denied* 411 Mich. 962 (1981). In *Peete*, the court ruled that where the value of a bargain is genuine, is valid, and is known to the defendant, the plea will be upheld. As explained above, the defendant in the case at bar was made aware of the value of the agreement regarding a habitual criminal charge, while appearing in open court. Voluntariness is dependent upon a defendant's knowledge of the actual value of his plea bargain. Scholl's plea was voluntary.

The defendant (Scholl) understandingly entered his plea and knew its effects. Thus, the plea represented an intelligent and voluntary choice among the alternative courses of action open to a criminal defendant. *State v. Wiley*, 225 Neb. 55, 402 N.W.2d 311 (1987).

It was further determined in *Peete, supra*, that if the facts of a case indicate that a plea is voluntary, regardless of whether the defendant received consideration in return, the plea will be upheld. See *People v Mrozek*, 147 Mich. App. 304, 382 N.W.2d 774 (1985).

Not only was Scholl's plea voluntary, but he also received

consideration. The fact that his prior convictions of escape would not have supported a habitual criminal charge will not, by itself, invalidate the plea. Despite his contentions, the defendant nonetheless received the benefit of his bargain, i.e., the misdemeanor theft charge was dropped and no objection to concurrent sentencing was made. In the case of *People v Eric Thompson*, 101 Mich. App. 428, 300 N.W.2d 585 (1980), the prosecutor had agreed not to file a supplemental information charging the defendant as a habitual offender. In fact, the people were foreclosed from such a filing because they did not file it at the same time the original information was filed. The court held: "In our opinion defendant's bargain was no illusion. Defendant may not have received as many benefits as he thought he would be receiving for his plea, but he did receive many benefits for the plea." *Id.* at 430, 300 N.W.2d at 586. See, also, *People v Kidd*, 121 Mich. App. 92, 328 N.W.2d 394 (1982), where a plea based on a prosecutor's promise not to file a supplemental information was held not to be illusory, especially where the plea resulted in other benefits to the defendant as well.

The defendant alleges ineffective assistance of counsel. A criminal defendant is entitled not only to counsel, but to the effective assistance of counsel. *State v. Apodaca*, 223 Neb. 258, 388 N.W.2d 837 (1986). Defendant's motion claims that he was denied effective assistance of counsel, causing him to plead guilty to burglary. Defendant specifically asserts that because he was not within the habitual criminal statute, his plea was not voluntary and intelligent; thus, he should have been granted a hearing on the effectiveness of counsel issue.

State v. Stranghoener, 212 Neb. 203, 322 N.W.2d 407 (1982), held that where a claim of ineffective counsel is made, the defendant must show how or in what manner the alleged inadequacy prejudiced him.

> "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. Broomhall, ante p. 341, 343, 417 N.W.2d 349, 351 (1988), quoting *State v. Rubek*, 225 Neb. 477, 406 N.W.2d 130 (1987).

Prejudice means a reasonable probability that but for the attorney's error, the result of the case would have been different. *State v. Jackson*, 226 Neb. 857, 415 N.W.2d 465 (1987); *State v. Rivers*, 226 Neb. 353, 411 N.W.2d 350 (1987). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Broomhall, supra; Rubek, supra.*

The presumption that trial counsel is competent must be overcome by the defendant. *Tinlin v. Parratt*, 680 F.2d 48 (8th Cir. 1982). See, also, *State v. Terrell*, 220 Neb. 137, 368 N.W.2d 499 (1985).

In the case at hand, the defendant, when comparison is made between the allegations of his motion and the undisputed facts contained in the record, has failed to meet his burden of showing a reasonable probability that the results below would have been different but for counsel's deficiencies. A requisite and sufficient factual basis for acceptance of the plea was found. The dialogue between the defendant and the court at the taking of the plea, as previously set out, demonstrated that the defendant was not prejudiced.

Because that discussion took place after the habitual criminal discussion, it is established that the defendant was not prejudiced as a result of his counsel's actions in securing the bargain. As was pointed out in *People v Cisco*, 113 Mich. App. 109, 110-11, 317 N.W.2d 308, 309 (1982):

> The acceptance of the prosecutor's plea offer not to file habitual offender charges is not illusory for the reason that the defendant is simply assured there will not be a subsequent attempt by the prosecutor to do so, even if the chances of a successful filing possibly would be minimal. It goes against all logic to give a defendant this assurance, which in many and probably most cases is requested by the defense as a matter of precaution by the defense attorney,

and then on appeal use it as a basis to reverse.

"[A] lawyer is not required to be infallible." *State v. Bevins*, 187 Neb. 785, 787, 194 N.W.2d 181, 182 (1972). " '[W]hen the defendant waives his state court remedies and admits his guilt . . . he assumes the risk of ordinary error in either *his* or his attorney's assessment of the law and facts.' " *State v. Miller*, 202 Neb. 443, 446, 275 N.W.2d 614, 616 (1979), quoting *Bevins, supra*. See, also, *McMann v. Richardson*, 397 U.S. 759, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970).

If the dialogue which is required between the court and the defendant whereat, as here, the court receives an affirmative answer as to whether the defendant understands the specified and full panoply of constitutional rights; whether the defendant is fully aware of his surroundings; whether defendant is satisfied as to counsel's services and representation; and whether it is true that defendant was not improperly influenced by threats or promises; and whereat the court is further told by the defendant of facts which leave no doubt as to defendant's guilt and the voluntary and knowledgeable entry of a plea of guilty, all done during the sanctity of a full and formal court proceeding, is to be impugned by a mere recantation made after the doors of the prison clang shut, we are wasting our time and that of the trial judges, making a mockery out of the arraignment process.

Defendant received the full benefit of his bargain, his prior longtime experience in the criminal justice system belies any claim of ignorance, and there is no possibility of the substantiation of a believable claim that the result would have been different absent the oblique reference to the habitual criminal statute.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. EDGAR L. NANCE, APPELLANT.

418 N.W.2d 598

Filed February 5, 1988. No. 87-596.

1. **Postconviction: Appeal and Error.** The findings of the trial court in a proceeding for postconviction relief will be upheld on appeal unless clearly erroneous.
2. **Postconviction: Effectiveness of Counsel: Proof.** 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. 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.
3. **Conflict of Interest: Words and Phrases.** A conflict of interest places a defense attorney in a situation inherently conducive to divided loyalties.
4. _____: _____. The phrase "conflict of interest" denotes a situation in which regard for one duty tends to lead to disregard of another.
5. **Postconviction: Appeal and Error.** On appeals from postconviction actions this court will not consider a question, as an assignment of error, not presented to the district court for disposition through a defendant's motion for postconviction relief.
6. **Postconviction.** A defendant is entitled to bring a second proceeding for postconviction relief only if the grounds relied upon did not exist at the time of the filing of the first motion.

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

Edgar L. Nance, pro se.

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

HASTINGS, C.J., WHITE, SHANAHAN, and FAHRNBRUCH, JJ., and HANNON, D.J.

WHITE, J.

This is an appeal from a postconviction order entered by the district court for Douglas County. The district court, following an evidentiary hearing, denied appellant's motion to vacate and set aside judgment and sentence. Appellant had filed the motion for postconviction relief, pursuant to Neb. Rev. Stat. § 29-3001 (Reissue 1985), based on alleged ineffective assistance of counsel at trial and the allegation that his

court-appointed counsel had a conflict of interest.

Following a jury trial in the district court for Douglas County on April 6 and 7, 1983, appellant was found guilty of second degree forgery. Following those proceedings appellant was found to be a habitual criminal and was ultimately sentenced to not less than 12 but no more than 20 years in the Nebraska Penal and Correctional Complex.

In his appeal to this court appellant is apparently alleging that the district court erred in denying him postconviction relief for ineffective assistance of counsel at trial, as well as denying relief based on the conflict of interest issue. In addition, appellant alleges ineffective assistance of counsel at his postconviction hearing.

At the outset we question the propriety of this appeal based on the fact that appellant's postconviction action was probably inappropriate in the first instance. The claims raised by appellant on postconviction were also raised on direct appeal from his conviction. Appellant's direct appeal was disposed of pursuant to Neb. Ct. R. of Prac. 3B (rev. 1983), after his court-appointed appellate defense counsel filed a motion to withdraw because the appeal was considered frivolous. See *State v. Nance*, 216 Neb. xxi (case No. 83-565, Feb. 23, 1984). This court notified appellant of his right to reply and subsequently received a brief from appellant. Appellant's brief directly addressed the above-mentioned issues.

As we have previously stated, the disposition of a direct appeal pursuant to rule 3B is a disposition on the merits. *State v. Sanders*, 220 Neb. 308, 369 N.W.2d 641 (1985). In granting relief pursuant to rule 3B, this court examines the entire record, not only to resolve those matters which are specifically called to the court's attention by court-appointed counsel, but also to determine whether any possible errors exist. Therefore, any matter which can be determined from the record on direct appeal is considered by the Supreme Court when granting relief pursuant to rule 3B and is not available for further relief pursuant to the Nebraska Postconviction Act. *State v. Wilson*, 224 Neb. 721, 400 N.W.2d 869 (1987); *State v. Sanders, supra.*

In any event, appellant was granted a postconviction evidentiary hearing, and the district court denied relief. The

district court heard testimony from appellant's trial counsel on the issues of conflict of interest and ineffective assistance of counsel. The findings of the trial court in a proceeding for postconviction relief will be upheld on appeal unless clearly erroneous. *State v. Broomhall, ante* p. 341, 417 N.W.2d 349 (1988).

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. Broomhall, supra.* Also, a defendant seeking reversal of a conviction on the basis that counsel's assistance was deficient must establish a reasonable probability that but for counsel's deficiencies, the result of the proceeding would have been different; a reasonable probability consists of a probability sufficient to undermine confidence in the outcome. *Id.*

Appellant alleged that his trial counsel was ineffective due to his failure to investigate the case adequately and because he failed to cross-examine one of the prosecution's witnesses, Denise Dirks. Counsel testified that he did not cross-examine Dirks because her testimony "related to burglary" of the victim company's stolen checks, and "I didn't see no [sic] need to have her repeat the story to the jury two times since it was totally unrelated to . . . whether or not Mr. Nance uttered a forged instrument. His defense was alibi."

As to the claim of inadequate investigation, counsel stated that he had been "unable to get witnesses from Mr. Nance," but ultimately learned of witnesses Nance wanted called through a letter Nance sent to the court. After reading the letter, counsel had his investigator locate and interview them, and subpoenaed them for the trial. Counsel eventually called six witnesses to verify his client's defense.

The record indicates that appellant's trial counsel did perform as well as a lawyer with ordinary training and skill in

the criminal law in the area given the amount of cooperation he received from his client. The district court's findings were not clearly erroneous as to trial counsel's effectiveness and are therefore upheld.

Appellant further alleged that his trial counsel had a business and/or personal relationship with the principals of the company from which the check that was forged was stolen. Counsel testified that he had no business relationship with the company and had never been paid by anyone from that company. The only relationship apparent from the record was that appellant's counsel had represented the owner's father once, as a public defender. Further, trial counsel had once assisted the company's owner in seeking approval from the district court to act as a bondsman. Counsel advised the court at trial and at the postconviction hearing that he explained these matters to Nance prior to trial.

A conflict of interest places a defense attorney in a situation inherently conducive to divided loyalties. *State v. Turner*, 218 Neb. 125, 354 N.W.2d 617 (1985). The phrase "conflict of interest" denotes a situation in which regard for one duty tends to lead to disregard of another. *Id.* A conflict of interest must be actual rather than speculative or hypothetical before a conviction can be overturned on the ground of ineffective assistance of counsel. *Id.*

The record in this case is devoid of any divided loyalties on the part of trial counsel. Neither of the parties whom counsel had met, the owner or his father, was a witness at Nance's trial. There is no merit to appellant's conflict of interest argument, and the district court was correct in denying relief on that basis.

The other errors assigned by appellant allege, in essence, that his postconviction counsel was ineffective and incompetent. This court has often held that on appeals from postconviction actions, we will not consider a question, as an assignment of error, not presented to the district court for disposition through a defendant's motion for postconviction relief. *State v. Casper*, 219 Neb. 641, 365 N.W.2d 451 (1985). Obviously, appellant's allegations of ineffective assistance of counsel at his postconviction hearing could not have been raised in his first postconviction motion. A defendant is entitled to bring a

second proceeding for postconviction relief only if the grounds relied upon did not exist at the time of the filing of the first motion. *State v. Ohler*, 215 Neb. 401, 338 N.W.2d 776 (1983). Appellant's avenue for challenging the competence and effectiveness of his postconviction counsel is a second postconviction action, where a record could be established as to his attorney's actions or inactions.

The order of the district court for Douglas County entered on June 11, 1987, is affirmed.

AFFIRMED.

III LOUNGE, INC., A NEBRASKA CORPORATION, APPELLANT AND CROSS-APPELLEE, V. TYLER B. GAINES, TRUSTEE, APPELLEE AND CROSS-APPELLANT.

419 N.W.2d 143

Filed February 12, 1988. No. 86-030.

1. **Equity: Appeal and Error.** Actions in equity, on appeal to the Supreme Court, are triable de novo on the record, subject, however, to the rule that when credible evidence on material questions of fact is in irreconcilable conflict, the Supreme Court may, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite.
2. **Contracts: Specific Performance.** In an action where specific performance is decreed, courts ordinarily attempt to place the parties in the same position in which they would have been if the contract had been performed at the time agreed upon.
3. **Contracts: Specific Performance: Vendor and Vendee: Damages.** If the purchaser is awarded rents, rental value, or profits from the premises during the delay in the performance of the contract to purchase realty, the vendor may deduct from them ordinary carrying charges paid during the delay, including taxes, insurance, utilities, and reasonable repairs.
4. **Damages: Proof.** The plaintiff must plead and prove damages, and bears the burden of offering evidence sufficient to prove such damages. The plaintiff's burden of proof cannot be sustained by evidence which is speculative and conjectural. Proof of damages to a mathematical certainty is not required; proof is sufficient if evidence is such as to allow the trier of fact to estimate actual damages with a reasonable degree of certainty and exactness.
5. **Contracts: Specific Performance: Vendor and Vendee: Damages: Liability:**

Interest. If the delay in the performance of a contract was caused by the vendor, and the purchaser is not awarded rents, rental value, or profits, and has not been in possession of the property during the delay, the purchaser is not liable for interest on the unpaid purchase money.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Affirmed in part, and in part reversed and remanded with directions.

Donald W. Kleine of Kleine Law Office, for appellant.

David D. Ernst of Gaines, Otis, Mullen & Carta, for appellee.

BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and BRODKEY, J., Retired, and COLWELL, D.J., Retired.

PER CURIAM.

This is the second appearance of this case in this court. In *III Lounge, Inc. v. Gaines*, 217 Neb. 466, 348 N.W.2d 903 (1984), this court held that plaintiff, III Lounge, Inc., was entitled to specific performance of an option to purchase real estate from defendant, Tyler B. Gaines, trustee, and remanded the cause to the district court for Douglas County to enter a decree in accordance with the opinion. Plaintiff appeals and defendant cross-appeals from the order of the district court on remand, awarding damages to the defendant. We vacate in part and affirm in part.

The plaintiff commenced leasing the premises at 1515 Dodge Street in Omaha from the defendant in 1972 and operated the Canopy Lounge in the leased space. On December 7, 1981, plaintiff attempted to exercise its option to purchase the leased premises, but the defendant refused to honor plaintiff's option to purchase the property.

Plaintiff then filed action against the defendant for specific performance of the option to purchase. The district court, after hearing the case, denied the relief requested by plaintiff, and plaintiff then appealed the case to this court, the decision in which case is set forth in *III Lounge, Inc. v. Gaines, supra.* This court held that the plaintiff had complied with the conditions and was entitled to exercise its option to purchase the premises at 1515 Dodge Street and that the defendant wrongfully failed

to honor plaintiff's option to purchase. Pursuant to the mandate of the Supreme Court, the parties stipulated that all damages resulting from the defendant's failure to perform be heard and determined by the district court.

In March 1985, a hearing was held before the Honorable Stephen A. Davis, one of the judges of said court, for the determination of the damages. The district court entered an order awarding damages to Gaines, and plaintiff filed a motion for new trial, claiming that the district court had not received all of the evidence. The district court sustained plaintiff's motion for new trial, and the hearing on damages was resumed on August 26, 1985.

On November 21, 1985, the district court for Douglas County entered an order instructing plaintiff to add the amount of $12,749.34 to the purchase price of the subject premises and awarded Gaines $900 in back rent. The court also instructed plaintiff to comply with the option to purchase within 30 days. Plaintiff in turn filed a motion for new trial, challenging the district court's order of November 21, which motion was overruled by the district court. Plaintiff then perfected its appeal to this court.

In its brief on appeal, III Lounge makes three assignments of error: (1) The district court erred in awarding defendant compensation for taxes, utilities, insurance, and repairs and maintenance expended by the defendant, inasmuch as the property did not generate any rents or profits; (2) the court erred in failing to offset from the purchase price lost profits suffered by the plaintiff as a result of the defendant's failure to perform the contract; and (3) the district court erred in awarding defendant damages for plaintiff's vacation of the premises 2 months early.

Defendant cross-appeals and assigns that the court erred in denying Gaines interest on the purchase price.

The evidence in this case reveals that III Lounge, doing business as the Canopy Lounge, has been doing business at 1515 Dodge Street since 1972. John Digilio, who was the manager of the Canopy Lounge, testified on behalf of the plaintiff. He testified that the plaintiff began leasing the premises from the defendant in 1972, that the lease in question

contained an option to purchase the premises, and that the plaintiff attempted to exercise its option to purchase the premises prior to April 30, 1982, which was the date the lease in question expired, having been renewed one time since its inception.

As previously stated, this court held that the defendant wrongfully denied the plaintiff its option to purchase the premises in question. It appears from the record that the plaintiff remained as a holdover tenant of the premises from May through December of 1982 and, also, that Digilio twice attempted to tender rent, for May and June of 1982, but such tender was refused by the defendant each time, and Digilio was told to vacate the premises. It next appears that on November 1, 1982, the plaintiff was unable to renew the liquor license for the premises because it had neither a lease nor a deed to the premises. See Neb. Rev. Stat. § 53-125 (Cum. Supp. 1982).

Digilio further testified that after the plaintiff was refused the liquor license, he tried to maintain the business by just selling lunches, but he closed because it was not profitable. The record reveals that the plaintiff vacated the premises in December 1982. The 1980 and 1981 income statements, admitted into evidence, reveal that the Canopy Lounge operated at a net loss of over $1,000 in each of the 2 years. Digilio further testified that business suffered in 1982 because access to the premises was limited due to repairs on Dodge Street. We point out, however, that Dodge Street was only closed in 1982 and 1983, so it would appear that this factor had nothing to do with the net losses incurred in 1980 and 1981.

James DiPrima, who had been the accountant for III Lounge since 1971, testified on behalf of the plaintiff. DiPrima prepared the 1981 income statement which was used as the basis for an income/expense projection for the years 1984 and 1985. This was done for the reason that 1981 was the last full year that the Canopy Lounge was in business before problems with the business developed.

It appears that DiPrima did not prepare a projection for the year 1983 because he felt that he could not conservatively estimate the sales because of Dodge Street's being torn up that year. He testified that the profit projections were conservative

because the sales figures used were the same as in 1981. However, there were two noticeable differences between the 1981 income statement and the 1984-85 profit projections. First, in 1981, the plaintiff incurred a net loss of $1,101, whereas the accountant projected that the plaintiff lost $28,600 in profits because of the fact the plaintiff was not in operation in 1984 and 1985. Second, the accountant projected 1984-85 gross profits at 60 percent of total sales, although from 1980 through 1982 gross profits were running between 35 and 40 percent. The accountant attributed this difference to the possibility and assumption that excessive food costs would be eliminated inasmuch as the business was generating a loss in that area. The accountant did not increase the amount of sales from 1981 to the 1984-85 projections, partially because he anticipated liquor sales would drop off as a result of eliminating food.

The record further reveals that Jeffrey Modica, who was the property manager used by the defendant, testified on behalf of the defendant that the last rental received from the plaintiff on the property in question was on April 30, 1982. He further testified that his company had not attempted to put another tenant in the premises after the plaintiff vacated the premises because of the present damage to the building and the present litigation. Modica estimated the fair rental value of the property in its current condition to be between $150 and $200 a month. He testified that the expenses incurred for 1515 Dodge Street since the time plaintiff vacated the premises through June 30, 1985, were broken down as follows: utilities, $2,451.84; insurance, $1,691.01; real estate taxes, $5,868.85; and repairs and maintenance, $2,737.64.

He further testified that the subject property received no rentals since it was vacated and, further, that the defendant received no income from the property since April 30, 1982.

It will be helpful at this point to set out this court's scope of review. Actions in equity, on appeal to the Supreme Court, are triable de novo on the record, subject, however, to the rule that when credible evidence on material questions of fact is in irreconcilable conflict, the Supreme Court may, in determining the weight of the evidence, consider the fact that the trial court

observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite. *Pallas v. Black*, 226 Neb. 728, 414 N.W.2d 805 (1987).

In its first assignment of error, the plaintiff seeks to vacate the court's award compensating the defendant for taxes, utilities, insurance, and repairs and maintenance expended by the defendant during the delay in the performance of the contract between the parties.

In *Sechovec v. Harms,* 187 Neb. 70, 187 N.W.2d 296 (1971), we set forth a standard to use when specific performance is decreed. "In an action where specific performance is decreed, courts ordinarily attempt to place the parties in the same position in which they would have been if the contract had been performed at the time agreed upon." *Id.* at 72, 187 N.W.2d at 298. The defendant relies on this language in arguing that he is entitled to compensation for expenses incurred between the time of the offer to purchase and the time of the trial, since these costs would not have been incurred by the defendant had the property been transferred to the plaintiff in December of 1981.

In *Russell v. Western Nebraska Rest Home, Inc.*, 180 Neb. 728, 144 N.W.2d 728 (1966), we refused to allow a vendor compensation for taxes because of the failure to transfer the property at the time set for performance, which was due to the fault of the vendor, and held that it would be inequitable to allow the vendor to gain advantage from its own fault. It is clear in the instant case that if we were to allow the defendant compensation, he would gain an advantage from his own fault. The defendant would gain the advantage of possession of the premises without being liable for the expenses which ran with it. This would be true even though the defendant was at fault for failing to transfer the property at the time set for performance.

The defendant also cites language from both *Tedco Development Corp. v. Overland Hills, Inc.*, 205 Neb. 194, 287 N.W.2d 49 (1980), and *Russell, supra*, where we stated that a vendor is liable for real estate taxes accruing between the time for performance of the contract and the trial when the vendor has retained possession and received rents or profits from the land. The defendant argues that since he did not receive rents or profits from possession of the property, he should not be liable

for the taxes thereon. We find a better interpretation of the principle to be that the vendor will be liable for taxes if he is in possession and either receiving rents or profits, *or could have received rents or profits*. We further point out that it appears from the record that the defendant in this case was in possession of the property at times subsequent to the vacation of the property by the plaintiff in December 1982.

The facts in the instant case reveal that the defendant chose not to accept the tender of rent by the plaintiff during the holdover tenancy. Further, the property manager, testifying on behalf of the defendant, stated that there was never an attempt to rent the premises after the plaintiff vacated it, even though the rental value of the premises in its current condition would be from $150 to $200 per month. If we were to follow defendant's arguments in this regard, we would be encouraging the vendor in possession to choose not to use the premises productively because he would be awarded compensation for taxes by choosing not to receive rents or profits. We are of the opinion that the defendant is liable for taxes because he was in possession and could have received rents or profits.

There are additional reasons for imposing liability for taxes, maintenance and repairs, insurance, and utilities upon the defendant. It is a principle of equity that the defendant vendor has a duty to keep the property in a reasonable state of repair during delay, so that the property is in the condition it was at the time the contract was made.

The vendee would have an action against the vendor if he, the vendor, allowed the property to fall into decay. Applying this reasoning to the facts in our case, the defendant, by incurring expenses for maintenance and repairs, utilities, and insurance, was discharging a duty owed to the plaintiff, a duty the defendant had chosen by causing the delay.

Equity will also impose liability for taxes accrued between the time of contract and the time of transfer from the defendant vendor who caused the delay.

The court in *Mitchell v. Mutch*, 189 Iowa 1150, 1155-56, 179 N.W. 440, 442 (1920), stated:

> Equity will treat the covenants of warranty of his deed as warranting the title against all incumbrances resulting

> from the acts of the vendor up to the date of delivery of his deed. In paying the annual taxes, therefore, appellant performed his own obligation, and that alone. The appellee was under no obligation to pay taxes, until he had obtained his title and his possession, pursuant to his contract. It cannot be said, therefore, that the appellant paid the taxes on behalf of the appellee. He paid them in discharge of his own obligation, an obligation which attached to the attitude chosen by himself in respect to the property.

Even though the defendant is liable for the taxes, insurance, utilities, and maintenance and repairs, it must be determined whether he has a right to an allowance from the plaintiff for expenses incurred.

The rule that governs the vendor's right to allowance for expenses can be concisely stated as follows: If the plaintiff is awarded rents, rental value, or profits from the premises during the delay, the defendant may deduct from them ordinary carrying charges he may have paid during the delay, including taxes, insurance, utilities, and reasonable repairs. Thus, if the plaintiff were awarded rents or profits, plaintiff would also be saddled with expenses associated with obtaining the rents or profits.

In the instant case, we find that the defendant was not entitled to an allowance for the expenses during the period of delay because the court did not award rents, rental value, or profits from the premises during the delay to the plaintiff. Accordingly, the trial court's decree awarding the defendant compensation for taxes, utilities, insurance, and repairs and maintenance should be vacated.

This brings us to the second issue of the case. The plaintiff contends that contrary to the trial court's finding, it did produce sufficient evidence to support an award for damages based on lost profits suffered during the period of delay. We are aware of the line of cases which establish that in order to place the parties in the same position as if the contract had been performed at the time agreed upon, the purchaser is entitled to a setoff from the contract price of an amount equal to the lost profits incurred during the period of delay. See, *Easton*

Theatres v. Wells Fargo Land & Mortg., 265 Pa. Super. 334, 401 A.2d 1333 (1979); *Chandler Trailer Convoy v. Rocky Mt'n Mobile Home*, 37 Colo. App. 520, 552 P.2d 522 (1976); *Northeast Theatre Corporation v. Wetsman*, 493 F.2d 314 (6th Cir. 1974).

In *Nebraska Truck Serv. v. U.S. Fire Ins. Co.*, 213 Neb. 755, 331 N.W.2d 266 (1983), we stated that the plaintiff must plead and prove damages, and bears the burden of offering evidence sufficient to prove such damages. Further, the plaintiff's burden of proof cannot be sustained *by evidence which is speculative and conjectural.* We also stated in *Lis v. Moser Well Drilling & Serv.*, 221 Neb. 349, 377 N.W.2d 98 (1985), that *proof of damages to a mathematical certainty* is not required; proof is sufficient if evidence is such as to allow the trier of fact to estimate actual damages with a reasonable degree of certainty and exactness.

We must now examine the evidence offered by the plaintiff to determine whether this burden of proof was met. Plaintiff offers an income/expense projection statement prepared by its accountant as the sole piece of evidence to prove lost profits. The accountant's statement projects that the plaintiff would have had net profits of $14,300 in 1984, and the same in 1985. This projection was based upon the same amount of sales as was shown in the 1981 income statement. The accountant used the 1981 income statement because that was the last year of uninterrupted business in the Canopy Lounge.

The manager of the plaintiff's business testified that two factors contributed to the net loss incurred in 1982. First, road construction limited the access to the premises, and, second, the business was unable to renew its license to sell liquor in November 1982. However, the record shows that the plaintiff operated at a net loss in excess of $1,000 in 1980, and the same in 1981. In each of these years the business operated free from the restrictive factors existing in 1982. Thus, the plaintiff's business had operated at a net loss in each of its last 3 years.

If the accountant had relied solely on the 1981 income statement as the basis of his projections, there would have been a net loss shown in 1984 and 1985. Instead, the accountant made an assumption. He assumed that the plaintiff would

eliminate food costs in the operation of the business because it was losing money in this area. This assumption resulted in two noticeable differences. First, the gross profit was based upon 60 percent of total sales in the 1984-85 projections, while the 1981 income statement showed a gross profit based on 35.5 percent of sales. This, in turn, changed the net loss in 1981 of over $1,000 to a projection of net profits of $14,300 in 1984, and the same in 1985. In other words, the plaintiff's evidence showing lost profits is based on a faulty projection. Further, this projection is dependent upon elimination of food costs. In short, the projection coupled with the assumption was unrealistic, speculative, and lacking the general certainty required as a basis for assessment of damages.

Accordingly, we affirm the trial court's refusal to award plaintiff damages for lost profits.

Finally, the plaintiff contends that the trial court erred in awarding the defendant $900 back rent because the plaintiff vacated the premises 2 months early. It is interesting to note that the defendant failed to address this issue in both his brief and oral argument. In the instant case, both the business manager of the plaintiff and the property manager of the defendant testified that the rent was paid up to and including April 30, 1982, the date the lease expired. Additionally, the record shows that the plaintiff did not vacate the premises prior to the expiration of the lease. On the contrary, the plaintiff remained in possession of the premises as a holdover tenant until December of 1982.

In short, not only does the evidence fail to support the holding of the trial court, it directly contradicts the trial court's finding. Thus, the trial court's award of $900 damages to the defendant must be and hereby is vacated.

We now turn to the sole issue on defendant's cross-appeal. The defendant alleges that the district court was wrong in its denial of interest on the purchase price.

This court and others have stated that a vendor who remains in possession of the premises during the period of delay caused by its own failure of specific performance is denied interest on the purchase money if it is at fault. See, *Russell v. Western Nebraska Rest Home, Inc.*, 180 Neb. 728, 144 N.W.2d 728

(1966); *Reis v. Sparks*, 547 F.2d 236 (4th Cir. 1976).

We find this rule can be concisely summarized as follows: If the delay in the performance of a contract was caused by the vendor, and the purchaser is not awarded rents, rental value, or profits, and has not been in possession of the property during the delay, the purchaser is not liable for interest on the unpaid purchase money.

Applying this rule to the facts in the present case, we find that the plaintiff neither possessed the property nor was awarded rents, rental value, or profits from the property during the delay. Further, the defendant was at fault for refusing to allow the plaintiff to exercise the option to purchase the property. Thus, the plaintiff is not liable to the defendant for interest on the purchase price.

In view of what we stated above, we conclude that the judgment of the district court must be affirmed in part and reversed in part, and the cause is remanded to the district court to modify its decree in accordance with this opinion. It is so ordered.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

BERNARD L. PACKETT, APPELLANT, V. LINCOLNLAND TOWING, INC., APPELLEE.

419 N.W.2d 149

Filed February 12, 1988. No. 86-057.

1. **Replevin: Appeal and Error.** Replevin is a law action wherein, where tried without a jury, the findings and disposition of the trial court have the effect of a jury verdict and will not be disturbed unless clearly wrong.
2. **Replevin: Proof.** In a replevin case, the plaintiff has the burden to prove by a preponderance of the evidence that at the time of the commencement of the action he was the owner of the property sought, he was entitled to immediate possession of the property, and the defendant wrongfully detained it.
3. **Liens: Proof.** A person claiming the existence of a lien has the burden of proving the existence of the lien.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Reversed and remanded for further proceedings.

Bernard L. Packett, pro se.

William E. Langdon, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

COLWELL, D.J., Retired.

This is a replevin action originally filed in the small claims division of the Lancaster County Court by plaintiff, Bernard L. Packett, against defendant, Lincolnland Towing, Inc., for return of possession of plaintiff's Volvo automobile, withheld by defendant because plaintiff refused to pay the towing charges of $25 and $2-per-day storage that defendant claimed due under the parking lots statutes. On appeal to the district court, plaintiff's petition was dismissed. He appeals. We reverse.

Plaintiff assigns two errors: (1) "The court erred in holding that the plaintiff had the burden of proving that a third party had the right or authority to have plaintiff's automobile removed from where plaintiff had parked it"; and (2) "The court erred in failing to find that defendant did not have a right superior to plaintiff's right of possession, and in failing to order defendant to release plaintiff's automobile without the payment of any towing or storage fees, and awarding plaintiff damages."

An appeal from the small claims court is heard de novo in the district court. Neb. Rev. Stat. § 24-541.07 (Reissue 1985). Replevin is a law action wherein, where tried without a jury, the findings and disposition of the trial court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Ford v. Jordan*, 220 Neb. 492, 370 N.W.2d 714 (1985).

The trial court could find the following facts from the evidence. The University of Nebraska had previously acquired an area near the Devaney Sports Center in Lincoln, known as the Jacob's Oil Company property. This area was leased to Rebounders, a group supporting the university basketball

program, for its private parking use. A "no parking" sign was displayed, and Rebounders kept a guard on duty during basketball games to enforce the restrictive parking. In early December 1984, plaintiff parked his Saab automobile in the parking lot, without authority. Upon request of John Breslow, president of Rebounders, defendant towed the Saab to its parking lot in Lincoln. Plaintiff refused to pay defendant's standard charges, claiming that the Rebounders' parking lot was property owned by the State of Nebraska and he had a right to park there. After learning that plaintiff was an assistant attorney general, and not wishing to offend that department of government, Rebounders paid defendant's charges, and the Saab was returned to plaintiff. Later, Breslow wrote a letter to plaintiff advising him that the area was a restricted parking lot and that if plaintiff parked there again his car would be towed away as before. On December 22, 1984, plaintiff telephoned James Green, vice president of defendant, advising that the parking area was state property and that he intended to park there that night during the basketball game; further, that Green should be sure that whoever requested the towing of his car should also sign the ticket authorizing the towing. Later that day, plaintiff did park his Volvo automobile in the Rebounders' parking lot, and Breslow requested defendant to tow the Volvo, which defendant did after Breslow signed the ticket. The next day, plaintiff demanded possession of the Volvo from defendant; defendant refused, until plaintiff paid $25 for towing and $2 per day for storage. Plaintiff refused to pay; this suit followed, on December 28, 1984. The Volvo was released after 88 days, when plaintiff posted a bond.

Central to this appeal are the parking lots statutes, Neb. Rev. Stat. §§ 60-2401 to 60-2411 (Reissue 1984). The relevant sections are § 60-2401, "[M]otor vehicles parked in a restricted parking lot without the consent of the owner or tenant shall be subject to being towed away, if the lot is properly posted," and § 60-2410, "The owner of any motor vehicle towed or stored pursuant to sections 60-2401 to 60-2411 shall be liable for any towing and storage fees incurred but *neither the motor vehicle nor the contents therein shall be subject to any storage or towing lien* except as provided in section 60-2405." (Emphasis

supplied.) The reference to § 60-2405 is an obvious error since that section does not concern a lien. Section 60-2404 was apparently intended. Section 60-2404 provides, "A motor vehicle towed away under sections 60-2401 to 60-2411, which is not claimed by the owner within one hundred eighty days after towing, is subject to liens by the person who towed the vehicle under Chapter 52, article 6."

The second assignment is first discussed. Both parties devote much of the evidence and their briefs to the authority of Rebounders to request Lincolnland to tow the Volvo. Plaintiff claims Rebounders had no authority, since the university did not own the parking lot and, thus, Rebounders' lease was void, the towing was unlawful, and therefore he was entitled to immediate possession, citing *Morfeld v. Bernstrauch*, 216 Neb. 234, 343 N.W.2d 880 (1984). The record shows that Rebounders, as lessee, had authority to order the towing of the Volvo that plaintiff had unlawfully parked in the lot.

Defendant claims that Rebounders had statutory authority to request the towing, that it lawfully came into possession of the Volvo, and that it lawfully withheld possession of the Volvo until its charges for towing and storage were paid.

Neither party was fully correct. In a replevin case, the plaintiff has the burden to prove by a preponderance of the evidence that at the time of the commencement of the action (1) he was the owner of the property sought, (2) he was entitled to immediate possession of the property, and (3) the defendant wrongfully detained it. *Fitzsimons v. Frey*, 153 Neb. 124, 43 N.W.2d 531 (1950). " 'The cardinal question in every replevin action is whether the plaintiff therein was entitled to the immediate possession of the property,' " *Arcadia State Bank v. Nelson*, 222 Neb. 704, 713-14, 386 N.W.2d 451, 458 (1986), " 'regardless of whether the original taking was wrongful,' " *White Motor Credit Corp. v. Sapp Bros. Truck Plaza, Inc.*, 197 Neb. 421, 426, 249 N.W.2d 489, 493 (1977).

Plaintiff met his burden of proof by his prima facie showing that he was the owner of the Volvo; that, as owner, he was entitled to immediate possession; and that the defendant unlawfully withheld possession.

The burden then shifted to defendant to establish a superior

right of possession. Defendant claims that proof was satisfied by its original lawful possession and plaintiff's refusal to pay for the towing and storage. Defendant does not support this by any authority. Apparently, both parties assumed that the parking lots statutes provided the tower, Lincolnland, with a lien or some form of a superior right to protect the tower in collecting fees.

A lien has been characterized in this jurisdiction as an " 'obligation, tie, duty, or claim annexed to or attaching upon property by the common law, equity, contract, or statute . . . .' " *Dupuy v. Western State Bank*, 221 Neb. 230, 233, 375 N.W.2d 909, 912 (1985). "A person claiming the existence of a lien has the burden of proving the existence of the lien." *Bishop v. Hotovy*, 222 Neb. 623, 627, 385 N.W.2d 901, 904 (1986).

A lien is not provided for in the parking lots statutes. In fact, § 60-2410 is contrary: "[N]either the motor vehicle nor the contents therein shall be subject to any storage or towing lien except as provided in section 60-240[4]." Section 60-2404 requires that the tower wait for 180 days before a lien may be enforced. Defendant did not sustain its burden to prove a right to possession superior to plaintiff's right as owner. At the time the replevin suit was filed, plaintiff was entitled to immediate possession of his Volvo.

The trial judge was wrong in dismissing plaintiff's petition. Upon remand, an order of replevin should be entered in favor of plaintiff against defendant to return possession of the Volvo to plaintiff and to release plaintiff's bond.

In view of the foregoing, it is not necessary to discuss the first assignment.

In dismissing plaintiff's petition, the trial judge made no finding as to damages for wrongful detention. The conflicts in the evidence on the issue of adequate damages, Neb. Rev. Stat. § 25-10,105 (Reissue 1985), require that the determination of that fact question be remanded to the district court for further proceedings in accord with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. GARY A. VRTISKA, APPELLANT.

418 N.W.2d 758

Filed February 12, 1988. No. 86-968.

1. **Speedy Trial: Indictments and Informations: Complaints.** Although the statutory requirements of the Nebraska speedy trial act, Neb. Rev. Stat. §§ 29-1207 to 29-1209 (Reissue 1985), expressly refer to indictments and informations, the speedy trial act also applies to prosecutions on complaint.
2. **Speedy Trial: Proof.** 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. 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 Neb. Rev. Stat. § 29-1207(4) (Reissue 1985) 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."
3. **Speedy Trial: Pretrial Procedure: Venue.** Motions for a change of venue are expressly included as pretrial motions to which the exclusion in Neb. Rev. Stat. § 29-1207(4)(a) (Reissue 1985) applies.
4. **Speedy Trial.** An accused cannot generally take advantage of a delay in being brought to trial, where he is responsible for the delay either by action or inaction.
5. **Sentences.** A defendant upon whom a fine has been imposed and who has the ability to pay a fine must be given the opportunity to do so. A defendant who can pay a fine, but not in one lump sum, must be given an opportunity to make installment payments of that fine.
6. _____. Where the imposed sentence of imprisonment is the statutory maximum for the offense, the sentencing court must give the defendant credit for jail time. A sentencing court's duty to credit a defendant with jail time is not discretionary when a defendant is sentenced to the statutory maximum term of imprisonment as punishment for a particular crime.
7. **Sentences: Words and Phrases.** "Jail time" is commonly understood to be the time an accused spends in detention pending trial and sentencing.

Appeal from the District Court for Pawnee County: ROBERT T. FINN, Judge. Affirmed as modified.

James R. Mowbray of Mowbray, Chapin & Walker, P.C., for appellant.

Robert M. Spire, Attorney General, and Susan M. Ugai, for appellee.

BOSLAUGH, CAPORALE, and SHANAHAN, JJ., and BRODKEY, J., Retired, and ROWLANDS, D.J.

SHANAHAN, J.

On August 29, 1985, a complaint was filed against Gary A. Vrtiska in the county court for Pawnee County and charged him with carrying a concealed weapon in violation of Neb. Rev. Stat. § 28-1202(1) (Reissue 1985). On September 1, the sheriff of Pawnee County and his deputy saw Vrtiska seated in a parked vehicle and, pursuant to the outstanding warrant, arrested Vrtiska. On searching Vrtiska and the automobile in which he was sitting, the officers discovered a .357 Magnum covered by a cloth in the car's back seat and a revolver in Vrtiska's left front pants pocket. The officers then took Vrtiska to the county jail.

A second complaint for carrying a concealed weapon was filed against Vrtiska in the Pawnee County Court on September 3, 1985, as a result of Vrtiska's arrest on September 1. Vrtiska was arraigned on the second weapon charge on September 3. After determining that Vrtiska was without funds to retain a lawyer, the county court appointed a lawyer for Vrtiska, who was unable to provide a bail bond and remained in jail pending his trial scheduled for September 19. At Vrtiska's request, the court discharged the initial court-appointed attorney and appointed another lawyer, Bruce Dalluge, to represent Vrtiska. Trial was rescheduled for October 17. However, on October 10, Dalluge, Vrtiska's lawyer, filed a motion to disqualify the judge. On Vrtiska's motion, trial was postponed until November 7. In the meantime, however, on October 25, Dalluge moved for permission to withdraw as Vrtiska's attorney, which motion was heard and denied by the court on November 7, the date previously set for Vrtiska's trial. Vrtiska claims that at the November 7 hearing he asked the court to allow him to act as his own attorney on the second weapon charge, but the record does not show any such request.

On November 27, Vrtiska moved for a change of venue and requested a jury trial. On December 5, the county judge denied a change of venue and refused to disqualify himself, but granted Vrtiska's request for a jury trial on a date to be determined. Dalluge filed a motion to suppress physical evidence on February 12, 1986. That motion was heard on March 20, when Vrtiska, in open court, asked to represent

himself. The court allowed Vrtiska to act as his own attorney but appointed Dalluge as advisory counsel. At the March 20 hearing, Vrtiska insisted that the suppression motion was not his. When the court directed Vrtiska to proceed with the suppression motion or it would be considered withdrawn, Vrtiska proceeded on the motion, which was denied without the court's setting the case for trial.

On March 28, Vrtiska was convicted on the first concealed weapon charge, which had been filed in August of 1985, and, on April 17, was sentenced to imprisonment for 1 year, the maximum term of imprisonment for conviction of misdemeanor concealed weapon. See, § 28-1202(3) and Neb. Rev. Stat. § 28-106(1) (Reissue 1985). On the April 17 sentence, Vrtiska was given 200 days credit for the time of his incarceration while he was awaiting disposition of the first weapon charge.

Meanwhile, on April 4, Vrtiska had filed other motions concerning the second weapon charge, requesting that the court permit discovery and quash the complaint, and on April 16 moved for absolute discharge, since he had not been brought to trial within 6 months after the complaint was filed on September 3, 1985, pertaining to the second weapon charge. The court, on April 17, granted Vrtiska's request for discovery, denied Vrtiska's absolute discharge, refused to quash the complaint, and set trial for May 9, at which time a jury convicted Vrtiska on the second weapon charge.

On May 23, the court sentenced Vrtiska to 1 year in the Nebraska Penal and Correctional Complex, imposed a fine of $750, ordered Vrtiska to pay the costs, and further ordered Vrtiska committed until the fine and costs were paid or otherwise "discharged according to law." The prison term was to be served consecutively with any other term of Vrtiska's imprisonment, and no credit for jail time was given to Vrtiska on the May 23 sentence. At sentencing, Vrtiska claimed he was entitled to credit for jail time, but the court informed Vrtiska that the credit of 200 days on the sentence for the first weapon conviction was all the credit allowable:

> Yes, you were given credit for, I think, 200 days on your other case; and, so this is a separate sentence, and it will

run consecutive to your other one.

. . . .

. . . The way I look at it you haven't got anything to be credited for in this case. I gave you credit, in your previous case, for all the time you've been in jail.

With his notice of appeal to the district court, Vrtiska filed a motion to proceed in forma pauperis and documented his assets as $18.59 and some income, namely, Social Security benefits. The record does not show any disposition made by the county court on Vrtiska's forma pauperis motion. On appeal, the district court affirmed the judgment of the county court.

As his first assignment of error, Vrtiska claims he should have been discharged, since he was not brought to trial within 6 months as required by the Nebraska speedy trial act, Neb. Rev. Stat. §§ 29-1207 to 29-1209 (Reissue 1985). Section 29-1207 provides in pertinent part:

(1) Every person indicted or informed against for any offense shall be brought to trial within six months, and such time shall be computed as provided in this section.

(2) Such six-month period shall commence to run from the date the indictment is returned or the information filed. . . .

. . . .

(4) The following periods shall be excluded in computing the time for trial:

(a) . . . the time from filing until final disposition of pretrial motions of the defendant, including motions to suppress evidence, motions to quash the indictment or information, demurrers and pleas in abatement and motions for a change of venue; and the time consumed in the trial of other charges against the defendant . . . .

Section 29-1208 states: "If a defendant is not brought to trial before the running of the time for trial, as extended by excluded periods, he shall be entitled to his absolute discharge from the offense charged and for any other offense required by law to be joined with that offense."

Although the statutory requirements of the Nebraska speedy trial act expressly refer to indictments and informations, the speedy trial act also applies to prosecutions on complaint. *State*

v. Stevens, 189 Neb. 487, 203 N.W.2d 499 (1973).

Since the complaint against Vrtiska was filed on September 3, 1985, the last day for commencement of Vrtiska's trial was March 3, 1986, unless any time must be excluded from such 6-month period pursuant to § 29-1207(4). Cf., *State v. Brown*, 214 Neb. 665, 335 N.W.2d 542 (1983); *State v. Fatica*, 214 Neb. 776, 336 N.W.2d 101 (1983).

> 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. [Citations omitted.] To avoid a defendant's absolute discharge from an offense charged, as dictated by § 29-1208, 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." [Citations omitted.]

State v. Lafler, 225 Neb. 362, 369, 405 N.W.2d 576, 582 (1987).

Vrtiska was not tried until May 9, 1986, which was 67 days beyond the 6-month period prescribed by § 29-1207. Therefore, the State had the burden to show that at least 67 days are excludable under § 29-1207(4) in computing the time for commencement of Vrtiska's trial.

Vrtiska concedes that certain periods are excludable in determining the last date for commencement of his trial, namely, from September 19 to November 7, 1985 (two continuances at Vrtiska's request), and from April 4 to 17, 1986 (Vrtiska's multiple pretrial motions). The total of those two periods is 62 days, thereby leaving to the State the burden to show that at least 5 other days are excludable from the speedy trial computation under § 29-1207(4).

Motions for a change of venue are expressly included as pretrial motions to which the exclusion in § 29-1207(4)(a) applies. See, also, *State v. Ogden*, 191 Neb. 7, 213 N.W.2d 349 (1973). The period from November 27, 1985 (Vrtiska's motion for change of venue), until December 5, 1985 (change of venue denied), or 8 days, is therefore excluded in computing the time for trial. Adding 8 days to the 62 days conceded by Vrtiska, there are 70 excludable days in determining the final day for

commencement of trial in accordance with Nebraska's 6-month rule. With the 70 excludable days added to March 3, 1986, which was the last day for commencement of trial in the absence of any excludable time, the last day for commencement of Vrtiska's trial was May 12, 1986. Vrtiska's trial commenced on May 9, which was within the 6-month limitation of § 29-1207 in view of the excluded time pertinent to Vrtiska's venue question. "An accused cannot generally take advantage of a delay in being brought to trial, where he is responsible for the delay either by action or inaction." *State v. Craig*, 219 Neb. 70, 72, 361 N.W.2d 206, 210 (1985). See, also, *State v. Lafler, supra; State v. Fatica, supra*. We do not reach a consideration of the time attributable to Vrtiska's motion to suppress and the excludability of that period under § 29-1207(4). The county court, therefore, properly denied Vrtiska's motion for dismissal on the basis of a denial of a speedy trial under Nebraska's "6-month rule," and the district court was correct in affirming the county court judgment in that respect.

Next, Vrtiska maintains the district court erred in affirming the county court sentence, which Vrtiska claims denied him an opportunity to make installment payments on the fine and court costs.

The relevant Nebraska statutes in effect at the time of Vrtiska's sentencing are Neb. Rev. Stat. §§ 29-2206 and 29-2412 (Reissue 1985), which in pertinent part provided:

> (1) In all cases wherein courts or magistrates have now or may hereafter have the power to punish offenses, either in whole or in part, by requiring the offender to pay a fine or costs, or both, such courts or magistrates may make it a part of the sentence that the party stand committed and be imprisoned in the jail of the proper county until the same is paid or secured to be paid, or the defendant is otherwise discharged according to law.
>
> (2) Notwithstanding the provisions of subsection (1) of this section, when any offender demonstrates to the court or magistrate that he or she is unable to pay such fine in one lump sum the court or magistrate shall make arrangements suitable to the court or magistrate and to the offender whereby the offender may pay the fine in

installments. The court or magistrate shall enter an order specifying the terms of such arrangements and the dates on which payments are to be made.

§ 29-2206, and

Whenever it shall be made satisfactorily to appear to the district court, or to the county judge of the proper county, after all legal means have been exhausted, that any person who is subject to being or is confined in jail for any fine or costs of prosecution for any criminal offense has no estate wherewith to pay such fine and costs, or costs only, it shall be the duty of such court or judge, on his or her own motion or upon the motion of the person so confined, to discharge such person from further imprisonment, for such fine and costs, which discharge shall operate as a complete release of such fine and costs; *Provided*, nothing herein shall authorize any person to be discharged from imprisonment before the expiration of the time for which he or she may be sentenced to be imprisoned, as part of his or her punishment, or when such person shall default on a payment due pursuant to an installment agreement arranged by the court. Any person held in custody for nonpayment of a fine or for default on an installment shall be entitled to a credit on the fine or installment of twenty-five dollars for each day so held. In no case shall a person held in custody for nonpayment of a fine be held in such custody for more days than the maximum number to which he or she could have been sentenced if the penalty set by law includes the possibility of confinement.

§ 29-2412.

In *State v. Holloway*, 212 Neb. 426, 430, 322 N.W.2d 818, 821 (1982), we examined the foregoing statutes and stated that it is clear that "a defendant, upon whom a fine has been imposed and who has the ability to pay a fine, must be given the opportunity to do so, and that a defendant who can pay but not in one lump sum must be given an opportunity to pay in installments." As part of the sentence in this case, the county court ordered Vrtiska to "pay a fine in the amount of $750.00, and to pay the court costs in the sum of $231.78, and to stand

committed until paid or further *discharged according to law*." (Emphasis supplied.) The county court's order of sentence contemplated and permitted a possible installment payment of the fine as provided under § 29-2206. Vrtiska complains that, after imposition of sentence, the court failed to consider Vrtiska's ability to pay the fine and costs, and relies upon our holding in *State v. Holloway, supra*, asserting that a defendant who can pay a fine, but not in one lump sum, must be given an opportunity to pay in installments and that the burden is on the court to afford the defendant an opportunity to show that he should be allowed to so pay. We agree. However, there is nothing in the record which shows that Vrtiska requested an arrangement to pay the fine in installments. Section 29-2206(2) provides that the court shall make suitable arrangements for an offender to pay a fine in installments, but this duty only follows "when any offender demonstrates to the court or magistrate that he or she is unable to pay such fine in one lump sum . . . ." Absent from the record in this case is any showing that Vrtiska demonstrated his inability to make a lump sum payment or that he indicated his wish to make installment payments of the fine imposed.

In *State v. Holloway, supra*, the trial court ordered that Holloway's $7,500 fine be satisfied by converting the fine into 300 days of jail time at $25 per day, see § 29-2412, without giving Holloway an opportunity to pay in the manner provided by statute, and without affording Holloway an opportunity to show indigency. We affirmed the sentence, but modified that portion of the judgment which required the satisfaction of the fine by conversion to 300 days jail time, and remanded the cause with directions to give Holloway an opportunity to show indigency and to have the fine discharged as provided by § 29-2412. See, also, *State v. Brumfield*, 212 Neb. 605, 324 N.W.2d 407 (1982) (trial court could not peremptorily direct that the fine be satisfied by crediting jail time against it; defendant had to be given an opportunity to pay the fine in accordance with law). Here, the county court expressly provided that Vrtiska's fine and costs could be discharged according to law. Vrtiska's fine was not ordered to be satisfied by conversion or application to jail time without an

opportunity to pay or discharge the fine imposed. Vrtiska had the opportunity to demonstrate his inability to pay in one lump sum; the record does not show that he attempted to take advantage of such opportunity.

Vrtiska also contends that he was indigent and the fine should have been discharged as provided by § 29-2412. Again, Vrtiska relies on *State v. Holloway, supra*, where we said § 29-2412 "clearly indicates that indigents cannot be required to satisfy fines by imprisonment." 212 Neb. at 430, 322 N.W.2d at 821. Vrtiska argues that there was sufficient evidence before the county court to show that Vrtiska had no estate to pay the fine imposed. That evidence of indigency, Vrtiska claims, was his inability to post bail and his affidavit in support of his motion to proceed in forma pauperis. However, in *State v. Holloway, supra*, we said that the inference that a defendant is indigent "does not necessarily follow" from his or her failure to post a bond. 212 Neb. at 431, 322 N.W.2d at 821. Although Vrtiska's affidavit listed funds of only $18.59, it also listed Social Security as a source of income. As a matter of law, we cannot say, based upon our review of the record, that there has been a sufficient showing of Vrtiska's indigency to make § 29-2412 applicable in the present case. Vrtiska's second assignment of error, therefore, has no merit.

Vrtiska's final assignment of error is directed at the district court's affirmance of the county court's sentence, which, according to Vrtiska, had not given him proper credit for jail time while Vrtiska was awaiting trial on the weapon charge alleged in the complaint of September 3, 1985.

The State does not dispute Vrtiska's assertion that he was incarcerated on September 1, 1985, and remained incarcerated until his sentencing on May 23, 1986. However, during that period Vrtiska stood charged with the first weapon charge, alleged in the August 29, 1985, complaint; was convicted on that charge; and, on April 17, 1986, was sentenced for that conviction. That period of incarceration is relevant to determine whether Vrtiska received the appropriate credit for jail time.

We have held that where the imposed sentence of imprisonment is the statutory maximum for the offense, the

sentencing court must give the defendant credit for jail time. See, *State v. Holloway*, 212 Neb. 426, 322 N.W.2d 818 (1982); *State v. Rathbun*, 205 Neb. 329, 287 N.W.2d 445 (1980); *State v. Blazek*, 199 Neb. 466, 259 N.W.2d 914 (1977). " 'Jail time' is commonly understood to be the time an accused spends in detention pending trial and sentencing." *State v. Fisher*, 218 Neb. 479, 481, 356 N.W.2d 880, 882 (1984). Therefore, Vrtiska was entitled to credit for the period of jail time from September 1, 1985, when he was taken into custody on the weapon charge in the present case, until April 17, 1986, when Vrtiska was sentenced as the result of his conviction on the first weapon charge contained in the complaint of August 29, 1985. The total of that period is 229 days.

Vrtiska does not maintain that he was entitled to credit for the entire time he was incarcerated before his sentence on the second conviction. His partial concession is correct, because part of the time that Vrtiska was in jail was attributable to his sentence of imprisonment as a result of his first conviction for carrying a concealed weapon, the charge in the complaint filed on August 29, 1985. The time during which Vrtiska was incarcerated due to his first conviction on the first weapon charge was not time spent awaiting disposition of the weapon charge in the present case on appeal, but, rather, was prison time imposed as a punishment for a conviction and was not jail time while awaiting trial and sentencing. See *State v. Fisher, supra*.

A sentencing court's duty to credit a defendant with jail time is not discretionary when a defendant is sentenced to the statutory maximum term of imprisonment as punishment for a particular crime. When a defendant is sentenced to the statutory maximum term of imprisonment, the sentencing court must ascertain the amount of jail time and give credit to the defendant for such jail time. When the court sentenced Vrtiska on April 17 for his conviction on the first weapon charge, Vrtiska had been in jail for 229 days, of which the trial court credited Vrtiska with 200 days jail time. Since the other 29 days were not credited against Vrtiska's sentence on his first conviction for the weapon charge, those 29 days retained their character as jail time, and, therefore, Vrtiska still had 29 days

of jail time to be credited toward the sentence imposed in the present case. Since the statutory maximum term of imprisonment, that is, 1 year, was imposed in this case, Vrtiska should have received credit for the 29 days of jail time in connection with the sentence imposed on May 23, 1986. Therefore, pursuant to Neb. Rev. Stat. § 29-2308 (Reissue 1985), we modify Vrtiska's sentence imposed in the present case under review, giving Vrtiska credit for 29 days jail time, which is credited or applied against the term of imprisonment (1 year) imposed in the present case.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. STEVEN R. GUY, APPELLANT.
419 N.W.2d 152

Filed February 12, 1988. No. 86-1025.

1. **Trial: Minors: Witnesses: Appeal and Error.** The question of the competency of a child witness rests largely within the discretion of the trial court, and that determination will not be disturbed in the absence of an abuse of discretion.
2. **Trial: Evidence: Convictions: Appeal and Error.** The improper admission of evidence is harmless error and does not require reversal if the evidence is cumulative and there is other competent evidence to support the conviction.
3. **Trial: Evidence: Verdicts: Appeal and Error.** The Supreme Court will not resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence. The verdict of the trial court will be upheld if, taking the view most favorable to the State, there is sufficient evidence to support it.

Appeal from the District Court for Dawson County: DONALD E. ROWLANDS II, Judge. Affirmed.

Kurt R. McBride of Hart & McBride, P.C., for appellant.

Robert M. Spire, Attorney General, and Jill Gradwohl Schroeder, for appellee.

HASTINGS, C.J., WHITE, and GRANT, JJ., and BRODKEY, J., Retired, and CORRIGAN, D.J.

GRANT, J.

This is an appeal from the district court for Dawson County. After trial to a jury, the court found the defendant guilty of sexual assault of his minor daughter, in violation of Neb. Rev. Stat. § 28-320.01 (Reissue 1985), and the defendant was sentenced to not less than 1½ nor more than 4 years' imprisonment. On appeal, the defendant assigns as error that the district court erred in finding that the defendant's daughter was a competent witness to testify at trial, in overruling the defendant's objections to testimony by Deputy Sheriff Nancy Vandenberg as to statements made by defendant's youngest daughter, and in overruling the defendant's motion to dismiss because the State "failed to establish beyond a reasonable doubt each and every essential element of the offense charged." For the reasons set out below, we affirm.

The record shows that on April 9, 1986, Deputy Sheriff Nancy Vandenberg interviewed the defendant, after giving him appropriate *Miranda* warnings, with regard to a complaint received by the police that the defendant had been handcuffing his children. On that day, the defendant stated to Deputy Vandenberg that he handcuffed his children for disciplinary purposes.

Deputy Vandenberg then interviewed defendant's daughter on four separate occasions. At trial, which was held on September 16 and 17, 1986, Deputy Vandenberg testified that on April 10, 1986, the daughter had told the deputy that the defendant, her father, had "touched" her and that she and her brothers were sometimes handcuffed for punishment. On April 24 the daughter told Deputy Vandenberg that defendant made the child feel funny inside when he felt between her legs and that she was scared that her parents would be angry with her for telling anyone. On April 26 the child told Deputy Vandenberg that the things the child and the defendant did made her feel bad and that if she told what her father had done to her, he might go to jail. On April 30 the child told Deputy Vandenberg that the defendant "makes love to me" when no one else is around, and

with anatomically illustrative dolls, the child demonstrated that after her father undressed her, he made her put her arms above her head, got on top of her, and rubbed his hand between her legs. The child also stated that her father had wanted her to touch him on his body and that her parents had told her that if she talked about that, she would be in real trouble. Additionally, Deputy Vandenberg testified that the child had told her that the last incident took place on March 28, 1986, the last holiday from school before the interview.

At trial, upon motion of the defendant, the court examined the child outside the presence of the jury in order to determine her competency to testify. At the time of trial, the child was 7 years old. During the court's questioning, the child testified that she knew the difference between right and wrong. After examination by the court, the court determined that she was competent to testify and swore her in as a witness. On direct examination, before the jury, the child testified as to details of the conduct of defendant toward her, that the defendant "made love" to her, that he had told her not to tell anyone, and that it made her sad to tell about these things.

At trial, a stipulation as to the testimony of Dr. K.A. Keifer was read to the jury and was not objected to by the defendant. Dr. Keifer had interviewed the child in her office on May 1, 1986, in Kearney, Nebraska. The stipulation was signed by the defendant, defendant's counsel, and the county attorney. The stipulation stated that if Dr. Keifer were to be called as a witness, she would testify that the child had come to her office "because dad hurt [her bottom]." Upon further questioning, the child told Dr. Keifer that her father hurt her when he "pressed between my legs with his legs" and that this happened "when everyone was on vacation except for the cats and dogs." Dr. Keifer asked the child about reporting the story, and the child said that she had told Deputy Vandenberg what had happened to her because "Nancy is a cop" and that she was afraid to tell "because her dad might go to jail."

After the investigation began, the child had been placed in a foster home. The foster mother testified, and no objection was made. She testified that on April 28, while the child was staying with her, the child told her that "her dad made her feel funny

and she was scared." When asked by the foster mother as to why she felt scared, the child stated that her father "takes my clothes off and his clothes off, except his underwear, and then he hurts me." The foster mother testified that the child told her that her father "puts his hands between my legs and it hurts," which made her "feel bad." When the foster mother asked the child what would happen if she told anyone, the child responded that "I might go to jail" and that she did not want to "hurt daddy."

The child's brother, who was 11 years old at the time of trial, gave further testimony. The brother testified that he had seen his sister on top of her father, "loving," with their clothes off, in his parents' bedroom and that his father had his hands on his sister's "private part."

In his first assignment of error, defendant contends that the district court erred in allowing defendant's daughter to testify at trial. It is settled that every person is a competent witness, except as otherwise provided. Neb. Rev. Stat. § 27-601 (Reissue 1985). The question as to the competency of a witness must be determined by the court, while the credibility and weight of the testimony are for the jury to determine. *State v. Hamilton*, 217 Neb. 734, 351 N.W.2d 63 (1984).

There is no age below which a child is presumed to be incompetent to testify. *Wells v. State*, 152 Neb. 668, 42 N.W.2d 363 (1950). The question of the competency of a child witness lies within the discretion of the trial court, and that determination will not be disturbed in the absence of an abuse of discretion. *State v. Miner*, 216 Neb. 309, 343 N.W.2d 899 (1984); *State v. Hitt*, 207 Neb. 746, 301 N.W.2d 96 (1981). In *State v. Hitt, supra*, we held that an 8-year-old boy who had a functional mental age of 3 to 5 years was a competent witness to testify. In ruling whether or not a child is a competent witness, the trial court must determine whether a child is sufficiently mature to receive correct impressions by his or her senses, whether the child can recollect and narrate intelligently, and whether the child appreciates the moral duty to tell the truth. *Wells v. State, supra*.

Defendant does not argue that his daughter did not appreciate the moral duty to tell the truth. The defendant does contend, however, that the child did not have sufficient

maturity to recollect and narrate intelligently. The record reflects that the court sometimes allowed the child to shake and nod her head in response to questioning, but the child did testify to specific acts. The child recalled and testified, in detail, as to what her father had done to her when he "made love" to her.

We find that there was no abuse of discretion on the part of the trial court in determining that the child was a competent witness and in allowing her to testify at trial. Defendant's first assignment of error is without merit.

In his second assignment of error, the defendant contends that the district court erred in overruling the defendant's objections to testimony by Deputy Vandenberg as to statements made by the child. The record shows that the deputy sheriff was examined as to her training and qualifications in investigating child abuse cases. The deputy was then asked if she had interviewed defendant's daughter on April 10, 1986, and was asked, "To the best of your recollection what did you say and what did [the child] say?" Defendant's counsel objected on the basis that what the child said was "hearsay, incompetent, irrelevant, [and] immaterial." The objection was overruled, and the witness responded that the child said that her brother took pictures of her "when she didn't have any clothes on" and that her dad and her named brothers "touch me."

Later, the witness was questioned as to her second interview of the child. Counsel again objected to the testimony as hearsay. The objection was overruled, and the witness related that the child again said her brothers and her dad felt between her legs.

Defendant's counsel made no further objection, and the deputy sheriff testified at length, as set out above, not only as to the fact that the child complained of defendant's acts, but as to the details of those acts related by the child to the deputy.

The testimony of the witness was inadmissible as adduced. The State contends the deputy sheriff's testimony was admissible because no objection was made to specific questions after defendant's counsel's objections were overruled. That contention is in error. Neb. Rev. Stat. § 25-1141 (Reissue 1985) provides:

> Where an objection has once been made to the admission of testimony and overruled by the court it shall

> be unnecessary to repeat the same objection to further testimony of the same nature by the same witness in order to save the error, if any, in the ruling of the court whereby such testimony was received.

Defendant's objections should have been sustained. The error, however, does not require reversing defendant's conviction.

The improper admission of evidence is harmless error and does not require reversal if the evidence is cumulative and there is other competent evidence to support the conviction. *State v. Daniels*, 222 Neb. 850, 388 N.W.2d 446 (1986); *State v. Thierstein*, 220 Neb. 766, 371 N.W.2d 746 (1985).

In this case there was substantial evidence apart from the testimony of Deputy Vandenberg to sustain the conviction.

Dr. Keifer testified, by stipulation not objected to by defendant, as to details of defendant's assault on his daughter. The woman in the foster home testified as to many of the same details. Defendant made no objection to the testimony of these two witnesses, and the provisions of § 25-1141 do not pertain to that testimony. The failure to object to the introduction of evidence at trial constitutes waiver of that objection on appeal. *State v. Roggenkamp*, 224 Neb. 914, 402 N.W.2d 682 (1987); *State v. Daniels*, 220 Neb. 480, 370 N.W.2d 179 (1985).

The child's brother testified, from direct observation, as to facts constituting a sexual assault on the child victim. The victim's testimony, if believed, set out facts constituting a sexual assault. The error made in admitting Deputy Vandenberg's testimony was harmless because her testimony was only cumulative of other evidence at trial. Defendant's second assignment of error is without merit.

In discussing his third assignment of error, the defendant in his brief contends that there was insufficient evidence to establish beyond a reasonable doubt that the defendant committed a sexual assault on his daughter. This court will not pass on the credibility of the witnesses, resolve conflicts in the evidence, or weigh the evidence. *State v. Donnelson*, 225 Neb. 41, 402 N.W.2d 302 (1987). The verdict of the trial court will be upheld if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. El-Tabech*, 225 Neb.

395, 405 N.W.2d 585 (1987). Viewing the evidence most favorably to the State, the jury could find the defendant guilty of sexual assault of a minor. This assignment of error is without merit.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RICKY J. COSTANZO, APPELLANT.

419 N.W.2d 156

Filed February 12, 1988. No. 87-254.

1. **Verdicts: Appeal and Error.** A jury verdict of guilty will not be overturned on appeal unless it is based on evidence so lacking in probative force that it can be said as a matter of law that the evidence is insufficient to support the verdict.
2. **Convictions: Appeal and Error.** In determining whether evidence is sufficient to sustain a conviction in a jury trial, the Supreme Court does not resolve conflicts in the evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh evidence presented to a jury—all of which is 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.
3. **Expert Witnesses: Assault.** Where the injuries are objective and the conclusion to be drawn from proved basic facts does not require special technical knowledge or science, the use of expert testimony is not legally necessary to prove a causal connection between a blow and the injuries inflicted.
4. **Evidence: Intent.** The law is settled that independent evidence of specific intent is not required. The intent with which an act is committed is a mental process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident.
5. **Jury Instructions: Evidence.** A requested jury instruction is properly denied when there is no evidence to support that instruction.
6. **Evidence: Juries: Proximate Cause: Assault.** A jury may properly infer from the evidence that a single blow to a victim's jaw was the proximate cause of the victim's serious injuries.
7. **Circumstantial Evidence: Juries: Self-Defense: Assault.** To determine whether the defendant acted with justification or had the required intent for assault in the first degree, the jury may consider circumstantial evidence as to the force of the blow the defendant administered.

8. **Jury Instructions: Lesser-Included Offenses.** A court sua sponte *may* give a lesser-included offense instruction, but it is not required to do so unless the evidence warrants it and a party requests it.
9. **Effectiveness of Counsel: Proof.** To assert a successful claim of ineffective assistance of counsel, a defendant must prove (1) that his attorney failed to perform as well as an attorney with ordinary training and skill in the criminal law in the area; (2) that his interests were not conscientiously protected; and (3) that if his attorney had been effective, there is a reasonable probability that the results would have been different.
10. **Sentences: Appeal and Error.** 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.
11. **Sentences.** When imposing a sentence the trial court may consider a defendant's prior criminal record and the seriousness of the offense involved.

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

John Stevens Berry and Robert B. Creager of Berry, Anderson, Creager & Wittstruck, P.C., for appellant.

Robert M. Spire, Attorney General, and Yvonne E. Gates, for appellee.

HASTINGS, C.J., WHITE, SHANAHAN, and FAHRNBRUCH, JJ., and HANNON, D.J.

FAHRNBRUCH, J.

The defendant, Ricky J. Costanzo, was found guilty of assault in the first degree by a Douglas County District Court jury. The defendant appeals his conviction and indeterminate sentence of 5 to 10 years' imprisonment. We affirm.

Neb. Rev. Stat. § 28-308 (Reissue 1985) provides that a person who intentionally or knowingly causes serious bodily injury to another person is guilty of assault in the first degree. In this case, Costanzo delivered a single blow to the left jaw of Edward McCarthy, which knocked McCarthy to the sidewalk. The victim suffered brain damage, a broken jaw in two places, and other injuries.

Summarized, defendant's assigned errors are (1) insufficiency of the evidence for conviction; (2) error in instruction No. 10 as given, failure to give defendant's proposed instruction, and failure to sua sponte give a lesser-included offense instruction; (3) ineffective assistance of counsel; and (4)

imposition of an excessive sentence. The assignments of error will be discussed in order, keeping in mind that "[a] jury verdict of guilty will not be overturned on appeal unless it is based on evidence so lacking in probative force that it can be said as a matter of law that the evidence is insufficient to support the verdict." *State v. Dwyer*, 226 Neb. 340, 344, 411 N.W.2d 341, 344 (1987); and that

> in determining the sufficiency of the evidence to sustain a criminal conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact, whose findings must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support them.

State v. Newson, 226 Neb. 867, 870, 415 N.W.2d 471, 473 (1987).

There was evidence that the victim, Edward McCarthy, was picked up at his home in Omaha by a friend, William Driscoll, at approximately 5 p.m., July 12, 1986. The pair drank some beer at the victim's home and then, at a club, had dinner without any alcoholic drinks. After that, with Driscoll driving, the pair picked up Driscoll's father at his home and then drove to Jerry's Parkway tavern, where one Kathy Shaw joined them. From there, the foursome proceeded to dograces in Council Bluffs, Iowa. After watching about 10 races, during which time each of the parties drank some beer, the foursome left. It was about 10 p.m. Driscoll's father was dropped off at his residence. The remaining threesome, with Driscoll still driving, went to four different taverns. Everyone drank some beer at each tavern. The group, sometime after midnight, arrived back at Jerry's Parkway bar, the place of employment of Shaw. Upon entering the tavern, Driscoll stopped for a minute or two of small talk with the defendant, whom he knew and who was drinking beer at a table near the front of the tavern. Driscoll then joined McCarthy at the bar. Shaw had two beers and left in her own automobile, which had been left near the tavern earlier. Both Driscoll and McCarthy drank some beer.

At about 12:50 a.m., Patrick Pecha, a drinking companion

of Costanzo's, left the tavern to lie down in the defendant's truck. The truck was parked directly in front of the tavern. Costanzo thought Pecha had gone to the cab of the truck. As it turned out, Pecha lay down in the bed of the truck box. At 1 a.m., the bartender, Tama Goodall, gave a "last call." Shortly after that, McCarthy asked to purchase another beer, but was refused because his request came too late. Following some innocuous small talk, Costanzo passed some beer, in a pitcher, down the bar to McCarthy.

Driscoll and McCarthy drank some beer from defendant's pitcher. They then walked out of the tavern, with McCarthy following Driscoll. Near Costanzo's truck, Driscoll mentioned to McCarthy that he had seen a head sticking up from the bed of the truck and remarked to McCarthy that "somebody bit the dust." It was Pecha. McCarthy walked over and glanced into the truck bed. Driscoll testified he heard a door "slam open," looked back, and saw Costanzo running from the bar toward McCarthy. Because it appeared that the defendant was going to attack McCarthy, Driscoll yelled: "No, Ricky, don't." The defendant denied hearing the admonition.

Driscoll testified that McCarthy made a quarter turn, and as he did so, Costanzo struck him. Driscoll testified that McCarthy said nothing and never raised his fist to Costanzo. The defendant claimed Driscoll's position did not permit him to see McCarthy's hands or arms. Driscoll did not think that McCarthy ever saw the defendant at the truck. Driscoll testified that the defendant swung his right fist and hit McCarthy on the left jaw. McCarthy went down on his back. His head struck the sidewalk. McCarthy was unconscious, and there was no response. Costanzo went back into the bar.

Costanzo gave this version of the incident: As he was returning to his table from the tavern's restroom, Costanzo looked through a glass door and saw someone leaning into the back of his truck. The individual had his hands in the back of Costanzo's truck, where tools were kept. The defendant walked out onto the sidewalk in front of the tavern, saw Driscoll, and exchanged remarks with McCarthy. As the defendant approached the back of his truck, McCarthy spun around with his fist in the air to hit the defendant. "[S]o I swung at him and

hit him one time" on the jaw, Costanzo testified. The defendant saw McCarthy fall down and told Driscoll that McCarthy would be all right. Then defendant walked back into the tavern, where he drank more beer. On direct examination, the defendant testified he was not sure if he tried to hit McCarthy with all of the force he had available to him and with all the strength he had in his right arm. The defendant acknowledged that he intentionally hit McCarthy, but claimed that it was in self-defense. It is inherent in the guilty verdict that the jury did not accept Costanzo's self-defense claim.

Driscoll testified that after the incident, he went back into the tavern and asked the defendant: "Ricky, what did you do that for? He didn't do anything to you." Costanzo replied: "That will teach him to mouth off in the bar." Then Costanzo threatened Driscoll: "Hey, punk, shut up or you're next." Driscoll further testified that he asked someone to call an ambulance, whereupon the defendant declared: "He doesn't need an ambulance, he's all right; I didn't hit him that hard." Driscoll said he told the defendant: "Ricky, he [McCarthy] is unconscious and he is bleeding." Costanzo testified that Driscoll said of McCarthy: "He's not getting up and he's going into convulsions." It was disputed as to whether Driscoll or the defendant told someone to call 911 for an ambulance. It is not disputed that before the rescue squad arrived, the defendant picked up a six-pack of beer he had ordered earlier, left the tavern, and went to a party at a friend's house.

McCarthy was transported to University Hospital where he could be observed. When Driscoll went to pick up his friend the next morning, medical personnel were taking McCarthy into surgery to remove a blood clot.

Edward McCarthy's father, Dr. John McCarthy, testified that he had been licensed to practice medicine in Nebraska for the past 36 years, about his undergraduate and medical education, about being an Air Force medical officer, and about his return to family practice. Later, he took 3 years of postgraduate training in surgery and obstetrics in Omaha. Since then to time of trial, Dr. McCarthy had been in the private practice of medicine in Omaha. He had been an associate professor at University of Nebraska Medical Center and an

instructor at Creighton University college of medicine. This foundation qualified Dr. McCarthy as a medical expert.

Dr. McCarthy testified that his 33-year-old son, prior to July 13, 1986, lived alone, was in good health, was 5 feet 9 inches tall, and weighed less than 135 pounds. On cross-examination, Costanzo said that he, the defendant, was 6 feet 1 inch tall and weighed 200 pounds. Defendant was a heavy-construction cement worker and was in "pretty good physical shape." Costanzo further testified he had no reason to be afraid of Edward McCarthy.

Dr. McCarthy testified that he learned through a telephone call from University Hospital personnel at 5 a.m. on July 13, 1986, that his son had been injured, and about his son's condition. After discussing his son's case again with hospital personnel about 7:30 a.m. the same day, Dr. McCarthy instructed and authorized that neurosurgery be performed immediately.

Dr. McCarthy went to the hospital, where his son was undergoing neurosurgery. Dr. McCarthy, from July 13, 1986, to date of trial, continually consulted with the physicians treating his son and familiarized himself with everything that was done. Dr. McCarthy read all medical reports concerning his son. He read his son's CAT scan, which showed a large blood clot on his son's brain. Because Edward McCarthy was starting to have convulsions and was going into a coma, the blood clot had to be evacuated at once, according to Dr. McCarthy. He testified that the blood clot permanently blinded the younger McCarthy on the right side of each eye. As a result, Dr. McCarthy had observed, his son staggers to the right and runs into things on the right side because he is not able to see them. The doctor testified that his son had two jaw fractures which were consistent with being hit on the left side of the head. Dr. McCarthy further testified that because of severe trauma, his son nearly died. Due to the extreme risk of death to his son, the doctor called a priest who, at the doctor's request, administered the last rites sacrament to Edward McCarthy.

Dr. McCarthy stated that his son was in University Hospital for a month, during which time the son was in a coma. When young McCarthy began coming out of the coma, he was

transferred to Immanuel Medical Center for rehabilitative purposes. At that time, his right side, including his right leg and right arm, were paralyzed. Young McCarthy was hospitalized at Immanuel until late September. From that time to time of trial, Edward McCarthy lived with his father and took an anticonvulsive medicine. Because of his brain injury, young McCarthy has memory problems and other mental disabilities and cannot handle his own affairs, according to Dr. McCarthy. The father was appointed by a court as legal guardian of Edward McCarthy.

Edward McCarthy testified that he could remember everything that occurred on July 12, 1986, and the early morning of July 13, to the time he looked into the back of Costanzo's truck. Edward McCarthy further testified that he was unable to do the work he used to do; that he could not drive a car, ride a bicycle, or run. He testified, "I can't hardly even walk."

On cross-examination, the victim testified that he had had 8 or 10 beers the evening before and the morning he was hit. He testified that at the time of the incident he was probably happy, but not drunk.

Two witnesses were called in defendant's behalf: Tama Goodall, the bartender at Jerry's Parkway bar; and the defendant. Both the bartender and the defendant testified that Costanzo was not drunk the evening of July 12 or early morning hours of July 13. Goodall related that both Driscoll and Edward McCarthy were drunk, but not so drunk as to prevent her from serving them three more beers. The defendant testified that both Driscoll and McCarthy were drunk. Both defense witnesses corroborated witnesses for the State that the defendant had given young McCarthy and Driscoll some beer in a pitcher after "last call." Both defense witnesses said that it was the defendant who asked that an ambulance be called. Goodall verified that Driscoll had come back into the bar and told the defendant that "[y]ou shouldn't have hit him."

Costanzo admits that he hit young McCarthy and McCarthy immediately dropped to the sidewalk. The defendant does not argue that McCarthy's injuries are not serious as defined by Neb. Rev. Stat. § 28-109(20) (Reissue 1985), which provides:

"Serious bodily injury shall mean bodily injury which involves a substantial risk of death, or which involves substantial risk of serious permanent disfigurement, or protracted loss or impairment of the function of any part or organ of the body."

Rather, defendant argues that the testimony of Dr. McCarthy is "totally incompetent to establish that the punch thrown by the defendant was the proximate cause of any permanent disability . . . ." Brief for Appellant at 8. Costanzo is apparently contending that his single punch to the victim could not cause the extensive injuries McCarthy suffered and that if it could, a causal nexus must be established by expert medical testimony. It is true that Dr. McCarthy was not asked whether his son's brain injury was a direct and proximate result of Costanzo's blow to the jaw. But expert testimony is not necessarily required to prove a causal relationship. " '[W]here the injuries are objective and the conclusion to be drawn from proved basic facts does not require special technical knowledge or science, the use of expert testimony is not legally necessary.' " *State v. Thomas*, 210 Neb. 298, 300-01, 314 N.W.2d 15, 18 (1981), quoting *Eiting v. Godding*, 191 Neb. 88, 214 N.W.2d 241 (1974).

From circumstantial evidence there can be no question but that Costanzo's punch knocked young McCarthy down and that the victim's head hit the sidewalk. The evidence is undisputed that young McCarthy had no physical or mental disabilities before the punch. From either the medical or the objective evidence concerning physical and mental disabilities of young McCarthy after Costanzo's blow, the jury, composed of lay people, could infer beyond a reasonable doubt that the defendant's blow proximately caused serious bodily injury to Edward McCarthy. Expert testimony of causal nexus was not required.

Costanzo also argues that there was insufficient evidence of his intent to inflict serious bodily injury. As we have consistently held: " '[T]he law is settled that independent evidence of specific intent is not required. The intent with which an act is committed is a mental process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident.' " *State v. Tweedy*,

224 Neb. 715, 720, 400 N.W.2d 865, 869 (1987), quoting *State v. Thielen*, 216 Neb. 119, 342 N.W.2d 186 (1983); *State v. Ristau*, 201 Neb. 784, 272 N.W.2d 274 (1978).

Section 28-308 requires that Costanzo inflicted Edward McCarthy's injuries intentionally or knowingly. Costanzo claims he did not intend to inflict serious bodily injury upon Edward McCarthy.

There is a wealth of facts from which the jury could determine Costanzo's state of mind at the time he threw his punch at the victim. The defendant admitted he knowingly hit McCarthy. Costanzo knew that McCarthy hit his head on the sidewalk, was unconscious, and was bleeding from the left ear, and Costanzo did little or nothing about it. When Driscoll made inquiry as to why the defendant had hit McCarthy, Costanzo replied: "That will teach him to mouth off in the bar," and "Hey, punk, shut up or you're next." The jury could also take into consideration the circumstantial evidence as to the force of the blow and the varying sizes and weights of the victim and defendant. With the knowledge that McCarthy was knocked to the sidewalk and that McCarthy was unconscious, was bleeding from his left ear, and was having convulsions, Costanzo picked up a six-pack of beer, left the scene before the rescue squad arrived, and went to a party. The jury obviously did not accept the defendant's testimony that McCarthy regained consciousness before Costanzo left the scene.

Whether Costanzo had the intent or knowledge required by § 28-308 was for the jury. There was sufficient circumstantial evidence for the jury to find beyond a reasonable doubt that the defendant did have the intent required by § 28-308. As we held in *State v. Pence, ante* p. 201, 202, 416 N.W.2d 581, 582 (1987), "Intent may be inferred from the words or acts of the defendant and from the circumstances surrounding the incident." See, also, *State v. Schott*, 222 Neb. 456, 384 N.W.2d 620 (1986). This the jury did, in Costanzo's case.

Costanzo also complains that the trial court failed to give defendant's requested instruction No. 1, which, in part, stated that "excessive intoxication by which a person is wholly deprived of reason may prevent [a defendant from] having the intent charged." While there is evidence in the record showing

that the defendant had been drinking beer up until the time young McCarthy was injured, there was no evidence that Costanzo was intoxicated. All of the evidence, including defendant's own testimony and that of the bartender called by the defendant, was that Costanzo was not intoxicated. There was no evidence to the contrary. The trial court properly denied the requested instruction, since there was no evidence to support it. *State v. Clayburn*, 223 Neb. 333, 389 N.W.2d 314 (1986); *State v. Menser*, 222 Neb. 36, 382 N.W.2d 18 (1986).

In his brief, defendant claims that the trial court erroneously used the words "deadly force" in instructions Nos. 7 and 10. The words do not appear in instruction No. 7. Defendant's brief also refers to instruction No. 20. The instructions end with No. 15. Instruction No. 10 concerns the doctrine of "justification," commonly called "self-defense."

Costanzo at trial contended that his acts were justified because he used only such force which he believed to be necessary to protect himself. He claims he believed he was threatened with being attacked by Edward McCarthy. There was evidence from which a jury could properly infer that the blow inflicted by Costanzo was the proximate cause of the victim's being placed in extreme danger of death. So extreme was that danger that a priest was called to administer last rites to Edward McCarthy. The defendant further claimed he had no intent to cause serious bodily injury to his victim. From the evidence, a jury could conclude that without medical intervention, Edward McCarthy would have died. "Deadly force," as used in the instruction, was defined as that "force which a person uses with the purpose of causing, or which the person knows creates a substantial risk of causing, death or serious bodily harm." "Serious bodily injury" involves "a substantial risk of death, or . . . substantial risk of serious permanent disfigurement, or protracted loss or impairment of the function of any part or organ of the body." § 28-109(20).

If the jury found that "deadly force" was used by Costanzo, it would then have to determine whether that type of force was necessary, i.e., Did the defendant believe that such force was necessary to protect himself against death or serious bodily harm? If the jury found that Costanzo did not so believe, then

the defense of justification was not available to the defendant. The jury could then conclude that because of the amount of force used, the defendant had the intent to cause the risk of death or serious bodily injury. "Unlawful force," as used in the instruction, was defined as a wrongful act or attempt to inflict bodily injury upon another. It says nothing about "serious bodily injury" or "causing substantial risk of death." To determine whether the defendant, Costanzo, acted with justification or had the required intent for assault in the first degree, the jury necessarily had to determine the force of the blow the defendant administered. Taken as a whole, instruction No. 10 was a correct statement of the law and provided proper guidelines for that determination. See Neb. Rev. Stat. §§ 28-1406 to 28-1416 (Reissue 1985). It was the duty of the trial court to instruct as to the law of the case, and it did so. *State v. Lamb*, 213 Neb. 498, 330 N.W.2d 462 (1983). Defendant's claimed error is not supported by the record.

Costanzo contends that the trial court should have sua sponte given a lesser-included offense instruction. The answer to that contention is found in *State v. Pribil*, 224 Neb. 28, 395 N.W.2d 543 (1986). *Pribil* stands for the proposition that a court sua sponte *may* give a lesser-included offense instruction, but it is not required to do so unless the evidence warrants it and a party requests it.

For his third assignment of error, Costanzo claims he had ineffective assistance of counsel during his trial.

To be successful in this claim, Costanzo must prove (1) that his attorney failed to perform as well as an attorney with ordinary training and skill in the criminal law in the area; (2) that his interests were not conscientiously protected; and (3) that if his attorney had been effective, there is a reasonable probability that the results would have been different. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Jackson*, 226 Neb. 857, 415 N.W.2d 465 (1987); *State v. Falkner*, 218 Neb. 896, 360 N.W.2d 482 (1984). This standard applies whether the claim is made in a postconviction relief proceeding (*Jackson*) or as a part of a direct appeal (*Falkner*).

Defendant claims that his trial counsel failed to object to an

unendorsed witness' testifying, failed to cross-examine that witness, and failed to request a lesser-included offense instruction. In this assignment of error, Costanzo is referring to Edward McCarthy's father, who is a medical doctor.

The transcript reflects that prior to the jury's being impaneled, the court gave the State leave to endorse Dr. John McCarthy's name as a witness on the information. The defense, therefore, had the opportunity to question the jurors as to whether anyone knew the witness. It should not have come as a surprise to the defendant that medical evidence would be adduced. The State had previously endorsed the names of three University of Nebraska doctors as witnesses.

By detailed questioning, Dr. McCarthy was qualified as a medical expert. The evidence further shows that from the time he was first called about his son's injuries, Dr. McCarthy was involved medically in his son's treatment. When he was first contacted, Dr. McCarthy was told that his son was hospitalized for observation, that some blood work had been done on him, and that x rays were being taken. Dr. McCarthy asked to be notified when the hospital personnel had something definite to report. When contacted a second time, it was Dr. McCarthy who instructed hospital personnel to proceed with neurosurgery immediately. Dr. McCarthy consulted with the physicians involved in working with his son and diagnosing his injuries from the hospitalization to the time of trial. He testified that he was familiar with everything they did and the reports they wrote. Based upon his education, background, familiarity with the case, and his own observations, Dr. McCarthy was qualified to testify as an expert as to his son's condition. Defendant also complains that his trial counsel did not cross-examine Dr. McCarthy. Defendant never contested the seriousness of young McCarthy's injuries.

Costanzo at trial relied upon his own lack of intent and the self-defense doctrine to acquit him. Those two theories have nothing to do with Dr. McCarthy's testimony. Cross-examination might well have served only to underscore the parts of the doctor's testimony most damaging to the defendant. Because the prosecutor did not question Dr. McCarthy as to the proximate cause of his son's injuries,

prudent trial strategy might well have dictated that no cross-examination of the doctor should be undertaken. On cross-examination or redirect examination, Dr. McCarthy might well have given a medical opinion that would totally destroy Costanzo's claim of no nexus between his blow and young McCarthy's injuries. Apparently, the defense was not willing to take that gamble.

Costanzo further assigns as error his trial attorney's failure to request a lesser-included offense instruction. In his testimony, defendant claimed he was acting in self-defense. By requesting an intoxication instruction, it can be deduced that trial counsel was also relying upon lack of intent, to acquit the defendant. Arguments of counsel are not included in the record, and it may be that defense counsel, as did appellate counsel, argued a lack of nexus between defendant's blow and young McCarthy's injuries. All three of these defenses are all-or-nothing defenses.

Considering the strength of all the admissible and credible evidence in this case, we find the defendant failed to prove to a reasonable probability that the jury would have brought in a verdict other than guilty of assault in the first degree even if a lesser-included offense instruction had been given. Defendant's third assignment of error is without merit.

In his last assignment of error, Costanzo complains that the indeterminate sentence of 5 to 10 years' imprisonment imposed upon him is excessive. Under § 28-308, assault in the first degree is a Class III felony. Neb. Rev. Stat. § 28-105 (Reissue 1985) fixes the penalty for a Class III felony offense, which is not more than 20 years' imprisonment, or up to a $25,000 fine, or both, with a minimum of 1 year's imprisonment.

The presentence investigation reflects that Costanzo, who was age 27 at time of sentencing, had an extensive criminal record dating back to 1973. That record includes two felonies: (1) a burglary, for which he was placed on probation for 3 years and with a condition of probation that he spend 90 days in jail, and (2) robbery, for which he was sentenced to an indeterminate term of not less than 5 nor more than 7 years in the Nebraska Penal and Correctional Complex.

This court has 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. Perdue,* 222 Neb. 679, 386 N.W.2d 14 (1986); *State v. Turner*, 221 Neb. 852, 381 N.W.2d 149 (1986); *State v. Sianouthai*, 225 Neb. 62, 402 N.W.2d 316 (1987); *State v. Schreck*, 226 Neb. 172, 409 N.W.2d 624 (1987). Costanzo's sentence was well within the statutory range of penalties permitted. Considering Costanzo's prior criminal record and the seriousness of the offense involved in this case, we cannot say that the trial court abused its discretion in sentencing the defendant.

The conviction and sentence are affirmed.

AFFIRMED.

JOHN HERNANDEZ, APPELLEE, V. FARMLAND FOODS, INC., AND AETNA CASUALTY AND SURETY COMPANY, APPELLANTS.

418 N.W.2d 765

Filed February 12, 1988. No. 87-342.

1. **Workers' Compensation: Appeal and Error.** In a review of a workers' compensation case, the findings of fact by the Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong.
2. **Workers' Compensation.** Whether an injured worker is entitled to vocational rehabilitation is ordinarily a question of fact to be determined by the Workers' Compensation Court.
3. _____. The right of an injured worker to vocational rehabilitation depends upon his inability to perform work for which he has previous training and experience.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Richard R. Endacott of Knudsen, Berkheimer, Richardson & Endacott, for appellants.

Thomas F. Dowd of Dowd, Fahey, Dinsmore & Hasiak, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

GRANT, J.

Plaintiff-appellee, John Hernandez, was employed as a boner at a hog-processing plant owned by defendant Farmland Foods, Inc. Defendant Aetna Casualty and Surety Company is Farmland's insurance carrier. Plaintiff was injured while at work on March 5, 1980. As a result of this accident plaintiff missed 2 days of work in March 1980 and did not work from May 13, 1981, to May 19, 1982. Plaintiff returned to work on May 20, 1982, wearing a back brace, and worked off and on until September 7, 1982. He missed approximately 7 weeks of work during that time on account of back, shoulder, and rib injuries. On September 10, 1982, surgery was performed on plaintiff's right shoulder. Plaintiff has not worked since that time.

On January 14, 1983, plaintiff filed an action in the Workers' Compensation Court. On August 3, 1983, on rehearing, that court found plaintiff was temporarily totally disabled and would remain so for an indefinite future time and that plaintiff was entitled to such vocational rehabilitation services as were necessary to restore him to suitable employment. No appeal was taken from this order.

On January 27, 1984, a counselor in the division of rehabilitation services of the Nebraska Department of Education summarized plaintiff's physical and academic limitations:

> [B]ased on the fact that John [plaintiff] has little if any transferable skills, and the fact that a formal training program would seem to be unfeasible for John based on his abilities academic-wise, it would appear as though competitive employment with another company or place of business would not be appropriate at this time.

Plaintiff was 49 years old at this time and had a seventh grade education. After this report, plaintiff sought no further vocational rehabilitation.

On June 18, 1986, defendants filed a petition for modification alleging that "Plaintiff's doctors have now given

their opinion that the Plaintiff should have vocational rehabilitation" and praying that "the Court order that the Plaintiff is a candidate for vocational rehabilitation and that the Plaintiff is to cooperate in a vocational rehabilitation program."

After the denial of defendants' modification petition, the petition came on for rehearing before the compensation court, and on March 23, 1987, the court found: "The weight of the evidence clearly favors the conclusions that (1) no substantial prospect exists at this time that the plaintiff can be successfully rehabilitated vocationally and (2) until such time as plaintiff's condition improves significantly, it would be futile for him to undertake vocational retraining." The court dismissed defendants' petition for modification. Defendants timely appealed.

In this court, defendants, in their three assignments of error, contend that the evidence does not support the order of the compensation court. We affirm.

At the rehearing, the January 27, 1984, report of the counselor of the state division of rehabilitation services, referred to above, was received in evidence without objection. That report stated:

> It appears, from the vocational evaluation and the medical reports, that John is definitely physically limited and that he should avoid prolonged standing, excessive bending, stooping, crouching or twisting. Our medical consultant felt that he should not be lifting continually things over 20 pounds. Also, excessive reaching, pulling, shoving or jerking or any type of pushing with his right shoulder would cause John problems. In taking a look at his transferable skills, it doesn't appear at this point that John has any, due to the nature of the kind of work he has done in the past. The college qualification test that was given to John, as well as the Able III test and the GATB test would all indicate that further schooling for John would not be feasible. John probably would not be able to pass the entrance exam to consider further schooling, even at a community college level. Therefore, based on the fact that John has little if any transferable skills, and the fact

> that a formal training program would seem to be unfeasible for John based on his abilities academic-wise, it would appear as though competitive employment with another company or place of business would not be appropriate at this time.

In their reply brief at 4, defendants state, "If the component of 'pain' and its limiting effect is deleted from the plaintiff's physical condition in 1983, it is true that the plaintiff's physical limitations between 1983 and 1987 are the same."

We first note that, in a review of a workers' compensation case, the findings of fact by the Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong. *Bender v. Norfolk Iron & Metal Co.*, 224 Neb. 706, 400 N.W.2d 859 (1987). Whether an injured worker is entitled to vocational rehabilitation is ordinarily a question of fact to be determined by the Workers' Compensation Court. *Hewson v. Stevenson*, 225 Neb. 254, 404 N.W.2d 35 (1987). The right of an injured worker to vocational rehabilitation depends upon his inability to perform work for which he has previous training and experience. *Smith v. Hastings Irr. Pipe Co.*, 222 Neb. 663, 386 N.W.2d 9 (1986).

Without regard to the pain aspect, defendants admit that the medical evidence presented in 1987 at the rehearing on defendants' petition to modify is, in effect, the same as that presented which supported the compensation court's findings in 1983. That evidence sets out plaintiff's physical limitations and supported the compensation court's 1983 findings. Defendants did not appeal from that 1983 order.

With regard to the aspect of pain, plaintiff testified that the pain still existed at the time of the 1987 rehearing, although other evidence indicates it was not to the same extent as in 1983. The testimony presented at the 1987 rehearing on behalf of plaintiff, if believed, fully supports the findings of the compensation court. The judgment is affirmed.

Plaintiff is awarded the sum of $1,500 for the services of his attorney in this court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES G. DALY, APPELLANT.

418 N.W.2d 767

Filed February 12, 1988. No. 87-656.

1. **Criminal Law: Motions for New Trial: Verdicts: Time.** A motion for new trial in a criminal case, except for newly discovered evidence, must be filed within 10 days after the verdict was rendered, unless unavoidably prevented.
2. _____: _____: _____: _____. A motion for new trial in a criminal case must be filed within 10 days after the verdict is rendered, not within 10 days from the date of sentencing, unless the verdict and sentencing occur on the same day.
3. **Convictions: Pleas: Motions for New Trial: Verdicts: Time.** When a guilty plea is accepted and the court enters a judgment of conviction thereon, it constitutes a verdict of conviction. The motion for new trial must be filed within 10 days thereafter.
4. **Evidence: Words and Phrases.** Generally, newly discovered evidence is evidence material to the defense which could not with reasonable diligence have been discovered and produced at the trial.

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

Richard J. Bruckner, for appellant.

Robert M. Spire, Attorney General, and Royce N. Harper, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, AND FAHRNBRUCH, JJ.

PER CURIAM.

The defendant was originally charged with first degree assault and felony child abuse. On March 6, 1987, an amended information was filed, alleging two counts of misdemeanor child abuse, negligently causing or permitting a minor child to be placed in a situation that endangered her life or health. Neb. Rev. Stat. § 28-707(1) (Reissue 1985).

On the same day, the defendant entered a plea of guilty to each count and was adjudged guilty on each count.

On May 21, 1987, the defendant was sentenced to imprisonment for 1 year on each count, the sentences to run concurrently, and was given credit for 4 days jail time. On the same day the defendant filed a notice of appeal to this court. That appeal was docketed as No. 87-480.

On June 19, 1987, the defendant filed a stipulation in this

court that the appeal be dismissed as premature. The stipulation was allowed; the appeal was dismissed; and on June 24, a mandate was issued.

On May 22, 1987, the day after the notice of appeal to this court was filed, the defendant filed a motion for new trial in the district court. Neb. Rev. Stat. § 29-2103 (Reissue 1985) requires that a motion for new trial in a criminal case, except for newly discovered evidence, "be filed within ten days after the verdict was rendered unless unavoidably prevented."

A motion for new trial must be filed within 10 days after the verdict is rendered, not within 10 days from the date of sentencing, unless the verdict and sentencing occur on the same day. *State v. Betts*, 196 Neb. 572, 244 N.W.2d 195 (1976). When a guilty plea is accepted and the court enters a judgment of conviction thereon, it constitutes a verdict of conviction. The motion for new trial must be filed within 10 days thereafter. *State v. Beans*, 199 Neb. 807, 261 N.W.2d 749 (1978); *State v. Betts, supra.*

Since the defendant was found guilty on March 6, 1987, the motion for new trial filed on May 22 was out of time and a nullity. *State v. Betts, supra.*

On July 10, 1987, a second motion for new trial was filed, but this motion was later withdrawn.

On July 13, 1987, the defendant filed a third motion for new trial, alleging that during the sentencing hearing on May 21, evidence was discovered which led to the "newly discovered evidence set forth in exhibits 1, 2, 3 and 4 . . . ." Exhibits 1 and 3 were affidavits of defendant's counsel; exhibit 2 was an affidavit of the defendant; and exhibit 4 was a transcript of the sentencing hearing on May 21.

This July 13 motion was overruled on July 17, 1987. A notice of appeal was filed the same day. This appeal, which is from the order of July 17, is docketed in this court as case No. 87-656.

The defendant's assignments of error on this appeal relate to the sentencing, which took place on May 21, 1987. The defendant contends that the trial court was improperly influenced by a conversation with a psychiatrist who had been treating the defendant; by the defendant's refusal to take a polygraph test prior to sentencing; and by observing color

photographs of the injured child, which the defendant claims were not available to him prior to sentencing. We reach none of these matters, because the defendant has presented no newly discovered evidence which could be the basis for an order granting a new trial for newly discovered evidence.

The trial court's conversation with the psychiatrist related to the reason the defendant had refused a polygraph test. Previously, the defendant or his counsel had informed the trial court that the defendant had refused the polygraph test on the advice of the psychiatrist. At the time of sentencing the defendant had all of the information that was later presented to the trial court in the form of affidavits at the hearing on July 17, 1987. So far as the polygraph test itself is concerned, the trial court stated that the defendant was not being penalized for refusing to take a polygraph test, because the court recognized that he had a right to refuse to submit to such a test, and that the refusal did not influence the sentencing.

The photographs referred to had been in the possession of the Bellevue Police Department, were obtained by the trial court on the day before the sentencing, and were made a part of the presentence report.

All of the foregoing matters were known to the defendant at the time of sentencing and do not constitute newly discovered evidence within the meaning of the statute. Generally, newly discovered evidence is evidence material to the defense which could not with reasonable diligence have been discovered and produced at the trial. *State v. Munson*, 204 Neb. 814, 285 N.W.2d 703 (1979).

If the defendant wanted to claim surprise and obtain leave to present additional information to the trial court before sentencing, his remedy was to request a continuance at the sentencing hearing and make a showing in the record as to the reason the continuance was requested. No continuance was requested.

There being no error, the judgment is affirmed.

AFFIRMED.

OSMOND STATE BANK, A NEBRASKA BANKING CORPORATION, APPELLEE, V. UECKER GRAIN, INC., A NEBRASKA CORPORATION, APPELLANT.

419 N.W.2d 518

Filed February 19, 1988. No. 86-094.

1. **Appeal and Error.** An appellee may not question a portion of a judgment at issue on appeal in the absence of the appellee's having properly filed a cross-appeal.
2. _____. In reviewing an action at law tried without a jury, it is not the role of the Supreme Court to resolve conflicts in or reweigh the evidence. Rather, the court presumes that the trial judge resolved any controverted facts in favor of the successful party. This court will also consider the evidence and the permissible inferences therefrom most favorably to the successful party. Moreover, in such actions the findings and conclusions of the trial judge have the effect of a jury verdict and will not be set aside unless clearly wrong.
3. **Contracts: Parties.** A third-party beneficiary's rights depend upon, and are measured by, the terms of the contract between the promisor and promisee. The right of a third party benefited by a contract to sue thereon rests upon the liability of the promisor, which must affirmatively appear from the language of the instrument when properly interpreted or construed; and the liability so appearing cannot be extended or enlarged on the ground alone that the situation and circumstances of the parties justify or demand further or other liability.
4. **Contracts: Intent.** If a written contract is expressed in unambiguous language, it is not subject to interpretation and construction, and the intention of the parties must be determined from the contents of the contract document.

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

Lynn D. Hutton, Jr., of Hutton and Freese, for appellant.

Bruce D. Curtiss of Curtiss Law Office, for appellee.

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

FAHRNBRUCH, J.

This law action arose out of defendant-appellant, Uecker Grain, Inc.'s, failure to pay the full sale price for PIK corn sold to Uecker Grain by the plaintiff-appellee, Osmond State Bank. After a bench trial, the district court divided the disputed amount of $9,064.03 as follows: Osmond State Bank, $5,763.30; and Uecker Grain, $3,300.73. We affirm.

Uecker Grain claims that the trial court erred in failing to find (1) that the parties had an oral agreement for Uecker Grain

to be paid for all feed and supplies furnished by it to one Elvin Krohn; and (2) that Uecker Grain was a third-party beneficiary creditor under written agreements between the bank and Krohn. The assignments will be discussed in inverse order.

Osmond State Bank claims in its brief that it is entitled to all of the disputed funds. The bank did not cross-appeal, and its claim will not be considered. "[A]n appellee may not question a portion of a judgment at issue on appeal in the absence of [the appellee's] having properly filed a cross-appeal." *Wittwer v. Dorland*, 198 Neb. 361, 366, 253 N.W.2d 26, 29 (1977). See, also, *Wellman v. Birkel*, 220 Neb. 1, 367 N.W.2d 716 (1985).

In reviewing an action at law tried without a jury, it is not the role of the Supreme Court to resolve conflicts in or reweigh the evidence. Rather, the court presumes that the trial judge resolved any controverted facts in favor of the successful party. This court will also consider the evidence and the permissible inferences therefrom most favorably to the successful party. Moreover, in such actions the findings and conclusions of the trial judge have the effect of a jury verdict and will not be set aside unless clearly wrong. *Caeli Assoc. v. Firestone Tire & Rubber Co.*, 226 Neb. 752, 415 N.W.2d 116 (1987); *Third Party Software v. Tesar Meats*, 226 Neb. 628, 414 N.W.2d 244 (1987); *Washington Heights Co. v. Frazier*, 226 Neb. 127, 409 N.W.2d 612 (1987); *Kimberling v. Omaha Public Power Dist.*, 225 Neb. 744, 408 N.W.2d 269 (1987).

The operative facts in this case emanated from Elvin Krohn's unfortunate financial situation in the fall of 1982. For years, Krohn charged grain, seed, fertilizer, and other items for his farm operation on an open account with Uecker Grain. Any balance owing in the fall of the year was paid from that fall's harvest. Additional operating funds were supplied through loans from Osmond State Bank. The bank held a security interest in growing crops and livestock. In 1982 and 1983 Krohn also had an indebtedness with the Farmers Home Administration, but that is not material to this action.

As of March 11, 1983, when Krohn applied to the Osmond State Bank for operational funds for the 1983 crop-year, Krohn owed the bank approximately $64,000 and Uecker Grain between $5,300 and $5,400. The Osmond bank was reluctant to

loan Krohn any further money. In a March 11, 1983, letter to the bank, Krohn proposed to borrow operational funds for the 1983 crop-year under certain conditions. James Stratton, president of the Osmond State Bank, verbally discussed Krohn's plight with him. On March 24, 1983, Stratton sent a letter to Krohn in which the bank conditionally agreed to loan Krohn $6,750 so Krohn could plant soybeans and alfalfa, buy hail insurance, and maintain other parts of the farm free from weeds. To obtain the loan, Krohn had to agree to sell certain livestock, 3,000 bushels of corn, and some farm equipment, all of which was located on the farm. It was anticipated that the items would bring $38,375. From the sale proceeds, Uecker Grain was to be paid $5,284, and other creditors were to be paid an aggregate sum of $10,037. The balance of the proceeds was to be applied to Krohn's loan with Osmond State Bank, which would reduce that item to approximately $41,000.

Krohn had failed to pay the balance of his Uecker Grain account in the fall of 1982. However, Uecker Grain continued to extend credit to Krohn through June 30, 1983, when Krohn's credit was terminated. From the proceeds of the sale of part of the items listed in the bank's letter of March 24, 1983, Krohn paid Uecker Grain $1,500 on July 29, 1983. Thereafter, Uecker Grain again extended credit to Krohn.

Meanwhile, sometime prior to March 11, 1983, Krohn signed up to participate in the U.S. Department of Agriculture's payment-in-kind program (PIK). By meeting the terms of that program, Krohn was entitled to receive 7,873 bushels of corn from USDA for not planting a crop on part of his farm. Uecker Grain was designated as the holding elevator for the PIK corn Krohn was to receive. On May 6, 1983, Krohn went to the Agricultural Stabilization and Conservation Service office and, in writing, assigned his PIK corn entitlement to Osmond State Bank. The bank accepted the assignment on May 9, 1983, by countersigning the assignment document at the ASCS office.

On March 12, 1984, Osmond State Bank, through its president, presented the assignment to Uecker Grain and sold the PIK corn involved for $23,540.27. On March 22, 1984, when Stratton, on behalf of Osmond State Bank, appeared at Uecker Grain to collect the sale price from Uecker Grain, he

was handed a check for $14,476.24, which he declined to accept. Glenn Uecker, president of Uecker Grain, testified that $9,064.03 of the sale price was withheld in satisfaction of Krohn's account with Uecker Grain. Subsequently, by stipulation, the $14,476.24 check was accepted by the bank without prejudice to its claim for the balance of the sale price.

Under its second assignment of error, Uecker Grain claims that the letters between Krohn and Osmond State Bank constituted a contract.

Uecker Grain further claims that it was a third-party beneficiary creditor under that contract and, therefore, had the right to retain the $9,064.03 from the PIK corn sale to satisfy Krohn's account.

To resolve this case, we need not determine whether the letters constituted a contract or whether Uecker Grain was a third-party beneficiary. Assuming arguendo that the letters between Krohn and Osmond State Bank did constitute a contract and that Uecker Grain was a third-party beneficiary, Uecker Grain still was not entitled to retain $9,064.03 from the PIK corn sale. Both letters specifically limited payment of Krohn's account with Uecker Grain to proceeds of the sale of corn, livestock, and farm equipment *located on Krohn's farm*. Those terms could not be extended or enlarged.

> "A third-party beneficiary's rights depend upon, and are measured by, the terms of the contract between the promisor and promisee. The right of a third party benefited by a contract to sue thereon rests upon the liability of the promisor, which must affirmatively appear from the language of the instrument when properly interpreted or construed; and the liability so appearing cannot be extended or enlarged on the ground alone that the situation and circumstances of the parties justify or demand further or other liability. . . ."

Haakinson & Beaty Co. v. Inland Ins. Co., 216 Neb. 426, 431, 344 N.W.2d 454, 458 (1984). See, also, *Dealers Electrical Supply v. United States F. & G. Co.*, 199 Neb. 269, 258 N.W.2d 131 (1977).

The intent of both Krohn and Osmond State Bank, as drawn from the unambiguous language of the letters, was to pay

Uecker Grain only with the proceeds of the sale of corn, livestock, and farm equipment *on the farm*. Since the language of the letters is unambiguous, neither Krohn's nor Stratton's parol evidence of intent can be considered. "[I]f a written contract is expressed in unambiguous language, it is not subject to interpretation and construction, and the intention of the parties must be determined from the contents of the contract document." *Washington Heights Co. v. Frazier*, 226 Neb. 127, 133-34, 409 N.W.2d 612, 616 (1987); *Clemens Mobile Homes, Inc. v. Anderson*, 206 Neb. 58, 291 N.W.2d 238 (1980).

Uecker Grain's second assignment of error is without merit.

In its first assignment of error, Uecker Grain claims that it and Osmond State Bank entered into an oral agreement that Uecker Grain would be paid for all feed and supplies furnished by Uecker Grain to Krohn. The trial court allowed Uecker Grain to keep $3,300.73 of the PIK entitlement funds. This was for corn purchased on credit from Uecker Grain by Krohn after October 11, 1983. That ruling was based upon the trial court's finding that there was an oral agreement between Uecker Grain and the Osmond State Bank wherein Uecker Grain was to extend credit to Krohn upon the bank's promise to pay for the corn from the PIK entitlement. The court noted that the bank held a security interest on the cows that consumed the corn. Since Osmond State Bank did not file a cross-appeal, we need not consider the correctness of the trial court's rulings in regard to the $3,300.73 awarded Uecker Grain.

The trial court found no other oral agreement between Uecker Grain and the Osmond State Bank. Having carefully reviewed the record, we cannot say that the trial judge's finding in that regard is clearly wrong.

The judgment of the trial court is affirmed in all respects.

AFFIRMED.

IN RE ESTATE OF LEONARD E. RITTER, DECEASED. VIRGINIA RITTER TETEN, APPELLEE, V. LULA C. L. RITTER, PERSONAL REPRESENTATIVE OF THE ESTATE OF LEONARD E. RITTER, DECEASED, APPELLANT.

419 N.W.2d 521

Filed February 19, 1988. No. 86-144.

1. **Decedents' Estates: Wills: Intent.** The cardinal rule concerning a decedent's will is the requirement that the intention of the testator or testatrix 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.
2. _____: _____: _____. To arrive at a testator's or testatrix's intention expressed in a will, a court must examine the decedent's will in its entirety, consider and liberally interpret every provision in a 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.
3. **Wills.** When language in a will is clear and unambiguous, construction of a will is unnecessary and impermissible. As a corollary of this rule, when ambiguity exists in a testamentary provision, construction of a will is necessary.
4. **Wills: Words and Phrases.** Ambiguity exists in an instrument, including a will, when a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable interpretations or meanings.
5. **Appeal and Error.** Regarding a question of law, the Supreme Court has an obligation to reach its conclusion independent from the conclusion reached by a court whose judgment is the subject of review.

Appeal from the District Court for Otoe County: RAYMOND J. CASE, Judge. Reversed and remanded with direction.

Harvey A. Neumeister and Kent J. Neumeister, and Donald R. Witt of Baylor, Evnen, Curtiss, Grimit & Witt, for appellant.

Otto H. Wellensiek of Wellensiek, Rehmeier & Kelch, for appellee.

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

SHANAHAN, J.

This appeal involves construction of a will concerning the testator's devise of a remainder. In his will admitted to probate in the county court for Otoe County, Leonard E. Ritter specified:

SECOND

It is my Will, wish and desire and I hereby devise and bequeath all of my personal property, of whatever nature, wheresoever situated, to my wife, Lula C. L. Ritter, to be hers absolutely and forever and if my wife, Lula C. L. Ritter predeceases me, then, it is my Will, wish and desire, and I give and bequeath all of the personal property, I may own at the time of my death, wheresoever situated, of whatever nature, to my child and daughter, Virginia Ritter Teten, and if Virginia Ritter Teten, shall predecease me, then to her child or children by right of representation under the laws of the State of Nebraska.

It is further my Will, wish and desire and I hereby give and devise to my wife, Lula C. L. Ritter, a life estate in the Southeast Quarter (SE1/4) of Section Eighteen (18), Township Seven (7), Range Thirteen (13), Otoe County, Nebraska, she to receive the income from all of such above described real estate for and during her lifetime, she to pay taxes thereon, and to pay insurance on the buildings and reasonably maintain them during her lifetime, and upon the death of my wife, Lula C. L. Ritter, I give and devise all of said above described real estate to my child and daughter Virginia Ritter Teten, and if the said Virginia Ritter Teten shall predecease me, then to her child or children by right of representation under the Laws of the State of Nebraska, however within eight months of my death, and I designate eight months so that such time is within the period of nine months if for any reason my daughter Virginia Ritter Teten may decide to disclaim her interest, I direct that my daughter Virginia Ritter Teten pay over to my wife Lula C. L. Ritter, absolutely the sum of Seventy-Thousand Dollars ($70,000.00) within said eight months of my death, and I expect that said $70,000.00 be considered as part of or as is necessary to figure the benefit of marital deduction, the said sum of $70,000.00 to be a lien on said above described real estate. I make the provision that the said payment of the sum of $70,000.00 be and is a lien on said above described real estate from the time of my death until paid.

Further I Will, that if my daughter Virginia Ritter Teten predeceases me, or if she disclaims, then all the provisions, obligations and conditions that I set forth above as to Virginia Ritter Teten paying the $70,000.00, as to the time and lien provisions, all apply to her child or children that take by right of representation under the Laws of the State of Nebraska.

I am aware that I do not have much cash or such property which my wife, Lula C. L. Ritter, can use to pay expenses upon my death or use for her proper living; that as a result of my illness, I have needed to use much of our cash reserve, but that yet I do desire to save the farm real estate above described for my daughter Virginia Ritter Teten, so I provide for this sum of $70,000.00 for my wife Lula C. L. Ritter, and likewise as I mentioned it is to be part of and figured as part of marital deduction of my estate and for her benefit.

As I provided I made the provision that the said payment of and said sum of said $70,000.00 be and is a lien on said above described real estate from the time of my death until paid within eight months, but if said sum is not paid to Lula C. L. Ritter within the said period of eight months from the date of my death, then said life estate as I provided for my wife Lula C. L. Ritter is null and void, and the remainder interest as I also provided for my daughter Virginia Ritter Teten, and the payment of the $70,000.00 as above provided, is all null and void, in other words all the above I have set forth as to the real estate described above, the Southeast Quarter (SE1/4) of Section Eighteen (18), Township Seven (7), Range Thirteen (13), Otoe County, Nebraska, is all null and void and it is then my Will, and I so devise said above described real estate to my wife Lula C. L. Ritter, absolutely, and if Lula C. L. Ritter shall predecease me then I give said real estate described as the Southeast Quarter (SE1/4) of Section Eighteen (18), Township Seven (7), Range Thirteen (13), Otoe County, Nebraska, to my child and daughter Virginia Ritter Teten, and if the said Virginia Ritter Teten shall also predecease me, then to her child or children by

> right of representation under the Laws of the State of Nebraska.
>
> . . . .
>
> FOURTH
>
> As I said before, I am aware of the limited amount of cash in my estate, that I desire ever so much to save the real estate described as the farm for my daughter Virginia Ritter Teten, and if Virginia Ritter Teten cooperates and carries through as I set forth in detail as to payment of the $70,000.00 it would aid considerably.

Surviving Leonard Ritter were his widow, Lula C.L. Ritter, who was also the personal representative of Leonard's estate, and his daughter, Virginia Ritter Teten. Lula and Virginia jointly petitioned the county court for construction of part "SECOND" of Leonard's will. Lula contended that Leonard devised to her a life estate with a remainder to Virginia "if Virginia Ritter Teten or her successors by disclaimer paid the sum of $70,000 to Lula C. L. Ritter and in the event the payment was not made that Lula C. L. Ritter would have title in fee simple absolute" to the subject real estate. Virginia claimed that Leonard devised a life estate to Lula in the subject real estate with the remainder to Virginia irrespective of any $70,000 payment to Lula.

The county court decreed that Leonard had devised the subject real estate in fee simple to Lula, unless Virginia or, if Virginia disclaimed, her children paid Lula $70,000 within 8 months after Leonard's death, which payment would thereupon result in a life estate for Lula with the remainder in Virginia or, if Virginia disclaimed, in her children.

Virginia appealed to the district court, which reversed the county court's judgment and entered judgment in accordance with the construction advocated by her, that is, Leonard Ritter had devised a life estate to Lula with the remainder to Virginia, or her children if Virginia predeceased Leonard.

> The cardinal rule concerning a decedent's will is the requirement that the intention of the testator or testatrix 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. [Citations omitted.] To arrive at a testator's or testatrix's intention expressed in a will, a court must examine the decedent's will in its entirety, consider and liberally interpret every provision in a 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. [Citations omitted.]
>
> When language in a will is clear and unambiguous, construction of a will is unnecessary and impermissible. [Citations omitted.] As a corollary of the immediately preceding rule, when ambiguity exists in a testamentary provision, construction of a will is necessary. Ambiguity exists in an instrument, including a will, when a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable interpretations or meanings. [Citations omitted.] A patent ambiguity is one which exists on the face of an instrument. [Citations omitted.] *Construction* includes the process of determining the correct sense, real meaning, or proper explanation of an ambiguous term, phrase, or provision in a written instrument. [Citation omitted.] When patent ambiguity exists in a will, a court must resolve such ambiguity as a matter of law. [Citation omitted.] . . . Regarding a question of law, the Supreme Court has an obligation to reach its conclusion independent from the conclusion reached by a court whose judgment is the subject of review. [Citation omitted.]

(Emphasis in original.) *In re Estate of Walker*, 224 Neb. 812, 818-19, 402 N.W.2d 251, 256 (1987).

The intent of Leonard Ritter leaps from the face of his will into the face of the reader for immediate recognition. Parts "SECOND" and "FOURTH" of Leonard Ritter's will contain provisions and language which clearly and unambiguously express the testator's intent, so that judicial construction is unnecessary.

On account of illness, Leonard Ritter had to use the "cash reserve" accumulated by Lula and himself. That reduction in his estate's liquidity presented a problem for Leonard, who was

concerned with Lula's well-being and maintenance as well as the expenses of his estate and death tax liability. One means to assure some liquidity and funds for Lula was the contingent remainder, that is, a remainder to Virginia and her children, as the case might be, in the event that the person(s) seeking realization of the remainder paid $70,000. If the potential remainder were not realized as a result of the payment of $70,000, Lula, nevertheless, retained fee simple title to the real estate, which would otherwise have been subject to the remainder, an unfettered asset which might be liquidated as Lula's and the estate's needs or liabilities required.

The county court's judgment is correct, and the district court's judgment incorrect. Therefore, we reverse the judgment of the district court and remand this matter to the district court with directions to reinstate and affirm the judgment of the county court.

REVERSED AND REMANDED WITH DIRECTION.

STATE OF NEBRASKA, APPELLEE, V. CHERYL A. SOCK, APPELLANT.

419 N.W.2d 525

Filed February 19, 1988. No. 87-323.

1. **Criminal Law: Pretrial Procedure: Motions to Suppress: Appeal and Error.** In a criminal trial, after a pretrial hearing and order overruling a defendant's motion to suppress evidence, the defendant must object at trial to admission of the evidence which was the subject of the motion to suppress in order to preserve a question concerning admissibility of that evidence for review on appeal.
2. **Criminal Law: Courts: Appeal and Error.** In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeal, and, as such, its review is limited to an examination of the county court record for error or abuse of discretion.
3. **Sentences: Courts: Appeal and Error.** A district court may modify a sentence imposed by a county court only where the county court has so abused its discretion as to render its sentence an error upon the record presented.

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

James R. Mowbray of Mowbray, Chapin & Walker, P.C., for appellant.

Norman Langemach, Jr., Lincoln City Prosecutor, for appellee.

BOSLAUGH, CAPORALE, and GRANT, JJ., and MULLEN, D.J., and COLWELL, D.J., Retired.

COLWELL, D.J., Retired.

Defendant was convicted in the county court for Lancaster County of driving while intoxicated (DWI); she was sentenced to a 6-month term of probation. Upon appeal to the district court, her conviction was affirmed, and her term of probation was extended from 6 months to 1 year. Defendant appeals, assigning two errors: (1) The district court should have found that the county court erred in denying defendant's motion to suppress; and (2) the district court erred in extending her term of probation. We affirm as modified.

Since defendant does not challenge the sufficiency of the evidence proving the State's case, the facts are briefly stated.

About 12:10 a.m. on September 25, 1986, defendant, Cheryl A. Sock, was stopped by Lincoln Police Officer Patrick L. McGuire in downtown Lincoln, when defendant drove a vehicle through a red traffic light signal. Officer McGuire detected evidence of defendant's intoxication, placed her under arrest for DWI, and transported her to the county-city building, where an Intoxilyzer Model 4011AS test was performed which registered .184 percent by weight to volume of alcohol in defendant's body fluids.

At a pretrial motion to suppress hearing on January 7, 1987, there was a close evidentiary question as to probable cause; however, the motion was denied. Prior to the trial that immediately followed, Sock's counsel informed the court, "If we go beyond the motion to suppress, we're gonna be stipulating to the test and only then take evidence as to opinion evidence from the State's witness as well as our witnesses."

At the trial, Officer McGuire testified without objection to most of the facts covered in the suppression hearing, and, in addition, that there was a strong smell of alcohol about

defendant, her eyes were bloodshot and watery, her voice was slurred, she was unsteady on her feet, and, in his opinion, defendant was under the influence of alcoholic beverage at the time of her arrest. Counsel also stipulated

> that if Officer McGuire were asked to testify to these matters that he would in fact testify that he has been properly trained and qualified and has a permit to obtain a sample of breath on an Intoxilyzer 4011AS and that he, in fact, used that machine on September 25, 1986, tested the breath of the defendant. And that the test result properly conducted under the rules of the State of Nebraska the test result was .184 percent by weight to volume of alcohol in the defendant's body fluids.

The first assignment presents the narrow issue wherein defendant relies on *State v. Van Ackeren*, 200 Neb. 812, 265 N.W.2d 675 (1978), holding that the denial of a motion to suppress (search and seizure issue) may be preserved on appeal without either renewing the motion or objecting to the evidence at the trial. That rule was changed in *State v. Roggenkamp*, 224 Neb. 914, 402 N.W.2d 682 (1987), which was released after the trial in the case at bar, holding:

> In a criminal trial, after a pretrial hearing and order overruling a defendant's motion to suppress evidence, the defendant must object at trial to admission of the evidence which was the subject of the motion to suppress in order to preserve a question concerning admissibility of that evidence for review on appeal.

(Syllabus of the court.) See, also, *State v. Pointer*, 224 Neb. 892, 402 N.W.2d 268 (1987) (motion to suppress statement).

Defendant's failure to object at trial to the reception of the evidence offered at the pretrial suppression hearing was a waiver and a failure to preserve the county court's denial of her motion as an issue upon appeal.

There is merit to defendant's second assignment. A judgment imposing reasonable terms of probation is a sentence. Neb. Rev. Stat. § 29-2262 (Reissue 1985). Those terms of probation may thereafter be terminated, modified, or extended under lawful limits by the trial court. Neb. Rev. Stat. § 29-2263 (Reissue 1985). Upon appeal, "the district court shall review the

case for error appearing on the record made in the county court [and] may affirm, affirm but modify, or reverse the judgment or final order of the county court . . . ." Neb. Rev. Stat. § 24-541.06 (Reissue 1985).

In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeal, and, as such, its review is limited to an examination of the county court record for error or abuse of discretion. *State v. Thompson*, 224 Neb. 922, 402 N.W.2d 271 (1987).

"A district court may modify a sentence imposed by a county court only where the county court has so abused its discretion as to render its sentence an error upon the record presented." *State v. Schott*, 222 Neb. 456, 464, 384 N.W.2d 620, 626 (1986).

The record here fails to show either error or abuse of discretion by the county court. It was error for the district court to modify the probation order by extending the probation term from 6 months to 1 year, and that part of the district court's judgment is set aside. The original 6-month term of probation as ordered by the county court is reinstated.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. CHARLES W. BABCOCK, APPELLANT.

419 N.W.2d 527

Filed February 19, 1988. No. 87-427.

1. **Drunk Driving: Proof: Blood, Breath, and Urine Tests.** An alcohol violation in Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1986) may be proved in either one of two ways: (1) that a person operated or was in actual physical control of a motor vehicle while under the influence of alcoholic liquor; *or* (2) that a person while driving a motor vehicle or who was in physical control of a motor vehicle had ten-hundredths of 1 percent or more by weight of alcohol in his/her body fluid as shown by chemical analysis of his/her blood, breath, or urine.
2. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact. The

verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.

3. **Blood, Breath, and Urine Tests.** A reading of the test results from an Intoxilyzer Model 4011AS is not to be adjusted automatically as a matter of law. Whether an adjustment is required is dependent upon the credible evidence in each case.
4. **Right to Counsel.** It is not necessary for a court to explain defendant's right to counsel when the defendant is represented by counsel.

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

Michael F. Gutowski, for appellant.

Gary P. Bucchino, Omaha City Prosecutor, for appellee.

HASTINGS, C.J., WHITE, SHANAHAN, and FAHRNBRUCH, JJ., and HANNON, D.J.

FAHRNBRUCH, J.

Defendant, Charles W. Babcock, after a Douglas County Court bench trial, was found guilty of driving a motor vehicle while under the influence of alcohol, second offense, in violation of Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1986). On appeal, the conviction and sentence were affirmed by the district court. We also affirm the conviction and sentence.

In substance, the defendant complains: (1) There was insufficient evidence to convict him; (2) the trial court erred in admitting the State's rebuttal testimony; and (3) the trial court erred in ruling that the defendant had previously been convicted of a like offense. We affirm.

An alcohol violation in § 39-669.07 may be proved in either one of two ways: (1) that a person operated or was in actual physical control of a motor vehicle while under the influence of alcoholic liquor; *or* (2) that a person while driving a motor vehicle or who was in physical control of a motor vehicle had ten-hundredths of 1 percent or more by weight of alcohol in his/her body fluid as shown by chemical analysis of his/her blood, breath, or urine. *State v. Burling*, 224 Neb. 725, 400 N.W.2d 872 (1987); *State v. Tomes*, 218 Neb. 148, 352 N.W.2d 608 (1984).

In reviewing the sufficiency of evidence in a case of this nature, we have said:

> " '[I]t is not the province of this court to resolve conflicts in the evidence, pass on credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact. The verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. . . .' "

State v. Thomte, 226 Neb. 659, 665, 413 N.W.2d 916, 920 (1987); *State v. Richter*, 225 Neb. 871, 408 N.W.2d 324 (1987); *State v. Hvistendahl*, 225 Neb. 315, 405 N.W.2d 273 (1987).

There is evidence in this case from which the trial court could find beyond a reasonable doubt that defendant operated his motor vehicle while under the influence of alcoholic liquor.

On November 21, 1986, two police officers in a single cruiser began following a white pickup truck after it was observed to have a defective taillight lens. At the time, the truck was being driven by the defendant north on 85th Street in Omaha, Douglas County, Nebraska. Some distance north of Blondo Street, 85th Street merges into 88th Street. The street has one lane for northbound traffic and one lane for southbound traffic. As the truck and cruiser proceeded north, the truck swerved over the centerline six times, causing at least one oncoming car to take evasive action to avoid a collision. Shortly thereafter, the truck turned right into a Denny's restaurant driveway, and, in so doing, the right rear wheel of the truck hit the street curb. The defendant utilized two parking stalls in parking his truck.

When one of the officers asked the defendant for his driver's license, vehicle registration, and insurance card, the defendant took out his billfold, fumbled for quite a long time to find his driver's license, and could not find his vehicle registration. Later, after the defendant was arrested, the officer found the vehicle registration in the glove compartment of the truck. No insurance card was ever produced or found. The officer testified that when he contacted the defendant there was a moderate to strong odor of alcoholic beverage about the defendant, that defendant's eyes were glazed and bloodshot, that defendant's speech was slurred and confused, and that defendant mumbled.

The officer testified that he had to hold on to the defendant

to keep him from falling as the defendant was getting out of his truck. The officer further testified that he had to hold on to defendant while defendant was trying to walk at the scene and, later, at police headquarters. Had the officer not held on to the defendant, the defendant would have fallen, according to the officer. At the scene, the defendant was given an Alco-Sensor test which registered .22 percent. The defendant was then placed under arrest about 9:30 p.m. Defendant was transported to police headquarters, where he performed a finger-to-nose test. With his right hand, defendant was hesitant, but with his left hand, "sure." He was slow in picking up a coin from a table, but did so.

The officer who first observed defendant's truck corroborated the testimony of the arresting officer in most material respects.

The arresting officer, based upon his observations of the defendant for 1 1/2 to 2 hours, and based upon the officer's experience with intoxicated people during nearly 15 years as a policeman, gave his opinion that the defendant was intoxicated and had too much to drink to be driving.

In his testimony, the defendant stated that his walking was impaired due to a hip injury, that his speech was impaired by false teeth, and that his eyes were always bloodshot. The defendant admitted he had a crack in his right taillight lens, but only in that portion which wrapped around to the side of the truck. He testified that his truck was cold, that the windows were frosty, and that "I was keeping it [the truck] on the road." In regard to a near collision with an oncoming car, the defendant testified: "I didn't think it was a near miss, but if they [the officers] said it was, it might have been." The defendant admitted he could have had a total of seven beers at two different establishments prior to 9:30 p.m.

The defendant claims that that part of the officers' testimony describing defendant's physical condition, including his bloodshot eyes, how he walked, and how he spoke, should be disregarded because the officers had not observed the defendant prior to 9:30 p.m., November 21, 1986. His complaint goes to the weight and credibility to be attached to the officers' testimony. As stated in *State v. Thomte*, 226 Neb.

659, 413 N.W.2d 916 (1987), it is not the province of this court to determine either the weight to be given to testimony or the credibility of witnesses.

Defendant's complaint in regard to the sufficiency of the evidence as to whether he was under the influence of alcoholic liquor is without merit.

At the trial, it was stipulated that at the police station defendant was given a breath test on an Intoxilyzer Model 4011AS and that the test reading was .181. It was further stipulated that the testing device was in working order on November 21, 1986, that the defendant was properly tested within the proper time period allowed, and that the machine had been properly maintained and was in good operating condition at the time of the test. The test was administered at 10:17 p.m. The evidence reflects that the defendant was arrested about 9:30 p.m.

In support of his claim that there was insufficient evidence that he had ten-hundredths of 1 percent or more by weight of alcohol in his body fluid while driving his truck, the defendant contends (1) that as a matter of law, pursuant to *State v. Burling*, 224 Neb. 725, 400 N.W.2d 872 (1987), the Intoxilyzer reading of .181 in defendant's case should be reduced to 52.38 percent of the test result, thereby lowering the measurement of the amount of alcohol in defendant's breath below the statutory requirement of ten-hundredths of 1 percent; and (2) that due to alcohol's being absorbed by the dental adhesive which was used to secure defendant's false teeth in his mouth, the reading of .181 was in error.

In *State v. Burling, supra*, this court did not intend to, nor did it, rule that as a matter of law a reading of the test results from an Intoxilyzer Model 4011AS should automatically be adjusted. In *State v. Burling, supra; State v. Hvistendahl*, 225 Neb. 315, 405 N.W.2d 273 (1987); and *State v. Bjornsen*, 201 Neb. 709, 271 N.W.2d 839 (1978), this court merely ruled upon evidentiary facts peculiar to each of those cases. Whether an adjustment is required is dependent upon the credible evidence in each case.

The defendant, based upon an experiment, claims that his breath test was inaccurate due to a mixture of alcohol and

dental adhesive remaining in his mouth after he removed his false teeth prior to the breath test. In his experiment, defendant mixed alcohol and dental adhesive. He testified that the alcohol dissipated within a half hour to 45 minutes. In this case, the defendant ingested his last alcoholic drink before he was arrested at 9:30 p.m. The Intoxilyzer test was performed at 10:17 p.m. The experiment had no probative value.

The State, on rebuttal, introduced evidence challenging defendant's experiment. Even if the evidence was improperly admitted, it was harmless error in view of the defendant's evidence relative to the experiment.

Lastly, the defendant complains that the trial court erred in finding that the defendant had previously been convicted of a like offense. At the enhancement hearing, the State introduced an Omaha Municipal Court record certifying that on February 22, 1985, the defendant entered a plea of "no contest" to violating § 39-669.07 (Reissue 1984). He was found guilty, and, on April 18, 1985, defendant was sentenced to 6 months' probation. Defendant argues that the court did not explain during the 1985 hearings that defendant had a right to counsel. The certified record explicitly shows that at the time of the plea and at the time of sentencing in the 1985 case the defendant was represented by counsel. It is not necessary for a trial court to perform a useless act of explaining to a defendant his right to counsel when the defendant is represented by counsel. The defendant's assignment of error is frivolous.

AFFIRMED.

D.S., APPELLANT, V. UNITED CATHOLIC SOCIAL SERVICES OF THE ARCHDIOCESE OF OMAHA, INC., ET AL., APPELLEES.

419 N.W.2d 531

Filed February 19, 1988. No. 87-469.

1. **Habeas Corpus: Child Custody: Appeal and Error.** A decision in a habeas corpus case involving the custody of a child is reviewed by this court de novo on the record. Where the evidence is in irreconcilable conflict, we consider the findings of the trial court.

2. **Motions to Dismiss: Appeal and Error.** 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.
3. **Child Custody: Adoption: Notice.** A relinquishment to a licensed child placement agency is complete when the agency executes its written acceptance. There is no requirement that a copy of the signed acceptance be delivered to the person executing the relinquishment.
4. **Trial.** A court may make any order which justice requires to protect a person from annoyance, embarrassment, oppression, or undue burden or expense, including limitations on the method of discovery.
5. **Trial: Proof.** Control of discovery is a matter of judicial discretion. The burden of showing an abuse of discretion is upon the individual asserting it.
6. _____: _____. A judicial abuse of discretion requires that the ruling of a judge be shown to be clearly untenable, depriving the litigant of a substantial right and denying a just result in the matter submitted for disposition.

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

Warren S. Zweiback of Zweiback, Flaherty, Betterman & Lamberty, P.C., for appellant.

Jeanne A. Weaver of Hotz, Kizer & Wintz, P.C., and John H. Kellogg, Jr., for appellees United Catholic Social Services et al.

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

PER CURIAM.

The plaintiff is a 21-year-old unmarried woman. On August 8, 1986, she gave birth to a son. On August 18, she executed a relinquishment in favor of the United Catholic Social Services of the Archdiocese of Omaha, Inc. (UCSS). The acceptance of the relinquishment was executed the same day and the baby placed for adoption on the following day.

On December 16, 1986, the plaintiff commenced this action for a writ of habeas corpus on the theory that her relinquishment was invalid. The second amended petition, filed April 10, 1987, alleged that the relinquishment was involuntarily given in the presence of threats, coercion, fraud,

and duress, and that a written acceptance was never delivered to the plaintiff.

At the close of the plaintiff's evidence, the defendants moved to dismiss the petition. The trial court found that the relinquishment had been freely and voluntarily signed by the plaintiff; that it had not been obtained by threats, force, or coercion; and that the motion to dismiss should be sustained. The plaintiff has appealed.

The plaintiff's principal assignment of error is that the trial court erred in failing to find that the relinquishment was invalid because it was involuntarily given.

A decision in a habeas corpus case involving the custody of a child is reviewed by this court de novo on the record. Where the evidence is in irreconcilable conflict, we consider the findings of the trial court. *Gaughan v. Gilliam*, 224 Neb. 836, 401 N.W.2d 687 (1987), citing *Auman v. Toomey*, 220 Neb. 70, 368 N.W.2d 459 (1985).

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. See, *First Nat. Bank & Trust Co. v. Hughes*, 214 Neb. 42, 332 N.W.2d 674 (1983); *Gordman Properties Co. v. Board of Equal.*, 225 Neb. 169, 403 N.W.2d 366 (1987). Thus, we review the record to determine whether the evidence, when viewed in the light most favorable to the plaintiff, was not sufficient as a matter of law to sustain a finding that the relinquishment was invalid.

The record shows that the plaintiff was a student at Creighton University on January 15, 1986, when she learned that she was pregnant. On the next day she notified the father, who was a married man with one child. They discussed the possibility of an abortion, and he sent the plaintiff some money to pay for an abortion.

The plaintiff's mother and father lived on a farm near a small town in Iowa. She did not tell her parents that she was pregnant until some days later, when her sister had a medical

appointment in Omaha. By that time she had consulted several doctors, had decided against having an abortion, and had completed plans to transfer to Gonzaga University at Spokane, Washington. The purpose of transferring to Gonzaga was so that students from her home town attending school at Creighton would not learn of her pregnancy.

When the plaintiff told her sister that she was pregnant, her sister shook her head and said, "Oh, my God." The sister, together with her mother, immediately began asking the plaintiff, "What are your plans? What are you going to do now?" The plaintiff told her sister and mother that she had made plans to leave for Gonzaga University and stated, "I have to go; I have to leave." The plaintiff told her sister that she planned to place the baby for adoption. In describing her mother's reaction, the plaintiff stated that "[s]he acted very disgusted with me and she asked me how I could do that and she asked me what I planned to do, how I planned to leave Creighton, how I could screw up my education and stuff like that. . . ."

The following day, the plaintiff left for Gonzaga, where she stayed until May, except for a brief return to Iowa over the spring break in March.

According to the child's father, he maintained contact with the plaintiff while she was at Gonzaga, and the two of them spoke on the telephone about every 10 days. He also stated that the plaintiff asked him for his opinion as to what she should do, "[m]any times." He said that he told the plaintiff that she had to "make up her own mind." He at no time made any physical threats to the plaintiff in regard to the adoption.

During the next few months, the plaintiff told various individuals that she planned to place the baby for adoption. Prior to the break in March, she apparently had conversations with her mother and sister about returning to Iowa for the break. She stated that she wished to spend the break at home but her mother would not allow it because people there would see her and learn of her pregnancy. Together, her mother and sister agreed that if she flew from Spokane to Sioux Falls instead of Omaha, no one would see her and learn of her condition. Her sister agreed to let the plaintiff stay with her and

her family in Spirit Lake, Iowa, if the plaintiff would not "go anywhere" or "do anything," including going home. The sister stated that the reason for "hiding" the plaintiff was so others would not see her and because "[w]e didn't want anybody to know." By "we" she meant the family, and at that time thought the plaintiff felt that way, too. The sister stated that she restricted the plaintiff's activities because "I thought nobody was going to know about this. I think we were trying to protect [the plaintiff] as well as protect ourselves." The plaintiff was not bound or tied in the sister's home over the break, nor were the doors locked when the sister left for work. The sister ultimately stated that everyone, including the plaintiff, was involved in the decision that the plaintiff restrict her "public" activities.

The plaintiff spent the spring break at her sister's house. Her parents visited her there during her stay. During this time the plaintiff told her parents that she was unsure of what she wanted to do with the baby and, for the first time, said that she was considering the idea of keeping the baby herself. In response, her mother said that "the child needs two parents and that these people really wanted this baby and that they would really love the baby." During this time, the plaintiff recalled, her mother told her that she was not a good person and that she had sinned and could probably never become a good person, and that if she kept the baby she would be ruining their life, the baby's life, and everyone's life.

The sister became aware of the plaintiff's ambivalence in placing the child for adoption and stated that she told the plaintiff "I didn't know how she could do that to mom and dad." The sister denied *arguing* with the plaintiff about the matter and characterized their encounters as *discussions*, in which she would tell the plaintiff that she thought it better for the plaintiff not to keep the baby. The sister denied telling the plaintiff anything about what others might think if they were to see her pregnant. According to the plaintiff, the conversations with her sister during the break focused on the humiliation and embarrassment that would inure to the plaintiff and the parents if she decided to keep the baby. The sister admitted taking a side in the debate and urging adoption as the proper choice for the

plaintiff as well as for the sister and the parents, so that no one would be embarrassed. The sister further told the plaintiff that welfare would be an awful choice, that the plaintiff could not go to school and have a baby, and that the plaintiff needed to give the baby two parents.

In addition to speaking with her parents and sister over the break, the plaintiff also spoke with the father of the child, who told her not to keep the child because it would ruin his life once his parents found out. Additionally, he feared losing custody of his son. The plaintiff also visited with an attorney who was a family friend, and who resided in the same town as the sister. At this time, according to the attorney, the plaintiff related that her parents would accept her if she relinquished the child. The plaintiff also stated that it was her perception that if she did not relinquish, her parents would disown her, and she would not be welcome in their home. At this time, the plaintiff considered the attorney as an individual who did not take a side, but who was someone she could talk to about a variety of things relating to the pregnancy and impending birth.

At the end of the break, the plaintiff returned to Gonzaga, and throughout the remainder of the semester counseled with a priest and a counselor. At the end of the semester, the plaintiff wanted to return home, but stated that her mother wrote her a "nasty" letter stating that she was an "embarrassment," a "disappointment," and a "disgrace," as well as irresponsible. Her mother again refused to permit the plaintiff to return home. After many family discussions and apparently tense moments, the plaintiff decided to return to her sister's home.

On May 15, 1986, the plaintiff visited with Beverly Macek, a children's services counselor for UCSS in Omaha, about the possibility of adoption. She told Macek that her parents and sister were supporting a decision for relinquishment and out-of-state placement. Apparently, the plaintiff told Macek that she feared her family would disown her if she were to raise the child herself.

The plaintiff stayed at her sister's home from May 15 until mid-June. During this time, they engaged in conversations relating to her plans for her baby. During this time, the plaintiff was confined to the house, and at times when guests were

visiting, she went to her room in the basement.

Around June 20, the plaintiff left her sister's home because of the situation's stressful nature. Both her sister and her sister-in-law were pregnant at this time, and it was difficult for the plaintiff to have to hide her own pregnancy.

At this time the plaintiff moved to the home of the attorney and her husband, where she lived until just days before the baby was born. Although not restricted to the attorney's home as she had been at her sister's, the attorney did not recall the plaintiff's going out to the grocery store or out in public generally, except for the times she would join them for a ride in their boat.

The plaintiff continued to have contact with her parents about every other week, and, according to the plaintiff, her mother continued to pursue the plaintiff's plans, stating, "If [you] planned to keep the baby, why did [you] leave in January? This is a big embarrassment to us, the whole family. What did we do wrong in raising you?" The plaintiff stated that she would ask her mother what she would do if she kept the baby and her mother would not specifically answer, but stated, "Everything will be fine as long as you come home empty-handed." Her mother also told her that if she were to keep the baby, her parents would not follow through on their original intentions of helping her repay her school loans.

The mother would not respond when asked if the plaintiff could retain the family car. The record does reflect that the mother sent the plaintiff various prayer cards, as well as letters, over the course of the pregnancy, all of which appear to be supportive in nature.

The plaintiff continued to talk with her sister during this period, and, according to the plaintiff, her sister did not understand how she could be putting her parents through this ordeal and thought that it would be best for everyone if she placed the baby for adoption. During conversations with the baby's father, he, too, said that adoption was the only option available to her and that he could not help her further financially.

While she was residing with the attorney, the attorney and the plaintiff quite frequently discussed the options available: a paternity suit, child support, ADC, child-care and day-care

centers, and remaining in college while raising a child. At no time prior to the baby's birth did the attorney take a position as to whether the plaintiff should retain or relinquish the baby. The attorney stated that the plaintiff continued to be indecisive and unsure of what her decision would be.

Throughout June and July the plaintiff continued to meet with Macek of UCSS about every 2 weeks, continually expressing fear and indecision. During one of these sessions, the plaintiff expressed her desire to have an out-of-state adoption so that she would not run the risk of meeting with her baby. However, the plaintiff testified that she changed her mind during the course of her counseling. The plaintiff stated that "[Macek] told me that if I placed the baby in-state through their agency they would have more control over the families, whereas, if I placed the baby out of state, they wouldn't and that I would just have to trust her." Additionally, she stated that Macek told her that if she were to choose in-state placement, she would receive pictures and a letter quarterly for the first year and annual pictures and letters thereafter, until the child reached age 25. The plaintiff stated that Macek told her that she would be able to meet her child at that time if she so chose. The plaintiff also recalled, however, that Macek told her early in the course of their meetings that "I cannot guarantee delivery of pictures and letters."

In the final week of her pregnancy, the plaintiff stated, discussions of her options escalated. The child was born on August 8, 1986. The plaintiff's mother and the attorney were present with her in the delivery room. Her mother did hold the newborn infant in the delivery room, after having him handed to her by the attorney. According to the plaintiff, her mother did not cuddle the baby, but upon seeing the infant said, "He is not a [family name]" and "that baby needs a father."

It was not until after the child's birth that Macek, the counselor at UCSS, learned that the child's father was a married man. It was also after the baby's birth that the attorney first took a stance and voiced an opinion as to what she believed the plaintiff should do with the baby. The attorney admitted telling the plaintiff that "she needed to do what was in [the child's] best interest," meaning, relinquish the child. She further stated that

the reason for her urging was "mainly it was in her relationship with her family. Up until that last week I wasn't convinced that her parents would in fact disown her or that [her sister] would but I became convinced of that after [the child's] birth." This concern was communicated to the plaintiff as the basis for the attorney's concern.

The plaintiff was dismissed from the hospital with the baby on the Sunday following the baby's birth, and remained in Omaha until Wednesday. Her mother would visit occasionally but would not look at the baby, according to the plaintiff. Similarly, her sister also visited the plaintiff and the baby but would not look at or touch the baby. The sister testified that she did not express love toward the baby, and essentially rejected the infant. Both the mother and sister continued to encourage the plaintiff to sign the adoption papers, as did the father, who told the plaintiff that she "needed to get the baby out of [her] life and get it into a stable home." The plaintiff testified that the father told her that if she kept the baby and named him as father, he would fight for custody of the child.

During the week following her delivery, the plaintiff said that she wanted to keep the baby, but everyone was upset with her because she was getting too attached. The mother called her every evening during this week and asked if she had made her decision.

During this week the plaintiff took the baby to a physician, who, according to the plaintiff, told her that a child needs two parents and ultimately recommended adoption to her.

On Wednesday, August 13, the child was placed in foster care with UCSS. The plaintiff spent that evening and night with the attorney. The next day, Thursday, the plaintiff took the child out of foster care and returned with him to the attorney's home, where she stayed until Friday evening. On August 15, the father signed a relinquishment at the attorney's office in Iowa. On Saturday, August 16, the plaintiff returned to Omaha with the attorney and the child and proceeded to UCSS to speak with Macek. After about an hour at UCSS, Macek took the baby to a foster care home, and then Macek, the attorney, and the plaintiff set out for Council Bluffs, where the relinquishment was to be be signed. (The relinquishment was to be signed in

Iowa because the attorney was to be the notary and she was an Iowa resident.) Due to a mixup relating to the location where the parties were to meet, the attorney and the plaintiff spent about an hour waiting for Macek to arrive. During this time, the plaintiff stated, she cried a lot, and also stated that she told the attorney, "I didn't know if I could do it. I didn't know if it was the right thing." The plaintiff related that when Macek arrived the plaintiff informed Macek that she had decided not to sign the papers. Macek testified, however, that due to the mixup in location and the fact that the papers would have to be signed on the hood of the car (because the church where they were to sign was closed), she felt it best to postpone the signing until Monday. The attorney and the plaintiff then returned to Omaha. The plaintiff continued to be emotionally upset, but the attorney testified that she did not think the plaintiff needed sedation or other medication.

On Monday, the 18th, the plaintiff drove herself to UCSS. While there, she saw the child, fed him, changed his pants, and took pictures of him. After many tears and apparent agonizing, the plaintiff signed the relinquishment in front of Macek, who signed as a witness, and a notary public who took her acknowledgment. Despite the plaintiff's crying, Macek testified, she felt the plaintiff was in control. The acceptance portion of the relinquishment was not signed at the time the plaintiff signed, nor in her presence, but was signed later that day by a representative of UCSS.

Immediately after signing the relinquishment, the plaintiff did not ask Macek to destroy the relinquishment or to return her son to her. The plaintiff was not under the influence of alcohol or drugs on the date of the signing. According to Macek, the baby was placed with adoptive parents the following day, persons whom the plaintiff had participated in selecting. The plaintiff left UCSS and returned to the attorney's home in Iowa. According to the attorney, the plaintiff did not actually remember signing the papers and "kept saying that she still didn't know whether she had done the right thing."

The plaintiff continued to counsel at UCSS, but at no time expressed an intention to revoke her relinquishment. On October 10, the plaintiff met the adoptive parents. During that

visit, they informed the plaintiff that they would only provide her with pictures for 2 years, which was different than the plaintiff had anticipated pursuant to her prior conversations with Macek. The plaintiff spoke with the father following her relinquishment and on several occasions spoke about revoking the relinquishment.

The plaintiff testified that she was persuaded by statements made by her mother, father, sister, the child's father, and the attorney in making her decision to sign the relinquishment. Because of their viewpoints, the plaintiff felt that she had to sign the papers, but it was not her desire to sign at the time that she did. The plaintiff admitted that throughout the course of her counseling at UCSS, she was never forced to sign any paper requiring her to promise to relinquish her child, nor did she pay a fee for the counseling services. She admitted that she and Macek discussed keeping her baby and placing her baby for adoption. In the same vein, Macek testified that in the course of her counseling at UCSS she has worked with women who have relinquished and those who have not relinquished, and that the ultimate decision is of no consequence to her *personally*. She does not receive a bonus for placing babies for adoption and is not subject to a quota system.

Despite the evidence of tense, emotional moments during the course of her pregnancy, the plaintiff stated that she believed that her parents loved her in the summer of 1986 and that she, too, loved her parents. On cross-examination, the plaintiff admitted that her mother never specifically told her "We will disown you if you keep this baby." In fact, she stated that no family member, including a brother who left the Catholic Church, had ever been disowned. The sister testified that she had great affection for the plaintiff and that her motivation for urging adoption was that she thought she was helping. The sister gave her opinions to the plaintiff because as sisters the two women had always valued each other's opinions. The sister denied threatening the plaintiff in any way regarding a decision to keep the child, although she felt she could have been more supportive of the plaintiff, and stated, "I never gave her the impression that I would be supportive of her keeping [the child]," and that she, in fact, gave the opposite impression.

The evidence in this case, which has been summarized above, when viewed in the light most favorable to the plaintiff, was as a matter of law not sufficient to show that the relinquishment was involuntary or that it was the result of threats, coercion, fraud, or duress. No one forced the plaintiff to make the decision she made. The plaintiff was faced with a very difficult decision. There were many disadvantages to either decision she could make. It was unfortunate that the father was married and suffering financial difficulties. We find, as a matter of law, that the relinquishment was voluntarily given and was not subject to revocation by the plaintiff.

The second assignment of error alleges that the relinquishment was conditioned upon the retention of some parental rights. The record does not support this contention. The plaintiff hoped that she would be able to receive letters and photographs of her son until he became 25 years of age. Although there was some mention of the possibility, there was no promise or guarantee that she would receive such letters or photographs. The assignment is without merit.

The third assignment of error is based on a theory that a relinquishment is not valid until the parent receives a signed copy of the acceptance by the agency. The statute makes no such requirement.

Neb. Rev. Stat. § 43-106.01 (Reissue 1984) provides the following requirements for a valid relinquishment:

> When a child shall have been relinquished by written instrument, as provided by sections 43-104 and 43-106 . . . to a licensed child placement agency and the agency has, in writing, accepted full responsibility for the child, the person so relinquishing shall be relieved of all parental duties toward and all responsibilities for such child and have no rights over such child.

The statute requires both a written relinquishment and a written acceptance, both of which were properly done in this case. The appellant signed the relinquishment on August 18, and, in turn, UCSS signed the acceptance on that same day. There is no language requiring adoption agencies such as UCSS to send notice of the acceptance to the relinquishing parent.

The relinquishment was complete and effective when UCSS

signed the acceptance, and there was no necessity to send a copy of the signed acceptance to the plaintiff.

The final assignment of error concerns the trial court's refusal to permit the plaintiff's counsel to inspect a confidential file kept by UCSS relating to the adoptive parents. The trial court examined the file *in camera*, found that it contained no evidence relevant to any issue in this case, and ordered it sealed and placed in the record. We have examined the file and find it contains nothing relevant to any issue in this case.

A court may make any order which justice requires to protect a person from annoyance, embarrassment, oppression, or undue burden or expense, including limitations on the method of discovery. Neb. Ct. R. of Disc. 26(c) (rev. 1986).

Control of discovery is a matter for judicial discretion. *Bump v. Firemens Ins. Co.*, 221 Neb. 678, 380 N.W.2d 268 (1986). The burden of showing an abuse of discretion is upon the individual asserting it. *Von Seggern v. Kassmeier Implement*, 195 Neb. 791, 240 N.W.2d 842 (1976). A judicial abuse of discretion requires that the ruling of a judge be shown to be clearly untenable, depriving the litigant of a substantial right and denying a just result in the matter submitted for disposition. *Newton v. Brown*, 222 Neb. 605, 386 N.W.2d 424 (1986). No such showing was made. The ruling of the trial court was correct, and it is affirmed.

The judgment is affirmed.

AFFIRMED.

DOROTHY J. ZELLER, APPELLANT, V. COUNTY OF HOWARD, APPELLEE.

DOROTHY J. ZELLER, PERSONAL REPRESENTATIVE OF THE ESTATE OF GEORGE ZELLER, DECEASED, APPELLANT, V. COUNTY OF HOWARD, APPELLEE.

419 N.W.2d 654

Filed February 26, 1988. No. 86-081.

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 incorrect.
2. **Trial: Evidence: Witnesses.** In a bench trial of a law action, the court, as a 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.
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. **Negligence: Proof.** To prevail in an action based on negligence, a plaintiff must prove four essential elements: the defendant's duty not to injure the plaintiff, a breach of that duty, proximate causation, and damages.
5. **Negligence.** A defendant's conduct is the cause of an event if the event would not have occurred but for that conduct; conversely, a defendant's conduct is not the cause of an event if the event would have occurred without the defendant's conduct.
6. **Proximate Cause: Words and Phrases.** The proximate cause of an injury is that cause which, in natural and continuous sequence, unaccompanied by any efficient, intervening cause, produces the injury, and without which the result would not have occurred.
7. **Negligence: Trial.** Determination of causation is, ordinarily, a matter for the trier of fact.
8. **Proximate Cause: Trial.** When there is conflicting evidence, determination of proximate cause is a question or matter for the trier of fact.
9. **Negligence: Proximate Cause: Words and Phrases.** In negligence law, an efficient intervening cause is new and independent conduct of a third person, which itself is the proximate cause of the injury in question and breaks the causal connection between original conduct and the injury.

Appeal from the District Court for Howard County: WILLIAM H. RILEY, Judge. Affirmed.

L.W. Kelly, Jr., of Kelly & Kelly, for appellant.

William T. Wright of Jacobsen, Orr, Nelson & Wright, P.C., for appellee.

BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and BRODKEY, J., Retired, and COLWELL, D.J., Retired.

SHANAHAN, J.

In consolidated cases, Dorothy J. Zeller appeals from judgments for Howard County in actions brought under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983). The alleged negligence involves an intersection of county roads and the absence of a stop sign for the road intersecting the arterial road.

In late morning of May 9, 1981, George and Dorothy Zeller were traveling in their northbound pickup on a Howard County graveled road to their daughter's home. Zellers were delivering fresh grass clippings in their pickup's uncovered box. Apparently, this was the first time Zellers had used this particular county road as a route to their daughter's house. Although the speed limit was 50 miles per hour, see Neb. Rev. Stat. § 39-666(1)(f) (Reissue 1984), George was driving the pickup at 15 miles per hour because he did not want the clippings to blow out of the pickup.

As the Zeller pickup headed north on the virtually level and straight road toward the eventual accident site, an intersection of gravel-surfaced county roads, the topography prompted Dorothy Zeller to remark about the distinguishable and upcoming intersection: "This looks like a bad corner." At that point, on Zellers' right, 100 feet south of the intersection, a slope ascended eastward to a knoll, which obstructed a northbound motorist's view to the right concerning the east-west crossroad leading to the intersection which lay ahead of Zellers. No stop sign was in place and erect to control northbound traffic into the intersection. The Zeller pickup did not stop before it entered the intersection. Simultaneously, but from the east, an automobile, driven at 45 miles per hour by

Don L. Lewandowski, was approaching the intersection. No evidence indicated that George Zeller applied the pickup's brakes, took evasive action, or saw the Lewandowski automobile before the collision. Lewandowski's car left 40 feet of preimpact skid marks. According to Dorothy Zeller, she "saw a sudden — like a puff of smoke, which was dust, and that was it. He had hit us. Mr. Lewandowski had hit us." The point of impact on Zellers' pickup was at the juncture of the pickup's cab and box. As a result of the collision, Dorothy Zeller received bodily injuries, and George Zeller sustained bodily injuries which caused his death shortly after the accident.

As personal representative of George Zeller's estate and in her individual capacity, Dorothy Zeller filed suits against Howard County and alleged that the county's negligence consisted of failure to inspect "traffic controls for said intersection for several weeks before May 9, 1981," and failure to replace and maintain the stop sign for northbound traffic entering the intersection, after the county had been "notified the stop sign was down."

Among the allegations in its answer filed in each of the Zeller cases, Howard County referred to a motorist's obstructed view to the east of the intersection and claimed that George Zeller's conduct in driving into the intersection, notwithstanding his obstructed view, was the proximate cause of the collision.

In *Lynn v. Metropolitan Utilities Dist.*, 225 Neb. 121, 125, 403 N.W.2d 335, 338-39 (1987), this court stated:

> A district court's factual findings in a case brought under the Political Subdivisions Tort Claims Act will not be set aside unless such findings are clearly incorrect. [Citations omitted.]
>
> 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. [Citation omitted.] "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."

(Quoting from *Alliance Nat. Bank v. State Surety Co.*, 223 Neb. 403, 390 N.W.2d 487 (1986).)

At trial, the only evidence pertained to the absence of a stop sign which otherwise would have protected the arterial road from northbound traffic. Several witnesses testified about the stop sign in question. The accident site was characterized as a "blind intersection," with the northbound approach into the intersection likened to "coming out of a tunnel" on account of the slope or hill which obstructed a motorist's view to the right on the northbound road. As a motorist approached the intersection, the view of the east-west road on the motorist's right was "totally obstructed" until the motorist was 10 feet from the south edge of the intersecting east-west road. During those last 10 feet of the northbound road into the intersection, a motorist's view to the right was unobstructed for at least a quarter mile.

Approximately 2 months before the accident, Howard County received notice that the intersection's stop sign for northbound traffic had been knocked down, apparently by vandals. Investigation immediately after the accident disclosed that the stop sign was lying in a foot-deep depression adjacent to the northbound road. The base of the steel post for the stop sign was embedded in the ground 20 feet from the south edge of the east-west road, but was bent toward that road. The stop sign or shield, still attached to the bent post, was lying at ground level within two parallel wheel marks on the roadside surface.

At conclusion of the evidence, nothing demonstrated Howard County's negligence in initially placing the stop sign at its installation site or in constructing the intersection and its approaches. Howard County requested that the court state, in writing, its conclusions of fact. See Neb. Rev. Stat. § 25-1127

(Reissue 1985) (a court's written statement of factual conclusions in a bench trial). See, also, *Lindgren v. City of Gering*, 206 Neb. 360, 292 N.W.2d 921 (1980) (permissible request for court's written conclusions of fact in an action under the Political Subdivisions Tort Claims Act). As requested, the court filed its conclusions, namely, Howard County was not obligated to install, maintain, or replace a stop sign at the intersection in question; George Zeller was negligent to a degree more than slight; the obstructed view to the east of the intersection was obvious to George Zeller as he approached the intersection; and Howard County's conduct was not the proximate cause of the accident. The court entered judgment in favor of Howard County in each of the Zeller cases, incorporating the findings contained in the court's written statement of conclusions.

To prevail in an action based on negligence, a plaintiff must prove four essential elements: the defendant's duty not to injure the plaintiff, a breach of that duty, proximate causation, and damages. See *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 412 N.W.2d 56 (1987). In accordance with the foregoing rule and to prevail in the actions against Howard County, Dorothy Zeller must prove that the county had a duty to inspect, replace, and maintain its stop sign after installation and that the county breached its stop sign duty, which breach proximately caused the collision in the intersection and the damages claimed as the collision's result. Regarding Howard County's breached duty pertaining to a stop sign, Dorothy Zeller points to § 23-2410 of the Political Subdivisions Tort Claims Act, which statute, in part, provides for recovery by one who "suffers personal injury or loss of life . . . by means of insufficiency or want of repair of a highway or bridge or other public thoroughfare . . . ."

Although each of Dorothy Zeller's assignments of error relates to various aspects of negligence law applicable to the present case, a dispositive question is: Was Howard County's conduct the proximate cause of the collision in the intersection?

While it may be interesting to discuss whether Howard County breached its stop sign duty, as Dorothy Zeller has alleged, in all practicality such discussion is pointless if the county's breach of its duty did not proximately cause the

intersectional collision. Consequently, if we assume, but do not decide, that Howard County breached its duty to inspect, replace, and maintain the stop sign at the intersection, it becomes necessary to determine whether the county's conduct proximately caused the collision resulting in damages to the Zellers.

A defendant's conduct is the cause of an event if the event would not have occurred but for that conduct; conversely, a defendant's conduct is not the cause of an event if the event would have occurred without the defendant's conduct. *Prime Inc. v. Younglove Constr. Co., ante* p. 423, 418 N.W.2d 539 (1988); *Hughes v. Enterprise Irrigation Dist.*, 226 Neb. 230, 410 N.W.2d 494 (1987). See, also, Prosser and Keeton on the Law of Torts, *Proximate Cause* § 41 (5th ed. 1984).

" 'The proximate cause of an injury is that cause which, in natural and continuous sequence, unaccompanied by any efficient, intervening cause, [produces the injury,] and without which the result would not have occurred. . . .' " *Hegarty v. Campbell Soup Co.*, 214 Neb. 716, 722, 335 N.W.2d 758, 763 (1983) (quoting from *Starlin v. Burlington Northern, Inc.*, 193 Neb. 619, 228 N.W.2d 597 (1975)).

> "There are three basic requirements in establishing proximate cause. The first requirement is that the negligence be such that 'without which the injury would not have occurred,' commonly known as the 'but for' rule. . . .
>
> "The second requirement is that the injury be the natural and probable result of the negligence. . . .
>
> . . . .
>
> "The third requirement is that there be no efficient intervening cause."

Greening v. School Dist. of Millard, 223 Neb. 729, 735, 393 N.W.2d 51, 56 (1986) (quoting from *Daniels v. Andersen*, 195 Neb. 95, 237 N.W.2d 397 (1975)).

"Determination of causation is, ordinarily, a matter for the trier of fact." *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 778, 408 N.W.2d 280, 285 (1987). When there is conflicting evidence, determination of proximate cause is a question or matter for the trier of fact. *Corbet, Inc. v. County of Pawnee*,

219 Neb. 622, 365 N.W.2d 437 (1985).

Delaware v. Valls, 226 Neb. 140, 409 N.W.2d 621 (1987), involved a motorcycle passenger's claim for injuries as the result of an intersectional collision between the motorcycle and an automobile. In *Delaware*, as the motorcyclist prepared to enter the intersection, his view of the intersection was hampered or somewhat obstructed by hedges adjacent to the intersection. When the motorcycle pulled into the intersection, the cycle was struck by an automobile traveling into the intersection. Delaware sued the automobile's driver and Vallses, the landowners on whose property the obstructive hedge was located. In sustaining a summary judgment for the landowners, we stated:

> We have defined an efficient intervening cause as a new and independent act, itself a proximate cause of an injury, which breaks the causal connection between the original wrong and the injury. . . . It is the intervening negligence of a third person who has full control of the situation and whose negligence is such as defendant was not bound to anticipate and could not be said to have contemplated, which later negligence results directly in injury to plaintiff. *Corbet, Inc. v. County of Pawnee*, 219 Neb. 622, 365 N.W.2d 437 (1985). The doctrine that an intervening act cuts off a tort-feasor's liability comes into play only when the intervening cause is not foreseeable. *Lincoln Grain v. Coopers & Lybrand*, 216 Neb. 433, 345 N.W.2d 300 (1984).

226 Neb. at 144, 409 N.W.2d at 624.

In negligence law, an efficient intervening cause is new and independent conduct of a third person, which itself is the proximate cause of the injury in question and breaks the causal connection between original conduct and the injury. See, *Delaware v. Valls, supra; Shelton v. Board of Regents*, 211 Neb. 820, 320 N.W.2d 748 (1982).

> " ' "The causal connection is broken if between the defendant's negligent act and the plaintiff's injury 'there has intervened the negligence of a third person who had full control of the situation and whose negligence was such as the defendant was not bound to anticipate and could

> not be said to have contemplated, which later negligence resulted directly in the injury to the plaintiff.' " ' "

Shelton v. Board of Regents, supra at 825, 320 N.W.2d at 752 (quoting from *Coyle v. Stopak*, 165 Neb. 594, 86 N.W.2d 758 (1957)). See, also, *Shupe v. County of Antelope*, 157 Neb. 374, 59 N.W.2d 710 (1953).

The absent stop sign in the Zeller cases presents a situation analogous to two vehicles approaching or entering the same intersection "from different roadways at approximately the same time," see Neb. Rev. Stat. § 39-635(1) (Reissue 1984), requiring the vehicle on the left to yield a qualified right-of-way to the preferred or favored vehicle on the right. See, *Muirhead v. Gunst*, 204 Neb. 1, 281 N.W.2d 207 (1979); *Reese v. Mayer*, 198 Neb. 499, 253 N.W.2d 317 (1977).

In *Hodgson v. Gladem*, 187 Neb. 736, 742-43, 193 N.W.2d 779, 783 (1972), this court enunciated the general rule applicable to motorists approaching a "blind" and unprotected intersection, when a motorist's view of the intersection or its approaches is obstructed:

> [A] driver approaching an unprotected intersection where he knows and can readily observe that his view is obstructed must do so at such a speed as will afford him a reasonable opportunity to make effective observations for cars approaching on the intersecting road and give him a reasonable opportunity to properly react to the situation he then observes or could observe, and where his view is completely obstructed and his speed is such that he has given himself no opportunity at all to observe and react appropriately he may, where the facts are undisputed, be found negligent as a matter of law.

See, also, *Crink v. Northern Nat. Gas Co.*, 200 Neb. 460, 263 N.W.2d 857 (1978).

Nevertheless, we dispose of the Zeller appeals by a hypothesis involving a stop sign placed at the site of the absent stop sign in question. If there were an erect stop sign located 20 feet from the south edge of the east-west road, and if George Zeller had stopped the pickup in obedience to that stop sign, there was still an obstructed view of westbound traffic approaching the intersection. That obstructed view persisted to

a point 10 feet north of our hypothetical stop sign, where a northbound motorist would then have an unobstructed view of traffic approaching the intersection from the east, which, in the cases before us, was the Lewandowski automobile traveling within the speed limit. Without application of the pickup's brakes or evasive action, and, inferentially, without looking and seeing Lewandowski's automobile, George Zeller drove the pickup into the intersection and into the path of the approaching and clearly observable Lewandowski automobile, virtually assuring inevitability of the collision.

Thus, if Howard County were negligent by breaching its duty concerning a stop sign for northbound traffic about to enter the intersection, George Zeller had complete control over the situation because he could have avoided the collision by exercising reasonable care while driving the pickup toward and into the intersection. Howard County, even if negligent regarding the absent stop sign in question, was not bound to anticipate, and could not have contemplated, that George Zeller would totally and unreasonably disregard the obvious danger inherent in vehicular travel into a visually obstructed intersection of public roads and fail to take appropriate measures to avoid the collision. Under the circumstances, George Zeller's conduct in driving the pickup was unforeseeable by the county and constituted an efficient intervening cause, namely, the proximate cause, of the intersectional collision. Therefore, in both of the cases against Howard County, Dorothy Zeller failed to prove that the county's conduct concerning the stop sign proximately caused the collision. We are unable to conclude that the district court's finding on proximate causation is clearly incorrect. Consequently, we affirm the judgments of the district court.

AFFIRMED.

STATE OF NEBRASKA EX REL. GREYHOUND LINES, INC., APPELLANT, V. CITY OF OMAHA, APPELLEE.

419 N.W.2d 539

Filed February 26, 1988. No. 86-200.

Mandamus. The writ of mandamus may not be issued in any case where there is a plain and adequate remedy in the ordinary course of the law.

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

Waldine H. Olson of Schmid, Ford, Mooney & Frederick, P.C., for appellant.

Herbert M. Fitle, Omaha City Attorney, and Charles K. Bunger, for appellee.

HASTINGS, C.J., WHITE, SHANAHAN, and FAHRNBRUCH, JJ., and BLUE, D.J.

FAHRNBRUCH, J.

Greyhound Lines, Inc., appeals the dismissal of its petition for writ of mandamus seeking to compel the City of Omaha to revoke a lease involving an alley adjacent to Greyhound's building in Omaha. The Douglas County District Court, after trial, determined the case on its merits. We affirm the district court's dismissal order, not on the merits, but because of the unavailability of a writ of mandamus to Greyhound.

The lease in question permits a third party to use the area below and the airspace above the alley in the construction of a bank building and a parking garage. It also grants the third party portions of the surface rights of the alley.

A writ of mandamus is an extraordinary remedy and "may not be issued in any case where there is a plain and adequate remedy in the ordinary course of the law." Neb. Rev. Stat. § 25-2157 (Reissue 1985). See, also, *Larson v. City of Omaha*, 226 Neb. 751, 415 N.W.2d 115 (1987); *Watts v. City of Omaha*, 184 Neb. 41, 165 N.W.2d 104 (1969); *State ex rel. League of Municipalities v. Loup River P. P. Dist.*, 158 Neb. 160, 62 N.W.2d 682 (1954).

By action and by oral admission, Greyhound admittedly had, at the time of filing its petition, at least two plain and

adequate remedies in the ordinary course of law available to it. Greyhound had already filed a law action in docket 848, page 470, in the Douglas County District Court. At oral argument in this court, Greyhound's counsel admitted that the remedy of injunction was available to his client when the petition for writ of mandamus was filed.

Because Greyhound had plain and adequate remedies in the ordinary course of the law available to it, the order of the district court is affirmed on that ground.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT E. WATKINS, APPELLANT.

419 N.W.2d 660

Filed February 26, 1988. No. 86-1012.

1. **Criminal Law: Directed Verdict.** 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.
2. **Criminal Law: Motions to Dismiss: Evidence.** On a defendant's motion to dismiss for insufficient evidence of the crime charged against such defendant, the State is entitled to have all its relevant evidence accepted or treated as true, every controverted fact as favorably resolved for the State, and every beneficial inference reasonably deducible from the evidence.
3. **Witnesses: Impeachment: Rules of Evidence: Prior Statements.** "The credibility of a witness may be attacked by any party, including the party calling him." Neb. Evid. R. 607 (Neb. Rev. Stat. § 27-607 (Reissue 1985)). Regarding a witness' prior inconsistent statement, "Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require." Neb. Evid. R. 613(2) (Neb. Rev. Stat. § 27-613(2) (Reissue 1985)).
4. _____: _____: _____: _____. Neb. Evid. R. 607, which authorizes impeachment, and Neb. Evid. R. 613, which permits extrinsic evidence of a prior inconsistent statement to impeach a witness, are not absolute rules for testimonial impeachment of a witness. Neb. Rev. Stat. §§ 27-607 and 27-613 (Reissue 1985).

5. _____: _____: _____: _____. Permissibility of testimonial impeachment by use of a witness' prior inconsistent statement is determined by collaterality of the prior statement.
6. **Witnesses: Impeachment: Prior Statements.** A witness may not be impeached by producing extrinsic evidence of collateral facts to contradict the first witness' assertions about those facts. A witness' prior inconsistent statement may be used to impeach the witness only on matters relevant to and otherwise admissible on some issue in the case tried.
7. **Criminal Law: Trial: Juries: Appeal and Error: Words and Phrases.** Harmless error exists in a jury trial of a criminal case when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in a verdict adverse to a substantial right of the defendant.
8. **Criminal Law: Trial: Evidence: Appeal and Error.** Error in admitting or excluding evidence in a criminal trial, whether of constitutional magnitude or otherwise, is prejudicial unless it can be said that the error was harmless beyond a reasonable doubt.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Affirmed.

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

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

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

SHANAHAN, J.

Robert E. Watkins was charged with burglary, in violation of Neb. Rev. Stat. § 28-507 (Reissue 1985), convicted as the result of a jury trial, and sentenced to imprisonment. Watkins claims errors in his trial, namely, (1) the district court's failure to direct a verdict of acquittal or dismiss the information filed against Watkins, and (2) over Watkins' objection, the district court allowed a rebuttal witness for the State to testify about Watkins' prior inconsistent statement to that witness. We affirm.

After shutting the windows and locking the doors of their house, Norman Terry Arndt and his family left to attend a fireworks display on the evening of July 4, 1986. Officers John Skanes and John Sherman, Omaha policemen on cruiser patrol, drove past the Arndt residence. From the cruiser, Officer Skanes saw a male standing in the shadows near a

first-story window of the Arndt house, an unidentified individual who was holding a rectangular box, which the officer believed was either a "VCR or a stereo piece of equipment . . . as if to be tugging on it and attempting to pull it down from the window." According to Officer Sherman, the individual "jumped back into the window, tugged on the cord once again, and came back down to the ground, and tried to tug again at the stereo," because the stereo's cord was still attached inside the house or somehow snagged in the window frame.

After turning the cruiser around in front of the Arndt house, Officer Skanes activated the cruiser's spotlight, which illuminated the area near the window and displayed the individual in its beam. Officer Skanes stopped the cruiser, got out, and ordered the individual to "stop and halt." By the cruiser's light and from some undisclosed previous encounter, the officers recognized the individual as Robert Watkins, who, having placed the stereo on the ground, at first walked and then ran behind the Arndt residence, with Officer Sherman in pursuit. When Watkins reappeared at the front of Arndt's residence and was running toward a house across the street, Officer Skanes shouted "Robert," and ordered the fleeing man to stop. Watkins complied. During a pat-down search of Watkins, Officer Skanes noticed a set of keys in the right front pocket of Watkins' pants. After Watkins was arrested, he was handcuffed by Officer Skanes and placed on the cruiser's rear seat. Officer Sherman later saw a set of keys on the cruiser's floor near Watkins' location on the rear seat.

Officer Skanes, accompanied by Officer Sherman, returned to the Arndt residence to ascertain whether anyone was inside the house, although the officers had not observed anyone but Watkins in the vicinity of the Arndt residence. Officer Skanes entered the Arndt house through the open living room window, at which the officers had first observed Watkins, and found the dwelling's interior to be "ransacked or in disarray." Crime lab technicians were called. Watkins was transported to police headquarters and booked on a charge of burglary.

During his case in chief, Watkins testified that he and Dwayne Black, a friend of some 4 years, spent the better part of July 4 drinking gin, vodka, and beer at Black's residence,

directly across from the Arndt house. Watkins observed the Arndt family leave for the fireworks display. Around 10:30 p.m., Watkins noticed a man walking down the sidewalk near Arndt's home. Watkins knew Arndt and realized that the man on the sidewalk was not Arndt. As Watkins watched, the man went to the living room window on the north side of Arndt's house, pushed the window air conditioner into the house, and entered through the open window. Watkins became suspicious and suggested to Black that they investigate, but Black, who "didn't want to get involved," declined Watkins' suggested investigation and went into his house, which had no telephone, where he watched television.

Watkins crossed the street to the Arndt house and, on arriving at the open window, shouted to the man inside: "Hey, you better come on out of there." As the intruder was climbing through the open window, the stereo was knocked from the window ledge and dangled by its cord, which apparently had become caught in the window's frame. While the intruder descended from the window, Watkins became alarmed, threw his set of keys at the "burglar," and then requested that the burglar assist Watkins in locating the keys, which Watkins thought might be located somewhere in the dark on the ground beneath the window and the dangling stereo. Before long, the burglar suddenly ran away, leaving Watkins groping in the dark for his keys. As Watkins manually moved the dangling stereo in his effort to find his keys, the police cruiser arrived and illuminated the window area. As expressed by Watkins, "When they shined the lights on me, that's when I said, 'I'm getting out of Dodge.' " Watkins ran behind the house, and at trial explained: "If they wouldn't have shined the light on me, I would have stayed. But when they shined the light on me, they was going to accuse me of it anyhow. . . . Breaking in the house."

Dwayne Black, also a witness during Watkins' case, testified that he had observed the pedestrian stranger near the Arndt house, as recounted by Watkins. After Black went inside his house and Watkins went to the Arndt residence to investigate, Black never saw Watkins during the remainder of July 4. With the exception of his observing the stranger, Black denied any

knowledge about the break-in at Arndt's, although shortly before midnight Black learned that Watkins had been arrested. On cross-examination and over Watkins' objection, the prosecutor asked Black:

> Q. . . . Isn't it true that when you spoke with Mr. Arndt and with Mr. Pottebaum on July 8th of 1986, four days after the time of the burglary of Mr. Arndt's house, didn't you tell them that you had information from a relative of yours that [Watkins], in fact, had committed the crime of burglary?

Black denied making such statement to Arndt. As the State's rebuttal witness, over Watkins' objection, Norman Terry Arndt testified that, 4 days after the burglary of his home, Arndt and Black were talking about the burglary. During that conversation, Black stated to Arndt that Black's brother-in-law had told Black that " 'Bobby did it.' . . . [H]is brother-in-law told him [Black] he had seen him [Watkins] do it all."

Although Watkins had moved for a directed verdict of acquittal on account of insufficiency of evidence against him, the court overruled Watkins' motion and submitted the case to the jury, which found Watkins guilty of the crime of burglary.

MOTION: DIRECTED VERDICT OR DISMISSAL

Section 28-507 defines the crime of burglary: "A person commits burglary if such person willfully, maliciously, and forcibly breaks and enters any real estate or any improvements erected thereon with intent to commit any felony or with intent to steal property of any value."

Watkins' motion for a directed verdict of acquittal or dismissal of the charge against him was properly overruled.

> 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. Clancy, 224 Neb. 492, 501, 398 N.W.2d 710, 717 (1987). See, also, *State v. Brown*, 225 Neb. 418, 405 N.W.2d 600 (1987).

On a defendant's motion to dismiss for insufficient evidence of the crime charged against such defendant, the State is

entitled to have all its relevant evidence accepted or treated as true, every controverted fact as favorably resolved for the State, and every beneficial inference reasonably deducible from the evidence. Cf. *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 412 N.W.2d 56 (1987).

Without repeating the facts, there is relevant evidence from the officers and Watkins which establishes each of the elements of burglary, § 28-507, namely, that Watkins willfully, maliciously, and forcibly broke and entered the Arndt house and had the intent to steal property located inside that dwelling.

IMPEACHMENT BY PRIOR INCONSISTENT STATEMENT

Next is the question concerning admissibility of Black's prior inconsistent statement made to Arndt regarding Watkins' involvement in the burglary.

In its distilled substance, the prosecutor's question to Black was: Did you tell Arndt that your relative informed (told) you that Watkins had committed the burglary?

In the setting of Watkins' appeal, we are not confronted by a party's questionable conduct in calling a witness to impeach that witness and thereby present otherwise inadmissible evidence, such as hearsay, to the jury, which might miss the subtle distinction between impeachment and substantive evidence. See *State v. Marco*, 220 Neb. 96, 368 N.W.2d 470 (1985). As expressed in *State v. Jackson*, 217 Neb. 363, 367, 348 N.W.2d 876, 878 (1984): "[T]he State may not use a prior inconsistent statement of a witness under the guise of impeachment for the primary purpose of placing before the jury substantive evidence which is not otherwise admissible." See, also, *State v. Brehmer*, 211 Neb. 29, 317 N.W.2d 885 (1982).

In this appeal, we find attempted impeachment through use of a prior inconsistent statement made by a witness called by the adverse party.

"The credibility of a witness may be attacked by any party, including the party calling him." Neb. Evid. R. 607 (Neb. Rev. Stat. § 27-607 (Reissue 1985)).

Regarding a witness' prior inconsistent statement, "Extrinsic evidence of a prior inconsistent statement by a witness is not

admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require." Neb. Evid. R. 613(2) (Neb. Rev. Stat. § 27-613(2) (Reissue 1985)).

The State contends that Black's statement to Arndt was admissible as a prior inconsistent statement because Black denied making the statement in question.

However, Neb. Evid. R. 607, which authorizes impeachment, and Neb. Evid. R. 613, which permits extrinsic evidence of a prior inconsistent statement to impeach a witness, are not absolute rules for testimonial impeachment of a witness.

Permissibility of testimonial impeachment by use of a witness' prior inconsistent statement is determined by collaterality of the prior statement, or, as this court expressed in *O'Connor v. State*, 123 Neb. 471, 475, 243 N.W. 650, 652 (1932):

> The principle is stated in *Attorney General v. Hitchcock*, 1 Wels. H. & G. Exch. (Eng.) 91: "The test, whether the matter is collateral or not, is this: If the answer of a witness is a matter which you would be allowed on your part to prove in evidence—if it have such connection with the issue that you would be allowed to give it in evidence—then it is a matter on which you may contradict him."

Referring to the test found in *The Attorney-General v. Hitchcock*, 154 Eng. Rep. 38 (Exch. 1847), Wigmore states: "The simple test is . . . whether [the contradictory statement] concerns 'a matter which you would be allowed on your part to prove in evidence' independently of the self-contradiction,—i.e., if the witness had said nothing on the subject." 3A J. Wigmore, Evidence in Trials at Common Law § 1020 at 1011 (J. Chadbourn rev. 1970).

The prohibition against impeachment concerning a "collateral" fact or matter was reaffirmed in *State v. Tainter*, 218 Neb. 855, 857-59, 359 N.W.2d 795, 797-98 (1984):

> The applicable rules were stated in *State v. Zobel*, 192 Neb. 480, 484, 222 N.W.2d 570, 572-73 (1974):
>
> ". . . If a witness is cross-examined on a matter

collateral to the issues, his answer cannot be subsequently contradicted by the party conducting the examination. [Citation omitted.] . . ."

In *State v. Claire*, 193 Neb. 341, 344, 227 N.W.2d 15, 18 (1975), we said:

". . . 'Evidence which does not tend to impeach any witness on a material point and which is not substantive proof of any fact relative to the issue is properly excluded.' "

The rule was stated in *Jones v. Tranisi*, 212 Neb. 843, 846, 326 N.W.2d 190, 192 (1982), as follows:

" '[A] witness may not be impeached by producing extrinsic evidence of "collateral" facts to "contradict" the first witness's assertions about those facts.' McCormick on Evidence § 47 at 98 (2d ed. 1972). McCormick further says at 98: 'What is to be regarded here as within this protean word of art, "collateral"? The inquiry is best answered by determining what facts are not within the term, and thus finding the escapes from the prohibition against contradicting upon collateral facts. The classical approach is that facts which would have been independently provable regardless of the contradiction are not "collateral." ' The above is the rule in Nebraska. ' "It is only as to matters relevant to some issue involved in a case that a witness can be contradicted for the purpose of impeachment." Carpenter v. Lingenfelter, 42 Neb. 728, 60 N.W. 1022, 32 L.R.A. 422.

. . . .

' "The general rule is that a witness cannot be impeached as to collateral or immaterial matter brought out on cross-examination; * * *." ' *Ambrozi v. Fry*, 158 Neb. 18, 26, 62 N.W.2d 259, 265 (1954)."

Some believe that the test for admitting or excluding a prior contradictory statement to impeach a witness should be controlled by Neb. Evid. R. 401 (relevant evidence; defined) (Neb. Rev. Stat. § 27-401 (Reissue 1985)), Neb. Evid. R. 402 (admissibility of relevant evidence) (Neb. Rev. Stat. § 27-402 (Reissue 1985)), and the factors prescribed in Neb. Evid. R. 403 (Neb. Rev. Stat. § 27-403 (Reissue 1985)): "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."

> Applying Rule 403 to impeachment by contradiction would require courts to exclude the proffered impeachment evidence if its probative value was substantially outweighed by these factors. This approach of leaving contradiction testimony to the discretion of the trial judge has been approved by Wigmore and McCormick . . . .

3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 607[05] at 607-79 (1987).

As observed in McCormick:

> The application of the standard theory of collateral contradiction . . . has been criticized for use under the Federal Rules of Evidence on the ground that the result is a mechanically applied doctrine without consideration of properly pertinent matters. . . . Basically, Federal Rules of Evidence 401-403, which do govern impeachment by contradiction, are entirely consistent with the "collateral" doctrine . . . except that Rule 403 is explicit in the discretion granted the trial judge to admit or exclude contradictions found relevant under Rule 401.

McCormick on Evidence § 47 at 112-13 (E. Cleary 3d ed. 1984).

We note that Rules 401 to 403 of the Federal Rules of Evidence are substantially identical to Neb. Evid. R. 401 to 403.

Nevertheless, we find Nebraska's current test concerning impeachment, that is, impermissible impeachment on a fact or matter which is "collateral," is satisfactory for disposition of Watkins' contention that Black's prior contradictory statement was inadmissible. Did Black's prior statement involve a matter which the State could show, independent of Black's self-contradiction? Bearing in mind the crime charged against Watkins was burglary, we must answer the immediately preceding question "No." First, the fact that Black discussed the burglary with his brother-in-law is irrelevant evidence that Watkins burglarized or broke and entered the Arndt house.

Second, the content of Black's conversation with his brother-in-law is clearly hearsay, that is, "[A] statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Neb. Evid. R. 801(3) (Neb. Rev. Stat. § 27-801(3) (Reissue 1985)). Consequently, Black's prior inconsistent statement related to a matter which the State could not prove independent of the self-contradiction and was, therefore, a "collateral" matter on which impeachment is not permitted under present Nebraska law. For that reason, the trial court committed error by allowing admission of Black's prior inconsistent statement.

Our next consideration in Watkins' appeal is whether the trial court's erroneously admitting Black's statement into evidence is reversible error. See Neb. Evid. R. 103(1) (Neb. Rev. Stat. § 27-103(1) (Reissue 1985)): "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected." See, also, Neb. Rev. Stat. § 29-2308 (Reissue 1985): "No judgment shall be set aside . . . in any criminal case, on the grounds of . . . improper admission or rejection of evidence . . . if the Supreme Court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred."

Harmless error exists in a jury trial of a criminal case when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in a verdict adverse to a substantial right of the defendant. See *United States v. McCrady*, 774 F.2d 868 (8th Cir. 1985).

Recognizing the distinction between an error of constitutional dimensions and a procedural error which does not reach constitutional proportions, we held in *State v. Lenz, post* p. 692, 699, 419 N.W.2d 670, 674 (1988): "[E]rror in admitting or excluding evidence in a criminal trial, whether of constitutional magnitude or otherwise, is prejudicial unless it can be said that the error was harmless beyond a reasonable doubt."

In view of all the evidence before the jury in the Watkins case, we conclude that the error in admitting Black's prior inconsistent statement was harmless beyond a reasonable

doubt. Our conclusion is supported by the substantial, even overwhelming, evidence in addition to Black's inadmissible prior statement. See, *State v. Daniels*, 222 Neb. 850, 388 N.W.2d 446 (1986) (in addition to erroneously admitted evidence, other competent evidence supported a conviction); *State v. Price*, 202 Neb. 308, 275 N.W.2d 82 (1979) (other admissible evidence was substantial; error in admitting evidence was inconsequential); *State v. Franklin*, 194 Neb. 630, 234 N.W.2d 610 (1975) (admissible evidence was very strong and practically conclusive). On arrival at the Arndt house, the officers saw Watkins near the open window, which had been shut by the Arndts. The officers found Watkins with Arndt's stereo in his hands. The officers' observations of Watkins are devastating evidence against Watkins. On discovery, Watkins' mercurial departure from "Dodge" was an inculpatory expression which undoubtedly influenced the jury far more than any prior statement by Black. Again, without reiteration of all salient facts, we are convinced, beyond a reasonable doubt, that the trial court's admitting Black's statement into evidence had no material effect upon the jury in arriving at its verdict, namely, Watkins' guilt of the burglary charged. There is no reversible error in the trial which resulted in Watkins' conviction of burglary. The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROGER E. LANE, APPELLANT.

419 N.W.2d 666

Filed February 26, 1988. No. 87-236.

1. **Criminal Law: Motions to Dismiss: Evidence.** On a defendant's motion to dismiss for insufficient evidence of the crime charged against such defendant, the State is entitled to have all its relevant evidence accepted or treated as true, every controverted fact as favorably resolved for the State, and every beneficial inference reasonably deducible from the evidence.
2. **Criminal Law: Directed Verdict.** 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.

3. **Convictions: Appeal and Error.** 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 explanation, 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.
4. **Sentences: Probation and Parole: Appeal and Error.** An order denying probation and imposing a sentence within the statutorily prescribed limits will not be disturbed on appeal unless there has been an abuse of discretion on the part of the sentencing judge.

Appeal from the District Court for Lancaster County: DALE E. FAHRNBRUCH, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Robert G. Hays, for appellant.

Robert M. Spire, Attorney General, and Jill Gradwohl Schroeder, for appellee.

BOSLAUGH, CAPORALE, and SHANAHAN, JJ., and ROWLANDS, D.J., and COLWELL, D.J., Retired.

SHANAHAN, J.

As the result of a jury trial in the district court for Lancaster County, Roger E. Lane was convicted of and sentenced for first degree sexual assault, a Class II felony. See Neb. Rev. Stat. § 28-319(1) and (2) (Reissue 1985). Lane was sentenced to imprisonment for not less than 15 nor more than 30 years, as authorized by Neb. Rev. Stat. § 28-105(1) (Reissue 1985), which specifies the penalty for a Class II felony.

In three of his five assignments of error, Lane questions the sufficiency of evidence at various stages of the prosecution, claiming that Lane's motions for dismissal and a directed verdict should have been sustained, and further claiming there was insufficient evidence to support the verdict.

According to the evidence in the State's case, the victim, 18 years of age, and her friends were watching television at the victim's home when one of the friends decided to leave. After driving that person to his home, the victim drove past her

boyfriend's house, saw some lights, stopped, and, when no one responded to her knock at the door, entered her boyfriend's house and found Lane asleep on a couch in the living room. The victim awakened Lane and asked the whereabouts of her boyfriend's roommate, who she believed had been in telephone contact with her boyfriend, who was presently in California. Lane responded that the boyfriend's roommate was at his (Lane's) house and suggested that they go to Lane's house if the victim wanted to talk with her boyfriend's roommate.

When Lane and the victim arrived at Lane's house and entered, there was no one inside. Lane later admitted he had not expected to find anyone at his house. As the victim started to leave, Lane commenced ripping the clothes from the victim, who started crying, screaming, and inflicting scratches on Lane's body with her fingernails and pickup keys. At knifepoint, Lane dragged the victim into the bedroom, where he sexually penetrated the victim and performed other sexual acts on her. A short time later, still in the bedroom and over the victim's resistance, Lane sexually penetrated the victim a second time, causing bodily injury to the victim, telling the victim: "[T]hat's what [the victim] got" for resisting him. When the victim continued to resist, Lane sexually assaulted the victim a third time. Twice, the victim asked to go to the bathroom. Each time Lane accompanied her to the bathroom and brought the victim back to the bedroom, where Lane forced other sexual acts on the victim. Believing that she might escape if Lane left the house, the victim asked Lane to get her cigarettes from her pickup parked at the house. However, Lane locked the victim in the basement and later unlocked the basement door. Because the victim's screaming and escape attempts had diminished, Lane invited the victim to smoke a cigarette with him in the living room. Hoping that Lane would free her if there were some expectation of future contact, the victim offered to give Lane her telephone number, but Lane took the victim back to the bedroom, where Lane forcefully performed sexual acts on the victim. Before Lane allowed the victim to leave, he requested the victim's telephone number. The victim wrote a fictitious telephone number on a newspaper. As the victim was departing, Lane told her that if the victim told police about the

assault, he would "just deny everything and say [the victim] was willing, because he's done it before and gotten by with it."

When she arrived at her home and told her mother about the assault, the victim was hysterical, her eyes were swollen, and her clothes disarrayed. Police were summoned to the victim's home, and, on arrival, an officer found the victim still hysterical, with bruises on her body, scratches on her face, and blood on her clothing. The victim was transported to a hospital for examination and treatment.

After Lane was arrested, scratch marks were discovered on his side and back. At Lane's house, police found a newspaper bearing the fictitious telephone number written by the victim. Police also found the victim's earrings and determined that when the basement door was bolted, exit from the basement of Lane's house was impossible.

In his case, Lane testified that soon after their arrival at Lane's house, the victim and Lane kissed and went into the bedroom with no resistance by the victim. Lane claimed that the basement door would not lock tightly, notwithstanding the contrary finding by the police. A physician testified "there was no obvious physical trauma to either the pelvic region or the anal region" of the victim. The victim's panties were not bloodstained.

Although Lane moved for dismissal and for a directed verdict, the case was submitted to the jury, which found Lane guilty as charged. After a presentence report, the court sentenced Lane to imprisonment for not less than 15 nor more than 30 years.

> On a defendant's motion to dismiss for insufficient evidence of the crime charged against such defendant, the State is entitled to have all its relevant evidence accepted or treated as true, every controverted fact as favorably resolved for the State, and every beneficial inference reasonably deducible from the evidence.

State v. Watkins, ante p. 677, 681-82, 419 N.W.2d 660, 663 (1988).

> 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. Clancy, 224 Neb. 492, 501, 398 N.W.2d 710, 717 (1987). See, also, *State v. Brown*, 225 Neb. 418, 405 N.W.2d 600 (1987).

> 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, supra at 428, 405 N.W.2d at 606.

What Lane perceives as insufficiency of evidence is actually his testimony in conflict with the victim's testimony about the incident, a question of credibility, and the weight to be given to the evidence, whether presented by the State or Lane. Without reiteration of all the facts, there is sufficient evidence to sustain the trial court's refusal to grant Lane's motions for dismissal and a directed verdict. The evidence establishes each element of first degree sexual assault, as defined by § 28-319, which in pertinent part provides: "(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 . . . is guilty of sexual assault in the first degree." The evidence supports the verdict. Lane's claimed defense of the victim's consent was a jury question, which was answered adversely to Lane. Therefore, Lane's assignments of error concerning sufficiency of evidence are without merit.

Next, Lane contends that his sentence should have been probation rather than imprisonment, and, in any event, the sentence to imprisonment is excessive. The presentence report on Lane reflected that Lane had been placed on probation for a previous sexual assault in the first degree. Neb. Rev. Stat. § 29-2260 (Cum. Supp. 1986) sets out the factors to be considered by a court in deciding whether to impose a sentence of probation or imprisonment. There is no question that first degree sexual assault is a serious crime. In imposing the sentence of imprisonment, obviously the district court

considered that Lane's imprisonment was necessary for protection of the public, because: "[a] lesser sentence will depreciate the seriousness of the offender's crime or promote disrespect for law." § 29-2260(2)(c). Also, the district court took into consideration the actual and threatened serious harm to the victim. See § 29-2260(3)(a).

An order denying probation and imposing a sentence within the statutorily prescribed limits will not be disturbed on appeal unless there has been an abuse of discretion on the part of the sentencing judge. *State v. Wood*, 220 Neb. 388, 370 N.W.2d 133 (1985). We find no abuse of discretion in the sentence imposed on Lane.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ARTHUR W. LENZ, JR., APPELLANT.

419 N.W.2d 670

Filed February 26, 1988. No. 87-246.

1. **Jury Instructions: Appeal and Error.** 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.
2. _____: _____. A party who desires more precise jury instructions must request them at the time the instructions are being considered and not on appeal.
3. **Trial: Evidence: Appeal and Error.** It is within the court's discretion to admit or exclude evidence, and such rulings on the evidence will be upheld upon appeal absent an abuse of discretion.
4. **Criminal Law: Trial: Evidence: Appeal and Error.** An error in admitting or excluding evidence in a criminal trial, whether of constitutional magnitude or otherwise, is prejudicial unless it can be said that the error was harmless beyond a reasonable doubt.
5. **Convictions: Trial: Evidence: Double Jeopardy: Appeal and Error.** When a conviction must be reversed because of an erroneous evidential ruling rather than because the remaining evidence, if believed by the trier of fact, would nonetheless not support the conviction, jeopardy has not attached, and the cause may be retried.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Reversed and remanded for a new trial.

Robert C. Wester, Deputy Sarpy County Public Defender, for appellant.

Robert M. Spire, Attorney General, and Jill Gradwohl Schroeder, for appellee.

BOSLAUGH, CAPORALE, and SHANAHAN, JJ., and ROWLANDS, D.J., and COLWELL, D.J., Retired.

PER CURIAM.

Defendant, Arthur W. Lenz, appeals his jury convictions of robbery, Neb. Rev. Stat. § 28-324 (Reissue 1985), and using firearms to commit a felony, Neb. Rev. Stat. § 28-1205 (Reissue 1985). Lenz was sentenced to 1 to 3 years' confinement for robbery and a consecutive term of 1 year for using firearms to commit a felony. We reverse and remand for a new trial.

Lenz assigns two errors: (1) The court erred in failing to properly instruct the jury concerning the essential elements of the crime of using firearms to commit a felony; and (2) the court abused its discretion and committed error in permitting inadmissible evidence into the record.

The facts are as follows: Lenz lived in a house in Omaha with three other people: his girlfriend, Laurie Milton; Mark Clifford Gosch; and Suzanne Marie Johnson. As a group, they could not pay their utilities. Lenz and Gosch planned to rob Domino's Pizza store, Chandler Road, Sarpy County, Nebraska, where Lenz was once employed. On July 6, 1986, about 2 a.m., Lenz and Gosch changed into dark clothing, obtained a knife and a BB gun, picked up a ski mask and a monster-type mask from the house, and, together with Milton, drove to a house about two blocks from Domino's. Milton stayed in the car. Lenz and Gosch walked to Domino's, where they waited near the rear of the building for someone to emerge with the trash, as Lenz knew was the custom. After about 20 minutes, Sean Kelly exited with the trash, and, when he was returning, Lenz stepped in front of Kelly. Lenz warned Kelly, "You fly, you die." Lenz and Gosch followed Kelly back into Domino's. Lenz was wearing the monster mask, exhibit 1, and brandishing a gun

covered with a clear yellow bag; Gosch was wearing a ski mask, and he carried the knife, exhibit 3. Another employee, Marjorie Gutridge, was mopping the floor, and employee David Gochenour was in a side room counting the daily receipts. Lenz forced Kelly and Gutridge into a nearby room. Lenz demanded the money from Gochenour while aiming the gun at him. Gochenour put the money, about $550, in a bag, later recovered and designated as exhibit 4. Upon leaving the building, Lenz warned, "First one out the door gets killed." Lenz and Gosch returned to their car and, with Milton, drove back to their house, where the money was divided. Following a police investigation, an executed search warrant at the Lenz home produced the knife, BB gun, and monster mask. Lenz and Gosch were arrested. Gosch testified at the trial as a State's witness. Although the gun is described in the evidence as a BB gun, it was a pellet gun using compressed gas for power. It was not a toy. In appearance it resembled a revolver, including frame, stock, sights, hammer, and the barrel. It was not armed with a gas propellant at the time of the robbery. Because the gun was covered by a bag during the robbery, witnesses Gochenour and Gutridge could not give a clear description of the gun; however, Gosch testified that the gun was used by Lenz during the robbery and that Gosch carried the knife, which was described as a Buck knife or blade knife.

ASSIGNED ERROR NO. 1: INSTRUCTIONS

Defendant did not object to any of the proposed instructions prior to their submission to the jury.

> 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.

(Syllabus of the court.) *First West Side Bank v. Hiddleston*, 225 Neb. 563, 407 N.W.2d 170 (1987).

"[A] party who desires more precise jury instructions must request them at the time the instructions are being considered

and not on appeal." *State v. Buchanan*, 210 Neb. 20, 24, 312 N.W.2d 684, 687 (1981).

The claimed instruction error relates to Neb. Rev. Stat. § 28-1205(1) (Reissue 1985): "Any person who uses a firearm, knife, brass or iron knuckles, or any other deadly weapon to commit any felony which may be prosecuted in a court of this state . . . commits the offense of using firearms to commit a felony." This statute was properly summarized in instruction No. 6.

Instruction No. 7 advised the jury concerning the material elements of the crime of using firearms to commit a felony, alleged in the information, which the State was required to prove beyond a reasonable doubt:

> (1) The defendant committed, or aided and abetted the commission of, a felony which may be prosecuted in a court of this state;
>
> (2) A *deadly weapon* was used to commit such felony;
>
> (3) The act took place on or about July 6, 1986; and
>
> (4) The act took place in Sarpy County, Nebraska.

(Emphasis supplied.)

Instruction No. 8 recited a "deadly weapon" shall mean "any device or instrument which in the manner it is used or intended to be used is capable of producing death or serious bodily injury." This definition appears in Neb. Rev. Stat. § 28-109(7) (Reissue 1985).

Instruction No. 6 instructed the jury on the issue of aiders and abettors.

Defendant's argument is based on the rule announced in *State v. Williams*, 218 Neb. 57, 352 N.W.2d 576 (1984), that neither a BB gun (pellet gun) nor a knife is a dangerous weapon per se and that the jury should be so instructed. *Williams* is distinguishable in that the crime there charged was carrying a concealed weapon, Neb. Rev. Stat. § 28-1202(1) (Reissue 1979), which has different elements. That statute provides for certain affirmative defenses, and the reasoning in *Williams* does not apply here. Considering the instructions given here, a "per se" instruction was not required; further, defendant did not request such an instruction.

From a reading of the instructions as a whole, they are not

misleading, they correctly state the law, they properly instruct the jury on the material elements of the crime charged, and there was no prejudicial error. *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984).

ASSIGNED ERROR NO. 2: EVIDENCE

Generally, it is the rule that it is within the court's discretion to admit or exclude evidence, and such rulings on the evidence will be upheld upon appeal absent an abuse of discretion. *State v. Wilson*, 225 Neb. 466, 406 N.W.2d 123 (1987).

Lenz first challenges as hearsay, Neb. Rev. Stat. § 27-802 (Reissue 1985), the following testimony (identified by numbers for discussion purposes) of Officer Michael W. Laufenberg, Bellevue Police Department:

> [1]Q. Okay, did either of the — Well, did any of the parties, Sean Kelly, Marge Gutridge, or David Gochenour, tell you if any weapons had been used in the robbery?
>
> MR. GARVEY: Objection, calls for hearsay.
>
> THE COURT: Overruled.
>
> [2]Q. (By Mr. Irwin) Did any of them tell you if a weapon was used?
>
> A. Yes.
>
> [3]Q. Which one told you weapons were used?
>
> A. All three of them.
>
> [4]Q. And did you learn what kind of weapons?
>
> A. One described as a four-inch nickel, possibly .38 caliber handgun.
>
> MR. GARVEY: Your Honor, I'd like the record to reflect a continuing objection.
>
> THE COURT: Overruled.
>
> [5]Q. (By Mr. Irwin) And who gave you that description?
>
> A. Kelly, I'm not sure of his first name.
>
> [6]Q. Okay, Mr. Kelly, though?
>
> A. Yes.

Questions Nos. 1 and 2 call for the same answer. They were not hearsay, since they were not offered to prove the truth of the matter asserted. Neb. Rev. Stat. § 27-801(3) (Reissue 1985); *Gray v. Maxwell*, 206 Neb. 385, 293 N.W.2d 90 (1980). Gutridge and Gochenour testified at the trial that weapons were

used and displayed by Lenz and Gosch during the robbery. Kelly did not testify; there is some suggestion that he was in the Armed Forces and not available as a witness.

The form of question No. 3 was leading, and it also called for hearsay. There was no objection to this question and no motion to strike the answer. At this point there was no prejudice resulting from admission of this hearsay, even if the prior objection was considered as continuing, since the evidence was cumulative, being supported by other evidence. *State v. Thierstein*, 220 Neb. 766, 371 N.W.2d 746 (1985); *State v. Klingelhoefer*, 222 Neb. 219, 382 N.W.2d 366 (1986).

Question No. 4 is another matter. It called for hearsay, and the unresponsive answer introduced for the first and only time evidence describing the gun as a .38-caliber handgun. This evidence was attributed to Kelly, who was not called as a witness. Questions Nos. 5 and 6 and their answers were further combinations of question No. 4. Other evidence in the record from several witnesses, including Gosch, clearly establishes that the BB gun (pellet gun) recovered from the Lenz home and made a part of the evidence as exhibit 2 was the gun used by Lenz during the robbery. That evidence was so overriding that there was neither an abuse of the court's discretion nor prejudice to defendant for admitting the answers to questions Nos. 4, 5, and 6.

Lastly, defendant objects to a part of the testimony of witness Mark Russell Weiss that at some unspecified time within the last 2 years he observed some people fighting near 13th and L Streets in Omaha, Nebraska, and he later learned that Lenz was a participant. He also testified that Lenz told him about another fight that Lenz had had. The State suggests that such evidence was properly admitted, as permitted in Neb. Rev. Stat. § 27-404(2) (Reissue 1985), to show that Lenz had the intent to perform violent acts during the robbery. There is no merit to that contention. The evidence concerning Lenz's fighting was an attempt to show character, contrary to § 27-404(1). It was error to receive it in evidence. The question, therefore, is whether the error was prejudicial. Neb. Rev. Stat. § 27-103 (Reissue 1985).

In *Fahy v. Connecticut*, 375 U.S. 85, 84 S. Ct. 229, 11 L. Ed.

2d 171 (1963), the state trial court admitted evidence obtained as the result of an unconstitutional search and seizure. The U.S. Supreme Court concluded that as there was "a reasonable possibility that the evidence complained of might have contributed to the conviction," the error was prejudicial and therefore not harmless. 375 U.S. at 86-87. In *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), the U.S. Supreme Court observed that there may be some constitutional errors which, in the setting of a particular case, are so unimportant and insignificant that they may, consistent with the federal Constitution, be deemed harmless. Noting that there was "little, if any, difference" between the *Fahy* test for determining whether a constitutional error was nonprejudicial and the test announced in *Chapman*, the *Chapman* Court nonetheless declared that the test is whether the court is able to declare that the error was "harmless beyond a reasonable doubt." 386 U.S. at 24. The *Chapman* doctrine was applied in *United States v. Hastings*, 461 U.S. 499, 103 S. Ct. 1974, 76 L. Ed. 2d 96 (1983), in which a majority of the Court concluded that in view of the overwhelming evidence of their guilt, the error in the prosecutor's reference to defendants' failure to testify was harmless beyond a reasonable doubt. The Court observed that the proper federal remedy for a violation of the rules of evidence is to discipline the offending lawyer, not reverse the case. (In this latter connection, see *State v. Borchardt*, 224 Neb. 47, 395 N.W.2d 551 (1986).)

We have said that an evidential error of constitutional magnitude is harmless unless the State's case would have been significantly less persuasive had the disputed evidence been excluded, *State v. Whitmore*, 221 Neb. 450, 378 N.W.2d 150 (1985), and *State v. Andersen*, 213 Neb. 695, 331 N.W.2d 507 (1983), or when no substantial miscarriage of justice has actually occurred, *State v. Massey*, 218 Neb. 492, 357 N.W.2d 181 (1984). We have suggested that the test for determining whether an evidential error of less than constitutional magnitude is harmless is whether it is so beyond a reasonable doubt, *State v. Sims*, 213 Neb. 708, 331 N.W.2d 255 (1983), or the defendant is not prejudiced from having a fair trial, *State v. Broomhall*, 221 Neb. 27, 374 N.W.2d 845 (1985), or it has not

affected a substantial right, *State v. Plymate*, 216 Neb. 722, 345 N.W.2d 327 (1984).

Whether these various tests actually articulate different standards, we, to avoid confusion, now hold that an error in admitting or excluding evidence in a criminal trial, whether of constitutional magnitude or otherwise, is prejudicial unless it can be said that the error was harmless beyond a reasonable doubt.

We cannot so say in this case, for we cannot determine how the jury would have evaluated the remaining evidence had it not, in effect, been told that defendant was of bad character in general and deserved punishment for something. See *State v. Johnson*, 226 Neb. 618, 413 N.W.2d 897 (1987).

Since the judgment of conviction must be reversed because of an erroneous evidential ruling rather than because the remaining evidence, if believed by the trier of fact, would nonetheless not support the convictions, jeopardy has not attached, and we therefore remand the cause for a new trial. *State v. Lee, ante* p. 277, 417 N.W.2d 26 (1987).

REVERSED AND REMANDED FOR A NEW TRIAL.

COLWELL, D.J., Retired, dissenting.

I respectfully dissent for reasons hereafter discussed. The "fighting" evidence was included in the testimony of the State's eighth witness, Mark Russell Weiss:

> Q. Okay. How long have you known A.J. Lenz?
>
> A. Probably about two years.
>
> Q. And have you ever known him to be in any kind of fights or assaults?
>
> A. I had come back with a friend of mine by — across from Iowa, we were coming to Nebraska, by the 13th and L Street. There's a Kwik Shop located at that intersection.
>
> Q. Okay. The L Street bridge there?
>
> A. And a friend of mine that I had worked with at Longnecker's, I had driven by it and I saw a fight taking place, I didn't know who it was at the time.
>
> Q. Let me stop you there. You say the fight taking place. Did you ever find out later who was involved in the fight?

A. Yes.

Q. And you learned that A. J. Lenz was one of the people involved?

A. Yes.

MR. GARVEY: Objection, hearsay, foundation, relevance.

THE COURT: Overruled.

Q. (By Mr. Irwin) And did you ever hear what had started the fight?

A. An argument about a car. Somebody said that A. J.'s car was a piece of junk, and he got very upset and he proceeded to act violently towards this —

Q. That night?

A. Yeah.

Q. Got out of the car, they had a fight?

A. Yeah.

Q. Did A. J. Lenz ever tell you about any other fights he had been in besides — other than that fight?

A. He had indicated where he was at a party, he was walking out to a car, his car, and somebody wanted to pick a fight with him at this party, and he was walking out to his car. And his — some girl was standing on top of the car or in a position where she could kick him, and hit him in the head. And she had kicked him in the head, and he fell down and he got up and he got into a fight then, too.

Q. With just the woman or with anyone else?

MR. GARVEY: I'd object again, Your Honor, I fail to see the relevance.

THE COURT: Sustained on [relevancy].

MR. IRWIN: Your Honor, could we approach the bench?

THE COURT: Mm-hmm.

(Discussion held in low tones at the bench, off the record.)

(The following proceedings were had in normal tones.)

MR. IRWIN: No other questions of this witness, Your Honor.

First of all, apparently defendant's counsel was not concerned about this line of testimony, since the second

question clearly put counsel on notice about the nature of the subject to be later pursued, and counsel did not object until four questions were asked and answered. After defendant's objection was overruled, four more questions and answers were elicited before counsel's objection was sustained, and then there was neither a motion to strike nor to admonish the jury to disregard the evidence.

> A litigant may not speculate about the answer to a question and then, after answer has been given, for the first time lodge his objection. . . . If a party does not make a timely objection to evidence, the party waives the right on appeal to assert prejudicial error. . . .
>
> In order to be timely an objection must ordinarily be made at the earliest opportunity after the ground for the objection becomes apparent.

State v. Archbold, 217 Neb. 345, 352, 350 N.W.2d 500, 505 (1984).

Neb. Rev. Stat. § 27-103(1) (Reissue 1985) provides that

> [e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and:
>
> (a) In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if a specific ground was not apparent from the context . . . .

Under the state of the record here, defendant's failure to make a timely objection to the "fighting" questions and answers was a waiver of his right to later raise that issue in this appeal.

Secondly, there is an overwhelming connecting thread of evidence, including circumstantial evidence, proving defendant's guilt beyond a reasonable doubt and establishing that the "fighting" evidence was harmless error beyond a reasonable doubt. Parts of that evidence are summarized: Mark Clifford Gosch, the State's 10th witness, testified concerning all of the details of the robbery, including his part in the planning, travel to the robbery scene, the robbery details, division of the money, identifying the gun, knife, and mask as being items connected with the robbery, and his participation in

the robbery and the part played by Lenz. Jeffords Byington testified that in April or May of 1986 he became acquainted with Lenz, a neighbor. Lenz told him that he planned to rob Domino's Pizza and asked Byington to help him, which Byington declined to do. After the robbery, Byington was helping Lenz move a waterbed from the basement of his residence to an upper floor when Lenz said that "him and Mark had ripped off Domino's." Byington, being a State police informant, furnished this information to the local police. A search of Lenz's residence produced the BB gun, knife, and monster mask, all a part of the evidence. The knife had a blade 3 3/16 inches long. Laurie Milton, 18 years of age, a codefendant in the trial, testified on her own behalf that she did not participate in the robbery; however, shortly before the robbery she, Lenz, and Gosch left the Lenz residence in the Lenz car. Lenz and Gosch told her that they were going to south Omaha to beat up somebody. At that time Lenz and Gosch took with them the BB gun, knife, and monster mask, which she identified in the evidence. She said that she got into an argument with Lenz about going to south Omaha so they left her off at her mother's house. The only defense witness for Lenz was Gosch, who was called to describe the gun as being a BB gun, inoperable, since it did not have the required carbon dioxide propellant cartridge. Gosch also testified that the gun belonged to Lenz, who used it in the robbery.

This evidence was very strong and practically conclusive, establishing defendant's guilt beyond a reasonable doubt. See *State v. Franklin*, 194 Neb. 630, 234 N.W.2d 610 (1975). When the "fighting" evidence is considered with all of the other evidence, it is insignificant as an evidentiary factor relating to defendant's guilt. See *State v. Price*, 202 Neb. 308, 275 N.W.2d 82 (1979).

In conclusion, the evidentiary error was not prejudicial to defendant. *State v. Borchardt*, 224 Neb. 47, 395 N.W.2d 551 (1986). The State's case could not have been significantly less persuasive had the "fighting" evidence been excluded upon defendant's timely objection and motion to strike. See *State v. Whitmore*, 221 Neb. 450, 378 N.W.2d 150 (1985). The evidence did not cause a substantial miscarriage of justice. *State v.*

Massey, 218 Neb. 492, 357 N.W.2d 181 (1984); § 27-103(1). The claimed evidentiary error was harmless beyond a reasonable doubt. Defendant's convictions should be affirmed.

BOSLAUGH, J., dissenting.

I concur in the dissent of Judge Colwell.

In my opinion the decision in this case cannot be reconciled with our recent decisions in *State v. Guy, ante* p. 610, 419 N.W.2d 152 (1988), decided February 12, 1988, and *State v. Watkins, ante* p. 677, 419 N.W.2d 660 (1988), decided today. The evidence of guilt in this case is much stronger and the objectionable evidence much less prejudicial than in the *Guy* and *Watkins* cases.

It is also a matter of some interest that after Lenz had been arrested and given the *Miranda* warnings, he gave the police a statement denying any involvement in the robbery.

After conviction, Lenz wrote out a complete confession in his own handwriting, which is a part of the presentence report.

MARGARET A. POLENZ, PERSONAL REPRESENTATIVE OF THE ESTATE OF KENNETH R. POLENZ, DECEASED, APPELLEE, V. FARM BUREAU INSURANCE COMPANY OF NEBRASKA, A NEBRASKA CORPORATION, APPELLANT.

419 N.W.2d 677

Filed February 26, 1988. No. 87-282.

1. **Insurance: Contracts.** Contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken and understood in plain, ordinary, and popular sense.
2. _____: _____. In construing an insurance contract, the court must give effect to the instrument as a whole and, if possible, to every part thereof.
3. **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.
4. **Insurance: Contracts.** Where the terms of an insurance contract are clear, they are to be accorded their plain and ordinary meaning.
5. _____: _____. 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.

6. _____: _____. In the case of ambiguity, the construction favorable to the insured prevails so as to afford coverage.
7. **Insurance: Contracts: Intent.** 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.
8. **Insurance: Contracts.** An ambiguity will not be read into policy language which is plain and unambiguous in order to construe it against the preparer of the contract.
9. _____: _____. Absent ambiguities, language in a policy of insurance is to be given its plain and ordinary meaning.
10. _____: _____. Where two or more policies provide coverage for the particular event and all the policies in question contain "excess insurance" clauses, it is generally held that such clauses are mutually repugnant and must be disregarded. If literal effect were given to both "excess insurance" clauses of the applicable policies, neither policy would cover the loss, and such a result would produce an unintended absurdity.

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

Thomas A. Otepka of Gross, Welch, Vinardi, Kauffman & Day, P.C., for appellant.

Edward F. Pohren of Dwyer, Pohren, Wood, Heavey & Grimm, for appellee.

BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and BRODKEY, J., Retired, and COLWELL, D.J., Retired.

SHANAHAN, J.

Margaret A. Polenz, personal representative of the estate of Kenneth R. Polenz, deceased, brought a declaratory judgment action against Farm Bureau Insurance Company of Nebraska to determine the amount payable under each of two Farm Bureau policies owned by Kenneth Polenz, which provided underinsured motorist coverage. On stipulated facts, the district court for Sarpy County entered a declaratory judgment concerning Farm Bureau's policies and then granted the personal representative judgment against Farm Bureau for $75,000, interest, and an attorney fee. Farm Bureau appeals.

Kenneth Polenz was a passenger in an automobile driven by a

Jim Collom, who fell asleep while driving, causing a one-car accident when Collom's automobile struck an embankment adjacent to the road on which the Collom vehicle was being operated. Polenz died as a result of injury sustained in the accident.

Collom was the owner and named insured of an automobile insurance policy issued by State Farm Insurance, which provided Collom with $25,000 in liability coverage for bodily injury caused by his operating a vehicle. Collom's State Farm policy also provided medical payment coverage of $2,500. Outside the liability coverage for bodily injury and the medical payment coverage, there was no coverage under Collom's policy from which any damages caused by Collom could be paid to Polenz.

In exchange for the personal representative's covenant not to sue Collom, State Farm paid the personal representative $27,500, that is, $25,000 on the Polenz bodily injury claim and $2,500 on the claim pertaining to medical payment coverage. The personal representative received no other payments from or on behalf of Collom.

At the time of his death, Kenneth Polenz owned two policies issued by Farm Bureau. Those policies were obtained at different times, and the premium for each policy was separately paid by Polenz. Policy No. 103385 on a 1983 Ford pickup and policy No. 651962 on a 1983 Lincoln Town Car contained "COVERAGE L UNDERINSURED MOTORIST COVERAGE" (UDM), with a $50,000 limit on each policy for the underinsured motorist coverage. In the pertinent parts of the Farm Bureau policies, coverage L, or the UDM coverage, provides:

> Our Limit of Liability
>
> The amount shown in the declarations for . . . Coverage L "per person" is the maximum amount *we* will pay for all damages due to bodily injury sustained by any one person in any one automobile accident. . . . [The maximum amount] shall be reduced by any amount paid or payable under any valid and collectible insurance policy or bond providing bodily injury liability coverage for the ownership, maintenance or use of the uninsured motor

vehicle or underinsured motor vehicle involved in the accident. [The maximum amount] shall also be reduced by any other payment made by or on behalf of the owner or operator of the uninsured motor vehicle or underinsured motor vehicle. [The reduced amount] shall be our maximum limit of liability regardless of the number of:

1. Insureds;
2. claims made;
3. vehicles or premiums shown in the declarations; or
4. vehicles involved in the accident.

. . . .

Other Insurance

If there is other applicable similar insurance:

1. That applies to an insured injured while occupying any vehicle you do not own:

a. The coverage afforded by this part shall apply only as excess coverage to the primary coverage;

b. such excess coverage shall be limited to the amount by which the coverage afforded by this part exceeds the primary coverage; and

c. when more than one policy applies as excess:

(1) The amount by which the highest limit of liability of any one of the policies applying as excess exceeds the Limit of Liability of the primary policy shall be determined;

(2) *we* shall pay *our* share of that amount. *Our* share is the proportion that *our* Limit of Liability is of the sum of the Limits of Liability of all the other policies applying as excess.

(Emphasis in original.)

The amount of damages from the wrongful death of Kenneth Polenz is substantially in excess of the declared limits of the coverage in all applicable policies of insurance available concerning Kenneth Polenz, including the limits of Collom's bodily injury liability insurance.

Farm Bureau refused to pay the personal representative's demand for $75,000, that is, the total of the coverage from both policies or $100,000 less the $25,000 received from State Farm on the claim against Collom. The personal representative then filed her declaratory judgment action, asking for

determination of the amount due under each of Farm Bureau's policies.

In its declaratory judgment, the district court found that the "other insurance" provision under Farm Bureau's UDM coverage was inapplicable in determining the limit of liability under each of Farm Bureau's policies. The district court then proceeded to determine and declare that Farm Bureau's aggregate liability on its policies was $75,000, which was determined as follows: $50,000 on each policy, reduced by a pro rata amount paid on the claim against Collom, that is, one-half of $25,000, or $12,500, leaving Farm Bureau's net liability on each policy in the amount of $37,500. Since there were two policies, the combined liability for both policies was $75,000. After entry of the declaratory judgment and pursuant to Neb. Rev. Stat. § 25-21,156 (Reissue 1985), the personal representative obtained a monetary judgment against Farm Bureau in the amount of $75,000. Farm Bureau has appealed the declaratory judgment and the monetary judgment awarded to the personal representative.

As this court stated in *Cordes v. Prudential Ins. Co.*, 181 Neb. 794, 797-98, 150 N.W.2d 905, 908 (1967):

> Contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken and understood in plain, ordinary, and popular sense. [Citation omitted.]
>
> In construing an insurance contract, the court must give effect to the instrument as a whole and, if possible, to every part thereof. [Citation omitted.]
>
> . . . .
>
> The construction of a written contract is ordinarily a question of law for the court. [Citations omitted.]

In *Boisen v. Petersen Flying Serv.*, 222 Neb. 239, 241, 383 N.W.2d 29, 31 (1986), we held: "Regarding a question of law, this court has an obligation to reach its conclusion independent from the conclusion reached by a trial court."

Other rules for construction of an insurance policy were stated in *Malerbi v. Central Reserve Life*, 225 Neb. 543, 550-51, 407 N.W.2d 157, 162-63 (1987):

> 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.*

In its first assignment of error, Farm Bureau claims that the entire amount received on the claim against Collom, $25,000, must be deducted from the limit of liability on each of Farm Bureau's policies, which would then leave $25,000 due under each of its policies, or a total of $50,000 payable to the personal representative.

The personal representative argues:

> It is apparent from this clause that the State Farm payment must be deducted to determine the maximum liability which Appellant has to Appellee. . . . [I]t is not clear (a) whether the total of all underinsured motorist coverages may first be aggregated or stacked before the deduction for the State Farm payment is made [by aggregating the two coverages, the total limit of liability would be $100,000, and after deduction for the State Farm payment, the reduced limit of liability would be

> $75,000 under both policies] or (b) whether the State Farm payment should be prorated among all of the policies providing underinsured motorist coverages [by prorating the State Farm payment $12,500 to each policy, the limits of liability would be reduced from $50,000 to $37,500 under each coverage], or (c) whether the State Farm payment should be deducted in full from each policy [which would reduce each of the limits of liability from $50,000 to $25,000 of coverage].

Brief for Appellee at 7.

The limit of liability, stated in each of Farm Bureau's policies in the present case, provides that the maximum amount payable under the policy, $50,000, shall be reduced by the amount paid under any insurance policy providing bodily injury liability coverage on the underinsured motor vehicle, which in this case was $25,000 paid under Collom's State Farm policy. The limit of liability provision in the underinsured motorist coverage found in each of Farm Bureau's policies does not contain a requirement or formula for allocating any amount paid as the result of bodily injury coverage from another insurer, when there are multiple Farm Bureau policies applicable to a particular automobile accident. " 'An ambiguity will not be read into policy language which is plain and unambiguous in order to construe it against the preparer of the contract.' " *Waylett v. United Servs. Auto. Assn.*, 224 Neb. 741, 745, 401 N.W.2d 160, 163 (1987) (citing and quoting from *Lumbard v. Western Fire Ins. Co.*, 221 Neb. 804, 381 N.W.2d 117 (1986)). "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.*, 225 Neb. 503, 508, 406 N.W.2d 640, 644 (1987). See, also, *Charley v. Farmers Mut. Ins. Co.*, 219 Neb. 765, 366 N.W.2d 417 (1985); *Kracl v. Aetna Cas. & Surety Co.*, 220 Neb. 869, 374 N.W.2d 40 (1985).

In *Waylett v. United Servs. Auto. Assn.*, *supra* at 743, 401 N.W.2d at 162, we construed the following provision in an automobile policy providing underinsured motorist coverage: " 'However, the limit of liability shall be *reduced* by *all sums* paid because of the bodily injury by or on behalf of *persons or organizations* who *may be* legally responsible.' " (Emphasis in

original.) In *Waylett*, the policy had a $300,000 limit of liability, and Waylett received $325,000 from persons who might have been responsible for the injuries suffered in an automobile accident. When the payments to the insured were applied against the $300,000 limit of liability under the policy which provided underinsured motorist coverage in *Waylett*, we held that "the liability under the policy is reduced to zero, and there is no sum due and owing from [the insurer] to the Wayletts." 224 Neb. at 747, 401 N.W.2d at 164. Although *Waylett* involved only one policy providing underinsured motorist coverage and several payments from others who might have been legally liable for damages to Wayletts, the reason for the reduction required in *Waylett* is equally applicable in the present case in view of the clear and unambiguous language used to limit liability in each of Farm Bureau's policies providing underinsured motorist coverage.

The personal representative suggests it would be a windfall to Farm Bureau to allow the $25,000 State Farm payment to be deducted from the limit of liability under each of the Farm Bureau policies. The personal representative argues "[a] reasonable person in the position of the insured would not expect that the setoff for amounts paid by the tort-feasor would exceed the amount actually paid by the tort-feasor, regardless of the number of insurers providing [UDM] coverage." Brief for Appellee at 13. We disagree. An insurer may limit its liability by contract as long as it does not violate public policy, and there is no Nebraska public policy requiring stacking. See, *Kracl v. Aetna Cas. & Surety Co., supra; Charley v. Farmers Mut. Ins. Co., supra*. Nor do we find it against public policy for an insurer to reduce its limit of liability under each policy by amounts paid to its insured on behalf of an underinsured tort-feasor, when the insured seeks to aggregate or stack multiple policies of insurance providing underinsured motorist coverage. Cf. *Waylett v. United Servs. Auto. Assn., supra*. "Any argument that to disallow the aggregation of multiple uninsured motorist coverages gives the insurer a windfall overlooks the fact that the nature and extent of the protections sold by the insurer and purchased by the insured, and the charges made for them, are determined by the policy language."

Charley v. Farmers Mut. Ins. Co., supra at 771, 366 N.W.2d at 421-22. "Thus, the party's reasonable expectation of coverage is to be measured not by premiums paid but by the clear terms of the insurance policy as understood by the reasonable, ordinary man." *Kracl v. Aetna Cas. & Surety Co., supra* at 874-75, 374 N.W.2d at 44. *Kracl* and *Charley* involved uninsured motorist coverage, but the rationale of *Kracl* and *Charley* applies as well to the underinsured motorist coverage in the case before us. The policy language contained in the limit of liability provisions of each Farm Bureau policy in this case clearly requires that the maximum amount otherwise available under each policy concerning underinsured motorist coverage shall be reduced by the amount paid under Collom's State Farm policy.

We note that the Underinsured Motorist Insurance Coverage Act, Neb. Rev. Stat. §§ 60-571 to 60-582 (Cum. Supp. 1986), became operative on January 1, 1987. This act was not in effect at the time Farm Bureau issued its policies with underinsured motorist coverage to Kenneth Polenz. Thus, the policies involved in this litigation were the result of negotiations between the parties, and the clear and unambiguous policy provisions will be enforced according to their plain and ordinary meaning. See *Waylett v. United Servs. Auto. Assn.*, 224 Neb. 741, 401 N.W.2d 160 (1987).

If plain and ordinary meaning is given to the provision for reduction of the amount payable under the underinsured motorist coverage of Farm Bureau's policies in these proceedings, there is no contractual basis for dividing or allocating the State Farm payment between the two Farm Bureau policies to determine the amounts payable thereunder. When the district court divided the State Farm proceeds equally between the Farm Bureau policies, that pro rata division lacked foundation in the policy provisions for underinsured motorist coverage afforded by Farm Bureau and, therefore, was contrary to the clear policy provisions and is incorrect. For that reason, we must reduce the amount payable under the underinsured motorist coverage in this case to $25,000 under each of Farm Bureau's policies, for a total underinsured motorist coverage of $50,000 payable to the personal

representative in this case.

As its second assignment of error, Farm Bureau claims there was "other insurance" which necessitates still further reduction of the amount payable under the underinsured motorist coverage in each of its policies. Farm Bureau argues that Collom's State Farm policy was the primary coverage on the Polenz claim and, therefore, the two Farm Bureau policies provided only excess coverage.

The policy provision in question is found in Farm Bureau's underinsured motorist coverage, under the heading "Other Insurance," as follows: "If there is other applicable *similar* insurance: 1. That applies to an *insured* injured while occupying any vehicle you do not own: a. The coverage afforded by this part shall apply only as excess coverage to the primary coverage . . . ." (Emphasis supplied.) Farm Bureau's policy does not define "other applicable similar insurance." *Similar* means "having characteristics in common: very much alike: comparable . . . alike in substance or essentials: corresponding." Webster's Third New International Dictionary, Unabridged 2120 (1981). In the absence of any definition pertaining to that clause, it is unclear whether the clause in question relates to any other insurance relative to bodily injury or only to other underinsured motorist coverage pertaining to bodily injury. Thus, the clause "other applicable similar insurance" is ambiguous, and we will resolve such ambiguity by construing the clause favorably to the insured, here the personal representative, so as to afford coverage. See, *Malerbi v. Central Reserve Life*, 225 Neb. 543, 407 N.W.2d 157 (1987); *Denis v. Woodmen Acc. & Life Co.*, 214 Neb. 495, 334 N.W.2d 463 (1983). We construe "other applicable similar insurance" in Farm Bureau's underinsured motorist coverage to mean other insurance which provides underinsured motorist coverage. Collom's policy with State Farm did not provide underinsured motorist coverage to Kenneth Polenz. Farm Bureau asserts "[t]here is no requirement that the primary insurance (State Farm) also provide underinsured motorist coverage to the Plaintiff for the Other Insurance provision to apply." Reply brief for Appellant at 10. However, in resolving an ambiguity in an insurance policy, the guiding principle is not 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. *Malerbi, supra; Denis, supra.* Since the "Other Insurance" clause can reasonably be understood as referring only to other underinsured motorist coverage as primary coverage, the State Farm policy, which provided no underinsured motorist coverage, is not "other applicable similar insurance" and, therefore, is not a policy providing primary coverage under the circumstances.

We realize that insurance on a vehicle in which the claimant is a passenger or a driver is, generally, considered as primary insurance coverage. See, *Turpin v. Standard Reliance Ins. Co.*, 169 Neb. 233, 99 N.W.2d 26 (1959); *Jones v. Morrison*, 284 F. Supp. 1016 (W.D. Ark. 1968); 7A Am. Jur. 2d *Automobile Insurance* § 434 (1980). In this case, however, State Farm provided no underinsured motorist coverage and, in fact, provided no insurance coverage whatsoever to Kenneth Polenz. State Farm paid $25,000 to the personal representative because there was a bodily injury claim against Collom, not because Kenneth Polenz was a State Farm insured. Thus, the State Farm policy did not provide primary coverage in this case.

However, each of the Farm Bureau policies did provide underinsured motorist coverage to Kenneth Polenz while he was an occupant in Collom's automobile, and, consequently, each policy was "other applicable similar insurance." A problem arises, since each Farm Bureau policy designates the other as the policy providing primary coverage. Even if one of the Farm Bureau policies could be designated as primary and the other as excess and since the limit of liability under each is equal, a literal interpretation of paragraphs 1b and 1c under "Other Insurance" would negate the underinsured motorist coverage for Polenz. The general rule is stated in 7A Am. Jur. 2d, *supra* at 87-88:

> [W]here two or more policies provide coverage for the particular event and all the policies in question contain "excess insurance" clauses—it is generally held that such clauses are mutually repugnant and must be disregarded, rendering each company liable for a pro rata share of the judgment or settlement, since, if literal effect were given to

> both "excess insurance" clauses of the applicable policies, neither policy would cover the loss and such a result would produce an unintended absurdity.

State Farm Mut. Auto. Ins. Co. v. Union Ins. Co., 181 Neb. 253, 147 N.W.2d 760 (1967), involved two automobile insurance policies issued by different companies. The automobile owners had a policy with State Farm on an auto which needed repairs. An uninsured substitute vehicle was loaned to the State Farm insureds while their auto was being repaired. The loaned vehicle was then entrusted to a third party insured by Union Insurance Company. During operation by that third party, the loaned vehicle was in an accident, and State Farm paid claims from that accident. Union rejected State Farm's demand for a part of the amounts paid by State Farm. The provisions of the policy issued by each of the insurance companies defined its coverage as "excess" in view of the character of the automobile in the accident, that is, a "temporary substitute" vehicle (State Farm) vis-a-vis a "non-owned" automobile (Union). This court stated:

> Although expressed in varying language, it seems to us clear that each company intended that if there were other insurance covering the loss, its coverage would be "excess." Both policies evidence the same intent with respect to insuring the risk and also with respect to avoiding liability in the event of adequate coverage by another carrier. If literal effect were given to the clauses in both policies, the result would be that neither policy covered the loss, and thus produce an unintended absurdity. It seems to us more important that each company in drafting its policy contemplated various types of situations which were likely to arise where the operation of a vehicle would probably be covered by other insurance.
>
> . . . .
>
> The excess insurance provisions are mutually repugnant and as against each other are impossible of accomplishment. Each provision becomes inoperative in the same manner that such a provision is inoperative if there is no other insurance available. Therefore, the

> general coverage of each policy applies and each company is obligated to share in the loss.

181 Neb. at 258, 147 N.W.2d at 762-63.

In this case, the excess insurance ("Other Insurance") provisions are mutually repugnant and as against each other are impossible of accomplishment. Under the circumstances of this case, the policy provision regarding "excess" underinsured motorist coverage is rendered inoperative and must be disregarded so that the underinsured motorist coverage of each of Farm Bureau's policies applies to the extent of the stated limit of liability found in each of those policies. The district court's finding and judgment that there was no "other insurance" is correct and is affirmed.

The district court's judgment concerning Farm Bureau's limit of liability under the underinsured motorist coverage provided by each of its policies is modified, that is, the limit of liability is $25,000 for each of the Farm Bureau policies, for a total liability of $50,000, and, as modified, the district court's judgment is affirmed.

As a part of the costs and pursuant to Neb. Rev. Stat. § 44-359 (Reissue 1984), Farm Bureau shall pay $5,000 as a fee for the services of the personal representative's counsel in this court.

AFFIRMED AS MODIFIED.

WHITE, J., dissenting.

The majority has, without explanation, prohibited appellee from "stacking" the two underinsured motorist coverages which were purchased from Farm Bureau. I am compelled to dissent from the result rendered by the majority because I do not believe our case law, statutes, or the insurance policy language dictates such a result.

Nebraska's Underinsured Motorist Insurance Coverage Act, Neb. Rev. Stat. §§ 60-571 to 60-582 (Cum. Supp. 1986), is inapplicable to this case. In the absence of applicable statutory direction, this case is controlled by this court's past decisions. I have no quarrel with the majority's assertion that "the rationale of *Kracl* and *Charley* applies as well to the underinsured motorist coverage in the case before us." However, neither *Kracl v. Aetna Cas. & Surety Co.*, 220 Neb. 869, 374 N.W.2d 40

(1985), nor *Charley v. Farmers Mut. Ins. Co.*, 219 Neb. 765, 366 N.W.2d 417 (1985), supports the conclusion that the underinsured motorist coverage provisions of these two separate policies may not be aggregated.

Kracl and *Charley* established the legal principles which today govern the "stacking" of multiple *uninsured* motorist coverages. It was held that whether multiple uninsured motorist coverages are to be aggregated depends upon the policy language. Further, an insurer may, by contract, limit its liability as long as it does not violate public policy. In short, these cases provided that an insurance company may, by contract, prohibit "stacking" by clear and unambiguous language within a policy. This case turns entirely on the language, as drafted by the insurer, used to limit liability within each of two policies issued by one insurer. A review of prior case law and Farm Bureau's liability limiting policy language points to one result: Nothing in these policies prohibits appellee from "stacking" these underinsured motorist coverage limits.

The cases in which this court has denied "stacking" are clearly distinguishable from the case at bar. In *Kracl*, we held that two separate policies issued by two different insurers could not be stacked because nearly identical provisions in the policies limited the uninsured motorist coverage to the "covered" automobile within the particular policy.

In *Charley*, we affirmed the district court's decision that denied plaintiff the ability to "stack" two uninsured motorist coverages on two autos insured under one policy. We affirmed, based on policy language which limited liability to no more than $15,000 per person in any one accident.

In *Pettid v. Edwards*, 195 Neb. 713, 716, 240 N.W.2d 344, 346 (1976) (which this court reaffirmed in *Charley*), we held that policy language which limited liability "to the limit stated in the declarations as applicable to each person, *regardless of the number of automobiles to which the policy applied*," clearly prevented stacking of uninsured motorist coverages. That case involved one policy which insured two vehicles.

This court in *Pettid* explicitly noted the difference in case law where the facts involved separate policies issued by the *same* insurer. We also cited other jurisdictions which clearly

distinguished these types of cases. I am not unmindful that in *Kracl* we overruled two of our "same insurer, separate policies" cases; however, we did so only to the extent that they were contrary to the *Kracl* opinion. In other words, policy language still controls the question of stacking. In a case such as this, however, we must look at the two policies, with identical language, issued by one insurer.

Farm Bureau argues in its brief that the "Other Insurance" clauses in the policies are "antistacking" provisions. The majority correctly addresses the fallacy of this argument. I agree that in this case the "Other Insurance" provisions "are mutually repugnant and as against each other are impossible of accomplishment." There is simply no *clear* language in these policies which prevents "stacking." Farm Bureau could easily have added language such as that found in the policy reviewed in *M.F.A. Mutual Ins. Co. v. Wallace*, 245 Ark. 230, 231, 431 S.W.2d 742, 743 (1968). That policy contained an "Other Automobile Insurance in the Company" clause, which limited liability to the highest applicable limit under any one policy issued the insured by the company. See, also, *Menke v. Country Mutual Insurance Co.*, 78 Ill. 2d 420, 401 N.E.2d 539 (1980).

Absent clear policy language to the contrary, there is no reason to prohibit the aggregation of the two underinsured motorist coverages. I would have allowed the coverage to be aggregated for a total limit of liability of $100,000 and, after reduction by the State Farm payment, awarded $75,000 to Polenz from Farm Bureau. This method seems preferable to the majority's decision, which transforms a $25,000 award into a $50,000 award based largely on the fact that the Farm Bureau policies failed to address the allocation issue in cases where more than one policy is issued to the same insured. As we said in *Waylett v. United Servs. Auto. Assn.*, 224 Neb. 741, 747, 401 N.W.2d 160, 164 (1987), "[T]he court is not free to redraft the contract" between an insured and the insurer. The majority opinion has given Farm Bureau the benefit of the State Farm deduction twice, plus the benefit of a limit of liability based on one policy. Neither the policy language nor case law dictates such an inequitable result.

GRANT, J., joins in this dissent.

DELORES MATTHEWS, FORMERLY DELORES JULIUS, APPELLANT, V. THOMAS MARION JULIUS, APPELLEE.

419 N.W.2d 540

Filed February 26, 1988. No. 87-618.

Appeal from the District Court for Box Butte County: ROBERT R. MORAN, Judge. Affirmed.

James C. Willis of Western Nebraska Legal Services, for appellant.

A. James Moravek of Curtiss, Moravek, & Curtiss, P.C., for appellee.

BOSLAUGH, CAPORALE, and GRANT, JJ., and RIST and CLARK, D. JJ.

PER CURIAM.

The petitioner mother, Delores Matthews, formerly Delores Julius, appeals from an order modifying a prior decree of dissolution so as to remove the care, custody, and control of the now almost-9-year-old child of the parties, Denita ReNae Julius, from the mother and placing the child's care, custody, and control in and with the respondent-appellee father, Thomas Marion Julius. We have, as is required in cases of this nature, reviewed the record de novo to determine whether there has been such a change in circumstances as to indicate that the mother is unfit for that purpose or that the best interests of the child require a modification of the initial custody provisions. *Scott v. Scott*, 223 Neb. 354, 389 N.W.2d 567 (1986). Such review convinces us that events have occurred since the initial placement of the child's care, custody, and control which, if existing and known to the trial court at the time of such placement, would, in the best interests of the child, have resulted in custody's being placed with the father. Accordingly, the judgment of the trial court is affirmed. *Hicks v. Hicks*, 223 Neb. 189, 388 N.W.2d 510 (1986).

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CALVIN T. LYNCOOK, APPELLANT.

419 N.W.2d 686

Filed February 26, 1988. No. 87-641.

Convictions: Appeal and Error. 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.

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

Thomas M. Kenney, Douglas County Public Defender, and Brian S. Munnelly, for appellant.

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

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

SHANAHAN, J.

A jury found Calvin T. LynCook guilty of violating Neb. Rev. Stat. § 28-517 (Reissue 1985): "A person commits theft if he receives, retains, or disposes of stolen movable property of another knowing that it has been stolen, or believing that it has been stolen, unless the property is received, retained, or disposed with intention to restore it to the owner." In his only assignment of error, LynCook contends that the evidence is insufficient to sustain the verdict.

During the early morning hours of August 19, 1986, someone gained entry into the "Clothes Works," a ladies' ready-to-wear store in Omaha, by hurling two concrete blocks through the store's glass front door. As the result of that break-in, several items of women's clothing were stolen from the Clothes Works.

In the evening of August 24, 1986, Lt. Anthony L. Infantino of the Omaha Police Department obtained a warrant authorizing a search of premises described as "3207 N. 61 st.

Apt. 2" in Omaha. The warrant also authorized search of a 1975 Buick Electra. When there was no response to their knock at the door of apartment No. 2, designated in the search warrant, Lieutenant Infantino and other police officers entered that four-room apartment. Inside, the police found several items of new women's clothes scattered on the floor, which were on hangers used to display merchandise in stores and still bore price tags. During their search of the apartment's bedroom, officers discovered a green plastic trash bag containing various items of women's apparel with price tags of the Clothes Works. Labels bearing "Jack Winter" were attached to several articles in the plastic trash bag and were also found in the bedroom wastebasket. The closet and dresser contained only men's clothing.

Later in their search, the officers came across a blue copy of a Nebraska sales and use tax statement for an automobile purchased by a "Calvin Lyncook" on April 25, 1986. The purchaser's Omaha address was "3207 No. 61st #2." Also, on the top of the dresser was an envelope from Immanuel Medical Center which bore a postmark of June 16, 1986, and was addressed to "CALVIN T LYNCOOK 3207 N 61 CT #2" in Omaha.

While some officers were searching the apartment, at a nearby parking lot other officers found the 1975 Buick Electra described in the search warrant. That Buick was registered in the name of "Calvin T. Lyncook." When officers searched the Buick's trunk, they found two concrete blocks, one weighing 40 pounds and the other weighing 25 pounds. LynCook was apprehended shortly thereafter.

A few days later the police contacted Lori Slack, manager of the Clothes Works, to identify the women's clothing found in the trash bag at the searched apartment. According to Slack, an inventory had been conducted at the Clothes Works a short time before the August 19 break-in. Among the items brought from the apartment for identification, Slack identified a woman's black blazer with a Clothes Works "ticket on it . . . originally sixty-one ninety-nine . . . marked down to forty-five ninety-nine." There were nineteen other items of women's apparel, including pants, blazers, and a skirt, identified by

Slack as merchandise stolen from the Clothes Works. Slack explained the sales procedure at the Clothes Works: when an item was sold, the perforated sales ticket for the item was torn and detached from the sold merchandise to keep track of sales. The items identified by Slack bore Clothes Works "tickets" which remained intact and attached to the identified items. The articles of clothing which had been identified by Slack had "Jack Winter" labels. Jack Winter, the parent company of the Clothes Works, manufactured the identified articles. Other than the Clothes Works, no store in Omaha or Council Bluffs handled the Jack Winter line. Slack also identified the concrete blocks which police had taken from the trunk of the Buick Electra as blocks which were substantially the same as those thrown through the front door of the Clothes Works in connection with the August 19 break-in.

At trial the State introduced a copy of a signed application for a Nebraska certificate of title for an automobile and a copy of the corresponding title issued pursuant to that application. The application and title pertained to a 1975 white Buick, the same vehicle described in the search warrant of August 24, 1986. The application for title was signed by "Calvin LynCook," whose Omaha address was "3207 N 61 #2." Pursuant to that application, a certificate of title was issued to "CALVIN T. LYNCOOK . . . 3207 N 61 #2 OMAHA, NE." The State also introduced a copy of an appearance bond regarding "STATE OF NEBRASKA, vs. Lyncook, Calvin T." for the offense of "Theft by Receiving Stolen Property." The bond was dated September 10, 1986, and signed by "Calvin LynCook," whose address was "3207 No. 61st #2."

After conclusion of the evidence presented in the State's case, LynCook offered no evidence.

> 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, 225 Neb. 418, 428, 405 N.W.2d 600, 606 (1987).

The overwhelming evidence substantiates that property was stolen from the Clothes Works and was later discovered by police at LynCook's address, namely, the apartment ostensibly under LynCook's control. The requisite guilty knowledge for the offense is established by the circumstances. The evidence and evidentiary inferences sustain the verdict that LynCook was guilty as charged.

AFFIRMED.

IN RE ESTATE OF RICHARD E. FISCHER, DECEASED. DUANE J. FISCHER, PERSONAL REPRESENTATIVE OF THE ESTATE OF RICHARD E. FISCHER, DECEASED, APPELLANT, V. CURTIS STATE BANK, CURTIS, NEBRASKA, APPELLEE.

419 N.W.2d 860

Filed March 4, 1988. No. 86-157.

1. **Appeal and Error.** In an appeal, the Supreme Court may, at its option, notice a plain error not assigned.
2. _____. Plain error may be found on appeal, when an error, unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would cause a miscarriage of justice or damage the integrity, reputation, and fairness of the judicial process.
3. **Guaranty: Liability.** A guaranty, which designates a joint indebtedness as the primary or principal obligation, covers only the joint debt of the principal or primary obligors and does not cover the individual debt of either primary or principal obligor.

Appeal from the District Court for Frontier County: JACK H. HENDRIX, Judge. Reversed and remanded with direction.

Jeffrey M. Cox of Person, Dier, Person & Osborn, for appellant.

Stephen P. Herman, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

SHANAHAN, J.

In November of 1976, Pamela Gay Hazen entered an agreement with the Curtis State Bank to obtain an extension of credit for the operating expenses of "The Flower Basket," a floral and gift shop which was Pamela's sole proprietorship. In conjunction with that agreement, Pamela signed a security agreement, granting the bank a security interest in the assets of the Flower Basket. According to an officer and director of the bank, in the summer of 1977 the bank made a loan "[i]n the neighborhood of $10,000.00" which was "credit extended to Pam Hazen doing business as The Flower Basket, for operating expenses." On September 23, 1977, Richard E. Fischer, Pamela's father, signed a guaranty of $16,000 in favor of the bank "to give and continue to give credit to Pamela Gay Hazen DBA: FLOWER BASKET."

Subsequently, in June 1978, Pamela and her husband, Dennis, signed a security agreement, granting the bank a security interest in their 1978 Chevrolet van and securing some unspecified indebtedness of Pamela and Dennis Hazen. On February 20, 1980, Pamela's parents, Richard E. Fischer and Elane L. Fischer, signed a guaranty of $25,000 to the bank "to give and continue to give credit to Pamela Gay Hazen." That guaranty contained no reference to the Flower Basket or Dennis Hazen. The exact amount of the indebtedness owed by Pamela Gay Hazen to the bank on February 20, 1980, is undisclosed in the record.

On October 21, 1983, Richard and Elane Fischer signed another guaranty in a preprinted form containing:

> I hereby request CURTIS STATE BANK of Curtis, NE 69025 hereinafter called the "Bank" to give and continue to give credit to Pam and Dennis Hazen and in consideration of all and any such credit given, I hereby unconditionally guarantee prompt payment to the Bank when due, of any and all notes at any time made by said debtor to said Bank and any renewal or renewals thereof, together with any other indebtedness (now existing or hereafter incurred) of said debtor to said Bank arising from borrowings, overdrafts, notes discounted or otherwise.

That guaranty also limited the liability of Richard and Elane Fischer to $40,000 and contained a further provision:

> 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.

Richard E. Fischer died in January 1984, a fact which the bank learned in January 1984. The record does not disclose the following, if extant at Richard E. Fischer's death: Terms and the amount of any indebtedness owed by Pamela Hazen or Dennis Hazen to the bank; whether any Hazen debt was a joint obligation of Pamela and Dennis or whether such debt was the individual obligation of Pamela or Dennis; and whether any Hazen debt was evidenced by a promissory note made jointly by Pamela and Dennis or made solely by either of them. Nevertheless, in the light of events after Richard E. Fischer's death, it becomes readily apparent that Pamela Hazen must have owed approximately $41,700 to the bank at the date of her father's death. Approximately 2 months after the death of Richard E. Fischer, that is, on February 27, 1984, Pamela Hazen signed a preprinted promissory note, denominated a "FLOATING RATE PROMISSORY NOTE," in favor of the bank and in the principal amount of $41,700. In reference to the promissory note of February 27, 1984, a bank officer explained:

> This was the loan that [the bank] renewed on February 27, 1984, for Pam Hazen doing business as The Flower Basket. The proceeds were advanced to renew a $39,000. debt plus $2,077.39 accrued interest, plus $22.61 new cash. It was agreed to at that time that the sale and/or auction of The Flower Basket would be made for reduction by the notes maturity on April 1, 1984.

The note specified that principal and interest were due in a single payment on April 1, 1984. At the signature line for the

promissory note there appears:

FLOWER BASKET, Curtis, NE 69025
/s/ Pam Hazen Owner

The promissory note of February 27, 1984, does not refer to any debt which Dennis Hazen may have owed to the bank, and the note was not signed by Dennis Hazen or otherwise acknowledged by him as evidence of indebtedness to the bank.

In April 1984 Pamela Hazen defaulted on her $41,700 note. However, by a payment made at the bank's drive-in window on June 25, Pamela paid $160.08 as interest on the February 27, 1984, promissory note to the bank.

On August 21, 1984, the attorney for the bank wrote to "Dennis Hazen or Pamela G. Hazen dba Flower Basket" and informed the Hazens about a prospective private sale of their 1978 Chevrolet van on August 27, 1984, pursuant to their security agreement signed on June 27, 1978. Also, on August 21, 1984, that same attorney for the bank wrote to "Pamela Gay Hazen dba Flower Basket" and stated that the physical assets of the Flower Basket would be sold at private sale on August 27, 1984. The bank never notified the personal representative of the Richard E. Fischer estate concerning the sale of the Flower Basket assets. As indicated in the letters from the bank's attorney, the private sales did take place. From the sale of the Flower Basket assets, the bank received $9,500 for which Pamela Hazen was given credit on her $41,700 promissory note to the bank. Part of the proceeds from the sale of Hazens' van was applied to the debt on the van, and the balance of the sale proceeds was then applied on the $41,700 note signed by Pamela (Pam) Hazen on February 27, 1984. Because no further payments were made on the $41,700 promissory note, the bank filed its guaranty-based claim against the Richard E. Fischer estate. The personal representative for the estate gave "Notice of Disallowance" concerning the bank's claim. On the bank's "Petition for Allowance of Claim" filed in the estate of Richard E. Fischer, deceased, the county court for Frontier County entered judgment in favor of the bank for $27,000, an amount remaining after credits applied to Pamela Hazen's promissory note of February 27, 1984. The personal representative

appealed to the district court, which affirmed the county court's judgment.

In his brief, the personal representative of the Richard E. Fischer estate contends that the estate is not liable on the guaranty because the bank failed to notify the personal representative about the private sale of the Flower Basket's assets. As the premise for his contention, the personal representative relies on the notice requirement in Neb. U.C.C. § 9-504(3) (Reissue 1980). However, there is a more fundamental flaw in the county court's judgment for the bank.

Regarding an appeal in a civil case, Neb. Rev. Stat. § 25-1919 (Reissue 1985) directs that an appellant's brief specify the errors in the judgment claimed to be erroneous, but also provides: "The Supreme Court may, however, at its option, consider a plain error not specified in appellant's brief." Neb. Ct. R. of Prac. 9D(1)d (rev. 1986) in part provides: "The court may, at its option, notice a plain error not assigned."

Plain error may be found on appeal, when an error, unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would cause a miscarriage of justice or damage the integrity, reputation, and fairness of the judicial process. See, *Gluckauf v. Pine Lake Beach Club, Inc.*, 78 N.J. Super. 8, 187 A.2d 357 (1963); *State v. Thompson*, 59 N.C. App. 425, 297 S.E.2d 177 (1982); *People v. Simmons*, 67 Ill. App. 3d 1045, 385 N.E.2d 758 (1978). Cf., *Enyeart v. Swartz*, 218 Neb. 425, 355 N.W.2d 786 (1984) (failure of trial court, although not requested, to instruct on proximate cause in a negligence action; plain error); *State v. Beyer*, 218 Neb. 33, 352 N.W.2d 168 (1984) (charge of theft but no penalty provided by statute; plain error); *Dell v. City of Lincoln*, 168 Neb. 174, 95 N.W.2d 336 (1959) (neither pleading nor proof of a city charter provision on which trial court relied in its decision; plain error).

At the time of oral argument in this appeal (December 2, 1987), we had not as yet issued the opinion in *Federal Deposit Ins. Corp. v. Heyne, ante* p. 291, 417 N.W.2d 162 (1987), which was filed on December 31, 1987, and disposes of the appeal in the present case. In *Federal Deposit Ins. Corp. v. Heyne, supra*, the plaintiff, as receiver for the insolvent Uehling State Bank,

sought a recovery based on Heyne's guaranty, which stated:

> "I hereby request Uehling State Bank to give and continue to give credit to *Robert & MaeNell Johnson* and in consideration of all and any such credit given, I hereby unconditionally guarantee prompt payment to the Uehling State Bank when due, of any and all notes at any time made by said debtor to said bank and any renewal or renewals thereof, together with any other indebtedness (now existing or hereafter incurred) of said debtor to said bank arising from overdrafts, notes discounted or otherwise."

(Emphasis in original.) *Ante* p. 292-93, 417 N.W.2d at 163. According to the petition against Heyne, Robert E. Johnson had borrowed from the Uehling State Bank but failed to pay his promissory note for the loan, a note which Johnson alone had signed. When the FDIC filed its petition, alleging a claim based on the Heyne guaranty, Heyne demurred. After the district court overruled the demurrer, Heyne elected to stand on his demurrer, and a default judgment was entered against Heyne on account of the guaranty in question. On appeal, this court reversed the default judgment against Heyne. Holding that the district court had improperly overruled Heyne's demurrer, we stated:

> The issue here is whether the guaranty agreement covers both the joint and individual debts of Robert and MaeNell Johnson. The FDIC asserts that this is a question of fact, while the appellant asserts that it is a question of law.
>
> Nebraska adheres to the rule of strict construction of guaranty contracts. In *Hunter v. Huffman*, 108 Neb. 729, 189 N.W. 166 (1922), this court said: "The rule of *strictissimi juris* applies in determining the effect of a contract of guaranty. When the meaning of the contract is ascertained, or its terms are clearly defined, the liability of the guarantor is controlled absolutely by such meaning and limited to the precise terms." (Syllabus of the court.) See, also, *Bash v. Bash*, 123 Neb. 865, 244 N.W. 788 (1932) (quoting and approving this language from *Hunter*). We have also held that the liability of a guarantor is not to be enlarged beyond the strict terms of the contract. See *Furst*

> *v. Kruger*, 132 Neb. 54, 271 N.W. 156 (1937). With these rules in mind, we hold that the guaranty agreement was clear and unambiguous and required no construction. The agreement guaranteed the debts of Robert *and* MaeNell Johnson, and not Robert *or* MaeNell Johnson. The guaranty does not, therefore, extend to cover the individual debts of Robert Johnson.
>
> Although this precise issue has not been litigated often, several other courts have come to the same conclusion on similar facts. See, *Hamilton Trust Co. v. Shevlin*, 156 A.D. 307, 141 N.Y.S. 232 (1913), *aff'd* 215 N.Y. 735, 109 N.E. 1077 (1915) (court holds that guaranty covering loans to five persons does not cover loans made to four of the five persons, and the judgment sustaining the demurrer was therefore proper); *O'Grady v. Bank*, 296 N.C. 212, 250 S.E.2d 587 (1978) (guaranty covered only the joint and several debts of the three individuals listed as obligors).

Ante p. 293-94, 417 N.W.2d at 163. Thus, as this court recognized in *Federal Deposit Ins. Corp. v. Heyne, supra*, a guaranty, which designates a joint indebtedness as the primary or principal obligation, covers only the joint debt of the principal or primary obligors and does not cover the individual debt of either primary or principal obligor.

With the exception of the debtors' names, the *Heyne* guaranty is almost a verbatim counterpart to the guaranty signed by Richard E. Fischer and Elane L. Fischer. The Fischer guaranty related to credit extended to "Pam and Dennis Hazen," a joint obligation, and did not pertain to credit extended to Pamela (Pam) Hazen alone. The basis of the bank's claim against the Fischer estate was Pamela Hazen's default on the $41,700 promissory note to the bank, a note signed by Pamela Hazen alone. The Fischer guaranty covered only the joint debt of Pamela and Dennis Hazen and, therefore, did not cover Pamela Hazen's individual indebtedness to the bank.

To impose liability on the estate of Richard E. Fischer, deceased, and, in effect, impose liability on the heirs or devisees of Richard E. Fischer, would necessitate our rewriting the unambiguous guaranty concerning a joint debt and thereby

convert the instrument into a guaranty covering a debt incurred by Pamela Hazen alone. We decline to make such revision. The county court's judgment, based on the Fischer guaranty, is incorrect as plain error.

Therefore, we reverse the district court's judgment and remand this matter to the district court with direction to reverse and vacate the judgment entered in the county court in favor of the bank and against the estate of Richard E. Fischer, deceased.

REVERSED AND REMANDED WITH DIRECTION.

DUGDALE OF NEBRASKA, INC., A MISSOURI CORPORATION, APPELLANT, V. FIRST STATE BANK, GOTHENBURG, NEBRASKA, A NEBRASKA BANKING CORPORATION, APPELLEE.

420 N.W.2d 273

Filed March 4, 1988. No. 86-279.

1. **Evidence: Appeal and Error.** Where the parties stipulate to all the facts at trial, the Supreme Court reviews the case as if trying it originally in order to determine whether the facts warranted the judgment.
2. **Certificate of Title: Motor Vehicles: Fraud.** The certificate of title act, Neb. Rev. Stat. §§ 60-101 et seq. (Reissue 1984), was enacted to protect vehicle owners, lien holders, and the public against fraud.
3. **Uniform Commercial Code: Sales: Motor Vehicles.** The provisions of Neb. U.C.C. art. 2 (Reissue 1980) governing sales are applicable to the sale of a motor vehicle.
4. **Statutes.** Statutes which relate to the same subject, although enacted at different times, are in pari materia and should be construed together.
5. **Statutes: Legislature: Presumptions: Intent: Appeal and Error.** In construing a statute, the Supreme Court will presume that the Legislature intended a sensible rather than an absurd result.
6. **Motor Vehicles: Debtors and Creditors: Certificate of Title: Sales.** A dealer having the authority to expose vehicles for sale in the ordinary course of business binds his financier to deliver title to any vehicle so sold, whether or not the dealer remits the proceeds to his financier. A buyer in the ordinary course of business in this limited circumstance is not within the intended purview of Neb. Rev. Stat. § 60-105 (Reissue 1984).

Appeal from the District Court for Dawson County: JOHN P. MURPHY, Judge. Reversed and remanded with directions.

Scott H. Trusdale of Trusdale & Trusdale, P.C., for appellant.

Richard G. Kopf of Cook, Kopf & Doyle, P.C., for appellee.

Andrew E. Grimm of Dwyer, Pohren, Wood, Heavey & Grimm, for amicus curiae Ford Motor Credit Company.

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

WHITE, J.

This is an appeal by the plaintiff, Dugdale of Nebraska, Inc. (Dugdale), from a decision of the district court for Dawson County. Dugdale brought an action seeking a declaratory judgment as to its ownership rights to a 1985 Ford LTD Crown Victoria. Dugdale claimed ownership rights by virtue of having paid good and valuable consideration to Vannier Ford, Inc., and having taken possession of the vehicle from Vannier Ford. The defendant, First State Bank, cross-petitioned, claiming ownership of the vehicle by virtue of its possession of the manufacturer's certificate of origin and, subsequently, possession of the certificate of title to the vehicle. The cross-petition also sought declaratory relief. The case was tried upon stipulated facts.

Roger Swenson is the vice president in charge of operations and manager of the beef processing plant owned by Dugdale, located in Norfolk, Nebraska. In the 9 years prior to this lawsuit, Swenson purchased nearly 100 vehicles for Dugdale from Vannier Ford. On one previous occasion Vannier Ford had been a few days late in delivering a certificate of origin for a vehicle purchased by Swenson.

On March 11, 1985, Dugdale purchased from Vannier Ford a 1985 Ford LTD Crown Victoria. Dugdale traded a 1984 vehicle and paid $2,890 cash for the car. The car was one of six cars purchased that year to be used by Dugdale's cattle buyers.

On the day that the vehicle was delivered, Swenson was informed by Don Vannier, president of Vannier Ford, that the title papers to the vehicle had not yet been received. Thereafter, Swenson made numerous inquiries regarding the title papers. Each time he was told that the certificate of origin either had

not yet arrived or was lost, and various promises to deliver the papers were made. Swenson received no answer from Vannier Ford's business number in his final attempt to attain the certificate of origin. Shortly thereafter, approximately 2 months after taking delivery of the vehicle, First State Bank contacted Swenson and made demand for possession of the vehicle.

Approximately 5 days before selling the vehicle to Dugdale, Vannier Ford pledged the 1985 Ford LTD Crown Victoria to First State Bank as collateral for an $11,636.51 loan. Vannier Ford delivered the manufacturer's certificate of origin to the bank pursuant to the loan. The car was also subject to a previous security agreement with the bank. Vannier Ford defaulted on the loan, and the bank applied for and received a certificate of title, pursuant to Neb. Rev. Stat. § 60-111 (Reissue 1984).

It is apparent from these facts that Vannier Ford perpetrated fraud against both parties to this lawsuit. Vannier Ford falsely represented clear title in the sale to Dugdale and at the same time defrauded the bank by selling collateral pledged for a loan.

The district court found that the plaintiff, Dugdale, never acquired proper and legal title to the vehicle and, as such, could not claim ownership under Nebraska law. The court relied upon Neb. Rev. Stat. § 60-105 (Reissue 1984), which states in relevant part as follows:

> No person . . . acquiring a motor vehicle . . . shall acquire any right, title, claim, or interest in or to such motor vehicle . . . until he shall have had delivered to him physical possession of such motor vehicle . . . and a certificate of title or a manufacturer's or importer's certificate . . . . No court in any case at law or in equity shall recognize the right, title, claim, or interest of any person in or to any motor vehicle . . . unless there is compliance with this section.

The court further found that ownership of the vehicle is vested in the defendant, First State Bank.

Since all of the facts were submitted by stipulation, we review this case as if trying it originally in order to determine whether the facts warranted the judgment. *State Farm Mut. Auto. Ins.*

Co. v. Budd, 185 Neb. 343, 175 N.W.2d 621 (1970).

The appellant presents six assignments of error, which can be summarized as follows: (1) Dugdale should have been free of the bank's security interest, since it was a buyer in the ordinary course of business, and § 60-105 should not have been applied to defeat that status on these facts; and (2) the bank failed to comply with Neb. U.C.C. § 9-403 (Cum. Supp. 1986) (security agreements) and § 60-111 (repossession) and therefore had no security interest or ownership interest in the vehicle.

In 1939 the Nebraska Legislature passed into law the certificate of title act. See Neb. Rev. Stat. §§ 60-101 et seq. (Reissue 1984). The act is very similar to the certificate of title act in Ohio and was adopted to protect vehicle owners, lien holders, and the public against fraud. *Securities Credit Corp. v. Pindell*, 153 Neb. 298, 44 N.W.2d 501 (1950). We have said that the certificate of title act is the exclusive means of transferring title, and a purchaser who takes possession of a motor vehicle without receiving a certificate of title acquires no ownership of the vehicle. *Boren v. State Farm Mut. Auto. Ins. Co.*, 225 Neb. 503, 406 N.W.2d 640 (1987); *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); *The Cornhusker Bank of Omaha v. McNamara*, 205 Neb. 504, 288 N.W.2d 287 (1980); *Weiss v. Union Ins. Co.*, 202 Neb. 469, 276 N.W.2d 88 (1979); *Wolfson Car Leasing Co., Inc. v. Weberg*, 200 Neb. 420, 264 N.W.2d 178 (1978); *First Nat. Bank & Trust Co. v. Ohio Cas. Ins. Co.*, 196 Neb. 595, 244 N.W.2d 209 (1976); *Forman v. Anderson*, 183 Neb. 715, 163 N.W.2d 894 (1969). None of these cases except *Boren* involved a claimant who was a buyer in the ordinary course of business, as defined by Neb. U.C.C. § 1-201(9) (Reissue 1980). Although the claimant in *Boren* was apparently a buyer in the ordinary course, that case did not involve an ownership dispute between a purchaser and a dealer's financier. As such, this is a case of first impression in Nebraska.

Within the limitations set forth in Neb. U.C.C. § 2-102 (Reissue 1980), the provisions of Neb. U.C.C. art. 2 (Reissue 1980) governing sales are applicable to the sale of a motor vehicle. See § 2-105(1). Section 2-312 provides that a seller

warrants that he will convey good title free from any security interest or lien or encumbrance of which the buyer has no actual knowledge. This warranty, which arises as a matter of law, can only be modified or excluded by specific language or by circumstances which put the buyer on notice that the seller's claim to title is limited or nonexistent. See § 2-312(2). In the contract between Vannier Ford and Dugdale there is no language which excludes or modifies the warranty of title, nor were the circumstances such that Dugdale had reason to know that Vannier Ford did not claim title. In fact, just the opposite is true. At the time of the contract for sale Vannier Ford represented, and continued to represent, to Dugdale that the certificate of origin would be delivered.

Section 2-403 provides as follows:

> (2) Any entrusting of possession of goods to a merchant for purposes of sale who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business.
>
> (3) "Entrusting" includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods have [sic] been such as to be larcenous under the criminal law.

It was stipulated that Dwight Stubbs and Marion Tatum, each an officer and director of First State Bank, would have testified that no one from the bank authorized Vannier Ford to sell the vehicle. The record indicates, however, that the vehicle remained in the possession of Vannier Ford, a licensed dealer. Under § 2-403 the bank entrusted possession of the vehicle to Vannier Ford, and as such Vannier had the authority to transfer all of the bank's rights to a buyer in the ordinary course.

It was stipulated that Bill Brandt would have testified for the defendant that in his view Dugdale was not a purchaser in the ordinary course, since, as a matter of fact, it is not in the ordinary course of business to pay for a motor vehicle, accept delivery, but fail to obtain delivery of the manufacturer's certificate of origin. The phrase "buyer in the ordinary course

of business" is defined in § 1-201(9) as one who purchases in good faith and without knowledge that the sale is in violation of ownership rights or security interests of a third party. The seller must be in the business of selling goods of the type purchased. The test does not require uniform sophistication among buyers and does not attempt to measure each sale transaction against an industry standard or norm. It simply requires good faith and no knowledge that the sale is in violation of the rights of a third party. In this case good faith can be inferred from Dugdale's prior dealings with Vannier Ford and also from Dugdale's continuous efforts to obtain the certificate of origin. There was no evidence that Dugdale was aware of the bank's security interest. Vannier Ford, a licensed dealer, was certainly one in the business of selling motor vehicles. We therefore find that Dugdale was a buyer in the ordinary course of business. We further find that Vannier Ford warranted clear title under § 2-312 and that under § 2-403 First State Bank is bound by that warranty.

Vannier Ford not only warranted title under § 2-312, but was obligated to deliver such title under § 60-104. Selling a vehicle without delivering to the purchaser a certificate of title constitutes a Class III misdemeanor. § 60-117(5) and (7). While § 60-104 makes it unlawful for a purchaser to *receive* a title which does not contain the proper assignment of rights, it does not make it unlawful for a purchaser to acquire a motor vehicle without obtaining the certificate of title. It is evident, then, that the certificate of title act places primary emphasis on the seller's duty to deliver title.

The need to consider the Uniform Commercial Code provisions concurrently with the certificate of title act becomes obvious in light of the facts in this case. It is clear that both the title act and article 2 of the Uniform Commercial Code apply to the transaction here in question. Statutes which relate to the same subject, although enacted at different times, are in pari materia and should be construed together. *Northwest High School Dist. No. 82 v. Hessel*, 210 Neb. 219, 313 N.W.2d 656 (1981). The district court refused to recognize Dugdale's claim because § 60-105 requires both physical possession and a certificate of origin or title, and Dugdale failed to have the

latter. Yet, the court recognized the bank's claim even though it did not have physical possession of the vehicle. The bank was just as much a "person" acquiring or attempting to acquire a motor vehicle as was Dugdale. The result under this analysis is that no court could recognize either the bank's claim or Dugdale's claim. We must presume that the Legislature did not intend such an absurd result. *State v. Sinica*, 220 Neb. 792, 372 N.W.2d 445 (1985).

Courts in numerous other jurisdictions which have enacted the Uniform Commercial Code together with certificate of title acts similar to our own have addressed the identical question presented here. The overwhelming majority of those courts hold that a good-faith purchaser should prevail.

In *Levin v. Nielsen*, 37 Ohio App. 2d 29, 306 N.E.2d 173 (1973), the Ohio appellate court construed Ohio Rev. Code Ann. § 4505.04 (Anderson 1982) (identical in all relevant respects to § 60-105) together with the Uniform Commercial Code. The plaintiff in *Levin* purchased an automobile and later brought an action against the dealer's financier to compel delivery of title. The court found that the defendant had entrusted the vehicle to the dealer, and as such the defendant was obligated to deliver title to the plaintiff. Other cases in support of this view include *N. C. National Bank v. Robinson*, 78 N.C. App. 1, 336 S.E.2d 666 (1985); *Owensboro Nat. Bank v. Jenkins*, 173 Ga. App. 775, 328 S.E.2d 399 (1985); *Shannon v. Snedeker*, 192 N.J. Super. 366, 470 A.2d 25 (1983); *Whitworth v. Dodd*, 435 So. 2d 1305 (Ala. Civ. App. 1983); *Island v. Warkenthien*, 287 N.W.2d 487 (S.D. 1980); *American Lease Plans v. Jacobs Plumbing*, 274 S.C. 28, 260 S.E.2d 712 (1979); *Milnes v. General Elec. Credit Corp.*, 377 So. 2d 725 (Fla. App. 1979); *Commercial Nat. Bank v. Reedman Chevrolet*, 265 Pa. Super. 512, 402 A.2d 663 (1979); *Godfrey v. Gilsdorf*, 86 Nev. 714, 476 P.2d 3 (1970); *Medico Leasing Company v. Smith*, 457 P.2d 548 (Okla. 1969); *Com. Cred. Corp. v. Asso. Dis. Corp.*, 246 Ark. 118, 436 S.W.2d 809 (1969); and *Price v. Universal C. I. T. Credit Corporation*, 102 Ariz. 227, 427 P.2d 919 (1967).

We hold that a dealer having the authority to expose vehicles for sale in the ordinary course of business, pursuant to § 2-403,

binds his financier to deliver title to any vehicle so sold, whether or not the dealer remits the proceeds to his financier. A buyer in the ordinary course of business in this limited circumstance is not within the intended purview of § 60-105.

Based upon the foregoing, it is unnecessary for us to decide whether the bank had a valid security agreement or whether the bank properly attained a certificate of title to the vehicle. The decision of the district court is reversed and the cause is remanded with directions.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. DAVID L. MEDINA, APPELLANT.

419 N.W.2d 864

Filed March 4, 1988. No. 86-1079.

1. **Jury Instructions: Evidence.** A jury instruction which directs the attention of the jury to, and unduly emphasizes, a part of the evidence should be refused.
2. **Implied Consent: Blood, Breath, and Urine Tests.** When an officer requests a person to submit to a chemical test, pursuant to the implied consent law, anything less than an unqualified, unequivocal assent constitutes a refusal.
3. **Jury Instructions.** All jury instructions must be read together, and if the instructions taken as a whole (1) correctly state the law, (2) are not misleading, and (3) adequately cover the issues, there is no prejudicial error.
4. **Implied Consent: Blood, Breath, and Urine Tests.** A person is not exempted from the provisions of a refusal statute merely because he or she was too intoxicated to appreciate the consequences of his of her refusal.
5. _____: _____. A refusal to submit to a chemical test requested under the implied consent statute occurs where the conduct of the arrested motorist is such that a reasonable person in the officer's position would be justified in believing that such motorist was capable of refusal and manifested an unwillingness to submit to the test.

Appeal from the District Court for Hall County: WILLIAM H. RILEY, Judge. Affirmed.

John S. Mingus of Mingus & Mingus, for appellant.

Robert M. Spire, Attorney General, and Jill Gradwohl Schroeder, for appellee.

HASTINGS, C.J., WHITE, and GRANT, JJ., and BRODKEY, J., Retired, and CORRIGAN, D.J.

GRANT, J.

Defendant, David L. Medina, appeals from the district court for Hall County, which affirmed a decision of the county court for that county. Defendant was charged in county court in two counts. After trial in the county court, a jury found defendant not guilty of driving while under the influence of alcohol, and guilty of refusing to submit to a chemical test, pursuant to the implied consent law, Neb. Rev. Stat. § 39-669.08 (Reissue 1984). Defendant timely appealed. We affirm.

The evidence shows that defendant had been to the horseraces in Grand Island, Nebraska, on the afternoon of March 7, 1986, and arrived at a Grand Island bar about 5:30 p.m. Defendant testified he had "[p]robably three, four" drinks at the bar and left, driving directly to the scene of the accident, which occurred on U.S. Highway 281 approximately 3 miles south of Grand Island. The accident happened at approximately 10 p.m.

The evidence showed that a semitrailer truck pulled out of a truck wash on the east side of Highway 281 south of Grand Island and proceeded south in the right lane of a four-lane highway. Approximately 100 feet from the point the truck entered the highway, defendant's car collided with the rear of the truck. When Nebraska State Patrol Trooper Gerald Schenck arrived at the scene, he saw defendant's car stopped in the right lane, with damage to the extent that "the whole front of the vehicle was caved clear in as to where the hood of the vehicle had actually crashed into and through the windshield."

When the trooper approached the defendant's car, he saw that the defendant's face was bleeding. Schenck attempted to speak with the defendant to determine the extent of his injuries, at which time the defendant told him to "get out of his face" and to "leave him alone."

Emergency medical technicians arrived at the scene and attempted to aid defendant, but the defendant kept pushing them away and telling them that he did not need their help. As the defendant was being removed from his car, Schenck smelled

alcohol on his breath. An emergency medical technician also smelled the odor of liquor about the defendant at this time. Schenck again smelled alcohol on defendant's breath after defendant was put in the ambulance.

The defendant was transported by ambulance to the hospital while the trooper conducted an investigation of the accident scene. Schenck radioed another Nebraska state patrolman, Trooper John Frederick, and asked him to go to the hospital to advise the defendant that he was under arrest for driving while intoxicated and to advise defendant of the implied consent law. After Schenck finished his investigation, he proceeded to the hospital.

At the hospital, Schenck told defendant that he was under arrest. At that time, Frederick had already placed defendant under arrest. Frederick then read the implied consent form to the defendant and again advised defendant he was under arrest. At that time, Frederick smelled an odor of alcoholic liquor about the defendant. The defendant told the troopers that he would take the test, but that he would not take it until "tomorrow." Schenck told the defendant that he would have to take the test that night or he would be cited for refusing to submit to a chemical test. The defendant again responded that he would not take the chemical test until the following day. Defendant remained in the hospital for several days for treatment of his injuries.

After defendant's conviction for refusing to submit to a chemical test, he appealed to the district court for Hall County, where his conviction was affirmed. He then appealed to this court, assigning and arguing that the trial court erred (1) in refusing defendant's requested jury instructions Nos. 1 and 2, (2) in sustaining the objection of the State to a question propounded to witness Nancy Hanna, who was a licensed practical nurse and who had seen defendant at the crash and later visited him, and (3) in finding that the evidence was sufficient to support the finding of guilt.

Defendant first assigns as error that his two proposed jury instructions were improperly rejected by the trial court.

Jury instruction No. 6, which was given by the trial court, explained the burden of proof and set out the material elements

which the State must prove in order to convict defendant of the crime of refusal to submit to a chemical test of his body fluids. These elements included: (1) that defendant was placed under arrest; (2) that defendant was placed under arrest for driving under the influence; (3) that the officer required defendant to submit to a chemical test; (4) that at the time of such requirement the officer had reasonable grounds to believe that defendant was driving while under the influence; and (5) that defendant refused to submit to such test. By its finding of guilt, the jury found that the State met its burden in proving these elements.

Defendant's requested jury instruction No. 1 sets out the same elements set out in instruction No. 6, plus more. Defendant's requested instruction expressly directed the jury also to consider defendant's testimony that he did not recall being arrested, being read the implied consent form, or being requested to take a test; and that the jury specifically determine whether defendant had sufficient understanding to be capable of refusing the test.

The trial court retains discretion in the wording of jury instructions. *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984). Further, a jury instruction which directs the attention of the jury to, and unduly emphasizes, a part of the evidence is erroneous and should be refused. *State v. Harrison*, 221 Neb. 521, 378 N.W.2d 199 (1985).

Jury instruction No. 6 set out the material elements that the State must prove "by evidence beyond a reasonable doubt in order to convict the defendant of the crime of refusal to submit to a chemical test of his blood, breath or urine." The last of those elements was set out as "5. That the defendant having been required to submit to a chemical test refused to submit to such chemical test." To "refuse" is defined as "to show or express a positive unwillingness to do or comply with (as something asked, demanded, expected) — used with a following infinitive (refused to answer the question)." Webster's Third New International Dictionary, Unabridged 1910 (1981). "To refuse," by definition, requires that a person understand what is being asked of him and then in some way manifest nonacceptance, nonconsent, or unwillingness. Since the issue

of whether defendant understood that he was being asked to take a test is embodied in the fact that refusal requires understanding, the jury had this issue before it and was sufficiently instructed.

In *State v. Reeves, supra* at 218, 344 N.W.2d at 443, this court held that " ' "[a]ll the instructions must be read together and if the instructions taken as a whole [1] correctly state the law, [2] are not misleading, and [3] adequately cover the issues, there is no prejudicial error." ' " (Quoting *State v. Bartholomew*, 212 Neb. 270, 322 N.W.2d 432 (1982).) See, also, *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987). While the issue of whether defendant understood he was being asked a question might have been more clearly submitted, we hold that, taken as a whole, the instructions submitted to the jury in this case correctly state the law, are not misleading, and adequately cover the issues.

Defendant's second requested jury instruction was also rejected by the trial court. That instruction set out that the jury could consider whether excessive intoxication, by which a person is wholly deprived of reason, may prevent a person from realizing that he was under arrest and that he was requested to take a test, and therefore resulted in defendant's not "refusing" to take the test.

Such an instruction is not proper in an implied consent proceeding. In *Jensen v. Jensen*, 222 Neb. 23, 27-28, 382 N.W.2d 9, 12 (1986), we held that " 'a person is not exempted from the provisions of a refusal statute merely because he was too intoxicated to appreciate the consequences of his refusal.' " Since intoxication may not be considered as a factor in whether defendant is capable of refusing, it would be incorrect to allow an intoxication defense as a jury instruction. We hold that the trial court correctly rejected defendant's proposed jury instruction No. 2. We further note that if defendant claims the benefits of the excessive intoxication defense as a defense to count II in this case, he has conceded the truth and accuracy of count I, driving while under the influence of alcohol—a result certainly not desired by defendant.

In his second assignment of error, defendant asserts that the trial court erred in sustaining the State's objection to a certain

question of defendant's directed to a witness. The witness had seen defendant at the site of the crash and later visited defendant in the hospital, 3 days after the accident. By offer of proof, defendant advised the court that he intended to offer testimony from the witness that defendant told the witness, at the hospital, that he did not remember seeing her at the crash scene. The State objected, stating that "[t]his [was] no longer relevant to the issues." The trial court sustained the objection. We agree. Defendant's self-serving statement made 3 days after the incident was not relevant to the issue before the jury. There was no showing as to defendant's condition or state of mind at that time in the hospital while defendant was under treatment. A statement by defendant, 3 days after the accident, is not relevant to the question of whether defendant refused to submit to a chemical test on the night in question.

Defendant's third assignment of error asserts that the evidence does not support the finding of guilt. Defendant alleges that the evidence does not show that defendant was under arrest, as required for taking the test. The evidence set out above, if believed by the jury, establishes the fact that defendant was placed under arrest—not once, but three times.

Defendant also contends that the evidence does not support a finding that he understood he was being asked to take a test and that he was in a condition to refuse to take the test. A review of the evidence in the record does not support defendant's contention. When asked to submit to a chemical test, defendant stated that he would take it the following day. In *Clontz v. Jensen, ante* p. 191, 195, 416 N.W.2d 577, 580 (1987), we held: "The law is clear that anything less than an unqualified, unequivocal assent to an officer's request to submit to a chemical test constitutes a refusal." See, also, *Guerzon v. Jensen*, 225 Neb. 712, 407 N.W.2d 788 (1987). The presence of mind required to be capable of refusal was set forth by this court in *Wohlgemuth v. Pearson*, 204 Neb. 687, 285 N.W.2d 102 (1979). We stated at 691, 285 N.W.2d at 104: "If the suspect knew that he was being asked a question and manifested a refusal, he was for the purpose of the statute [§ 39-669.08], refusing to take a test." See, also, *Clontz v. Jensen, supra; Pollard v. Jensen*, 222 Neb. 521, 384 N.W.2d 640 (1986). The

responsive nature of defendant's reply to the trooper's request indicates that he knew he was being asked a question. Defendant's reply constituted a refusal.

In *Wohlgemuth v. Pearson, supra*, this court considered the refusal to take a chemical test in a civil proceeding—an appeal from the administrative order of the Director of Motor Vehicles suspending a motorist's driver's license. Nonetheless, the tests set out in such a proceeding may be applied to a criminal proceeding, provided, of course, that the burden of proof in the criminal proceeding must be that of "beyond a reasonable doubt."

In *Wohlgemuth, supra* at 691, 285 N.W.2d at 104, we held that " 'a refusal to submit to the [chemical] test occurs where the conduct of the arrested motorist is such that a reasonable person in the officer's position would be justified in believing that such motorist was capable of refusal and manifested an unwillingness to submit to the test.' " Viewed in that light, the evidence supports the jury's determination of guilt in this case.

There was no error in the action of the trial court, and defendant's conviction is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. STEVEN R. BLAIR, APPELLANT.
419 N.W.2d 868

Filed March 4, 1988. No. 87-330.

1. **Trial: Evidence: Appeal and Error.** Error may not be predicated on the admission of evidence to which timely objection was not made.
2. _____: _____: _____. In order for any question as to the admissibility of evidence to be reviewed on appeal, the record must show that the objection was brought to the attention of the trial judge and ruled upon.
3. _____: _____: _____. In order to preserve an objection to the admission of evidence, an objection must be made at the time the evidence is offered.

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

James Martin Davis, for appellant.

Robert M. Spire, Attorney General, and Yvonne E. Gates, for appellee.

HASTINGS, C.J., WHITE, SHANAHAN, and FAHRNBRUCH, JJ., and HANNON, D.J.

HANNON, D.J.

On the following evidence, the defendant was convicted of possession of cocaine. On the evening of March 27, 1986, the defendant and a Ms. Allen were leaving Omaha in her 1985 Corvette. The sun had set and headlights and streetlights were on. He drove south on 72d Street and turned west on Maple Street. At that time a police officer by the name of Brian Smith was also driving south on 72d Street, and he observed the defendant change lanes and turn without signaling. The police officer followed the defendant onto Maple Street with the intention of issuing a ticket for failure to signal. After driving about two blocks west, the defendant moved from the curbside lane into the lane next to the median. Officer Smith testified he was following one car length behind the defendant when he saw the defendant extend his arm out the window and throw a white piece of paper onto the median. The defendant then returned to the curbside lane, turned right at the next block, and stopped near the corner. After stopping, he walked back to the police car and, upon request, returned to the Corvette to get the vehicle registration.

The defendant denied throwing anything from the vehicle, but at the officer's request went with him to the point where the officer saw the defendant throw the object. They walked directly back to the spot and found a small white piece of paper on the median. It was folded like an envelope and is commonly called a snow seal. The officer suspected it contained cocaine. The contents of the snow seal were later analyzed to be four-tenths of a gram of cocaine. The defendant denied throwing the package out, or possession of any cocaine. After they returned to the vehicles, the officer arrested the defendant and told him to wait in his own automobile. The defendant got into the Corvette and drove off at a high rate of speed while the officer was calling for help. The officer tried to follow the defendant, but was unsuccessful. The defendant was arrested

later.

At the trial, the State introduced the testimony of two police officers, who testified that in March of 1985 the defendant was pulled over in a radar trap. He drove off and was pursued and arrested. On that occasion the police searched the automobile and found two small scales with a residue on them which appeared to the officers to be cocaine. As a result of that incident, he was charged with a number of traffic offenses and possession of a controlled substance. He was convicted of speeding, and the controlled substance charge was dismissed. At the trial in this case, the State's chemist testified that the residue was cocaine.

More than 10 days before trial the defendant filed a motion entitled "Motion to Suppress." In paragraph 1 of the motion, the defendant moved to suppress the testimony described above on the grounds that it would be offered to show propensity to commit the crime and that its probative value was outweighed by danger of unfair prejudice. In the second paragraph of the motion, the defendant moved to suppress the cocaine retrieved on March 27, 1986, on the ground that it was recovered pursuant to an unlawful arrest and without probable cause. Immediately before trial a hearing was had on the motion. The record shows that just before receiving evidence at that hearing the trial judge said: "You may proceed. This matter comes on for a hearing on Paragraph 2 of the defendant's written motion to suppress filed December 30 of last year. You may proceed." At that hearing the only evidence offered related to March 27, 1986. When the court offered the defendant an opportunity to be heard on the motion, the defendant's attorney referred the trial judge to paragraph 2 of the motion. In overruling the motion, the judge stated there was no expectation of privacy for an object in the highway median and noted that the defendant disclaimed any interest in the object. No other reference appeared in the record as to the motion to suppress, or any part of it. No motion for new trial was filed.

The defendant testified at the trial. He denied throwing anything from his vehicle. On cross-examination, he testified he drove off after reflecting on the 1985 incident. He testified he was beaten by police at the time of the 1985 incident.

The defendant assigns two errors: (1) that the trial court erred in overruling the defendant's motion to suppress all testimony and evidence relating to a prior charge against the defendant for which he was never convicted, and (2) that the evidence was insufficient to support the verdict.

This court cannot consider the first error for three reasons. One, the record shows only that the trial court heard and ruled upon paragraph 2 of the motion to suppress, but does not show that paragraph 1 of the motion was even brought to the attention of the court and ruled upon. "This court has consistently held that a defendant may not predicate error on the admission of evidence to which timely objection was not made. *State v. Laymon*, 217 Neb. 464, 348 N.W.2d 902 (1984); *State v. Holland*, 213 Neb. 170, 328 N.W.2d 205 (1982)." *State v. Pointer*, 224 Neb. 892, 894, 402 N.W.2d 268, 270 (1987). The record must also show that the trial court ruled upon the motion. *State v. Harris*, 205 Neb. 844, 290 N.W.2d 645 (1980). Furthermore, Neb. Rev. Stat. § 25-1912.01(1) (Reissue 1985) provides: "A motion for a new trial shall not be a prerequisite to obtaining appellate review of any issue upon which the ruling of the trial court appears in the record." The ruling of the trial court on the issue of paragraph 1 of the motion to suppress does not appear in the record.

The third reason is that paragraph 1 of the motion to suppress had to do with the admissibility of evidence under Neb. Rev. Stat. §§ 27-403 and 27-404(2) (Reissue 1985). Such a motion is more properly called a motion in limine. Even if a trial court rules upon such a motion before trial, any error can only be preserved by also objecting at the time the evidence was offered. *State v. Pointer, supra; State v. Tomrdle*, 214 Neb. 580, 335 N.W.2d 279 (1983); *State v. Harper*, 215 Neb. 686, 340 N.W.2d 391 (1983).

The defendant also maintains that the evidence is insufficient to support the verdict. There is direct evidence by Officer Smith that the defendant threw a small white object from the automobile while he was being stopped by the police. A few minutes later the officer recovered a white packet containing cocaine at the spot where he saw it thrown. The defendant's flight from the scene adequately established his guilty

knowledge. The evidence is sufficient and convincing.

AFFIRMED.

JUDITH LYNNE RAMSIER, APPELLEE, V. LARRY ALBERT RAMSIER, APPELLANT.

419 N.W.2d 871

Filed March 4, 1988. No. 87-435.

Default Judgments: Motions to Vacate. 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 interests. Such a party will not be permitted to ignore the process of the court and thereby impede the termination of litigation.

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

Richard E. Mueting of Mueting & Stoffer, for appellant.

James G. Egley of Moyer, Moyer, Egley & Fullner, for appellee.

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

WHITE, J.

This is an appeal from a judgment of the district court for Madison County, Nebraska, denying appellant's motion to set aside a judgment rendered on default. We affirm.

A single assignment of error is stated: "The District Court abused its discretion in refusing to set aside the default judgment and in refusing to order an evidentiary hearing."

On December 31, 1980, the appellee, Judith Lynne Ramsier, was granted a decree dissolving her marriage to appellant, Larry Albert Ramsier. In paragraph 9 of the decree, the court held,

> The respondent shall pay to the petitioner as property settlement, an amount equal to one-half of the cash value of his interest in the Pamida, Inc., profit sharing plan as it

> exists on February 1, 1981. Such payment shall not be terminable by death or remarriage of either party.

The decree was not appealed.

On September 22, 1982, a document entitled "Supplemental Petition" was filed in the proceedings. The petition alleged, regarding the substance of paragraph 9 above, the nonpayment of any amount due, which appellee alleged was $2,315.77. The prayer was for judgment, together with interest from the date of the decree, attorney fees, and costs. On October 4, 1982, the court granted leave to file the supplemental petition and directed that appellant plead or answer within 20 days of the date of the order. Appellant did not plead to the petition, although he filed a voluntary appearance.

On February 18, 1987, a motion for default judgment was filed. A copy of the motion was mailed to appellant and received by him on February 20. No response was filed by appellant. A hearing on the motion for default was held on March 2, 1987. The appellee introduced evidence establishing the value of the interest in the profit-sharing plan to be as pled, and the court entered judgment for appellee for that amount, plus interest from the date of the decree and an attorney fee of $250.

In the trial court and in this court, appellant, by way of avoidance, argues that no notice was given to appellant of the date of the hearing on the default, and on this ground alone the motion to set aside the judgment should have been granted.

We take judicial notice of the rules of court filed with the Clerk of the Nebraska Supreme Court. The rules of the Ninth Judicial District in effect provide for an automatic motion calendar. All motions arrive for hearing on dates set by order of the court prior to the commencement of the term. The rules provided that a copy of the motion docket be mailed to each attorney of record prior to the motion day. The assertion that no specific notice was given is not meritorious. See Rules of the District Court of the Ninth Judicial District of Nebraska 3(a), (b), (c), and (d) (filed February 8, 1984).

Appellant further alleges that he has satisfied the provision in the decree by reason of the surrender of certain items of personal property to appellee, and their subsequent sale. The

decree awarded all personal property to the person having possession at the date of the decree. There is no allegation that this property was in the possession of appellant at the time of the decree.

> "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 interests. 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., 225 Neb. 211, 217, 403 N.W.2d 377, 382 (1987).

This case finally came on for disposition some 5 years after the petition for supplemental relief was filed. Though the claimed defenses are suspect, they might, on a showing of at least a slight attention to the orderly process of the court, justify a court in setting aside the default. In this case, to do so would be a travesty. Litigation must end. The failure to diligently pursue his remedies dooms the appellant. The decision of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. ROXANNE E. STASTNY, ALSO KNOWN AS ANN E. EWING, APPELLEE.

419 N.W.2d 873

Filed March 4, 1988. No. 87-620.

Sentences: Appeal and Error. In the State's appeal, allowed by Neb. Rev. Stat. §§ 29-2320 et seq. (Reissue 1985), on a claim that an imposed sentence is excessively lenient, the sentence imposed will be upheld unless the sentencing court abused its discretion concerning the questioned sentence.

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

Ronald L. Staskiewicz, Douglas County Attorney, and Robert C. Sigler, for appellant.

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

HASTINGS, C.J., WHITE, SHANAHAN, and FAHRNBRUCH, JJ., and HANNON, D.J.

SHANAHAN, J.

Pursuant to Neb. Rev. Stat. § 29-2320 (Reissue 1985), the county attorney of Douglas County appeals the sentences imposed on Roxanne E. Stastny and claims that the sentences are excessively lenient.

Initially, the State charged Stastny in separate informations, that is, charges of second degree forgery in violation of Neb. Rev. Stat. § 28-603(1) (Reissue 1985), theft by unlawful taking in violation of Neb. Rev. Stat. § 28-511(1) (Reissue 1985), and second offense issuance of a "bad check" for $100 (no account or insufficient funds) in violation of Neb. Rev. Stat. § 28-611(1)(c) and (2) (Reissue 1985). Apparently, there was a fourth information, "three counts of possession of a controlled substance," but the record contains no other information about the nature of the controlled substance charges.

Pursuant to a plea agreement, the State dismissed the controlled substance charges, and Stastny entered her plea of guilty to the charges of theft and forgery and her no contest plea to the bad check charge. Each of the crimes charged to which Stastny entered her plea is a Class IV felony and is punishable by a maximum term of imprisonment for 5 years, with no minimum term of imprisonment statutorily specified; a $10,000 fine; or both such imprisonment and fine. See Neb. Rev. Stat. § 28-105(1) (Reissue 1985). The court accepted Stastny's pleas and ordered a presentence investigation.

According to the presentence report, Stastny was 26 years of age, married but separated, and had two dependent daughters, ages 11 and 5, who were living with Stastny's mother and grandmother while Stastny was serving a 6-month sentence for "issuing a bad check." At sentencing in the present case, 3 months remained to be served on that 6-month sentence. Although unemployed since 1980, Stastny obtained her GED while in custody at the Douglas County department of corrections. Since the age of 15, Stastny has used controlled

substances obtained through physicians' prescriptions and, during the 2 years preceding her sentence in the present case, daily used methamphetamine and occasionally used cocaine.

Stastny has a Nebraska criminal record which started in 1983 with a conviction and sentence of probation for a bad check. In 1986, Stastny was convicted of shoplifting and theft by deception, which resulted in imprisonment for 90 days on the shoplifting conviction. In 1987, before the sentences involved in this appeal, Stastny was convicted of second degree forgery and received a sentence of 10 days' imprisonment.

For the theft conviction involved in this appeal, the court sentenced Stastny to imprisonment for 60 days, which was to be served consecutively to the 6-month sentence already being served by Stastny. Concerning the forgery and bad check convictions, the court sentenced Stastny to concurrent periods of probation for 2 years on each conviction, ordered Stastny to "enter the N.O.V.A. Program immediately upon her release from Douglas County Department of Corrections and remain in the program as recommended," and additionally ordered that Stastny "serve the last ninety (90) days in the Douglas County Department of Corrections, unless waived by the Court for good cause shown." The probation order also included a provision that Stastny "shall not take prescription drugs without Court approval."

Concerning a claim that a sentence is excessively lenient, Neb. Rev. Stat. § 29-2322 (Reissue 1985) provides in pertinent part:

> [T]he Supreme Court, upon a review of the record, shall determine whether the sentence imposed is excessively lenient, having regard for:
>
> (1) The nature and circumstances of the offense;
>
> (2) The history and characteristics of the defendant;
>
> (3) The need for the sentence imposed:
>
> (a) To afford adequate deterrence to criminal conduct;
>
> (b) To protect the public from further crimes of the defendant;
>
> (c) To reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; and

(d) To provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and

(4) Any other matters appearing in the record which the court shall deem pertinent.

Regarding an appeal and claim by the State that an imposed sentence is "excessively lenient," this court stated in *State v. Winsley*, 223 Neb. 788, 792-93, 393 N.W.2d 723, 726 (1986): "These cases of necessity must be reviewed by us on a case-by-case basis. As a result, therefore, we are unable to set out with exactness any greater standards than those prescribed by the provisions of § 29-2322."

As we expressed in *State v. Dobbins*, 221 Neb. 778, 781-82, 380 N.W.2d 640, 642 (1986):

> The scope of review in a case where the State appeals a sentence is whether there was an abuse of discretion. A grant of probation will not be disturbed on appeal unless there appears to be an abuse of discretion. [Citation omitted.] The trial court has the opportunity to observe the defendant throughout the judicial process and is in a better position than this court to determine whether the defendant is suited for probation.

In *Dobbins*, we determined that a sentence of imprisonment for 90 days and probation for 18 months may have been "a lenient sentence, [but] not excessively lenient," 221 Neb. at 782, 380 N.W.2d at 643, for convictions on an information charging Dobbins with two counts of burglary, a violation of Neb. Rev. Stat. § 28-507 (Reissue 1985) and a Class III felony.

Therefore, in the State's appeal, allowed by Neb. Rev. Stat. §§ 29-2320 et seq. (Reissue 1985), on a claim that an imposed sentence is excessively lenient, the sentence imposed will be upheld unless the sentencing court abused its discretion concerning the questioned sentence.

In sentencing Stastny to imprisonment for 150 days, the district court considered the 6-month sentence already being served by Stastny. If the court were to remit the last 90 days of imprisonment regarding the sentences appealed, Stastny, nevertheless, would be incarcerated for approximately 5 months after sentencing in the present case, that is, the

remainder of her 6-month sentence being served at imposition of the sentences questioned by the State plus the consecutive 60 days of imprisonment as a part of the sentences involved in this appeal. The sentencing court apparently felt that imprisonment, by itself, would not be an effective sentence under the circumstances and concluded that a program for Stastny's rehabilitation was appropriate. Therefore, the district court imposed stringent and special conditions to be satisfied during Stastny's probation for 2 years, namely, entry into the "N.O.V.A. Program" and abstinence from prescription drugs without court approval. If Stastny's desire for self-improvement were insufficient for the rehabilitative program, prospective remission of 90 days' imprisonment, at least in the eyes of the sentencing court, might encourage Stastny's satisfactory participation in the program for her rehabilitation. In fashioning a sentence which included probation for Stastny, the district court obviously kept in mind a permissible consequence of Stastny's violation of probation, namely: "If the court finds that the probationer did violate a condition of [her] probation, it may revoke the probation and impose on the offender such new sentence as might have been imposed originally for the crime of which [she] was convicted." Neb. Rev. Stat. § 29-2268(1) (Reissue 1985). See, also, *State v. Painter*, 223 Neb. 808, 394 N.W.2d 292 (1986).

While deliberating the sentence for Stastny, the district court likely considered, and we note, the provisions of Neb. Rev. Stat. § 29-2260(3) (Reissue 1985), which provides in part: "The following grounds, while not controlling the discretion of the court, shall be accorded weight in favor of withholding sentence of imprisonment: . . . (k) Imprisonment of the offender would entail excessive hardship to his or her dependents." The district court undoubtedly gave weight to Stastny's dependent minor children as factors in the sentence to be imposed.

From the information presented to this court, we are unable to conclude that the district court abused its discretion and imposed excessively lenient sentences on Stastny. Therefore, the sentences are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM F. VAUGHAN, APPELLANT.

419 N.W.2d 876

Filed March 4, 1988. No. 87-735.

1. **Constitutional Law: Court Rules: Statutes.** A court cannot make and enforce rules which are arbitrary, unreasonable, or uncertain in their operation; which deprive a party of his legal rights; or which are inconsistent with or contravene any constitutional or statutory provision or principles of general law.
2. _____: _____: _____. Court rules are subservient to statutes, and in case of conflict the statute, if constitutional, prevails.
3. **Convictions: Trial: Appeal and Error.** A party cannot be heard to complain of error predicated upon a ruling unless a substantial right of the party has been affected. Error without prejudice does not provide a ground for the reversal of a criminal conviction.

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

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

Robert M. Spire, Attorney General, Gary P. Bucchino, Omaha City Prosecutor, and J. Michael Tesar, for appellee.

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

HASTINGS, C.J.

The defendant has appealed the order of the district court which affirmed the judgment of the county court finding him guilty of operating a motor vehicle while intoxicated, second offense. Assigned as error is the ruling of the county court that defendant's motion to suppress be overruled. We affirm.

Defendant was arrested in Douglas County for driving while intoxicated on January 28, 1987. A complaint was filed in county court on February 2 and trial was set for April 28. On April 16 (12 days before the trial date), the defendant filed his motion to suppress, alleging that there was no probable cause for the initial stop of his vehicle.

The applicable state statute relating to filing of motions to suppress, Neb. Rev. Stat. § 29-822 (Reissue 1985), states that such a motion "must be filed at least ten days before trial,"

whereas the comment to rule 17 of the county court for Douglas County rules, which the court treated as a rule, provides "[p]reliminary motions in contested criminal/traffic cases shall be filed at least twenty (20) days prior to trial . . . ."

Upon a bench trial, the county court found that the motion was not timely filed and so denied the motion, but went on to find that "the officer did have probable cause to stop him [the defendant], and there was some weaving."

The testimony of the arresting officer related that the officer had observed the oncoming headlights of the defendant's automobile weaving from side to side. The officer made a U-turn and followed the defendant for a distance of four to five blocks. The defendant's vehicle continued in the same weaving manner and nearly struck the east curb of the street. Nothing in the nature of a physical obstruction or traffic was observed that would have required such maneuvers. The defendant's auto was stopped by the officer, who had had training in the apprehension of suspected drunk drivers and had arrested over 200 such drivers. This occurred at approximately 2:50 a.m., which, the officer testified, was the peak time for drunk drivers to be operating.

It is obvious that the local court rules with comments conflict with the provisions of the statute. "A court cannot make and enforce rules which are arbitrary, or unreasonable, or uncertain in their operation, which deprive a party of his legal rights, or which are *inconsistent* with, or *contravene* any constitutional or statutory provision or principles of general law." (Emphasis supplied.) 21 C.J.S. *Courts* § 170 at 262-63 (1940).

This court has continued to hold the statutory 10-day rule valid and operable. *State v. Madsen*, 226 Neb. 722, 414 N.W.2d 280 (1987). Thus, "[c]ourt rules are subservient to statutes, and in case of conflict the statute, if constitutional, prevails . . . ." 21 C.J.S. *supra* at 263.

The local rule, with comments, adopted by the county court is repugnant to law, because it imposes terms more onerous than those fixed by statute. *Korn v. Ray*, 434 S.W.2d 798 (Mo. App. 1968); *Newdigate v. Walker*, 384 S.W.2d 312 (Ky. 1964); *People ex rel. Carey v. Power*, 59 Ill. 2d 569, 322 N.E.2d 476 (1975).

However, because the error, if any, in overruling the motion was harmless beyond a reasonable doubt, it is unnecessary for this court to pass upon the validity of the rule in question. The trial court heard the evidence presented and determined that probable cause did exist. This conclusion was adequately supported by the record, as previously recited. A party cannot be heard to complain of error predicated upon a ruling unless a substantial right of the party has been affected, *State v. Threet*, 225 Neb. 682, 407 N.W.2d 766 (1987); and "error without prejudice does not provide a ground for the reversal of a criminal conviction," *State v. Tully*, 226 Neb. 651, 656, 413 N.W.2d 910, 914 (1987).

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. PETE COLEMAN, ALSO KNOWN AS RUFUS TWO TWO, APPELLEE.

419 N.W.2d 878

Filed March 4, 1988. No. 87-896.

1. **Miranda Rights: Words and Phrases.** Custodial interrogation, necessitating the *Miranda* warning, is questioning instigated by a law enforcement officer after a person has been taken into custody or otherwise deprived of freedom of action in any significant way.
2. **Miranda Rights: Confessions: Right to Counsel.** Before a defendant's custodial statement is admissible as evidence, the absolute and indispensable prerequisites of the *Miranda* warning must have been satisfied preceding the interrogation producing such statement, namely, law enforcement personnel must (1) inform the defendant of the right to remain silent, (2) explain that anything said can and will be used against the defendant in court, and (3) inform the defendant of the right to consult with a lawyer and to have a lawyer present during interrogation.
3. **Miranda Rights: Words and Phrases.** Custodial interrogation by police may consist of express questioning of a suspect or the functional equivalent of express questioning, such as police conduct recognized by police as reasonably likely to elicit an incriminating response from the suspect or defendant.
4. **Miranda Rights: Confessions.** A spontaneously volunteered statement of a suspect or defendant is admissible in the absence of the *Miranda* warning.

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

George G. Rhodes, Custer County Attorney, for appellant.

Brad Roth of Sennett & Roth, for appellee.

SHANAHAN, J.

Authorized by Neb. Rev. Stat. § 29-116 (Reissue 1985), the State appeals from an order of the district court for Custer County, suppressing an oral statement of Pete Coleman, also known as Rufus Two Two.

The county court for Custer County issued a warrant for the arrest of Pete Coleman, also known as Rufus Two Two, for three felony charges (burglary, terroristic threats, and theft) and one misdemeanor (second degree forgery). While on patrol and aware of the unserved arrest warrant for Coleman, Officer Larry Sanchez of the Broken Bow Police Department saw Coleman in a parked van and confronted Coleman with the fact that there was an outstanding warrant for Coleman's arrest. When Coleman asked about the nature of the charge reflected in the warrant, Officer Sanchez responded that he "was not aware of what the contents of the warrant were, that it would be best if he [Coleman] would come down to the police department and have it explained to him." In his cruiser, Sanchez took Coleman to the police station "to clear the matter of a warrant being served."

On arrival at the police station, Sanchez took a nervous Coleman to the "cop shop," a room used for booking and interrogation. Coleman was not free to leave Sanchez's custody while the pair awaited someone from the sheriff's department to serve the Coleman arrest warrant. In the course of their waiting, Coleman again asked Sanchez about the nature of the charge stated in the warrant. Sanchez's reply was:

> I don't know, I don't know the contents . . . but I stated to him, don't say anything that you don't want to be repeated. He acknowledged and said, okay. Waited for the warrant to be served and prior to the warrant being served to Pete he stated that, I don't understand why I am here but it must be because of those checks that I got from O'Brian that I forged.

Presumably, the O'Brian checks mentioned by Coleman relate to the forgery charge stated in the warrant for Coleman's arrest.

Coleman and Sanchez had no further conversations at the police station before a Custer County deputy sheriff arrived, served the arrest warrant on Coleman, and removed him to the sheriff's department. Throughout the time that Coleman was in Sanchez's custody, that is, from apprehension at the van until arrival of the deputy sheriff, Sanchez never gave Coleman the "*Miranda* warning." See *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Coleman did not waive any of the rights reflected in the *Miranda* warning.

Coleman filed a motion to suppress his custodial oral statement to Sanchez. See Neb. Rev. Stat. § 29-115 (Reissue 1985). In his motion, Coleman alleged that his custodial statement to Sanchez was made without Coleman's "having been informed of his constitutional rights" and was "not freely and voluntarily given." At the hearing on Coleman's suppression motion, the district court remarked:

> Officer Sanchez, I am not necessarily disagreeing with what you said, it appears a better procedure would have been to advise Mr. Coleman immediately upon arrest of his Miranda rights, at the latest he should have been advised of his Miranda rights was when you got him to the station and at the very latest when he started making statements without knowing his rights at that particular time.
>
> Had you given his Miranda rights you would have had no problem with this or had you had him sign a waiver of his Miranda rights form and that is what those forms are for. I understand that sometimes you are rushed and you can't do all those things but in this situation it appears to me from the evidence that the statements were not voluntarily, intelligently made after advisement of the rights and they should be suppressed.

The court then entered its order suppressing Coleman's oral statement to Sanchez, including findings that Coleman "was being held without being advised exactly why he was being held and there was a question in the defendant's mind as to why he was being held without being notified of the specific reason";

that Coleman "should have been advised of his Miranda rights when he started making statements without knowing his rights at that particular time"; and that Coleman's statement was "not voluntarily and intelligently made after advisement of the rights."

First, the State claims that Coleman's oral statement was not the product of custodial interrogation and is, therefore, admissible without the *Miranda* warning from Officer Sanchez. Second, the State contends that Coleman's statement was made voluntarily, notwithstanding that Sanchez did not inform Coleman concerning the specific charge contained in the arrest warrant.

Coleman argues that police must administer the *Miranda* warning before express interrogation of a suspect and before words or actions by police, which are likely to elicit an incriminating response from the suspect. Also, Coleman argues that his ignorance of the specific charge rendered his oral statement involuntary.

"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." *State v. Copple*, 224 Neb. 672, 689, 401 N.W.2d 141, 154 (1987).

In *State v. Bodtke*, 219 Neb. 504, 508-09, 363 N.W.2d 917, 921 (1985), we stated:

> *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), formulated prerequisites for admissibility of a suspect's in-custody statement(s) obtained "in a police-dominated atmosphere, resulting in self-incriminating statements," *id.* at 445, and sought to minimize the psychological advantage frequently inherent in an exercise of governmental authority as a tool for coercion, that is, the "potentiality for compulsion." *Id.* at 457. "Custodial interrogation" has been characterized by the U.S. Supreme Court in *Miranda* as "questioning instigated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* at 444.

To counter potentially coercive circumstances surrounding a

suspect's statement to police officers and as a prerequisite for admissibility of a suspect's in-custody statement, law enforcement personnel must inform the person in custody "that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

According to the U.S. Supreme Court, a purpose of the *Miranda* warning is "preventing government officials from using the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment." *Arizona v. Mauro*, 481 U.S. 520, 529-30, 107 S. Ct. 1931, 1936-37, 95 L. Ed. 2d 458 (1987).

> Before a defendant's custodial statement is admissible as evidence, the absolute and indispensable prerequisites of the *Miranda* warning must have been satisfied preceding the interrogation producing such statement, namely, law enforcement personnel must (1) inform the defendant of the right to remain silent, (2) explain that anything said can and will be used against the defendant in court, and (3) inform the defendant of the right to consult with a lawyer and to have a lawyer present during interrogation.

State v. Norfolk, 221 Neb. 810, 814-15, 381 N.W.2d 120, 125 (1986).

In *Rhode Island v. Innis*, 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980), Innis was arrested for a robbery perpetrated with a sawed-off shotgun and received the *Miranda* warning before transportation to the police station. Police had not found the shotgun used in the robbery. While accompanying Innis to the station, officers talked among themselves concerning location of the shotgun and commented about the possible tragedy of a child's finding the loaded shotgun and receiving injury from that weapon. Innis interrupted the conversation and told the officers that, if they would return to the arrest scene, he would locate the shotgun for the police. At the scene, Innis led police to the missing shotgun. In considering whether Innis' actions in pointing out the shotgun were the

product of compulsion by the police, the U.S. Supreme Court stated:

> The issue, therefore, is whether the respondent was "interrogated" by the police officers in violation of the respondent's undisputed right under *Miranda* to remain silent until he had consulted with a lawyer. In resolving this issue, we first define the term "interrogation" under *Miranda* before turning to a consideration of the facts of this case.
>
> The starting point for defining "interrogation" in this context is, of course, the Court's *Miranda* opinion. There the Court observed that "[b]y custodial interrogation, we mean *questioning* initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way," *Id.*, at 444 (emphasis added). This passage and other references throughout the opinion to "questioning" might suggest that the *Miranda* rules were to apply only to those police interrogation practices that involve express questioning of a defendant while in custody.
>
> We do not, however, construe the *Miranda* opinion so narrowly. The concern of the Court in *Miranda* was that the "interrogation environment" created by the interplay of interrogation and custody would "subjugate the individual to the will of his examiner" and thereby undermine the privilege against compulsory self-incrimination. *Id.*, at 457-458. The police practices that evoked this concern included several that did not involve express questioning. . . . The Court in *Miranda* also included in its survey of interrogation practices the use of psychological ploys, such as to "posi[t]" "the guilt of the subject," to "minimize the moral seriousness of the offense," and "to cast blame on the victim or on society." *Id.*, at 450. It is clear that these techniques of persuasion, no less than express questioning, were thought, in a custodial setting, to amount to interrogation.
>
> This is not to say, however, that all statements obtained by the police after a person has been taken into custody are to be considered the product of interrogation. As the

Court in *Miranda* noted: " 'Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. *The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated.* . . . Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.' *Id.*, at 478 [emphasis supplied in original]." It is clear therefore that the special procedural safeguards outlined in *Miranda* are required not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation. "Interrogation," as conceptualized in the *Miranda* opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself.

We conclude that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to

> words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response. [Emphasis in original.]

446 U.S. at 298-302.

The U.S. Supreme Court, in *Rhode Island v. Innis*, 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980), concluded that Innis was not interrogated within the meaning of *Miranda* and was not subjected to the "functional equivalent" of questioning. As expressed by the U.S. Supreme Court:

> The case thus boils down to whether, in the context of a brief conversation, the officers should have known that the respondent would suddenly be moved to make a self-incriminating response. Given the fact that the entire conversation appears to have consisted of no more than a few offhand remarks, we cannot say that the officers should have known that it was reasonably likely that Innis would so respond. This is not a case where the police carried on a lengthy harangue in the presence of the suspect. Nor does the record support the respondent's contention that, under the circumstances, the officers' comments were particularly "evocative." It is our view, therefore, that the respondent was not subjected by the police to words or actions that the police should have known were reasonably likely to elicit an incriminating response from him.

446 U.S. at 303.

The Supreme Court of Nebraska has held that a "spontaneously volunteered statement" of a suspect or defendant is admissible in the absence of the *Miranda* warning. *State v. Red Feather*, 205 Neb. 734, 738, 289 N.W.2d 768, 771 (1980). See, also, *State v. Torrence*, 192 Neb. 213, 216, 219 N.W.2d 772, 774 (1974) (a suspect's oral statement, "spontaneous and voluntary in nature and not the result of interrogation," was admissible in the absence of the *Miranda* warning).

In Coleman's case, there was no interrogation which resulted in Coleman's oral statement about the forged checks. Officer Sanchez did not expressly question Coleman about any aspect of the offenses reflected in the warrant for Coleman's arrest.

Consequently, Coleman's oral statement, made while Coleman was in police custody, was not the product of express interrogation requiring the *Miranda* warning. See *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Officer Sanchez's conduct in transporting Coleman to the police station, as well as his conversation and actions while waiting with Coleman in the "cop shop" for Coleman's transfer to the sheriff's department pursuant to the arrest warrant, was not the functional equivalent of express interrogation, that is, conduct recognized by police as reasonably likely to elicit an incriminating response from Coleman. See *Rhode Island v. Innis, supra*.

The *Miranda* warning is not some constabulary intonation which must be expressed whenever police detain or take an individual into custody. See *Rhode Island v. Innis, supra* (the *Miranda* warning is not required "where a suspect is simply taken into custody." 446 U.S. at 300). A suspect's spontaneously volunteered statement in the absence of the *Miranda* warning, made while a suspect is in police custody, is not excluded from evidence as a contravention or violation of the constitutional protection against compulsory self-incrimination. See *Miranda v. Arizona, supra*. The three-part *Miranda* warning, see *State v. Norfolk*, 221 Neb. 810, 381 N.W.2d 120 (1986), does not include a requirement that police inform a suspect or defendant of a charge against him or her, whether the charge is actual, probable, or merely possible. Such a requirement would compound confusion and exponentially expand errors contaminating an individual's custodial statement which is otherwise constitutionally admissible evidence.

Apart from the *Miranda* warning and its applicability in Coleman's case, there is another question in view of the trial court's findings: Is a defendant's statement, made in the defendant's ignorance of a specified offense, either suspected or charged, an involuntary statement and constitutionally inadmissible? Coleman emphatically answers "yes," but, unfortunately, provides no judicial opinion supporting an affirmative answer to the question.

The Supreme Court of Nebraska has considered the question about constitutional admissibility of a defendant's statement

concerning a crime different from that under investigation or charged against the defendant, when the defendant made the statement after receipt of the *Miranda* warning. See *State v. Comer*, 205 Neb. 549, 288 N.W.2d 487 (1980) (defendant arrested for possession of stolen property; *Miranda* warning given before interrogation in which defendant's statement implicated him in a sexual assault known to the police; held, defendant's statement about sexual assault was admissible).

Colorado v. Spring, 479 U.S. 564, 107 S. Ct. 851, 93 L. Ed. 2d 954 (1987), involved admissibility of a defendant's statement made after the *Miranda* warning. Spring and a companion shot and killed a Donald Walker in Colorado. An informant told federal agents that Spring was involved in the interstate transportation of stolen firearms and had discussed participation in the Colorado killing. After Spring's arrest and receipt of the *Miranda* warning, federal agents questioned Spring about the firearms transactions. During that questioning, Spring admitted that "I shot another guy once." When the federal agents asked whether he had been to Colorado and shot Walker, Spring answered "no." Later, after giving Spring the *Miranda* warning, Colorado law enforcement officials interrogated Spring, who was in jail on the federal firearms offenses. In that questioning Spring confessed to killing Walker and signed a statement summarizing the interview in which the confession was made. Spring also signed a written waiver of his rights described in the *Miranda* warning. The Colorado Supreme Court concluded that the federal agents' failure to inform Spring that he would be questioned about the Colorado homicide vitiated Spring's waiver of the rights reflected in the *Miranda* warning. The U.S. Supreme Court disagreed with the Colorado court and stated:

> The Constitution does not require that a criminal suspect know and understand every possible consequence of a waiver of the Fifth Amendment privilege. *Moran v. Burbine, supra*, at 422; *Oregon v. Elstad, supra*, at 316-317 . . . .
>
> . . . .
>
> This Court's holding in *Miranda* specifically required

> that the police inform a criminal suspect that he has the right to remain silent and that *anything* he says may be used against him. There is no qualification of this broad and explicit warning. The warning, as formulated in *Miranda*, conveys to a suspect the nature of his constitutional privilege and the consequences of abandoning it. Accordingly, we hold that a suspect's awareness of all the possible subjects of questioning in advance of interrogation is not relevant to determining whether the suspect voluntarily, knowingly, and intelligently waived his Fifth Amendment privilege.

479 U.S. at 574, 577.

However, both *State v. Comer, supra*, and *Colorado v. Spring, supra*, involve a situation where the *Miranda* warning had been given and do not address the question whether, in the absence of the *Miranda* warning, law enforcement officers must inform a suspect or defendant concerning the nature of a particular offense, suspected or charged, before a defendant's statement pertaining to the offense may be characterized as voluntary. Whether a defendant's statement, made in the defendant's ignorance of a particular offense, suspected or charged, constitutes a voluntary statement is a question concerning the constitutional safeguard of due process. I am unable to find any decision of the Nebraska Supreme Court addressing the precise question. If such Nebraska decision exists, I believe that counsel would have referred, in oral argument or brief, to such authority. Even if decisions from other jurisdictions were unearthed, the question about voluntariness, as previously stated and a case of first impression, is more properly presented for consideration and response by the entire Supreme Court of the State of Nebraska.

Nevertheless, Coleman's oral statement, a volunteered expression, was not the product of police interrogation which must be preceded by the *Miranda* warning. The district court's finding, namely, that the *Miranda* warning was a prerequisite to the constitutional admissibility of Coleman's statement, is clearly erroneous. For the purpose of this appeal by the State, a defendant's statement, made in a defendant's ignorance of a particular offense, suspected or charged, constitutes a

voluntary statement and is constitutionally admissible evidence. Therefore, the district court's finding that Coleman's statement was involuntary is clearly erroneous.

The district court's judgment, suppressing Coleman's oral statement to Officer Sanchez, is reversed.

REVERSED.

JAMES E. JOYNER, APPELLANT, V. DONALD R. STEENSON, APPELLEE.

420 N.W.2d 278

Filed March 11, 1988. No. 86-270.

1. **Verdicts: Appeal and Error.** A jury verdict may not be set aside unless clearly wrong, and it is sufficient if there is any competent evidence presented to the jury upon which it could find for the successful party.
2. **Expert Witnesses.** Triers of fact are not required to take the opinions of experts as binding upon them.
3. **Juries: Evidence.** It is for the jury, as trier of the facts, to resolve conflicts in the evidence and to determine the weight and credibility to be given to the testimony of the witnesses.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Affirmed.

Michael L. Getty, for appellant.

John M. Burns of Schmid, Ford, Mooney & Frederick, P.C., for appellee.

HASTINGS, C.J., WHITE, SHANAHAN, and FAHRNBRUCH, JJ., and BLUE, D.J.

WHITE, J.

This case arises out of a two-vehicle accident which occurred on May 17, 1980, in Omaha, Nebraska, near the intersection of 97th and Q Streets. Plaintiff-appellant, James E. Joyner, was traveling westbound on Q Street. He testified that as he neared 97th Street, he noticed a car behind him that had been tailgating him for "quite a ways." Joyner stopped at the intersection, and

his vehicle was struck from behind by the vehicle driven by Donald R. Steenson. Joyner sued Steenson, alleging negligence and that as a result of the accident he suffered spinal injuries, continued pain, headaches, and numbness in his extremities.

In his answer to plaintiff's petition, Steenson admitted that he was negligent in the operation of his vehicle and that his negligence was the sole proximate cause of the accident. However, at trial the defendant introduced evidence that would tend to prove that the accident was not the cause of Joyner's medical problems. Steenson asserted that plaintiff's alleged injuries were actually preexisting conditions with no causal connection to the car accident.

After a jury trial, the jury returned a verdict in favor of the defendant. Plaintiff timely filed a motion for a new trial or, in the alternative, a judgment notwithstanding the verdict. That motion was overruled, and this appeal followed.

Appellant's assigned errors can be summarized as follows: (1) The jury verdict was clearly wrong because it was not supported by any credible evidence; (2) the overwhelming weight of the evidence favored plaintiff, but the jury disregarded that evidence; and (3) the trial court erred in refusing to set aside the jury verdict.

In determining the sufficiency of the evidence to sustain a verdict, it must be considered most favorably to the successful party and every controverted fact resolved in such party's favor, giving the benefit of inferences reasonably deducible from it. *Bell v. Williams Care Center*, 226 Neb. 1, 409 N.W.2d 294 (1987). A jury verdict may not be set aside unless clearly wrong, and it is sufficient if there is any competent evidence presented to the jury upon which it could find for the successful party. *Id.*

Plaintiff, Joyner, testified that the evening of the accident he did not feel like he was injured and continued on to a party, as he had planned. He stated that he had continuing aches and pains that summer, but had attributed that to his sports activities, his teaching job, and his work as an electrician. The evidence is somewhat conflicting as to when Joyner first sought medical assistance for any pain relating to the accident. He had been to Ehrling Bergquist USAF Regional Hospital at Offutt Air Force Base on May 21, August 13, and August 21, 1980,

and apparently made no mention of the accident or injuries therefrom. Joyner did report the accident to Dr. Margules, a neurological surgeon, on December 9, 1980, and informed the doctor that he had been having back pain and numbness since July of 1980.

Plaintiff introduced expert medical testimony from three physicians. The two treating physicians testified, by deposition, that the May 17, 1980, accident either caused or could have caused the injuries they noted in the plaintiff's spine. The third physician testified that trauma could have caused the spinal fusion plaguing Joyner, but that there was no real way of telling the actual cause.

The experts' deposition testimony indicated that plaintiff's condition and symptoms could have been caused by other factors also. Among these factors were infection, arthritis, and disk degeneration caused by aging. There was no evidence of a history of infection that may have led to Joyner's condition. However, Dr. Rassekh testified that Joyner's osteophyte problem was caused by disk degeneration and aging. Dr. Margules, plaintiff's treating physician, testified that the fusion process seen in Joyner's neck may have been going on for 10 to 15 years. He stated that complete fusion in just a 4-year timespan is unusual.

Defendant introduced evidence relating to the past medical history of Joyner. The purpose of this evidence was to show that plaintiff had been experiencing the same or similar medical problems before the accident occurred. In fact, the plaintiff testified that he had experienced back problems after a car accident in 1967. These problems, he stated, were resolved by a chiropractor.

Joyner's medical records introduced by defendant covered a period from 1974 to 1978. These records indicate that during that time period plaintiff had consulted physicians regarding chest pains, stomach problems, and severe pain in his right shoulder. He had been diagnosed as having a hiatal hernia, bursitis in the right shoulder, and diabetes. His past history listed the prior cervical spine injury.

On cross-examination defendant's counsel read the following question from interrogatories submitted to plaintiff:

"State the injuries you claim to have sustained as a result of the accident which is the subject matter of this action." The answer, read to the jury by the plaintiff, stated:

> Very uncomfortable and alarming tingling sensation from right shoulder to right hand. Like sensation of the feet — recurrence of short duration. A nagging discomfort throughout the back between the shoulders and lower neck. More nervous and high-strung and have lost some control of penmanship. Have (recurring) jolting headaches that were not experienced prior to the accident, and have had total blackout.

Appellant argues that the expert testimony clearly established that the May 17, 1980, accident caused his recent medical complications and that the testimony was wholly uncontradicted. He asserts that the other possibilities raised by the defendant as to causation were rejected by the expert witnesses. In essence, appellant would have this court treat the expert witnesses' testimony as conclusive as to causation. This is simply not the law. Triers of fact are not required to take the opinions of experts as binding upon them. *Mulder v. Minnesota Mining & Mfg. Co.*, 219 Neb. 241, 361 N.W.2d 572 (1985); *Cathcart v. Blacketer*, 217 Neb. 755, 351 N.W.2d 70 (1984).

Defendant introduced medical records in evidence that could have led the jury to believe that Joyner's medical condition was a preexisting problem. Although defendant's evidence was not extensive, this is not a contest where winning is measured by the volume of evidence introduced. It is for the jury, as trier of the facts, to resolve conflicts in the evidence and to determine the weight and credibility to be given to the testimony of the witnesses. *Bay v. House*, 226 Neb. 521, 412 N.W.2d 466 (1987).

Given the fact that Joyner apparently did not report the accident to a physician for nearly 7 months, that he had a prior history of back problems, and that he had prior complaints of pain in the right shoulder, the jury could reasonably have concluded that the accident did not cause his problems. At least some competent evidence existed to support the jury's verdict, and, as such, this court cannot reweigh those facts to reach a contrary conclusion.

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED.

BUELL, WINTER, MOUSEL & ASSOCIATES, INC., A NEBRASKA CORPORATION, APPELLEE, V. OLMSTED & PERRY CONSULTING ENGINEERS, INC., ET AL., APPELLANTS.

420 N.W.2d 280

Filed March 11, 1988. No. 86-379.

1. **Equity: Appeal and Error.** In an action in equity, the Nebraska Supreme Court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where the credible evidence is in conflict on a material issue of fact, it will consider, 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. **Appeal and Error.** In an action at law the findings and conclusions of the trier of fact are not to be set aside unless clearly wrong.
3. _____. In an action at law tried without a jury, it is not the role of the Nebraska Supreme Court to resolve conflicts in or reweigh the evidence, and it will presume that the trial court resolved any controverted facts in favor of the successful party and will consider the evidence and permissible inferences therefrom most favorably to that party.
4. **Actions: Pleadings.** Whether an action is legal or equitable in nature is determined from its main object as disclosed by the averments of the pleadings and the relief sought.
5. **Appeal and Error.** Regardless of the scope of review, the Nebraska Supreme Court has an obligation to reach independent conclusions on questions of law.
6. **Breach of Contract: Damages.** One injured by a breach of contract is entitled to recover all its damages, including the gains prevented as well as the losses sustained, provided the damages are reasonably certain and such as might naturally be expected to follow the breach.
7. **Damages: Proof.** While lost profits need not be proved with mathematical certainty, neither can they be established by evidence which is speculative and conjectural.
8. _____: _____. Loss of prospective profits may be recovered if the evidence shows with reasonable certainty both their occurrence and the extent thereof; uncertainty as to the fact of whether damages were sustained at all is fatal to recovery, but uncertainty as to amount is not if the evidence furnishes a reasonably certain factual basis for computation of the probable loss.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Reversed and remanded with direction to dismiss.

C.L. Robinson of Fitzgerald & Brown, for appellants.

William T. Ginsburg of Zuber & Ginsburg, for appellee.

HASTINGS, C.J., BOSLAUGH, CAPORALE, SHANAHAN, and FAHRNBRUCH, JJ.

CAPORALE, J.

Appellee, Buell, Winter, Mousel & Associates, Inc., sued the appellants, Olmsted & Perry Consulting Engineers, Inc., James J. Olmsted, and Steven W. Perry, alleging that the individual appellants formed the corporate appellant, Olmsted & Perry, and, while still employed by Buell, enticed some of their employer's clients into becoming clients of the newly formed corporate appellant. The district court determined that appellants had breached their duty of loyalty to Buell and sustained Buell's motion for summary judgment on that issue. Following a trial on the issue of damages, the district court entered a judgment in favor of Buell in the sum of $39,714.21 against the appellants, who assign eight errors to the district court's judgment. These errors merge to claim that the district court erred in finding (1) that appellants breached their fiduciary duties as agents of Buell and (2) that Buell proved damages. Since the record sustains the second claim, we, without considering the first claim, reverse the judgment of the district court and remand with direction to dismiss the action.

The parties begin by disagreeing as to the scope of our review. The appellants argue that the matter is one in equity. In such a case this court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where the credible evidence is in conflict on a material issue of fact, we consider, and may give weight to, the fact the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Pluhacek v. Nebraska Lutheran Outdoor Ministries, post* p. 778, 420 N.W.2d 286 (1988); *III Lounge, Inc. v. Gaines, ante* p. 585, 419 N.W.2d 143 (1988); *Pallas v. Black*,

226 Neb. 728, 414 N.W.2d 805 (1987). Buell, on the other hand, argues the case is one at law and that, as a consequence, the findings and conclusions of the trier of fact are not to be set aside unless clearly wrong. Moreover, in an action at law tried without a jury, it is not the role of this court to resolve conflicts in or reweigh the evidence, and this court will presume that the trial court resolved any controverted facts in favor of the successful party and will consider the evidence and permissible inferences therefrom most favorably to that party. *Washington Heights Co. v. Frazier*, 226 Neb. 127, 409 N.W.2d 612 (1987).

Whether an action is legal or equitable in nature is determined from its main object as disclosed by the averments of the pleadings and the relief sought. *White v. Medico Life Ins. Co.*, 212 Neb. 901, 327 N.W.2d 606 (1982); *Nebraska Engineering Co. v. Gerstner*, 212 Neb. 440, 323 N.W.2d 84 (1982). Buell's petition not only sought to recover damages from the appellants but sought as well, under a variety of theories, to enjoin them from, among other things, "unfairly competing with" Buell; that is, from serving clients which the individual appellants had enticed to Olmsted & Perry while the two men were employed by Buell. Although not contained in the record, it appears that a temporary injunction of some nature was issued and was "continued in effect thereafter." Reply brief for Appellants at 1. The fact a summary judgment was granted Buell on the issue of whether appellants had breached their fiduciary duties, leaving the issue of damages to be litigated separately, does not change the essential character of the action. See *III Lounge, Inc. v. Gaines, supra*, in which an action in equity for specific performance continued to be treated as one in equity after remand on the issue of damages. Accord *Nixon v. Harkins*, 220 Neb. 286, 369 N.W.2d 625 (1985), in which an action for specific performance remained one in equity notwithstanding the fact the parties stipulated that the only issue for determination by the court was the fair market value of the property. See, also, *Johnson v. NM Farms Bartlett*, 226 Neb. 680, 414 N.W.2d 256 (1987), which, without discussion, treats an action seeking both injunctive relief and damages as a suit in equity. Thus, the action presently before us is one in equity, and we review the factual issues as they relate to

the issue of damages accordingly.

However, with regard to the questions of law presented, we have the obligation to reach independent conclusions regardless of the scope of review. *OB-GYN v. Blue Cross*, 219 Neb. 199, 361 N.W.2d 550 (1985).

Buell is an engineering firm which operates out of Omaha, Nebraska, and other locations, as does its parent owner, Dana, Larson, Roubal & Associates, Inc., an architectural firm which hired James Olmsted as an engineer in 1974. Steven Perry, also an engineer, was hired by Dana, Larson, Roubal in 1979.

Both James Olmsted and Steven Perry were transferred to the employment of Buell in 1980. During their employment, the two men worked closely together and decided to form their own firm, Olmsted & Perry. By processes which are not relevant to the dispositive issue before us, the two men persuaded two of Buell's former clients, the cities of Tabor, Iowa, and Gretna, Nebraska, to become clients of the newly formed Olmsted & Perry.

The evidence convinces us, as it did the district court, that Olmsted & Perry received combined gross revenues of $86,902 from the cities of Tabor and Gretna.

In order to establish its damages, Buell undertook to prove the relationship which the direct expenses incurred by the Omaha office bore to the gross revenues received by that office. Depending upon the method of analysis used, the direct expenses ranged from 58.4 to 44.3 percent of gross revenues. Buell's accountant testified that the historical average of the expenses for the 4 years consisting of 2 years preceding the departure of James Olmsted and Steven Perry (1981 and 1982) and 2 years after their departure (1984 and 1985), thereby omitting the year they left (1983), was the "most proper method to use." That study indicated that the Omaha office's direct expenses were 44.3 percent of its gross revenues. The trial court, without any evidential basis, concluded that an additional 10 percent should be deducted for "indirect expenses" and awarded Buell damages amounting to 45.7 percent of the gross revenues Olmsted & Perry received from the cities of Tabor and Gretna.

Such damages as Buell may have suffered result from the

breach of duties arising from the employment contracts which existed between it and James Olmsted and between it and Steven Perry. One injured by a breach of contract is entitled to recover all its damages, including the gains prevented as well as the losses sustained, provided the damages are reasonably certain and such as might naturally be expected to follow the breach. *Chadd v. Midwest Franchise Corp.*, 226 Neb. 502, 412 N.W.2d 453 (1987); *Quad-States, Inc. v. Vande Mheen*, 220 Neb. 161, 368 N.W.2d 795 (1985). While it is true that such damages need not be proved with mathematical certainty, neither can they be established by evidence which is speculative and conjectural. *III Lounge, Inc. v. Gaines, ante* p. 585, 419 N.W.2d 143 (1988). *El Fredo Pizza, Inc. v. Roto-Flex Oven Co.*, 199 Neb. 697, 261 N.W.2d 358 (1978), observed that loss of prospective profits may be recovered if the evidence shows with reasonable certainty both their occurrence and the extent thereof. Uncertainty as to the fact of whether damages were sustained at all is fatal to recovery, but uncertainty as to amount is not if the evidence furnishes a reasonably certain factual basis for computation of the probable loss. Accord *Quad-States, Inc. v. Vande Mheen, supra.*

Appellants complain that the various studies conducted by Buell's accountant are deficient in a number of respects, including the fact they contained a number of unverified assumptions which distorted the real income produced by the Omaha office. As an example, whenever a Buell Omaha office employee worked on a project for another Buell office, the Omaha office multiplied that employee's salary by 2.25 and reflected the product as Omaha office income. Buell's accounting manager was unable to explain how the 2.25 multiplier was computed nor exactly what it represented, but knew that it had been used for a number of years. The same multiplier was also used in transferring Omaha expenses to other offices when Omaha office employees performed work for those other offices. Buell's accountant admitted the 2.25 multiplier was not intended to be exact, might result in distortions, and ignored actual expense differences in the various offices.

The most fundamental complaint made by appellants,

however, is that merely proving the ebb and flow of moneys through a single office or operation does not prove the profit, if any, Buell as an entity lost because it did not perform certain work. In other words, proving that direct expenses consume anywhere from approximately 45 to 60 percent of the gross revenues taken in by Buell's Omaha operation does not, in and of itself, establish that Buell could reasonably have expected to realize a profit of $39,714.21 from the $86,902 of revenues generated by the Tabor and Gretna work, a profit of 45.7 percent. Indeed, the evidence is that Buell was experiencing difficult times. The number of its employees had dropped from 40 to approximately 12 in a matter of about a year and a half, and a wage freeze had been in effect since early 1982. Thus, there has been not a partial failure to prove damages (as, for example, was the situation in *LeRoy Weyant & Sons, Inc. v. Harvey and Classic Lanes*, 212 Neb. 65, 321 N.W.2d 429 (1982), where the evidence established damages were sustained but failed to take into account an item of savings, thus entitling us to remand the cause for a new trial), but a complete failure to do so. Under such a circumstance, Buell is not entitled to any recovery. *Quad-States, Inc. v. Vande Mheen, supra.*

For the foregoing reasons, the judgment entered by the district court in favor of Buell must be, and hereby is, reversed as to each of the appellants, and the cause is remanded with the direction to dismiss.

REVERSED AND REMANDED WITH DIRECTION TO DISMISS.

WHITE and GRANT, JJ., not participating.

KATHLEEN C. SHADE, APPELLEE, V. KATHLEEN B. KIRK, APPELLANT, KIRK TYPEWRITER CO., INC., ET AL., APPELLEES.
420 N.W.2d 284

Filed March 11, 1988. No. 86-395.

1. **Judgments: Collateral Attack.** A judgment is not subject to collateral attack unless it is void for lack of jurisdiction over the parties or the subject matter.

2. **Collateral Attack: Jurisdiction.** When a district court has acquired jurisdiction, its judgment, even if erroneous, cannot be collaterally assailed.
3. **Divorce: Judgments.** When the language of a dissolution decree is plain and unambiguous, there is no room for construction, and the effect of the decree must be declared in light of the literal meaning of the language used.

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

S. Caporale, for appellant.

Edward F. Fogarty of Fogarty, Lund & Gross, and Mary Kay Green, for appellee Shade.

HASTINGS, C.J., WHITE, SHANAHAN, and FAHRNBRUCH, JJ., and BLUE, D.J.

WHITE, J.

This action arises from a dissolution of the marriage between James L. Kirk and Kathleen C. Kirk, now Kathleen C. Shade. After 32 years of marriage James Kirk filed for divorce in the district court for Sarpy County, Nebraska. The court, on January 14, 1982, entered a decree of dissolution providing for child support and alimony. The portion of the decree relevant to this litigation provides as follows:

> IT IS FURTHER ORDERED that the petitioner [James L. Kirk] shall be awarded sole ownership of the two insurance policies insuring his life, provided that, in order to secure respondent's support in the event of the petitioner predeceasing the respondent, petitioner shall keep sufficient life insurance in force, designating respondent as beneficiary, to provide death benefits of at least $25,000.00. Such coverage shall be maintained for respondent's benefit for as long as petitioner owes a duty to pay alimony to respondent.

(Emphasis in original.)

James Kirk remarried and then changed the beneficiary on the policies to his new wife, Kathleen B. Kirk. After James Kirk's death, Kathleen C. Shade brought an action in the district court for Douglas County for declaratory judgment, seeking a determination of the rights of the parties under the contracts of insurance at issue. The two insurance companies

deposited the amounts due under the policies with the court. All of the remaining parties moved for summary judgment.

The district court ruled that, as a matter of law, the Sarpy County Court had the authority to require a spouse in a dissolution action to maintain life insurance as a death benefit for the other spouse and ordered that the sum of $25,000 held by the court be paid over to the plaintiff, Kathleen C. Shade.

On appeal to this court the appellant, Kathleen B. Kirk, contends that the dissolution court did not have the power to require James Kirk to maintain life insurance as a death benefit for the plaintiff. The appellant also contends the language of the dissolution decree should be construed as only requiring security for past-due alimony. We affirm.

The appellant's first contention is an attempt to collaterally attack the original dissolution decree. A judgment is not subject to collateral attack, however, unless it is void for lack of jurisdiction over the parties or the subject matter. When a district court has acquired jurisdiction, its judgment, even if erroneous, cannot be collaterally assailed. *State ex rel. Ritthaler v. Knox*, 217 Neb. 766, 351 N.W.2d 77 (1984). The appellant's first contention is therefore without merit.

As for the appellant's second contention, we think the meaning of the dissolution decree is clear and unambiguous. The decree provides for Kathleen C. Shade's support in the event that James Kirk predeceases her at a time when she has not remarried. When the language of a dissolution decree is plain and unambiguous, there is no room for construction, and the effect of the decree must be declared in light of the literal meaning of the language used. See *Bokelman v. Bokelman*, 202 Neb. 17, 272 N.W.2d 916 (1979). There being no error, the judgment of the district court is affirmed.

AFFIRMED.

THOMAS J. PLUHACEK AND JEANNE M. PLUHACEK, APPELLANTS, V. NEBRASKA LUTHERAN OUTDOOR MINISTRIES, INC., APPELLEE.

420 N.W.2d 286

Filed March 11, 1988. No. 86-439.

1. **Specific Performance: Equity: Appeal and Error.** An action for specific performance is an equitable matter triable de novo on appeal to this court.
2. **Contracts: Specific Performance.** Before a trial court may compel specific performance, there must be a showing that a valid, legally enforceable contract exists.
3. **Contracts.** To establish an express contract, there must be shown what amounts to a definite proposal and an unconditional and absolute acceptance thereof.
4. **Contracts: Specific Performance: Proof.** The burden of proving the contract is on the party who seeks to compel specific performance.

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

David J. Lanphier of McGill, Koley, Parsonage & Lanphier, P.C., for appellants.

Larry R. Forman of Schmid, Ford, Mooney & Frederick, P.C., for appellee.

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

BOSLAUGH, J.

This case arises out of a controversy concerning an alleged contract for the sale of land. The property involved is a 100-acre tract of land in Douglas County, Nebraska, located near west Q Street and the Elkhorn River.

The owner of the property, the defendant, Nebraska Lutheran Outdoor Ministries, Inc., listed the property for sale in 1985. The original listing price was $210,000. On April 17, 1985, the listing price was reduced to $195,000; on July 22, 1985, it was reduced to $175,000. In January 1986, the listing price was reduced to $155,000.

The plaintiff Thomas J. Pluhacek is a licensed real estate agent. On March 2, 1986, the plaintiffs submitted an offer to purchase the property for $110,000, subject to their ability to obtain an $88,000 conventional mortgage.

In a conference call on March 5, 1986, the executive director

and executive committee of the defendant considered the plaintiffs' offer. The committee decided to submit a counterproposal subject to the following conditions: the offer must be a cash offer not contingent upon the buyers' obtaining a loan; the earnest deposit must be increased to $5,000; the seller was to retain the insurance proceeds resulting from a fire on February 7, 1986; the 1985 taxes were to be prorated; and "[a]cceptance [was] subject to full Board of Directors approval on March 17, 1986." The conditions were written on the uniform purchase agreement form on which the plaintiffs' offer had been submitted, in the following language:

> Except offer to be CASH (No loan contingency); Earnest Deposit to be raised to $5,000; Sellers to retain any insurance proceeds as a result of the fire on or about February 7, 1986, 1985 taxes that are payable in 1986 are to be prorated and treated as though all are current taxes. This contract is subject to the full Board of Directors approval of the Nebraska Lutheran Outdoor Ministries on or before March 17, 1986.

The acceptance was then signed by the president of the defendant, and the document was returned to the plaintiffs.

On March 7, 1986, the plaintiffs added the following language to the agreement and signed their names: "We have read, understand and accept the terms and conditions of the above offer." The document was then returned to the defendant's real estate agent.

On March 10, 1986, the plaintiff Thomas Pluhacek delivered a $5,000 check to the office of the plaintiff's real estate agency for the earnest money.

On the following day, a news article appeared in the Omaha World-Herald stating that the defendant had a signed contract to sell the property. The article further stated that the board would act on the offer March 17. After seeing the article in the paper, the defendant's agent notified it that the article might stimulate interest in the property and generate additional offers.

On March 13, 1986, the Omaha/Council Bluffs Metropolitan YMCA submitted an offer to purchase the property for $135,000. On March 16, 1986, another offer to

purchase the property, for $140,000, was submitted, by Eric Petersen and Peter Bristol.

The defendant's board of directors met on March 17, 1986, considered the three offers to buy the property, and accepted the YMCA offer.

This action was commenced on March 18, 1986, to compel specific performance of the plaintiffs' alleged contract to purchase the property. The trial court found that approval of the contract by the full board of directors of the defendant was a condition precedent to the formation of a contract and that the defendant acted in good faith, and dismissed the petition. The plaintiffs have appealed.

"[A]n action for specific performance is an equitable matter triable de novo on appeal to this court." *Pallas v. Black*, 226 Neb. 728, 733, 414 N.W.2d 805, 809 (1987); *III Lounge, Inc. v. Gaines*, 217 Neb. 466, 348 N.W.2d 903 (1984); Neb. Rev. Stat. § 25-1925 (Reissue 1985).

> As such, we try the factual issues presented de novo on the record and reach a conclusion independent of the findings of the trial court, provided that where the credible evidence is in conflict on a material issue of fact, we consider, and may give weight to, the fact the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.

Pallas, supra at 733, 414 N.W.2d at 809; *Johnson v. NM Farms Bartlett*, 226 Neb. 680, 414 N.W.2d 256 (1987); *Hughes v. Enterprise Irrigation Dist.*, 226 Neb. 230, 410 N.W.2d 494 (1987). "[W]e are obligated to reach our own independent conclusions on the questions of law presented." *Pallas, supra* at 733-34, 414 N.W.2d at 809; *OB-GYN v. Blue Cross*, 219 Neb. 199, 361 N.W.2d 550 (1985); *In re Estate of Corrigan*, 218 Neb. 723, 358 N.W.2d 501 (1984).

The threshold issue in a specific performance case is whether there was a contract. As we stated in *Rybin Investment Co., Inc. v. Wade*, 210 Neb. 707, 709, 316 N.W.2d 744, 745 (1982), "Before a trial court may compel specific performance, there must be a showing that a valid, legally enforceable contract exists." *Panhandle Rehabilitation Center, Inc. v. Larson*, 205 Neb. 605, 288 N.W.2d 743 (1980). Furthermore, "[t]o establish

an express contract, there must be shown what amounts to a definite proposal and an unconditional and absolute acceptance thereof." *Rybin, supra* at 709, 316 N.W.2d at 746; *Reifenrath v. Hansen*, 190 Neb. 58, 206 N.W.2d 42 (1973); *Griggs v. Oak*, 164 Neb. 296, 82 N.W.2d 410 (1957). "The burden of proving the contract is on the party who seeks to compel specific performance." *Rybin, supra* at 709, 316 N.W.2d at 745.

The plaintiffs' offer to purchase the defendant's property was not unconditionally accepted by the defendant. Although four of the conditions were capable of immediate acceptance by the plaintiffs, the final condition, that acceptance of the plaintiffs' offer was subject to full board approval on March 17, 1986, was a contingency to which the plaintiffs could agree, but it prevented a contract from being made until the full board had accepted the offer.

As stated in *Rybin, supra* at 710, 316 N.W.2d at 746:

> [A]cceptance of the offer must be an unconditional acceptance of the offer as made, otherwise no contract is formed. There must be no substantial variation between the offer and the acceptance. If the acceptance differs from the offer or is coupled with any condition that varies or adds to the offer, it is not an acceptance, but it is a counterproposition.

The plaintiffs' acceptance of the terms and conditions of the defendant's counterproposal on March 7, 1986, merely expressed their willingness to subject their offer to the five conditions specified.

A contract was not made on March 7, 1986. The condition that the sale was contingent on board approval postponed formation of a contract until March 17, 1986.

Before there could be a contract between the plaintiffs and the defendant for a sale of the property, the board of directors of the defendant had to approve the sale. Because this did not occur, there was no enforceable contract. The plaintiffs have failed to show by clear, satisfactory, and unequivocal evidence that they were entitled to specific performance. *Coniglio v. Hansl*, 220 Neb. 580, 371 N.W.2d 273 (1985); *Tedco Development Corp. v. Overland Hills, Inc.*, 200 Neb. 748, 266

N.W.2d 56 (1978); *Meyer v. Meyer*, 180 Neb. 379, 142 N.W.2d 922 (1966).

The judgment of the district court is affirmed.

AFFIRMED.

LARRY BAMESBERGER, IN PERSON AND FOR ALL PERSONS SIMILARLY SITUATED, APPELLANT, V. MICHAEL L. ALBERT ET AL., APPELLEES.

420 N.W.2d 289

Filed March 11, 1988. No. 86-514.

Demurrer: Appeal and Error. When considering a demurrer, this court accepts as true all the facts pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept as true the conclusions of the pleader.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Affirmed.

Dalton Tietjen and Ray Simon of Tietjen, Simon & Boyle, for appellant.

John E. North and Randal M. Limbeck of McGrath, North, O'Malley & Kratz, P.C., for appellees.

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

FAHRNBRUCH, J.

Plaintiff-appellant, Larry Bamesberger, a former joint county-state social services worker, brought a class action to recover funds contributed to his retirement plan by Douglas County. The defendants-appellees in the case are Douglas County commissioners, in their private and official capacities.

Bamesberger appeals dismissal of the action by the Douglas County District Court after the defendants' several demurrers were sustained for failure to state a cause of action. We affirm the dismissal of the case.

When considering a demurrer, this court accepts as true all the facts pled, together with the proper and reasonable

inferences of law and fact which may be drawn therefrom, but does not accept as true the conclusions of the pleader. *Bard v. Cox Cable of Omaha, Inc.*, 226 Neb. 880, 416 N.W.2d 4 (1987); *Knoell v. Huff*, 224 Neb. 90, 395 N.W.2d 749 (1986); *Abboud v. Lakeview, Inc.*, 223 Neb. 568, 391 N.W.2d 575 (1986).

Before July 1, 1983, Larry Bamesberger was employed jointly as a social services worker by the State of Nebraska and Douglas County. On July 1, 1983, Bamesberger, along with other joint county-state social services workers in Douglas County, was transferred to the exclusive employment of the state, pursuant to Neb. Rev. Stat. § 68-718 (Reissue 1986), which states in part:

> All . . . personnel utilized by the county divisions or boards of public welfare for the administration of public assistance programs shall be transferred . . . to the Department of Social Services. The transferred employees shall not lose any accrued benefits or status due to the transfer and shall receive the same benefits as other state employees, including participation in the State Employees Retirement Fund.

Prior to his transfer, Bamesberger had participated in Douglas County's employee retirement plan. Upon transfer of the employees to the state, the retirement plan was amended to give each employee two options: (1) An employee could leave his accumulated funds in the retirement plan and receive full benefits, including the benefits from funds contributed by Douglas County, upon retirement; or (2) an employee could withdraw his/her contributions together with interest and forfeit the county's contributions.

Bamesberger elected to withdraw his contributions to the county retirement plan upon his employment's being transferred to the state. He then requested that he be given the funds contributed by Douglas County to his retirement plan. That request was denied, and this suit followed.

Bamesberger's petition alleged violation of that part of § 68-718 which provides that "transferred employees shall not lose any accrued benefits or status due to the transfer . . . ." The defendants' demurrer was sustained because

> Plaintiffs' Petition . . . does not allege any specific

> contract or pension provision which entitled Plaintiffs to a benefit that has been denied to them as a result of their transfer to employment by the State of Nebraska. Furthermore, the Petition is absent any allegation . . . that the Douglas County Retirement Plan permitted a withdrawal of both the employee and the employer contribution.

A first amended petition, containing no substantive changes, was filed. Defendants' demurrer was again sustained. Plaintiff's second amended petition contained few changes, but did include a third cause of action based upon unjust enrichment. The court's reasons for sustaining the demurrer were not altered.

In this court, Bamesberger continues to assert that the county's refusal to give him Douglas County's retirement plan contributions made on his behalf constitutes a loss of benefits in violation of § 68-718. We disagree.

The record shows that had he remained a joint county-state employee, Bamesberger's contributions of money would have stayed in the retirement plan until he retired or terminated his employment. In the event Bamesberger terminated his county-state employment, he would have been permitted to withdraw only his contributions to the plan together with interest thereon. The county's contributions would have been forfeited. As a joint employee, Bamesberger would never have been entitled to receive the county's retirement plan contributions in a lump sum. He cannot now claim that his inability to obtain the county's contribution in a lump sum is a loss of benefit.

In order to have stated a cause of action for breach of contract, Bamesberger must have first alleged that his employment contract gave him the right to the county's retirement plan contributions *before* his employment was transferred solely to the state. Only then could he claim that his inability to obtain those contributions was a breach of his contract with the county. This he could not do. The retirement plan has always specifically provided that *any* employee who withdraws his or her contributions prior to retirement forfeits the county's contributions regardless of the reason for the

withdrawal.

Bamesberger never had a right to receive any benefits of Douglas County's contribution to his retirement plan before he retired. He voluntarily gave up the right to any benefits provided by Douglas County when he withdrew his own contributions to the plan. None of his causes of action have merit, because Bamesberger sustained no loss of benefits.

The district court's orders sustaining the defendants' demurrers and the court's dismissal of the case were correct and are affirmed.

AFFIRMED.

WEST OMAHA INVESTMENTS, A NEBRASKA PARTNERSHIP, APPELLANT, V. SANITARY AND IMPROVEMENT DISTRICT NO. 48 OF SARPY COUNTY, NEBRASKA, APPELLEE.

420 N.W.2d 291

Filed March 11, 1988. No. 86-532.

1. **Sanitary and Improvement Districts: Words and Phrases: Political Subdivisions Tort Claims Act.** A sanitary and improvement district is a "political subdivision" to which the terms of the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983), are applicable.
2. **Political Subdivisions Tort Claims Act: Pleadings: Notice.** The filing of a notice of claim under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983), is a condition precedent to the institution of suit for an alleged tort against a political subdivision.
3. **Political Subdivisions Tort Claims Act: Notice: Damages.** All that is necessary to be included in a claim under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983), is a recitation of the time and place of the occurrence giving rise to the claim and such other facts pertinent to the claim as are known to the claimant. It is not mandated that the claim contain the amount of damages or loss.
4. **Political Subdivisions Tort Claims Act: Notice.** The purpose of the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983), is not to require a statement of fact to the extent that the governmental subdivision's absolute liability is verbally demonstrated in the documentary or written claim. Rather, the written claim required notifies a political subdivision concerning possible liability for its relatively recent act or omission and provides an opportunity for the political subdivision to investigate and obtain

information about its allegedly tortious conduct.

5. _____: _____. Substantial compliance with the statutory requirements of the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983), pertaining to a claim's content supplies the requisite and sufficient notice to a political subdivision, when the lack of compliance has caused no prejudice to the political subdivision.
6. **Notice.** Statutory notice requirements should be liberally construed so that those with meritorious claims are not barred by technicalities.
7. **Political Subdivisions Tort Claims Act: Notice.** A petition to state a claim against a political subdivision under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983), must allege compliance with the terms of the act.
8. **Actions: Pleadings: Limitations of Actions.** A cause of action pleaded by amendment ordinarily relates back to the original pleading for statute of limitations purposes, provided that the claimant seeks recovery on the same general set of facts.
9. _____: _____: _____. Alternative theories of recovery on the same general set of facts are not ordinarily separate causes of action for the purposes of the running of a statute of limitations.
10. _____: _____: _____. As a general rule, an amended pleading which relies upon the same set of facts as the original pleading, but simply alters the legal theory upon which recovery is sought, will relate back even though the statute of limitations has run in the interim.
11. **Limitations of Actions.** The main purpose of the statute of limitations is to notify the defendant of a complaint against it within a reasonable amount of time so that the defendant is not prejudiced by having an action filed against it long after the time it could have prepared a defense against the claim.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Reversed and remanded for further proceedings.

John D. Hartigan and Thomas D. Wulff of Kennedy, Holland, DeLacy & Svoboda, for appellant.

Dixon G. Adams, for appellee.

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

HASTINGS, C.J.

Following the demurrer of Sanitary and Improvement District No. 48 of Sarpy County, Nebraska (S.I.D. No. 48), the district court dismissed plaintiff's fourth amended petition because of failure to state a cause of action and because of the expiration of the statute of limitations.

In its first petition, plaintiff stated that it owned real estate located within the boundaries of Sanitary and Improvement District No. 51 (S.I.D. No. 51). It further alleged that in order to provide adequate water for fire protection, S.I.D. No. 51 contracted with the defendant, also a sanitary and improvement district, whereby the latter was to furnish water for such purposes. On January 15, 1984, a fire occurred in an industrial building owned by the plaintiff in S.I.D. No. 51, and because of the alleged negligent failure of S.I.D. No. 48 to turn on the water service to mains providing water service to S.I.D. No. 51, plaintiff's property was damaged in a substantial amount.

After several procedural skirmishes, plaintiff filed a third amended petition on March 10, 1986, wherein for the first time it was alleged that defendant "may be a political subdivision as defined in the Political Subdivisions Tort Claim Act . . . ." A demurrer to this petition was also sustained, and, on April 15, 1986, plaintiff filed its last amended petition, which finally alleged that a claim had been made against the defendant sanitary and improvement district which was not acted upon and which was withdrawn.

The last amended petition was dismissed, according to the order of the trial court, because "[t]he Court finds that the plaintiff failed to present a claim within the one year time period required by statute and that the petition should be dismissed pursuant to Section 25-221, R.R.S. Neb. 1943, Reissue of 1985."

The record discloses that on January 4, 1985, the plaintiff sent a letter to the clerk of S.I.D. No. 48, containing the following language:

> RE: 10802 Frontage Road
> I-80
> Sarpy County, Nebraska
>
> Dear Mr. Sapp:
>
> I am writing to you because you are shown as the Clerk for Sanitary Improvement District No. 48 in Sarpy County, Nebraska.
>
> Pursuant to §23-2404, R.R.S. (Reissue of 1983) [the Political Subdivisions Tort Claims Act], claim is made

> against Sanitary Improvement District No. 48 for the property loss suffered on January 15, 1984 at 10802 Frontage Road, I-80 in Sarpy County, Nebraska, by West Omaha Investments, a partnership. The improvements at this location were destroyed by fire on that date. Preliminary investigation indicates that a contributing cause of the fire loss was the negligent omission on the District's part - in failing to furnish the water with which to extinguish this fire. Please present this claim to the governing body of the political subdivision. If you have any questions, or if additional information would be of assistance to you in your consideration of this claim, please call me.
>
> Yours very truly,
> KENNEDY, HOLLAND, DELACY & SVOBODA
> [attorneys for plaintiff]

There appears to be no question but that a sanitary and improvement district is a "political subdivision" and that the terms of the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983 & Cum. Supp. 1984), are applicable. *S.I.D. No. 95 v. City of Omaha*, 221 Neb. 272, 376 N.W.2d 767 (1985). As such, a plaintiff is required to file a claim in writing with the clerk of the district which sets forth "the time and place of the occurrence giving rise to the claim and such other facts pertinent to the claim as are known to the claimant." § 23-2404 (Reissue 1983). This claim must be made within 1 year after it accrues. § 23-2416 (Cum. Supp. 1984).

Furthermore, the filing of a notice of claim under the Nebraska Political Subdivisions Tort Claims Act is a condition precedent to the institution of suit against a political subdivision. *Utsumi v. City of Grand Island*, 221 Neb. 783, 381 N.W.2d 102 (1986).

The trial court agreed with the defendant that the letter did not satisfy the requirements of the claim statute in that it did not specify the amount of damages sustained as a result of the fire. For that reason, according to the trial court, a proper claim was never filed.

The defendant, as well as the lower court, relied on *Peterson v. Gering Irr. Dist.*, 219 Neb. 281, 363 N.W.2d 145 (1985). In

Peterson, the plaintiffs' "claim" consisted of a document which stated in part:

> "[Y]ou [the irrigation district] have failed to deliver water by reason of negligence or omission of duties and responsibilities of the District and [the plaintiffs] shall hold such district liable for whatever damages *may result* as a result of failure to deliver water as required by the laws of the State of Nebraska." (Emphasis supplied.)

Id. at 283-84, 363 N.W.2d at 147. This court found that such document was not a valid claim against the political subdivision because "[t]he document contained no statement as to the amount of damage or loss sustained by the plaintiffs, nor did it allege that such damage or loss had occurred." *Id.* at 284, 363 N.W.2d at 147.

The lower court apparently read this as requiring a plaintiff to specify an exact dollar amount of loss in its claim. However, upon a closer look, it appears that the court in *Peterson* was mostly concerned that the plaintiffs make an actual demand upon the defendant. The court emphasized that the questionable language in the plaintiffs' "claim" was "whatever damages *may result* . . . ." *Id.* Furthermore, the court went on to point out: "Despite plaintiffs' characterization of the document as a 'claim,' it made no demand against the district; rather, it only alerted the district to the *possibility* of a claim." (Emphasis supplied.) *Id.* The court then distinguished a claim from a mere notice of a possible demand by citing from *In re Estate of Feuerhelm*, 215 Neb. 872, 341 N.W.2d 342 (1983). In *Feuerhelm*, the court had compared a notice with a "claim" upon an estate:

> The suggested "claim" demonstrates further deficiency. Although the language of Thompson's individual claim did alert the personal representative to the possibility of a claim by the trust, Thompson's claim did not contain a demand by the trust upon the estate for satisfaction of any obligation. Mere notice to a representative of an estate regarding a possible demand or claim against an estate does not constitute presenting or filing a claim under § 30-2486. If notice were accorded the stature of a claim, the resultant state of flux and uncertainty would frustrate

> and avoid the purpose and objectives of the nonclaim statute.

Feuerhelm, supra at 875, 341 N.W.2d at 344-45.

The plaintiff in the present case, while not specifying an exact dollar amount, did definitely state that property loss had occurred and that the defendant was responsible. The letter did not merely alert the defendant to the future "possibility of a claim" for "whatever damages may result" as in *Peterson*. Rather, the plaintiff stated that "claim is made" against the defendant for actual property loss caused in part by the defendant's negligence.

Moreover, the act itself does not mandate that the claim contain the amount of damages or loss. The act only specifies that the claim must contain "the time and place of the occurrence giving rise to the claim and such other facts pertinent to the claim as are known to the claimant." § 23-2404. The plaintiff's letter complied with these requirements.

This court recently considered the question of the sufficiency of information set forth in a claim in *Chicago Lumber Co. v. School Dist. No. 71, ante* p. 355, 417 N.W.2d 757 (1988). In that case, the defendant alleged that the letter from the plaintiff's attorney was a defective claim because it did not state "the exact date and the precisely specified location" of the alleged tort. *Ante* p. 366, 417 N.W.2d at 764. This court disagreed:

> [I]t is evident that the notice required by § 23-2404 does not have to state the indicated information, circumstances, or facts with the fullness or precision required in a pleading. . . . The purpose of § 23-2404 is not to require a statement of fact to the extent that the governmental subdivision's absolute liability is verbally demonstrated in the documentary or written claim. Rather, the written claim required by § 23-2404 notifies a political subdivision concerning possible liability for its relatively recent act or omission, provides an opportunity for the political subdivision to investigate and obtain information about its allegedly tortious conduct, and enables the political subdivision to decide whether to pay the claimant's demand or defend the litigation predicated on the claim made.

Ante p. 368-69, 417 N.W.2d at 765-66.

The court went on to hold that the requirements of the act should be liberally construed so as not to deny relief merely on the basis of technical noncompliance: "Therefore, substantial compliance with the statutory provisions pertaining to a claim's content supplies the requisite and sufficient notice to a political subdivision in accordance with § 23-2404, when the lack of compliance has caused no prejudice to the political subdivision." *Ante* p. 369, 417 N.W.2d at 766. See, also, *Anderson v. City of Minneapolis*, 138 Minn. 350, 165 N.W. 134 (1917) (a notice of a claim for loss or injury need not be as specific as the complaint in an action to enforce the claim); *Orr v. City of Knoxville*, 346 N.W.2d 507 (Iowa 1984), and *Vermeer v. Sneller*, 190 N.W.2d 389 (Iowa 1971) (substantial compliance with notice of claim statute similar to Nebraska's was sufficient); *Ruth v. City of Omaha*, 82 Neb. 846, 118 N.W. 1084 (1908) (statutory notice requirements should be liberally construed so that those with meritorious claims are not barred by technicalities).

The plaintiff's claim set forth the date, location, and circumstances of the event which gave rise to the claim, and alleged that property loss had occurred as a result of the defendant's negligence.

Although not ruled on by the trial court, the parties argue the effect of the 2-year statute of limitations for filing of a petition as provided by § 23-2416. Because the cause must be remanded for further proceedings, we will attempt to forestall the raising of that issue on retrial.

Section 23-2416 requires the filing of a petition within 2 years of the accrual of the claim (loss by fire), extended for a period of 6 months from the withdrawal of the claim. The claim arose on January 15, 1984. As previously stated, notice of claim was filed on January 4, 1985, within the 1-year period required by § 23-2416. The claim was withdrawn in writing on August 26, 1985. Plaintiff's first petition alleging negligence on the part of the defendant was filed on September 18, 1985, well within the statutory period.

However, it was not until the filing of the fourth amended petition on April 15, 1986, that plaintiff first alleged a

compliance with the claim provision of the Political Subdivisions Tort Claims Act. In *Utsumi v. City of Grand Island*, 221 Neb. 783, 785, 381 N.W.2d 102, 104 (1986), this court stated: "The petition, insofar as it sought relief against the City of Grand Island, failed to allege that Utsumi had complied with the provisions of the Political Subdivisions Tort Claims Act. This was a fatal defect." Accordingly, unless the allegations in the fourth amended petition relate back to the date of filing of the original petition for statute of limitations purposes, the present suit would seem to be time barred.

The plaintiff refers to *Kohler v. Ford Motor Co.*, 187 Neb. 428, 191 N.W.2d 601 (1971), for the proposition that "[a] cause of action pleaded by amendment ordinarily relates back to the original pleading for limitation purposes, provided that claimant seeks recovery on the same general set of facts." (Syllabus of the court.) The issue in *Kohler* was whether the cause was "barred by the statute of limitations because an amended petition, filed after the statute had run, presented for the first time the 'strict liability' theory." *Id.* at 430, 191 N.W.2d at 604. The court held that the plaintiff had not stated a new cause of action in the amended pleading, but, rather, had only stated a new theory of recovery, and, therefore, the amendment related back and the cause was not barred by the statute of limitations. The court noted that "[t]he general facts upon which the right to recover was based are the same." *Id.* at 432, 191 N.W.2d at 605.

The defendant agrees with the above rule of law, but claims that it is not dispositive of the issue here involved. The defendant argues that the proper focus is on the requirements set forth in the act itself. Since "no suit shall be maintained against [any] political subdivision . . . except to the extent, and only to the extent, provided by this act" (§ 23-2401 (Reissue 1983)), and the plaintiff's case was filed as a "common law negligence action" only (brief for Appellee at 7), the plaintiff did not file an action permitted by the Political Subdivisions Tort Claims Act, and the plaintiff is barred by the statute of limitations.

In *Utsumi, supra*, the plaintiff's petitions, up to and including his fourth amended petition, did not include any

allegations that he had complied with the act by filing a claim within 1 year. The defendant filed a demurrer, and when the plaintiff failed to plead further, the plaintiff's action was dismissed. This court affirmed, deciding that the failure to allege compliance with the act was a "fatal defect." *Id.* at 785, 381 N.W.2d at 104. The court held that the trial court was correct in sustaining the demurrer, and when the plaintiff "elected not to further plead within the time granted by the court, the district court was correct in dismissing the action . . . ." *Id.* at 786, 381 N.W.2d at 104-05.

The court in *Utsumi* cited *Campbell v. City of Lincoln*, 195 Neb. 703, 240 N.W.2d 339 (1976), in which the court sustained the defendant's demurrer when the plaintiff's petition failed to allege that he had complied with the act. The *Campbell* decision stated at 712-13, 240 N.W.2d at 344: "The notice of claim requirements of the Nebraska Political Subdivisions Tort Claims Act is a condition precedent to the institution of suit against a political subdivision . . . ." "The failure to allege that the condition precedent had been met was a fatal defect." *Utsumi, supra* at 786, 381 N.W.2d at 104. See, also, *Parriott v. Drainage Dist. No. 6*, 226 Neb. 123, 410 N.W.2d 97 (1987), wherein this court found that a drainage district is a political subdivision within the meaning of the act "and, therefore, compliance with §§ 23-2401 et seq. is a condition precedent to the institution of a tort action against a drainage district. The failure to allege that the condition had been met is a fatal defect to such a suit." 226 Neb. at 125, 410 N.W.2d at 99-100.

Of course, the present case may be distinguished from *Utsumi* and *Campbell* because in *Utsumi* and *Campbell* the plaintiffs apparently did not attempt to remedy their mistakes; the opinion in *Utsumi* specifically noted that the plaintiff elected not to amend his petition within the time granted by the lower court. The court in *Utsumi* had no need to determine what the result would have been had Utsumi attempted to conform his petition to allege compliance with the act.

The plaintiff is correct in stating that the general rule in Nebraska is that an amended pleading in the same cause of action ordinarily relates back to the original pleading for statute of limitations purposes. This has long been the rule. As early as

1899, the Nebraska court held that where an amendment to a petition, declaration, or complaint sets up no new matter or claim, but merely amplifies and restates with more certainty or in a different form the cause of action set out in the original pleading, it relates back to the commencement of the suit, and the statute of limitations is arrested at that point. *Norfolk Beet-Sugar Co. v. Hight*, 59 Neb. 100, 80 N.W. 276 (1899); *Bush v. Tecumseh Nat. Bank*, 64 Neb. 451, 90 N.W. 236 (1902); *Chicago, R. I. & P. R. Co. v. Young*, 67 Neb. 568, 93 N.W. 922 (1903). In *Kennedy v. Potts*, 128 Neb. 213, 258 N.W. 471 (1935), the court ruled that where an original action was timely instituted, an amended petition, which was filed after the running of the statute of limitations and which was merely declaring on the same cause of action, was not barred by limitations. And in *Witt v. Old Line Bankers Life Ins. Co.*, 92 Neb. 763, 139 N.W. 639 (1913), the court affirmed that where an original petition merely stated a cause of action defectively, a restatement of the cause of action in proper form did not amount to a statement of a new or different cause of action.

This court has recently reaffirmed the general rule: " '[A] cause of action pleaded by amendment ordinarily relates back to the original pleading provided that claimant seeks recovery on the same general set of facts.' " *Forker Solar, Inc. v. Knoblauch*, 224 Neb. 143, 148, 396 N.W.2d 273, 277 (1986), citing *Abbott v. Abbott*, 185 Neb. 177, 174 N.W.2d 335 (1970). See, also, *Knoell Constr. Co., Inc. v. Hanson*, 210 Neb. 628, 316 N.W.2d 321 (1982). "Alternative theories of recovery on the same general set of facts are not ordinarily separate causes of action for the purposes of the running of a statute of limitations." *Knoell, supra* at 629, 316 N.W.2d at 322. "[I]f the general facts upon which the right to recover is based are the same, the amendment relates back." *Forker Solar, supra* at 148, 396 N.W.2d at 277, citing *Kohler v. Ford Motor Co.*, 187 Neb. 428, 191 N.W.2d 601 (1971).

The federal "relation-back" statute is nearly identical to the general rule stated in Nebraska case law. Fed. R. Civ. P. 15(c) states in part: "(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or

attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading."

Furthermore, federal case law on the subject of the relation back of amended petitions is analogous to Nebraska case law in that area. Thus, a look at federal cases decided under rule 15(c) and the corresponding general rules of law may provide guidance.

In *United States v. Johnson*, 288 F.2d 40 (5th Cir. 1961), the plaintiffs complained that they suffered damages as a result of Air Force planes flying too close to their home, the planes crashing "within plain view" of their home, and the failure of the U.S. Government to compensate them for being forced to move. This tort claim fell within the Federal Tort Claims Act, which, like the act in the present case, required the plaintiffs to commence an action within 2 years after the tort occurred. The plaintiffs' original complaint was filed well within the 2-year period, but did not allege negligence on the part of the United States. Not until the second amended petition, which was filed after the 2-year period had run, did the plaintiffs allege negligence of the United States, thus bringing the claim within the province of the Federal Tort Claims Act.

The court noted: "The question, then, is whether the second amendment relates back to the filing of the original complaint." 288 F.2d at 42. The court cited a previous decision in which it held: " 'Limitation is suspended by the filing of a suit because the suit warns the defendant to collect and preserve his evidence in reference to it. . . .' " *Id.* The court noted rule 15(c), and agreed with Professor Moore's explanation of the general rule:

> "If the original pleading gives fair notice of the general fact situation out of which the claim or defense arises, an amendment which merely makes more specific what has already been alleged generally, or which changes the legal theory of the action, will relate back even though the statute of limitations has run in the interim."

288 F.2d at 42, citing 3 J. Moore, Moore's Federal Practice 852 (2d ed. 1948). The court concluded:

> Though there was a complete change in the legal theory of plaintiffs' complaint, their claim continued to arise out of the conduct, transaction or occurrence attempted to be

> set forth in the original complaint. We hold, therefore, that the second amendment relates back to the date of the original complaint, and that the action was not barred by the two-year limitation in the Federal Tort Claims Act.

288 F.2d at 42.

Wirtz v. W. G. Lockhart Construction Co., 230 F. Supp. 823 (N.D. Ohio 1964), was also decided under rule 15(c). The court decreed: "So long as the original complaint notices the defendant that a claim is lodged against him, amendment will be freely granted to help in particularizing the claim, so long as the purported amendment does not in fact serve as a subterfuge for including a *separate* claim which would otherwise be barred at the time of amendment." (Emphasis in original.) 230 F. Supp. at 830.

The plaintiff in *Drakatos v. R. B. Denison, Inc.*, 493 F. Supp. 942 (D. Conn. 1980), sought to file a second amended petition to allege jurisdiction under the "Death on High Seas by Wrongful Act" statute, although, if filed on that date as an original complaint, the claim would have been barred by the statute's 2-year time limitations. The court observed that the language of the original and amended claims was virtually identical, the only distinction being that the amended claim was grounded in the statute, while the original claim was based on common law.

The court found rule 15(c) controlling, and determined that "amendment under Rule 15(c) is freely granted to cure a defective statement of jurisdiction or to replace an inadequate legal theory." 493 F. Supp. at 945. The court further explained rule 15(c)'s function:

> Rule 15(c) is based on a theory of constructive notice. So long as the amendment arises from the core circumstances asserted in the original complaint, the defendant is considered to have had fair notice of the amendment since the filing of the complaint. For the purposes of a statute of limitations, therefore, the original filing date becomes the only relevant event.

493 F. Supp. at 946-47 n.6. Despite the defendant's assertion that the running of the act's 2-year limitations period served not merely to time-bar but to actually extinguish the plaintiff's

cause of action, the court allowed the plaintiff to amend her claim to allege jurisdiction under the act.

Finally, in *Beeler v. United States*, 338 F.2d 687 (3d Cir. 1964), the plaintiffs' cause of action fell within the Suits in Admiralty Act, although they originally filed their claim under the Federal Tort Claims Act. They sought to amend the complaint by substituting the Suits in Admiralty Act for the Federal Tort Claims Act after the 2-year limitation of the Suits in Admiralty Act had expired. The court allowed the amendment, noting especially that "the allowance of the amendment cannot adversely affect the defendant while refusal to allow it might put an end to the plaintiffs' right to pursue their cause of action." *Id.* at 690. The court seemed to focus on the fairness of allowing the amendment:

> To hold that, having set forth facts which if proved would entitle him to recover, a plaintiff in a case like the present one loses, beyond hope of redemption, the right to pursue his action because he has cited the wrong statute as the basis for it would be indeed a sterile technicality.

Id. at 689. See, also, *Bay State Crabmeat Co. v. United States*, 78 F. Supp. 131 (D. Mass. 1948), in which the court allowed the plaintiff to amend its complaint in admiralty to refer instead to the Federal Tort Claims Act, even though the Federal Tort Claims Act's statute of limitations had run.

Although the Nebraska court has not yet had the opportunity to directly decide whether the general "relation back" principles apply to claims brought under the state's Political Subdivisions Tort Claims Act, an analysis of federal case law, Nebraska case law, general policy considerations, and the act itself leads to the conclusion that an amended pleading under the act should relate back to the date of the original petition as well.

Based on the reasoning of the foregoing cited cases, we hold that an amended pleading which relies upon the same set of facts as the original pleading, but simply alters the legal theory upon which recovery is sought, will relate back even though the statute of limitations has run in the interim. In this case, the plaintiff relied upon the same incident and the same set of facts, i.e., the negligent failure to furnish water, which caused

plaintiff loss by reason of fire.

The main purpose of the statute of limitations is to notify the defendant of a complaint against it within a reasonable amount of time so that the defendant is not prejudiced by having an action filed against it long after the time it could have prepared a defense against the claim. This purpose was satisfied in the present case.

The defendant was aware of the claim against it when it received plaintiff's letter of January 4, 1985. From the substance of the original petition, the defendant was aware that the plaintiff's petition was referring to the circumstances which gave rise to the plaintiff's letter of January 4. The substance of the plaintiff's claim has not changed from the notice of claim sent on January 4, 1985, to the final amended petition filed April 15, 1986. By amending to allege compliance with the act, the plaintiff has not introduced anything new to the defendant. The plaintiff's fourth amended petition does relate back to its original filing for statute of limitations purposes.

The judgment of the district court is reversed, and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

V. EDSON EWING ET AL., APPELLEES AND CROSS-APPELLANTS, V. SCOTTS BLUFF COUNTY BOARD OF EQUALIZATION ET AL., APPELLEES, SCHOOL DISTRICT OF LYMAN IN SCOTTS BLUFF COUNTY ET AL., APPELLANTS AND CROSS-APPELLEES.

420 N.W.2d 685

Filed March 11, 1988. No. 86-804.

1. **Legislature.** Where the Legislature has provided reasonable limitations and standards for carrying out the delegated duties, there is no unconstitutional delegation of legislative authority.
2. **Constitutional Law: Statutes.** The following portion of Neb. Rev. Stat.

§ 79-4,102(2)(f) (Cum. Supp. 1984) is unconstitutional: "which may reduce such charge to any amount decided by the receiving district's school board or board of education, except that such amount shall not be less than the per pupil cost in the district as stated in the immediately preceding annual term finance report on file with the State Department of Education."

3. _____: _____. Where it appears that unconstitutional portions of an act can be separated from the valid portions, and the latter enforced independent of the former, and it further appears that the invalid portions did not constitute such an inducement to the passage of the valid parts that they would not have been passed without them, the former may be rejected and the latter upheld.
4. **Constitutional Law: Statutes: Legislature: Intent.** The test to be applied to determine whether an unconstitutional clause may be severed from the remainder of a statute is (1) whether, absent the invalid portions, a workable plan remains; (2) whether the valid portions of an act can be enforced independently, and where the invalid portions do not constitute such an inducement to the valid parts that the valid parts would not have passed without the invalid parts; (3) whether the severance will do violence to the intent of the Legislature; and (4) whether a declaration of separability is included in the act, indicating that the Legislature would have enacted the bill absent the invalid portion.
5. **Constitutional Law: Statutes.** A severability clause in a statute is not a condition precedent to a determination of the question of severability.
6. _____: _____. The cardinal principle of statutory construction is to save and not to destroy.
7. _____: _____. A court should refrain from invalidating more of the statute than is necessary.
8. _____: _____. Neb. Rev. Stat. § 79-4,102 (Cum. Supp. 1984) is constitutional when the unconstitutional portion of § 79-4,102(2)(f) is severed.
9. _____: _____. There can be no unlawful delegation of legislative power where the Constitution itself authorizes the delegation.
10. **Constitutional Law: Statutes: Proof.** The burden is on one who attacks a statute to prove facts to establish its invalidity.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Affirmed in part, and in part reversed and remanded with directions.

Joy Shiffermiller of Atkins Ferguson Zimmerman Carney, P.C., for appellants School District of Scottsbluff and School District of Minatare; and Robert M. Spire, Attorney General, and Harold Mosher, for appellants State Board of Education and Lutjeharms.

Donn C. Raymond of Simmons, Raymond, Olsen, Ediger, Selzer & Ballew, P.C., for appellants School District of Gering, School District of Bayard, and School District No. 81.

R.L. Gilbert of Gilbert Law Offices, P.C., for appellants School District of Morrill and School District of Lyman.

G. Randolph Reed of Reed Law Office, for appellant School District of Mitchell.

Walter R. Metz, Jr., of Metz & Metz, for appellees Ewing et al.

James B. Gessford of Perry, Perry, Witthoff, Guthery, Haase & Gessford, P.C., for amici curiae School District of Lincoln et al.

Patrick G. Vipond of Sodoro, Daly & Sodoro, for amicus curiae School District of Ashland-Greenwood.

Thomas A. Danehey of Curtiss, Moravek, Danehey and Curtiss, P.C., and Laurice M. Margheim, for amici curiae School District of Alliance and School District of Hemingford.

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

GRANT, J.

Plaintiffs (appellees and cross-appellants) filed their amended petition against defendants (appellants and cross-appellees), school districts of Lyman, Minatare, Mitchell, Morrill, Gering, Scottsbluff, School District No. 81 (all in Scotts Bluff County), school district of Bayard in Morrill County, State Board of Education, and Joe E. Lutjeharms, Commissioner of Education. Other defendants named in plaintiffs' amended petition (not appellants in this court) were Scotts Bluff County Board of Equalization, Scotts Bluff County treasurer Darlene Robertson, and Scotts Bluff County superintendent William D. Zitterkopf. Alliance School District in Box Butte County (Alliance) was originally named as a defendant, but its motion for summary judgment was sustained and plaintiffs' petition dismissed as to Alliance. No cross-appeal was taken from that dismissal.

The 10 appellants (hereinafter "defendants") appeal from the trial court's order granting plaintiffs' motion for summary judgment, determining that Neb. Rev. Stat. § 79-4,102 (Cum. Supp. 1984) is unconstitutional in its entirety, and granting

certain injunctive relief for the 1987-88 school year, while denying such relief for the 1986-87 school year. Because there have been numerous changes in § 79-4,102 over the years, a reference to that statute herein, without further identification, shall mean § 79-4,102 as amended by 1984 Neb. Laws, L.B. 930, and as codified in the cumulative supplement of 1984.

As set out in the four briefs filed on behalf of the defendants in the appeal herein and agreed to by plaintiffs as appropriate for both the appeal and the cross-appeal, the case may be summarized as follows.

Plaintiffs are taxpayers of Scotts Bluff County, owning property located within nonresident high school districts and subject to the Scotts Bluff County nonresident high school tuition levy. They filed this action for a declaratory judgment and for injunctive relief. Defendant school districts included all high school districts authorized to receive students from non-high-school districts in Scotts Bluff County, with tuition for said students paid to the receiving districts from tax funds to be generated by the nonresident high school tuition levy for 1985-86 on property located in the non-high-school districts. The county treasurer and the superintendent of schools of Scotts Bluff County and the State Department of Education and its Commissioner of Education were also joined as defendants.

Defendant school districts operate high schools and are Class III school districts, as described in Neb. Rev. Stat. § 79-102 (Reissue 1987). Plaintiffs are residents of Class I districts, which do not maintain high schools. The Legislature is faced with the duty imposed on it by Neb. Const. art. VII, § 1, to furnish "free instruction in the common schools of this state of all persons between the ages of five and twenty-one years." Since 1899, the Legislature has attempted in various ways to satisfy that duty and has enacted various statutes attempting to provide a constitutional method which would make a high school education available to children who reside in a district which does not maintain a school at that level. Not surprisingly, since the recovery of revenue by some form of taxation is necessary to operate the constitutionally required schools, litigation seems to follow each legislative enactment. The

history of that litigation is summarized, in part, in *Mann v. Wayne County Board of Equalization*, 186 Neb. 752, 186 N.W.2d 729 (1971), and not to be repeated here.

Plaintiffs, in their amended petition, alleged that § 79-4,102 was unconstitutional in one or more of the following respects:

1. The statute constituted an unlawful delegation of legislative authority to the State Department of Education and receiving districts in violation of Neb. Const. art. II, § 1, and Neb. Const. art. III, § 1.

2. The statute is unconstitutional in that to the extent the nonresident tuition charges are permitted to exceed the actual cost of educating nonresident high school students, the 1985-86 nonresident tuition levy violates Neb. Const. art. VIII, § 1, and U.S. Const. amend. XIV, which require taxation to be levied uniformly, and Neb. Const. art. VIII, § 4, which forbids commutation of taxes.

3. The statute is unconstitutional in that the nonresident tuition levy constitutes taxation without representation.

Defendants filed individual answers, each generally admitting plaintiffs' description of the parties, generally denying the other allegations of the amended petition, and alleging that § 79-4,102 was constitutional.

Plaintiffs and defendants filed motions for summary judgment. Defendants' motions were denied. The trial court in its decree found that there was no genuine issue of material fact and that plaintiffs were entitled to judgment, as a matter of law, that § 79-4,102 was unconstitutional in its entirety, stating in part:

> 3. Plaintiffs are entitled to a judgment as a matter of law, and are hereby rendered judgment that Laws 1984, LB930, as codified in §79-4,102 R.S.Supp., 1984 is unconstitutional and void by reason of an unlawful delegation of legislative power to the boards of education of school districts receiving nonresident students without sufficient or adequate standards pertaining to the exercise of discretion in applying that power, in violation of Article II, Section 1 and Article III, Section 1, Constitution of Nebraska.
>
> 4. Laws 1984, LB930, as codified in §79-4,102

R.S.Supp., 1984 is unconstitutional in its entirety and is therefore void and of no effect.

The court also granted certain portions of the requested injunctive relief.

Defendants appeal from that order. The errors assigned in the four briefs filed by various groupings of defendants may be summarized as follows: (1) that the trial court erred in holding § 79-4,102 was unconstitutional as an unlawful delegation of legislative authority to receiving school districts on the stated grounds that the section lacks sufficient guidelines and standards; (2) that the court erred in holding § 79-4,102 unconstitutional in its entirety, and not treating the portion of the statute relating to the authority of the receiving districts as severable; (3) that the court erred in granting an injunction; and (4) that the court erred because the plaintiffs can suffer no harm from the receiving districts' reductions of the amount of nonresident tuition.

In the appeal herein, we reverse the trial court's decision holding § 79-4,102 unconstitutional, for the reasons hereinafter set out. The matters of the injunctive relief, insofar as it was granted or denied, and of the constitutionality of § 79-4,102 challenged by plaintiffs-appellees in their cross-appeal will be later discussed.

In its memorandum decision and decree, the court found that § 79-4,102 was constitutional in all respects except in a part of § 79-4,102(2)(f) which is hereinafter set out in italics:

> The State Department of Education shall certify such total high school tuition charge to the receiving district *which may reduce such charge to any amount decided by the receiving district's school board or board of education, except that such amount shall not be less than the per pupil cost in the district as stated in the immediately preceding annual term finance report on file with the State Department of Education.* The superintendent of the receiving district shall certify the nonresident high school tuition charge to the county superintendent for transmittal to the county treasurer and each receiving district on or before March 31 of each year.

(Emphasis supplied.)

That provision followed other sections of the statute setting out, in detail, the method for determining the high school tuition rate by the finance division of the State Department of Education. The trial court held that while the determination of the charge by the State Department of Education was constitutional, the portion of the statute italicized above was unconstitutional in that there was no standard set out in the statute governing the decision of the receiving school district as to whether the tuition charge set by the state board should be reduced and, if it were reduced, to what level. The trial court stated, "There is absolutely no standard given for where the [receiving] district may choose to fall within that range." The range referred to by the trial court is that between the tuition rate determined by the state board and "the per pupil cost in the district as stated in the immediately preceding annual term finance report on file with the State Department of Education."

The trial court stated, in its memorandum decision, in determining that § 79-4,102(2)(f) was unconstitutional:

> No indication exists that receiving districts are limited to anything resembling "compensatory", "fair", "reasonable", or any other kind of rate. In short, no standard at all is furnished to receiving boards in exercising what amounts to a wide discretion that affects the taxes of another district. Where no standard at all is given, the delegation is unconstitutional.

We agree that the portion of § 79-4,102(2)(f) italicized above is unconstitutional. It is appropriate for the Legislature, in certain situations, to delegate taxing authority to a school district. As stated in *Banks v. Board of Education of Chase County*, 202 Neb. 717, 719-20, 277 N.W.2d 76, 78-79 (1979):

> The power delegated by the statute is the power to levy a tax, and the tax is clearly limited as to amount and purpose. The plaintiff's contention that the Legislature is without constitutional authority to make such a delegation is without merit. Campbell v. Area Vocational Technical School No. 2, 183 Neb. 318, 159 N.W.2d 817, is controlling here: "A school district is a creation of the Legislature. Its purpose is to fulfill the constitutional duty placed upon the Legislature 'to encourage schools and the

> means of instruction' and it is a governmental subdivision to which authority to levy taxes may properly be delegated under the Constitution."

The controlling issue on this point, however, is that the delegation must be limited to a determinable degree. This court has recognized that on many occasions. In *Banks, supra* at 719, 277 N.W.2d at 78, we noted, "The power delegated by the statute is the power to levy a tax, and the tax is clearly limited as to amount and purpose." In *Mann v. Wayne County Board of Equalization*, 186 Neb. 752, 759, 186 N.W.2d 729, 734 (1971), we stated, in holding that a delegated power was constitutional, "Where the Legislature has provided reasonable limitations and standards for carrying out the delegated duties, there is no unconstitutional delegation of legislative authority."

In the statute before us, there are no "reasonable limitations and standards." Under § 79-4,102(2)(f), the receiving district may reduce the tuition charge set by the State Department of Education "to any amount decided by the receiving district's school board or board of education . . . ." It is true that the reduction may not be "less than the per pupil cost in the district as stated in the immediately preceding annual term finance report," but that range is extremely wide. In the trial court's memorandum decision, the court states in footnote 12:

> The total amount used in the levy was $1,437,115 applied to Class I lands in Scotts Bluff County. If a cost per pupil educated were used, the figure would have been $881,718 for a difference of $555,397. This is 63% higher than what it would have been if the receiving districts had been more generous. Nine districts contributed to the certified levy, six of them actually had students from the county. Because a five-year average attendance is used, it is possible to certify an amount whether any students are educated that year or not.

The statute sets out no criteria as to the determination of the amount to be decided. We agree with the decision of the trial court on this point, and hold the following portion of § 79-4,102(2)(f) is unconstitutional:

> which may reduce such charge to any amount decided by the receiving district's school board or board of education,

> except that such amount shall not be less than the per pupil cost in the district as stated in the immediately preceding annual term finance report on file with the State Department of Education.

The trial court, after making its determination as to the unconstitutionality of that portion of § 79-4,102, held that "Laws 1984, LB930, as codified in §79-4,102 R.S.Supp., 1984 is unconstitutional in its entirety and is therefore void and of no effect." With that determination we cannot agree.

This court has often held:

> "Where it appears that unconstitutional portions of an act can be separated from the valid portions and the latter enforced independent of the former, and it further appears that the invalid portions did not constitute such an inducement to the passage of the valid parts that they would not have been passed without them, the former may be rejected and the latter upheld."

Tom & Jerry, Inc. v. Nebraska Liquor Control Commission, 183 Neb. 410, 417-18, 160 N.W.2d 232, 238 (1968).

In *State ex rel. Douglas v. Sporhase*, 213 Neb. 484, 486, 329 N.W.2d 855, 856-57 (1983), we set out the test to be applied in determining whether an unconstitutional clause may be severed from the remainder of a statute, as follows:

> (1) Whether, when absent the invalid portions, a workable plan remains. *Nelsen v. Tilley*, 137 Neb. 327, 289 N.W. 388 (1939). (2) Whether the valid portions of an act can be enforced independently, and where the invalid portions do not constitute such an inducement to the valid parts that the valid parts would not have passed without the invalid parts. *State v. Padley*, 195 Neb. 358, 237 N.W.2d 883 (1976). (3) Whether the severance will do violence to the intent of the Legislature. *Chase v. County of Douglas*, 195 Neb. 838, 241 N.W.2d 334 (1976). (4) Whether a declaration of separability is included in the act, indicating that the Legislature would have enacted the bill absent the invalid portion. *State ex rel. Meyer v. County of Lancaster*, 173 Neb. 195, 113 N.W.2d 63 (1962); *Nelsen v. Tilley, supra*.

The bill in question did not contain a severability clause. The

presence of a severability clause in the statute being examined is not essential to a ruling declaring the offending portion of a statute severable. In *Chase v. County of Douglas*, 195 Neb. 838, 852, 241 N.W.2d 334, 342 (1976), we stated: "Where such a [severability] clause is not present, we have held: '. . . a severability clause is merely an aid to construction and not an inexorable command. A severability clause in a statute is not a condition precedent to a determination of the question of severability.' " See, also, *Tom & Jerry, Inc. v. Nebraska Liquor Control Commission, supra; Linn v. Linn*, 205 Neb. 218, 286 N.W.2d 765 (1980); *Tilton v. Richardson*, 403 U.S. 672, 91 S. Ct. 2091, 29 L. Ed. 2d 790 (1971).

Applying the tests set out in *Tom & Jerry, Inc., supra*, and in *Sporhase, supra*, our examination of § 79-4,102(2)(f) shows that when the italicized language set out above is removed, a "workable plan" remains. The statute sets out a procedure, in detail, to reach a certain result. The offending language does not affect the calculation of the amount of the rate determined by the finance division of the State Department of Education. The constitutionality of that rate is discussed below in connection with the cross-appeal, but it is clear that the language in question does not affect the calculation to be made.

Similarly, examination of the statute shows that the remaining valid portions of the act, assuming the language in question is severed, can be enforced independently. Without the offending language, the statute provides that the State Department of Education certifies the calculated charge to the receiving district and the superintendent of the receiving district certifies the charge to the county superintendent.

The next part of the test is to determine if the invalid portions of an act constituted such an inducement to the valid parts that the valid parts would not have passed without the invalid parts. Plaintiffs state in their brief at 9, "The legislative history indicates that the role of the receiving district to reduce tuition charges was a product of an amendment on the floor . . . . The sponsors must not have had votes for passage of the bill without the amendment. The amendment therefore constituted a 'primary inducement' for its passage."

Plaintiffs' conclusions as to why the Legislature acted as it

did are not more than that—conclusions. From the record before us, we cannot reach the conclusion that the sponsor did not have enough "votes for passage of the bill." The act itself is detailed and comprehensive, and we determine that its passage did not rise or fall on a last-minute addition, on the floor without debate, that would result in a detailed statute's failing in its entirety. For the same reasons, we cannot say that the severance will do violence to the intent of the Legislature.

As stated in *Tilton v. Richardson*, 403 U.S. at 684: " 'The cardinal principle of statutory construction is to save and not to destroy.' " The U.S. Supreme Court later stated, in *Alaska Airlines, Inc. v. Brock*, ____ U.S. ____, ____, 107 S. Ct. 1476, 1480, 94 L. Ed. 2d 661 (1987), " '[A] court should refrain from invalidating more of the statute than is necessary . . . .' "

We hold that severance of the unconstitutional portion of § 79-4,102(2)(f), to wit: "*which may reduce such charge to any amount decided by the receiving district's school board or board of education, except that such amount shall not be less than the per pupil cost in the district as stated in the immediately preceding annual term finance report on file with the State Department of Education,*" cannot be determined to constitute an inducement to the passage of 1984 Neb. Laws., L.B. 930, codified at § 79-4,102; does not make the act inoperative; and will not frustrate the intent of the Legislature. The remainder of § 79-4,102 remains a viable statute and, with the deletion set out above, is constitutional. In view of this holding, defendants' remaining assignments of error will not be discussed.

On the defendants' appeal, the judgment of the trial court is reversed and the cause remanded.

CROSS-APPEAL

In their cross-appeal, constituting 34 pages of their 48-page brief, plaintiffs contend that the trial court erred in its determination that § 79-4,102 was constitutional in all respects except in the particulars discussed above. Plaintiffs challenge that determination and set out four assignments of error, which may be summarized:

1. The district court erred in finding that 1984 Neb. Laws, L.B. 930, does not constitute an unlawful delegation of authority to the State Department of Education.

2. The district court erred in failing to find that L.B. 930 is unconstitutional on its face, or as applied, because it permits nonresident tuition charges to exceed the cost of education the students received.

3. The district court erred in failing to find that the levying of taxes for purposes of nonresident tuition under § 79-4,102 constitutes an unconstitutional taxation without representation of residents of non-high-school districts within the county.

In beginning consideration of plaintiffs' challenge, in their cross-appeal, to the constitutionality of § 79-4,102, we reiterate the statement set out in *Tilton v. Richardson*, 403 U.S. 672, 684, 91 S. Ct. 2091, 29 L. Ed. 2d 790 (1971): " 'The cardinal principle of statutory construction is to save and not to destroy.' " This court has recognized that principle in many cases. In *Mann v. Wayne County Board of Equalization*, 186 Neb. 752, 756, 186 N.W.2d 729, 733 (1971), we stated: "In construing an act of the Legislature, all reasonable doubt must be resolved in favor of constitutionality."

The first error assigned on the cross-appeal concerns plaintiffs' contention that the Legislature has unconstitutionally delegated authority to the Nebraska Department of Education. It is clear that, although plaintiffs refer in their brief to the "Nebraska Department of Education," they refer to the State Department of Education, and that term will be used. First of all, the Nebraska Constitution, in article VII, makes general provisions for education in the state. Neb. Const. art. VII, §§ 2, 3, and 4, provide for a "State Department of Education" and set out provisions for the election of a State Board of Education and for the appointment, by that board, of a Commissioner of Education. The state department consists of the board and the commissioner. In this case, therefore, we are concerned with a constitutionally created agency which, as set out in Neb. Const. art. VII, § 2, "shall have general supervision and administration of the school system of the state and of such other activities as the Legislature may direct."

We said, in *School Dist. of Seward Education Assn. v. School Dist. of Seward*, 188 Neb. 772, 777, 199 N.W.2d 752, 756 (1972), quoting from *School Dist. No. 8 v. State Board of*

Education, 176 Neb. 722, 127 N.W.2d 458 (1964):

> "Article VII, section 14 [now article VII, § 2], of the Nebraska Constitution authorizes the grant of administrative and legislative powers to the State Department of Education, subject to implementation and limitation by the Legislature in accordance with Article VII, section 15 [now amended and set out in article VII, § 3], of the Constitution."

It is clear that the Legislature may delegate legislative powers to the State Department of Education. Plaintiffs do not contend that the State Department of Education does not have general powers to supervise and administer the state school system, but do contend that those powers do not extend to the power of taxation, pointing out that Neb. Const. art. VIII, § 1, provides, in part, "The necessary revenue of the state and its governmental subdivisions shall be raised by taxation in such manner as the Legislature may direct," and that Neb. Const. art. VII, § 1, provides, in part, "The Legislature shall provide for the free instruction in the common schools of this state of all persons between the ages of five and twenty-one years."

Some defendants present the contention that since the State Board of Education is a constitutionally established agency, the board must have the inherent power to raise revenue in order to perform its function. Although the state board is established by the Constitution and consists of elected members, the Constitution itself limits its powers when it states in Neb. Const. art. VII, § 3, that the board's "duties and powers shall be prescribed by the Legislature." The Legislature's overall powers are clearly set out in Neb. Const. art. VII, § 1, quoted above.

Nonetheless, the status of the state board must be kept in mind. As noted by the trial court in its memorandum decision in this case, "[T]here can be no unlawful delegation of legislative power because the [Nebraska] Constitution itself authorizes the delegations." The fact remains that the Legislature, to discharge its constitutional duties to "provide for the free instruction" of Nebraska schoolchildren, must set out guidelines within which the state board must exercise its duties in calculating the amount of apportionment of revenues

necessary for the operation of high schools for nonresident pupils.

Section 79-4,102 states, in part, "The high school tuition rate for nonresident pupils shall be determined annually by the finance division of the State Department of Education . . . ." The statute then sets out, in detail, the method by which that rate is to be calculated. Plaintiffs' cross-appeal on this point contends that the evidence shows that the Legislature has enacted a statute which is too vague to be followed. Plaintiffs summarize their contentions at page 39 of their brief, as follows:

> 1) LB930 is vague as to which NDE forms from which data necessary to carry out LB930 calculations is [sic] to be taken (enrollments and valuation data).
>
> 2) LB930 is vague as to what other sources of data NDE is to look to in making the calculations (enrollment and valuation data).
>
> 3) LB930 is vague as to which years from which the data is [sic] to be taken (enrollment and valuation data).
>
> 4) The meaning of the following terms are [sic] left undefined:
>
> a) "Combined valuation base" (leading to the filing of Lancaster County District Court Case #388-001).
>
> b) "Uniform taxation basis".
>
> c) "Total current expense".
>
> d) "Insurable or present value of school plant and equipment".
>
> e) "Unadjusted share of operational expense".
>
> f) "Annual cost of education index".
>
> g) "Increasing or decreasing cost".

In summary, plaintiffs adopt the position that the Legislature itself must provide, in detail, the forms which the State Department of Education must use to collect data to implement its calculations, and must define, in a legislative enactment, terms such as "total current expense," "insurable or present value," and "increasing or decreasing cost." The standards in § 79-4,102(2) are set out in 6 subparagraphs consisting of 65 lines in our statutes. Among many other things, the State Department of Education is directed to consider data provided

to the board pursuant to other legislative enactments set out in Neb. Rev. Stat. §§ 79-451, 79-1331, 79-1333.02, and 79-1334 (Reissue 1987). In short, the Legislature has set out a detailed plan to solve a most difficult problem. It would appear that much greater detail could not be set out unless the Legislature would forgo all other responsibilities and itself become a full-time board of education. We agree with the determination of the trial court that the standards set out "are adequate and reasonable to accomplish the goal of apportioning secondary education costs between districts on a formula acknowledging and legislatively weighting number of pupils educated and respective property valuations of the districts."

We hold that § 79-4,102, here under consideration, does not "constitute an unlawful delegation of authority," as alleged by plaintiffs, and is not unconstitutional on that ground.

Insofar as plaintiffs contend § 79-4,102 is unconstitutional "on its face [emphasis in cross-appellants' assignment of error No. 2] because it permits nonresident tuition charges to exceed the cost of educating the students received," we determine that assignment is also without merit.

Plaintiffs, in this contention, summarize their position at page 29 of their brief as follows:

> To the extent that LB930 allows tuition charges to exceed the cost (as measured by per pupil cost) of the benefit received (education of nonresident students for the current year), it results in a lack of tax uniformity in violation of Article VIII, §1, Constitution of Nebraska, and the Fourteenth Amendment, United States Constitution.

There can be no disagreement as to the underlying principle that Neb. Const. art. VIII, § 1, requires that taxes shall be levied "uniformly and proportionately." In *Mann v. Wayne County Board of Equalization*, 186 Neb. 752, 757, 186 N.W.2d 729, 733 (1971), we stated: "[A] statute which provides for the raising of revenue for nonresident high school tuition which places a substantially unequal tax burden on either the district which receives the nonresident students or the district which sends them would be discriminatory." Plaintiffs contend that any tuition charges, other than the per pupil cost for each

student educated in the school year in question, are invalid. In earlier years, as noted in the *Mann* case at 757, 186 N.W.2d at 733, "historically under a fixed tuition rate, it was cheaper for a taxpayer to live in a district which paid tuition than it was to live in the receiving district." The Legislature provided, in § 79-4,102, for a way of calculating a nonresident tuition charge which is designed to compensate the receiving districts for maintaining a high school which the sending districts may utilize when they have children of high school age who claim their constitutional right to "free instruction in the common schools."

Section 79-4,102(2)(b) provides: "A combined valuation tax base shall be established . . . ." The subsection goes on to set out how to establish that base, in part, as a "proportionate share of the current valuation of all Class I school districts not a part of any Class VI school district in each county where nonresident students registered to attend the receiving district for the ensuing school year reside." The Legislature is getting away from a flat, per-student charge and attempting to establish a basis for the sharing of the common goal of educating our children through high school. That effort is not per se unconstitutional because it departs from a calculation based on per-pupil cost alone.

It is clear that absolute preciseness is not possible in this area. As we stated in *Mann, supra* at 758, 186 N.W.2d at 733:

> Tuition rates are always prospective and in a period of rapidly increasing costs, even a complete and accurate cost figure is outdated before it becomes effective. Many cost items can only be determined by using figures which are, in some degree, arbitrary. Exact equalization is impossible to achieve in any area of taxation, but particularly in this sensitive area of school operations.

Earlier, we noted in *C. R. T. Corp. v. Board of Equalization*, 172 Neb. 540, 549, 110 N.W.2d 194, 200 (1961):

> As is clearly apparent in a situation such as this the needs are not capable of exact ascertainment. In the very nature of things and as the pertinent statutes declare there may only be estimates, which of course negative any thought that accuracy must be attained. The true test is

> that there shall be a reasonable and approximate estimate and determination made in the light of the known and reasonably ascertainable facts and also in the light of known and fairly anticipated conditions.

The burden is on one who attacks a statute to prove facts to establish its invalidity. *City of Parkview v. City of Grand Island*, 188 Neb. 267, 196 N.W.2d 197 (1972). Statutes are presumed to be constitutional, and unconstitutionality must be clearly established. *Weiner v. State ex rel. Real Estate Comm.*, 217 Neb. 372, 348 N.W.2d 879 (1984).

In this case before us, plaintiffs have the burden of establishing that § 79-4,102 is unconstitutional. They have not met that burden insofar as their allegation that the taxes on the receiving and sending districts are not uniform. It appears that the statute authorizes a tuition charge higher than the per-pupil cost as determined in years past. It is not necessarily unconstitutional for the Legislature to give weight to the fact that receiving districts have erected and maintained a school system, providing for physical buildings and staffing, available to furnish constitutionally required high school education over long periods of time, although some taxpayers from sending districts wish to pay only for the sporadic actual utilization of the facilities. The setting of rates beyond per-pupil costs is not per se unconstitutional. *Mann v. Wayne County Board of Equalization, supra.*

Insofar as plaintiffs contend § 79-4,102 is unconstitutional "as applied" (emphasis in cross-appellants' third assignment of error), the same analysis leads to the conclusion that the assigned error is without merit. Again, plaintiffs premise their contention on the proposition that any amount, other than the precise per-pupil charge for each pupil actually educated in the receiving high school, is unconstitutional. As we have stated above, § 79-4,102 is not unconstitutional, per se, merely because it set a rate higher than per-pupil cost as historically calculated. Plaintiffs have not shown the detailed formula set out in § 79-4,102 to be discriminatory, in practice.

Plaintiffs' last challenge to the constitutionality of § 79-4,102 is that the statute "constitutes an unconstitutional taxation . . . without representation." In their argument,

plaintiffs complain of the "[wholesale] delegation of authority . . . made in LB930 to the receiving districts to allow them to set their tuition charges within the broad guidelines" between per-pupil cost as a floor and the charge certified by the State Department of Education as a ceiling. Brief for Cross-appellants at 44.

The "wholesale delegation" to the receiving districts has been determined to be unconstitutional and has been stricken from the statute in question.

The authority to set the charge has been given to the State Department of Education by the Legislature. Neb. Const. art. VII, § 2, provides that the department is comprised of a "State Board of Education" and a Commissioner of Education. Neb. Const. art. VII, § 3, provides that eight members of the board "shall be elected from eight districts." The members of the Legislature, which prescribes the "duties and powers" of the state board, are elected. Plaintiffs' contention of "taxation without representation" is without merit.

In conclusion, we hold that 1984 Neb. Laws, L.B. 930, codified in § 79-4,102 of the cumulative supplement of 1984, is constitutional when the unconstitutional portion is severed. The trial court's determination to the contrary is reversed.

On plaintiffs' cross-appeal, the determination of the trial court is affirmed. In its order the trial court denied plaintiffs' request seeking injunctive relief for the 1986-87 school year and granted certain relief for the 1987-88 school year. We are aware that § 79-4,102, effective July 10, 1984, has already been amended by 1987 Neb. Laws, L.B. 182, effective May 30, 1987, and 1987 Neb. Laws, L.B. 367, effective August 1, 1987. The injunction of the trial court is vacated and the cause is remanded.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

KRIVOSHA, C.J., not participating.

STATE OF NEBRASKA, APPELLEE, V. BOBBY H. BLAKELY, APPELLANT.

420 N.W.2d 300

Filed March 11, 1988. No. 87-353.

1. **Motions to Suppress: Appeal and Error.** 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.
2. **Motions to Suppress.** At a hearing to suppress evidence, the court, as the trier of fact, is the sole judge of the credibility of witnesses and the weight to be given to their testimony and other evidence.
3. **Motions to Suppress: Appeal and Error.** In reviewing a court's ruling as the result of a suppression hearing, the Supreme Court does not reweigh the evidence or resolve conflicts in the evidence.
4. _____: _____. 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.
5. **Search and Seizure: Arrests.** A valid search as an incident to an arrest without a warrant necessarily depends on the legality of the arrest itself.
6. **Constitutional Law: Search and Seizure: Arrests: Probable Cause.** The constitutional issue regarding a reasonable search, as an incident of a felony arrest without a warrant, depends on the presence or absence of probable cause for that arrest, that is, whether immediately before the search an officer has probable cause to believe that the person to be searched has committed a felony.
7. **Police Officers and Sheriffs: Arrests: Probable Cause.** When a law enforcement officer has knowledge, based on information reasonably trustworthy under the circumstances, which justifies a prudent belief that a suspect is committing or has committed a crime, the officer has probable cause to arrest without a warrant.
8. _____: _____: _____. To determine whether police had probable cause for a warrantless arrest based on information from an informant, the test is whether the information from the informant, when taken as a whole in the light of underlying circumstances, is reliable.

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

Gregory M. Schatz of Stave, Coffey, Swenson, Jansen & Schatz, P.C., for appellant.

Robert M. Spire, Attorney General, and Mark D. Starr, for appellee.

HASTINGS, C.J., WHITE, SHANAHAN, and FAHRNBRUCH, JJ., and HANNON, D.J.

SHANAHAN, J.

Bobby H. Blakely appeals from his conviction in a bench trial for possession of methamphetamine in violation of Neb. Rev. Stat. § 28-416(3) (Cum. Supp. 1986). Blakely argues that the district court committed reversible error in not suppressing certain physical evidence, including the contraband methamphetamine, which, over Blakely's objection at trial, was received into evidence.

Blakely moved for suppression of physical evidence, claiming that the officers did not have probable cause to arrest Blakely without a warrant, and, therefore, any evidence obtained from Blakely was the result of an unreasonable search and is constitutionally inadmissible evidence. Neb. Const. art. I, § 7; U.S. Const. amend. IV. The dispositive background for Blakely's arrest was presented at the hearing on Blakely's suppression motion. See Neb. Rev. Stat. § 29-822 (Reissue 1985) (suppression of physical evidence).

At 3:45 p.m. on September 11, 1986, Sgt. Daniel McGovern, a member of the vice and narcotics unit of the Douglas County Sheriff's Department, received a telephone call from a confidential source, who provided information about a methamphetamine sale which was going to take place. Before the September 11 call, the informant had not supplied information to the Douglas County Sheriff's Department. McGovern had never spoken to the previously unknown informant. As far as the record reflects, the informant was a private citizen rather than a source paid by law enforcement to obtain information about possible criminal activity. During the telephone conversation with McGovern, the informant related that a man and woman had approached the informant at a party on the previous evening and offered to sell methamphetamine to the informant. On September 11 the couple had recontacted the informant and told him they could deliver the methamphetamine in 15 minutes. When the informant told McGovern that he did not want any arrest to occur near the home of the informant's mother, McGovern arranged to meet the informant at Christie Heights Park in Omaha. At that meeting, it was decided to direct the drug suspects to Hitchcock Park, six blocks from Christie Heights

Park. Shortly after meeting McGovern, the informant contacted the suspects, instructing them to meet the informant in the parking lot at Hitchcock Park.

After an unspecified period of time, McGovern again called the informant from a public phone booth, although McGovern could not recall the location of that phone. During this third contact with the informant, sometime around 4 o'clock, McGovern received the informant's description of the suspects' clothing, appearance, and the type of car they would be driving, including information that the suspects drove a two-door tan Chrysler Cordoba with prestige license plates containing the word "Rugsy." In this telephone conference, the informant also told McGovern that the male suspect had a mustache and would be wearing a blue jean jacket and blue jeans, while the other suspect was described as a large female wearing a white shirt with a flower print, blue jeans, and sunglasses. After this third contact with the informant, McGovern, at about 4 p.m., placed telephone calls to police officers of the La Vista and Ralston Police Departments to ascertain the informant's reliability. The Ralston and La Vista officers told McGovern that the informant's past information to police had led to two arrests for violations of law concerning a controlled substance. McGovern testified that he did not know the location of the phone used to contact the La Vista and Ralston officers, but attested that he did speak by telephone with those officers concerning the informant. McGovern also testified that, shortly after the informant's telephone call, he quickly assembled two deputies from the vice and narcotics unit of the sheriff's department, Officers Wilson and Buglewicz, to assist him, because the delivery of the methamphetamine would occur approximately 15 minutes after the informant's call. McGovern then testified that, after giving Wilson the informant's description of the suspects, he and the two deputies went directly to Hitchcock Park, arriving sometime around 4:30 p.m.

The officers traveled in separate vehicles to Hitchcock Park, and, when they arrived, McGovern and Buglewicz remained in their cars a short distance from Hitchcock Park. Wilson, an undercover officer in an unmarked car, went into the park and,

using his radio, informed McGovern and Buglewicz that the suspects were already in the parking lot. In response to that radioed information, McGovern and Buglewicz came to the parking lot. The officers noted that the tan automobile with its prestige plates, the suspects' clothing, and the appearance of the suspects matched the description given by the informant. With their revolvers unholstered, the officers approached the parked Chrysler and identified themselves as police officers. The deputies then ordered the suspects to get out of the Chrysler. As characterized by McGovern, the suspects were "technically under arrest" at that point and were not "free to leave" the officers' presence. While McGovern was standing beside the car, he observed a small cellophane packet, containing a white powdery substance, on the Chrysler's console between its bucket seats. According to McGovern, packaging of that type was "commonly the way we see Methamphetamine packaged." Officer Wilson undertook a pat-down search of Blakely and found a metal compact case in Blakely's right pants pocket and three syringes in Blakely's clothing. The compact taken from Blakely contained 14 packets of methamphetamine. The officers then "formally" arrested Blakely and his female companion. Searching the Chrysler, Officer Wilson found a Marlboro cigarette box under the front seat on the passenger's side, where Blakely had been seated at the time of the officers' arrival. The cigarette box contained nine packets of methamphetamine.

Deputy Wilson's testimony conflicted with McGovern's testimony. According to Wilson, McGovern gave him the description of the suspects "around 4 o'clock" at the sheriff's office on 115th and Burke Streets in Omaha, after which the officers immediately departed for Hitchcock Park. The record does not disclose the distance from the sheriff's office to Hitchcock Park. Wilson followed McGovern en route to Hitchcock Park and recalled that McGovern made no stop before the officers arrived at that park. Wilson further testified that he entered Hitchcock Park to observe the suspects' car and, 3 minutes later, radioed McGovern and Buglewicz that the suspects were already located in the parking lot.

Deputy Buglewicz did not testify.

The district court overruled Blakely's suppression motion. At trial, with evidence substantially the same as that presented at the suppression hearing, the court sustained Blakely's objection to the admission of the cigarette box and its contents found under the passenger's seat of the Chrysler, but overruled Blakely's objection concerning the other items obtained by the officers when they found Blakely in the parking lot.

Blakely claims that the officers lacked probable cause for his arrest because the officers' information for the arrest was obtained from a previously unknown informant. If the arrest was unlawful, Blakely argues, then evidence seized from Blakely must be suppressed. To support his argument, Blakely asserts that Officer McGovern was not telling the truth concerning his verification of the informant's reliability and the events which occurred between the informant's telephone call to Officer McGovern and Blakely's arrest.

" ' "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*, 225 Neb. 454, 459, 406 N.W.2d 114, 119 (1987). See, also, *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987).

At a hearing to suppress evidence, the court, as the "trier of fact," is the sole judge of the credibility of witnesses and the weight to be given to their testimony and other evidence. See *State v. Dixon*, 222 Neb. 787, 387 N.W.2d 682 (1986). In reviewing a court's ruling as the result of a suppression hearing, the Supreme Court does not reweigh the evidence or resolve conflicts in the evidence. Cf. *State v. Wood*, 220 Neb. 388, 370 N.W.2d 133 (1985).

" '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. . . .' " *State v. Vrtiska, supra* at 459, 406 N.W.2d at 119.

An exception to the warrant requirement for seizure and arrest of a person was recognized in *Carroll v. United States*, 267 U.S. 132, 158, 45 S. Ct. 280, 69 L. Ed. 543 (1925): "When a

man is legally arrested for an offense, whatever is found upon his person or in his control which it is unlawful for him to have and which may be used to prove the offense may be seized and held as evidence in the prosecution."

As further explained in *Chimel v. California*, 395 U.S. 752, 762-63, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969):

> When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. . . . In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction.

A valid search as an incident to an arrest without a warrant necessarily depends on the legality of the arrest itself. As provided in Neb. Rev. Stat. § 29-404.02 (Reissue 1985): "A peace officer may arrest a person without a warrant if the officer has reasonable cause to believe that such person has committed" a felony, or a misdemeanor under certain conditions not applicable to the present case. The key to a lawful arrest without a warrant is "reasonable" or probable cause that a person has committed a crime.

In *State v. Harding*, 184 Neb. 159, 164, 165 N.W.2d 723, 726 (1969), this court stated: "It is not necessary that an actual formal arrest occur before a search is undertaken as long as probable cause for arrest does exist prior to the search." In *Harding* we pointed out that the constitutional issue regarding a reasonable search, as an incident of a felony arrest without a warrant, depends on the presence or absence of probable cause for that arrest, that is, whether immediately before the search an officer has probable cause to believe that the person to be searched has committed a felony.

When a law enforcement officer has knowledge, based on information reasonably trustworthy under the circumstances, which justifies a prudent belief that a suspect is committing or has committed a crime, the officer has probable cause to arrest without a warrant. See, *State v. Roggenkamp*, 224 Neb. 914, 402 N.W.2d 682 (1987); *State v. Moore*, 226 Neb. 347, 411 N.W.2d 345 (1987); *State v. Nowicki*, 209 Neb. 640, 309

N.W.2d 89 (1981). See, also, *Beck v. Ohio*, 379 U.S. 89, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964); *Brinegar v. United States*, 338 U.S. 160, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949).

In *State v. Butler*, 207 Neb. 760, 301 N.W.2d 332 (1981), a private citizen, who apparently had no prior association with police, overheard individuals conspiring to rob the Bank of Valley on August 28, 1979, and later identified Butler as one of the parties overheard. The informant also supplied a description of the automobile to be driven by Butler in the robbery. The informant received no compensation or other consideration from police to provide the information. When the police, on the date of the planned robbery, observed Butler in the automobile previously identified by the informant, they approached the automobile and arrested Butler. In determining that probable cause existed for Butler's arrest, we held:

> [T]he record is clear that the informant actually overheard the parties conspiring to rob the bank. As we noted in *State v. Payne*, 201 Neb. 665, 670, 271 N.W.2d 350, 352 (1978), "An informant's detailed eyewitness report of a crime may be self-corroborating; it supplies its own indicia of reliability; and an untested citizen informant who has personally observed the commission of a crime is presumptively reliable." . . .
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> . . . .
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> In *State v. Drake* [224 N.W.2d 476 (Iowa 1974)], the Iowa court noted: "When considering the sufficiency of probable cause based on information supplied by an informant, it is important to distinguish the police tipster, who acts for money, leniency, or some other selfish purpose, from the citizen informer, whose only motive is to help law officers in the suppression of crime.
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> . . . .
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> "In the latter the rule of prior reliability is considerably relaxed for several reasons. In the first place the citizen informer has rarely had any earlier experience in reporting suspected criminal activity. Furthermore, unlike the professional informant, he is without motive to exaggerate, falsify or distort the facts to serve his own ends.

> "Reliability still must be shown, but it may appear by the very nature of the circumstances under which the incriminating information became known. Any other rule would lead to the totally unacceptable result that public-spirited citizens interested only in law enforcement could seldom furnish information sufficient to establish probable cause." [224 N.W.2d at 478.] . . .
>
> . . . We believe that in the instant case the information furnished by the informants, when taken as a whole in light of the underlying circumstances, must be said to have been reliable so as to create sufficient probable cause and justify the arrests made by the officers. Butler was arrested for conspiring to rob a bank. The underlying evidence was, in our opinion, sufficient to constitute probable cause.

207 Neb. at 763-65, 301 N.W.2d at 334-35.

Thus, in *State v. Butler, supra*, this court held that, to determine whether police had probable cause for a warrantless arrest based on information from an informant, the test is whether the information from the informant, when taken as a whole in the light of underlying circumstances, is reliable.

Blakely's appeal becomes a case of contraband and credibility. Blakely argues that Sergeant McGovern's testimony is incredible and discredited by contradictory testimony of his fellow officer, Deputy Wilson. The basis of Blakely's argument seems to be that McGovern, in his arrest-related travels around Omaha between the informant's call and the officers' convergence in the park, would have been moving at a speed approaching that of light. Also, Blakely contends that Wilson's contradicting McGovern renders McGovern's testimony untrustworthy. However, in view of the standard of review, this court does not resolve conflicts in or reweigh the evidence.

Blakely's case is similar to the situation in *State v. Butler, supra*. Nothing indicates that the informant, who contacted Sergeant McGovern, was anyone but a private citizen, that is, a source of information without payment or other consideration from police for the information supplied. According to that informant, persons were prepared to make an imminent and illegal delivery of a controlled substance, methamphetamine.

The officers had a detailed description from a person who had previously communicated information to police which led to arrests for violations of law governing controlled substances. The information about the prospective delivery eventually proved to be extremely accurate and trustworthy, as the officers realized, when they found Blakely in the tan Chrysler bearing the license plate "Rugsy," just as the informant had descriptively predicted. The suspects, with their wardrobe and physical features, matched the description given by the informant. The information communicated by the informant to McGovern, when taken as a whole in the light of the underlying circumstances, supplied probable cause for Blakely's arrest without a warrant. Since the arrest was lawful, the search of Blakely, which was an incident of a lawful arrest, was valid and resulted in constitutionally admissible evidence under the circumstances.

We cannot state that the district court was clearly erroneous in denying Blakely's motion to suppress. Additionally, the evidence which Blakely had unsuccessfully sought to be suppressed was admissible at trial over Blakely's objection that the evidence was obtained by an illegal search after an unlawful arrest.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHN A. EGE, APPELLANT.
420 N.W.2d 305

Filed March 11, 1988. No. 87-571.

1. **Police Officers and Sheriffs: Investigative Stops: Probable Cause.** In order for an investigatory stop to be lawful and justifiable, the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.
2. **Criminal Law: Investigative Stops: Probable Cause.** An investigatory stop must be justified by an objective manifestation, based upon the totality of the circumstances, that the person stopped has been, is, or is about to be engaged in criminal activity.

3. **Police Officers and Sheriffs: Investigative Stops: Probable Cause.** The factual basis for an investigatory stop need not arise from the officer's personal observation, but may be supplied by information acquired from another person. When the factual basis is supplied by another, the information must contain sufficient indicia of reliability.
4. **Eyewitnesses: Presumptions.** An informant's detailed eyewitness report of a crime supplies its own indicia of reliability, and a citizen informant who has personally observed the commission of a crime is presumptively reliable.
5. **Police Officers and Sheriffs: Investigative Stops: Eyewitnesses: Probable Cause.** In determining whether the facts known to an officer who receives a report from an informant provide a reasonable basis for an investigatory stop, the courts have balanced several factors, including the reliability and credibility of the informant, the description of the vehicle, the officer's observations of traffic violations, and the timelag between the report of criminal activity and the stop.
6. **Police Officers and Sheriffs: Trial: Testimony: Investigative Stops: Probable Cause.** Where a police officer testifies in open court, subject to cross-examination, as to what an informant related to her, such evidence may, standing alone, satisfy the State's burden to show that the officer formed a reasonable suspicion to stop, if the trial judge is convinced that the officer relied in good faith upon credible information supplied by a reliable informant.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Affirmed.

J. Michael Coffey of Stave, Coffey, Swenson, Jansen & Schatz, P.C., for appellant.

Robert M. Spire, Attorney General, Gary P. Bucchino, Omaha City Prosecutor, and J. Michael Tesar, for appellee.

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

WHITE, J.

The defendant, John A. Ege, was convicted of second offense drunk driving. On appeal, he contends he was improperly stopped by a police officer who was informed by a citizen that the defendant was intoxicated. We affirm.

On the evening of October 26, 1986, Officer Hearn of the Omaha Police Department was in her cruiser, parked next to a Texaco station, attending to some paperwork. An employee of the station approached her and identified himself as Tim Blankenship. Blankenship called Hearn's attention to a green automobile in a parking lot across the street and told her that

the driver of the car had just driven up over the curb near the front door of the station. Blankenship further informed Officer Hearn that the driver came into the station to purchase some chewing gum and that he smelled strongly of alcohol. Hearn drove across the street to follow the vehicle. She observed the car start and stop three or four times in the parking lot, and then followed the car for a short distance without observing any moving violations. Officer Hearn stopped the vehicle. Hearn, like Blankenship, noted a strong odor of alcohol on the defendant's breath and also noticed slurred speech. The defendant failed a field sobriety test, and an Intoxilyzer test later showed his blood-alcohol content was 0.149 percent.

The defendant presents four assignments of error, all of which relate to the issue of whether the initial stop of the defendant was lawful.

The conduct of Officer Hearn in this case must be tested by the fourth amendment's proscription against unreasonable searches and seizures. In order for an investigatory stop to be lawful and justifiable, "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). See, also, *State v. Ebberson*, 209 Neb. 41, 305 N.W.2d 904 (1981); Neb. Rev. Stat. § 29-829 (Reissue 1985). An investigatory stop must be justified by an objective manifestation, based upon the totality of the circumstances, that the person stopped has been, is, or is about to be engaged in criminal activity. *United States v. Cortez*, 449 U.S. 411, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981); *State v. Thomte*, 226 Neb. 659, 413 N.W.2d 916 (1987). The factual basis for the stop need not arise from the officer's personal observation, but may be supplied by information acquired from another person. *Adams v. Williams*, 407 U.S. 143, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972). When the factual basis is supplied by another, the information must contain sufficient indicia of reliability. *Id.* An informant's detailed eyewitness report of a crime supplies its own indicia of reliability, and a citizen informant who has personally observed the commission of a crime is presumptively

reliable. *State v. Duff*, 226 Neb. 567, 412 N.W.2d 843 (1987); *State v. Butler*, 207 Neb. 760, 301 N.W.2d 332 (1981).

In this case the record clearly demonstrates that Officer Hearn had a reasonable basis, supported by specific and articulable information, upon which to stop the defendant's vehicle. In determining whether the facts known to an officer in this context provide a reasonable basis for an investigatory stop, the courts have balanced several factors, including the reliability and credibility of the informant, the description of the vehicle, the officer's observations of traffic violations, and the timelag between the report of criminal activity and the stop. See *State v. Warren*, 404 N.W.2d 895 (Minn. App. 1987). In *Warren*, the court defined the scope of such information as follows:

> The reliability of the informant varies from an anonymous telephone tipster to a known citizen's face-to-face meeting with police officers. The vehicle description varies from minimal to very detailed. The reported location of the vehicle varies from pinpoint accuracy to a general direction of travel. The observation of traffic violations ranges from none to several. The shorter the time lag, the more likely the stop is valid.

Id. at 897.

Here, there was a face-to-face confrontation between the informant and the officer. The informant identified himself by name and, in doing so, positioned himself to be held accountable for his intervention. By giving his name, the informant presumably knew that the police could arrest him for giving a false report. See Neb. Rev. Stat. § 28-907 (Reissue 1985). The informant's knowledge was based upon his observation of the defendant's driving his car over a curb, as well as on his face-to-face encounter with the defendant. Clearly, the informant in this case was of the most reliable type.

The description and reported location of the vehicle could not have been more accurate, since the informant was able to point directly to the car. Although Hearn did not observe any traffic violations, she did observe the defendant's vehicle move erratically in the parking lot. There was, apparently, little time between the informant's report and the subsequent stop of the

defendant's vehicle. We conclude on these facts that the stop was legal.

The defendant also contends that the informant should have been required to testify at trial to substantiate the officer's basis for stopping him. In his brief, the defendant submits that "there is no way of knowing whether there really was a Mr. Blankenship, and whether he ever relayed those statements to offer [sic] Hearn . . . ." Brief for Appellant at 12. The veracity of Officer Hearn, however, was subject to cross-examination. Furthermore, the informant's statements were not offered for the truth of the matter of the defendant's intoxication; they were offered to show that Officer Hearn formed a reasonable suspicion that the defendant was involved in criminal activity. As such, the statements were not hearsay. This is not a case where the State attempted to withhold the identity of the informant pursuant to Neb. Evid. R. 510, Neb. Rev. Stat. § 27-510 (Reissue 1985). The defense could have called the informant as a witness to discredit the testimony of Officer Hearn. We hold that where, as here, an officer testifies in open court, subject to cross-examination, as to what an informant related to her, such evidence may, standing alone, satisfy the State's burden to show that the officer formed a reasonable suspicion to stop, if the trial judge is convinced that the officer relied in good faith upon credible information supplied by a reliable informant. See *McCray v. Illinois*, 386 U.S. 300, 87 S. Ct. 1056, 18 L. Ed. 2d 62 (1967).

The decision of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. SALLY JO COLLINS, APPELLEE, V. JAMES F. BEISTER, APPELLANT.

420 N.W.2d 309

Filed March 18, 1988. No. 86-096.

1. **Contempt: Final Orders.** A sanction for criminal contempt of court is an appealable order.
2. **Contempt.** Before a sanction for criminal contempt of court committed outside the presence of the court may be levied, defendant must be brought before the court, notified of the accusation against him, and given reasonable time to make his defense.

Appeal from the District Court for Boone County: JOHN M. BROWER, Judge. Reversed and remanded.

George H. Moyer, Jr., of Moyer, Moyer, Egley & Fullner, for appellant.

Marianne Clifford Upton, Special Deputy Boone County Attorney, for appellee.

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

GRANT, J.

This is an appeal from the district court for Boone County, Nebraska. That court found defendant, James F. Beister, guilty of contempt of court and ordered him to pay a $50 fine. Defendant has appealed to this court.

The record shows that on June 18, 1985, pursuant to Neb. Rev. Stat. § 43-512.03(3) (Reissue 1984), the State of Nebraska ex rel. Sally Jo Collins filed a petition to determine the paternity of a child born out of wedlock. In its petition to establish paternity, the State sought an order determining that the defendant was the father of the child and requiring defendant to pay child support and expenses for the dependent child. The defendant filed a general denial and alleged an affirmative defense that the mother, during the period of possible conception, had sexual relations with numerous men, "any one of whom could be the father of the child."

On August 20, 1985, the State filed a motion requesting a court order requiring the mother, the minor child, and

defendant to submit to genetic testing, pursuant to Neb. Rev. Stat. § 43-1414 (Reissue 1984). On September 3, 1985, defendant filed "Objections to Motion For Genetic Testing and Motion To Quash Said Motion." A hearing was held on the State's motion and on defendant's motion on October 8, 1985. After hearing, the court denied defendant's motion to quash and set the matter for further hearing on November 19, 1985, on the State's motion for genetic testing, in order to determine the details of the genetic testing.

At that hearing, defendant's counsel appeared for the defendant. The defendant himself did not appear. The court then ordered defendant, as well as the mother and the child, to appear at the Boone County Memorial Hospital for genetic testing on December 3, 1985. The following ensued:

> MR. MOYER: Let the record show that the defendant respectfully declines to obey the order of the Court and to present himself for genetic testing at the Boone County Hospital on December 3, 1985, at the hour of 10:00 a.m. or at any other time and ask that the Court find the defendant in contempt of Court for refusing to obey the Court's order and assesss [sic] a fine against the defendant so that we may present this whole issue to the Supreme Court of the State of Nebraska.
>
> THE COURT: Let the record so reflect that the Court will find the respondent in this matter in contempt, and under the contempt powers of the Court — Now, you are going to put up bond, I assume, for appeal?
>
> MR. MOYER: Traditional fine has been $50.00.
>
> THE COURT: He can purge contempt. If he does not appear on that date, he will be picked up and put in jail and held to purge himself only by presenting himeslf [sic] at the hospital on that date.
>
> MR. MOYER: All right, Judge, now what are you doing?
>
> THE COURT: He's in contempt. Have you not consented that?
>
> MR. MOYER: Yes, Your Honor. If you please, there are at least four cases that I can recall in the Court in which matters of this kind have been presented to the Supreme

Court of the State of Nebraska. Ordinarily what the Court does in cases — in those cases which involve a discovery proceeding — I will admit nothing like this paternity matter — the Court simply fined the defendant $50.00, thereby creating a final judgment which their opinion was appealed to the Supreme Court of the State of Nebraska in order to resolve the legal questions involved.

It was clearly understood in those cases, as it clearly should be understood in this case, Your Honor, that the defendant was taking his stand merely for the purpose of obtaining an adjudication by the Supreme Court of the State of Nebraska upon his rights in the case and not because of any disrespect for the Court, and no jail sentences were posed and nothing was mentioned about jail.

THE COURT: I assume, counsel, with the dilemma we are in, is the fact the amount of bond has to be placed in lieu of his time in jail. That is what I would say.

MR. MOYER: Why is the Court talking about jail?

THE COURT: All right. I will set the jail — fine him $50.00, and you can appeal your case.

MR. MOYER: Thank you, Your Honor. We will file a motion for new trial promptly before the Court on the 3rd of December.

Defendant, having persuaded the court to do exactly what the court did, then filed a motion for a new trial on December 2, 1985. On December 13, 1985, defense counsel served notice on the State to take the depositions of the mother of the dependent child and an employee of the state Department of Social Services. On December 17, 1985, the State filed a motion for a protective order as to the taking of the deposition of the state employee. On January 14, 1986, the court denied defendant's motion for a new trial and sustained the State's motion for a protective order. Defendant filed his notice of appeal.

In his brief, the defendant sets out 12 assignments of error, including several concerning court rulings on defendant's motions filed after the court's contempt order.

We first note that defendant is seeking this court's review of the trial court's rulings in procedural matters occurring after the

trial court's entry of its order of contempt on November 19, 1985. Any such attempt to review such orders is premature. This court will not review, on a piecemeal, interim basis, discovery procedures of the parties. Defendant's assignments of error on such matters will not be further discussed.

We further note that defendant's counsel is trivializing the concept of contempt of court in treating it as a procedural device for obtaining an interim appeal. The role of contempt of court was long ago set out in *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 450, 31 S. Ct. 492, 55 L. Ed. 797 (1911), where the U.S. Supreme Court stated:

> For while it is sparingly to be used, yet the power of courts to punish for contempts is a necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed on them by law. Without it they are mere boards of arbitration whose judgments and decrees would be only advisory.

We turn to consideration of the sole matter before this court—the validity of the $50 fine for contempt. Contempt of court may be civil or criminal in nature and may be direct or constructive (indirect). As stated in *Gompers, supra*, 221 U.S. at 441:

> Contempts are neither wholly civil nor altogether criminal. And "it may not always be easy to classify a particular act as belonging to either one of these two classes. It may partake of the characteristics of both." [Citation omitted.] But in either event, and whether the proceedings be civil or criminal, there must be an allegation that in contempt of court the defendant has disobeyed the order, and a prayer that he be attached and punished therefor.

A civil contempt order is intended to compel a party to do some act for the benefit of another party to the action. *Eliker v. Eliker*, 206 Neb. 764, 295 N.W.2d 268 (1980). Such an order is not final because the defendant is in a position to mitigate the sentence through compliance with the court's order. Such orders are not appealable directly. *State ex rel. Kandt v. North Platte Baptist Church*, 225 Neb. 657, 407 N.W.2d 747 (1987). If

incarceration is ordered as a coercive sanction, the imprisonment can only be collaterally attacked by a habeas corpus action. *In re Contempt of Liles*, 216 Neb. 531, 344 N.W.2d 626 (1984).

A criminal contempt sanction, however, is appealable. It is in the nature of a final order and is not subject to modification. *Liles, supra*. The criminal sanction is intended to preserve the power and dignity of the court for disobedience of its orders. *In re Contempt of Sileven*, 219 Neb. 34, 361 N.W.2d 189 (1985).

In this case, after the defendant was ordered to appear for genetic testing and defendant's attorney indicated that the defendant intended to refuse to obey that order, defendant's conduct was in the nature of a criminal contempt. The court initially stated it intended to make a coercive order of imprisonment. Defendant's counsel successfully resisted such an order, which could have been reviewed in an appropriate habeas corpus proceeding. As eventually entered, the court's order was a final order intended to vindicate the court's authority. The trial court did not set out any conditions which the defendant could satisfy to make the fine subject to mitigation. The $50 fine was not coercive in nature (indeed it is difficult to see how such a fine could be coercive in this day's economy) and operated as a final judgment. The order imposed an unconditional fine, which operated as punishment for the completed act of disobedience and did not allow the defendant to " 'carr[y] the keys of his prison in his own pocket.' " *Southern Railway Company v. Lanham*, 403 F.2d 119, 125 (5th Cir. 1968). *State ex rel. Kandt v. North Platte Baptist Church, supra*.

In this case, then, the $50 fine constituted the sanction in a criminal contempt. The statutes concerning contempt are set out in Neb. Rev. Stat. §§ 25-2121 to 25-2123 (Reissue 1985). Section 25-2122 provides: "Contempts committed in the presence of the court may be punished summarily; in other cases the party upon being brought before the court, shall be notified of the accusation against him, and have a reasonable time to make his defense."

In the case before us, it is clear that the contempt was not committed by the defendant "in the presence of the court."

Indeed, the record before us does not show that defendant was ever before the court. The record further does not show that defendant was ever brought before the court or notified of the accusation against him (by way of information as referred to in *Leeman v. Vocelka*, 149 Neb. 702, 32 N.W.2d 274 (1948), and *State ex rel. Beck v. Lush*, 168 Neb. 367, 95 N.W.2d 695 (1959); or by other means as used in *In re Contempt of Potter*, 207 Neb. 769, 301 N.W.2d 560 (1981)), nor was he given time to make his defense. *Muffly v. State*, 129 Neb. 334, 261 N.W. 560 (1935); *In re Contempt of Potter, supra.*

Further, there was no evidence of a willful criminal contempt of court committed by defendant. Defendant said or did nothing. His attorney said that defendant "respectfully" declined to obey. We particularly note that Neb. Ct. R. of Disc. 37(b)(2)(D) (rev. 1986) does not authorize, as a sanction, the filing of a contempt action in connection with "an order to submit to a physical or mental examination."

In short, the record before this court will not support a finding of criminal contempt of court committed by defendant. His conviction must be reversed.

Since the cause must be remanded and defendant has already accomplished a long delay, we feel it is appropriate to mention some matters apparent in the record before us. The petition herein is not positively verified, and indeed it might not be possible to positively verify all the allegations thereof. It would be appropriate for the trial court to have an evidentiary hearing to determine whether the factual allegations are supported by sworn testimony. In that connection, we note, but do not necessarily approve, language in *Bowerman v MacDonald*, 157 Mich. App. 368, 374, 403 N.W.2d 140, 143 (1987), where the court stated:

> Therefore, because a paternity case is only quasi-criminal, we decline defendant's invitation to use probable cause or reasonable grounds as the test. However, something more than filing a complaint alleging paternity is needed when the answer filed denies paternity. While we are not suggesting extensive proofs, at least sworn testimony by the complainant should be considered.

We also direct the parties' attention to our discovery rules.

Rule 37(b)(2) provides for various sanctions in discovery matters where a litigant refuses to respond to proper discovery motions. As an example, it is clear that entry of a default judgment would provide a final order that could be reviewed on appeal. See, also, *Taylor v. Illinois*, ____ U.S. ____, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988), approving other sanctions for the violation of a discovery order.

Each party is ordered to pay the costs incurred herein by that party.

REVERSED AND REMANDED.

PATRICK G. LANDRIGAN ET AL., APPELLEES, PAUL E. LANDRIGAN ET AL., APPELLANTS, V. PATRICK J. NELSON ET AL., APPELLEES.

420 N.W.2d 313

Filed March 18, 1988. No. 86-145.

Attorney and Client. A lawyer's duty is to his client and does not extend to third parties absent facts establishing a duty to them.

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

Steven E. Achelpohl of Schumacher & Gilroy, for appellants.

Paula J. Metcalf of Knudsen, Berkheimer, Richardson & Endacott, for appellees Nelson et al.

BOSLAUGH, CAPORALE, and GRANT, JJ., and RIST and CLARK, D. JJ.

PER CURIAM.

This is an action for damages alleged to have been caused by acts of defendants constituting legal malpractice.

Patrick G. Landrigan and Paul J. Landrigan (known as the Landrigan boys) retained the defendant Patrick J. Nelson as their attorney in the negotiation of a restaurant lease in Kearney, Nebraska. The Landrigan boys are denominated plaintiffs, but are not involved in this appeal. The plaintiffs

who are involved as appellants are Paul E. Landrigan and his wife, Alda J. Landrigan, parents of the Landrigan boys; Janice J. Landrigan, wife of Patrick Landrigan; and Sandra Herbig, sister of the Landrigan boys.

The appellants signed two real estate mortgages securing the lease payments due from the Landrigan boys under the lease above noted. Upon default of such payments, the mortgages were foreclosed, and this action followed.

The trial court sustained defendants' motion for summary judgment and dismissed appellants' action, finding no duty was owed them by defendants.

We have reviewed the record and find no evidence that either defendant Nelson or his law firm and the members thereof, the other defendants herein, acted as attorneys for appellants. The rule is well established that a lawyer's duty is to his client and does not extend to third parties absent facts establishing a duty to them. *Ames Bank v. Hahn*, 205 Neb. 353, 287 N.W.2d 687 (1980); *Lilyhorn v. Dier*, 214 Neb. 728, 335 N.W.2d 554 (1983). As no attorney-client relationship existed between appellants and defendants, and as no other facts or circumstances were shown which establish a duty to appellants, we determine the action of the trial court was correct.

We also decline appellants' request that this court enlarge the scope of an attorney's liability to third parties.

AFFIRMED.

DEPARTMENT OF HEALTH, STATE OF NEBRASKA, APPELLANT, V. COLUMBIA WEST CORPORATION, A DELAWARE CORPORATION, ET AL., APPELLEES.

420 N.W.2d 314

Filed March 18, 1988. No. 86-227.

1. **Administrative Law: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 84-918 (Reissue 1981), the Supreme Court reviews an agency's decision de novo on the record.
2. **Administrative Law: Public Health and Welfare.** Where the need for an existing

health care facility is not disputed and a willing buyer and a willing seller have agreed upon a price for that facility, Neb. Admin. Code tit. 182, ch. 2, § 005.02A2 (1983), is not a relevant review criterion in the application for a certificate of need.

3. _____: _____. Neb. Admin. Code tit. 182, ch. 2, § 005.02B (1983), is applicable to the acquisition of an existing health care facility if the acquisition involves any increase in cost to consumers. The increase in cost is justified if it is reasonable when compared to preacquisition rates for the same facility and rates of other similar facilities in the area.

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

Robert M. Spire, Attorney General, and Marilyn B. Hutchinson, for appellant.

Lavern R. Holdeman, for appellees.

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

WHITE, J.

This is an appeal from a judgment of the district court for Lancaster County affirming the decision of the Certificate of Need Appeal Panel of the Nebraska Department of Health. The Certificate of Need Appeal Panel reversed a decision of the Certificate of Need Review Committee.

At issue here, essentially, is whether appellee Columbia West Corporation should be permitted to purchase from Valley View Care Centre, Inc., a nursing home facility of 112-bed capacity at a price of $20,000 per bed, or $2,240,000. Valley View is an intermediate-care facility, described in the Nebraska Health Care Certificate of Need Act (Neb. Rev. Stat. §§ 71-5801 to 71-5872 (Reissue 1986)) as an

> institution or facility which provides, on a regular basis, health related care and services to individuals who do not require the degree of care and treatment which a hospital or skilled nursing facility is designed to provide, but who, because of their mental or physical condition, require health related care and services above the minimum level of room and board.

§ 71-5819.

The acquisition of Valley View by Columbia West requires

the approval of the agencies of the health department since Valley View has received, and at the time of the application was receiving, federal or state reimbursement for care to patients. § 71-5830. The Legislature authorized, and the department has enacted, extensive rules for conducting reviews of the certificate of need applications. § 71-5851; Neb. Admin. Code tit. 182, ch. 2 (1983).

The statutory procedure after the initial decision of the review committee and upon the consideration by the appeal panel varies as to the burden of proof, depending on whether the certificate was granted or denied by the review committee. Where, as here, the committee denied the certificate, the burden was on the applicant to prove to the appeal panel that the application met the "applicable criteria." § 71-5865.

It is from the decision of the panel, that the application did meet the applicable criteria, that the appeal was taken to the district court. Appeals from a decision of the panel to the district court are subject to the Administrative Procedures Act, Neb. Rev. Stat. § 84-917 (Cum. Supp. 1984), and the review is limited in scope.

The appeal to this court is, however, de novo on the record. Neb. Rev. Stat. § 84-918 (Reissue 1981). In *Haeffner v. State*, 220 Neb. 560, 371 N.W.2d 658 (1985), we concluded that regardless of the incongruity of a true de novo review of a district court review for error only, we had no choice save to follow the legislative mandate. Whether this review in fact constitutes this court as a super-agency as to the administrative decisions of the agencies subject to § 84-918 is beside the point. We therefore proceed to review the matter de novo, reaching a decision independent of all dispositions that have gone before.

The assignments of error are then reduced to a single question, i.e., Has the applicant, Columbia West, satisfied the criteria necessary to entitle it to a certificate of need authorizing the purchase of the nursing home?

It is important to note that the population's need for the 112-bed facility is not at issue; nor does the applicant question whether, in exchange for the receipt of public money, regulation of the sale of health facilities is authorized by law. The sole question is whether the purchase price negotiated between

private owners must be disapproved if the resulting entity violates any of the material criteria. The review criteria specified in Neb. Admin. Code tit. 182, ch. 2, § 005 (1983), which are in dispute are as follows:

005.02A Alternatives.

. . . .

005.02A2 The applicant must demonstrate that the proposed project is the least costly of the alternatives for meeting the need established under part 005.01A above, or if it is not the least costly, that it is the most effective alternative for meeting such need. . . .

005.02B Cost.

005.02B1 Any increase in costs or charges (to any class of payers or to all payers) resulting from the proposed project must be justified by the needs of the population established under part 005.01A above which will be met by the project. In estimating increases in costs or charges which will result from the proposed project, capital costs, operating costs, projected utilization of the proposed services, and any other factors bearing on future costs or charges shall be considered.

005.02B2 Increases in costs may be justified in part where improvements or innovations in the financing and delivery of health services will foster competition and promote quality assurance and cost effectiveness for consumers and payers.

005.02C Financial Feasibility.

005.02C1 The resources and proposed means of financing the proposed project must in fact be available.

005.02C2 It must be reasonably certain that the proposed project will be financially feasible for the period of life of the assets.

A preliminary issue in this case is the applicability of these criteria to purchases of existing care facilities. Neb. Admin. Code tit. 182, ch. 2, § 005 (1983), states: "The applicant bears the burden of demonstrating in its application that the proposal satisfies all of the review criteria in this section which are appropriate and significant to the proposal in order to be granted a certificate of need." The review criteria were thus

drafted to cover a range of applications and were not intended to be entirely relevant to all.

Citing § 005.02A2, the appellant, Department of Health, argues that the proposed purchase is not the least costly alternative. The appellant maintains that either the status quo should be maintained, forcing the present owner to continue operating the facility, or the buyer could purchase the facility for less money. The appellant then demonstrates several valuation methods as evidence of "alternative" purchase prices. The appellant's argument is misguided.

On its face, § 005.02A2 appears to be primarily concerned with new construction projects. In this regard Neb. Admin. Code tit. 182, ch. 2, att. 4, § C2a (1983), informs the applicant to "[i]nclude comparisons of financing alternatives, construction alternatives, and energy alternatives for construction projects." The purpose of § 005.02A2 is to ensure that all economically viable alternatives to meet an established need are weighed and considered. The alternatives contemplated by this section do not include price alternatives for the acquisition of an existing facility. To have an alternative means to have a choice between two or more things. An applicant who wishes to purchase an existing facility is presumably not free to choose the purchase price. To say that this section mandates a purchase price other than the one agreed to between a willing buyer and a willing seller simply ignores economic reality. We therefore hold that where, as here, the need for an existing health care facility is not disputed and a willing buyer and a willing seller have agreed upon a price for that facility, § 005.02A2 is not a relevant review criterion in the application for a certificate of need.

The price to be paid for an existing facility does become relevant under § 005.02B, however, when it results in higher costs for consumers and payers. An increase in such cost must be justified by the need. The appellees argue that since the cost increase justification criterion is dependent upon a showing of need and need is not at issue here, § 005.02B should not apply. We disagree. While it is true that the need for the Valley View health care facility is not disputed, an increase in the price to consumers must nevertheless be considered. Section 005.02B1

specifically applies to "[a]ny increase in costs or charges (to any class of payers or to all payers) resulting from the proposed project . . . ." Furthermore, promotion of a more competitive health care delivery system is among the stated purposes of the Nebraska Health Care Certificate of Need Act. See § 71-5802.

Section 005.02B2 provides ways in which increases in cost may be justified, but the examples are not all-inclusive. The section deals with "improvements or innovations in the financing and delivery of health services" but does not discuss increased costs as they relate to the acquisition of an existing facility. In this regard, however, Neb. Admin. Code tit. 182, ch. 2, att. 4, § C2b (1983), gives some guidance. The applicant is advised to "[c]ompare such costs and charges to those of other similar facilities or services if information is available about other facilities."

In light of the foregoing, we hold that § 005.02B is applicable to the acquisition of an existing health care facility if the acquisition involves any increase in cost to consumers. The increase in cost is justified if it is reasonable when compared to preacquisition rates for the same facility and rates of other similar facilities in the area.

The applicant in this case presented evidence concerning projected revenues and costs of operating the facility. The projections acknowledge the existing Medicaid reimbursement limitations and project increases for private-pay residents at 5 percent per year to account for inflation. The projections show that a reasonable profit margin can be maintained despite the increase in capital costs resulting from the purchase price of the facility. We also note here evidence that in this case we deem persuasive, i.e., that the proposed increased costs to both public and private patients will result in less costly care than the rates of other intermediate-care facilities in the immediate area. We therefore find that the increased costs are reasonable and the applicant has met the burden of § 005.02B.

The applicability of § 005.02C is not disputed. The applicant has demonstrated in its evidence both the means of financing and the fact that it will be able to maintain an adequate cash flow for the period of life of the assets, using only an inflationary increase in costs. We are satisfied that the plan is

feasible and find that the applicant has met the burden of § 005.02C.

Having thus concluded de novo that the applicant met its appropriate burden, we affirm the decision of the district court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ARTHUR H. BARKER, APPELLANT.

420 N.W.2d 695

Filed March 18, 1988. No. 87-095.

1. **Trial: Judges: Recusal.** A judge, who initiates or invites and receives an ex parte communication concerning a pending or impending proceeding, must recuse himself or herself from the proceedings when a litigant requests such recusal.
2. **Trial: Judges: Witnesses: Rules of Evidence.** The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point. Neb. Evid. R. 605 (Neb. Rev. Stat. § 27-605 (Reissue 1985)).
3. **Trial: Judges: Witnesses: Rules of Evidence: Recusal.** Although a judge is not sworn as a witness, Neb. Evid. R. 605 contains a bar to the judge's testifying and disqualifies the judge as a competent witness in proceedings over which the judge presides. Neb. Rev. Stat. § 27-605 (Reissue 1985).

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Sentence vacated, and cause remanded with direction.

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

Robert M. Spire, Attorney General, and LeRoy W. Sievers, for appellee.

BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and BRODKEY, J., Retired, and COLWELL, D.J., Retired.

SHANAHAN, J.

Although the information charged Arthur H. Barker with murder in the second degree, see Neb. Rev. Stat. § 28-304 (Reissue 1985), the jury found Barker guilty of the

lesser-included offense of manslaughter, see Neb. Rev. Stat. § 28-305 (Reissue 1985), concerning the death of Patricia A. Pappas. As his sole assignment of error, Barker contends that the sentencing judge should have recused himself, as requested by Barker, on account of the judge's ex parte contact with members of the victim's family. Barker's contention presents a question of first impression in Nebraska. We set aside the sentence imposed on Barker and remand this matter for a sentence hearing and imposition of sentence on Barker.

Shortly after the verdict was announced in court, the prosecutor approached the trial judge and informed the court that the victim's parents and sister wished to visit with the judge because the victim's family were nonresidents of Nebraska. The judge conferred with the prosecutor and Barker's lawyer, informing counsel about the family's wish. Barker's lawyer objected to the court's meeting with the victim's family. The prosecutor and Barker's lawyer declined to attend the meeting requested by the family. Apparently in chambers, the judge met with the victim's parents and sister in the absence of counsel and without recording what transpired at that meeting.

Later, immediately before the sentence hearing, for which the presiding judge was the same judge who had visited with the victim's family, Barker's lawyer requested that the judge recuse himself in view of the meeting in question and its prejudice to Barker regarding any prospective sentence. In connection with Barker's request for recusal, the judge recounted what had transpired during his meeting with the victim's family. According to the court, the family was "overwrought" and "upset by the verdict being manslaughter and not second-degree murder." In the course of the meeting, the judge suggested that the family write him so that "first of all, their thoughts could be disclosed in a rational way, and secondly, it would be available to Counsel as well as to the Court." The judge further expressed:

> The Court was in no way prejudiced by the meeting with the family and as far as the Court's reassessing its own ability to be fair and consider all the facts and circumstances in this case, its opinion and judgment would not be colored at all by the visit had with the family.

In refusing to recuse himself from the sentence hearing, the judge stated: "Based upon the statements made by the Court on the record at the time you referred to on the record, the Court sees no basis or grounds to recuse itself from this matter."

The presentence report on Barker does not contain any correspondence from the victim's family, although the record indicates that such correspondence was sent by the family. Therefore, in the form presented by this appeal, the record does not contain a verbatim record of the judge's visit with the victim's family, but reflects the judge's characterization or description of what transpired at that meeting. At the sentence hearing, which was attended by members of the victim's family, neither the State nor Barker presented evidence regarding the sentence to be imposed. After counsel's comments, the court sentenced Barker to imprisonment for a term of 6 2/3 to 20 years, which is the maximum penalty of imprisonment prescribed for manslaughter, a Class III felony. See Neb. Rev. Stat. § 28-105(1) (Reissue 1985).

To counter Barker's claim that the trial judge should have recused himself as a result of meeting with the victim's family, the State argues that "[s]ince the appellant has not shown that the sentencing judge was in any way influenced by his contact with the victim's family, there was no error in the refusal of the judge to recuse himself from sentencing [Barker]." Brief for Appellee at 8-9.

> [I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause. . . . The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process.

Gardner v. Florida, 430 U.S. 349, 358, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977).

While consideration of questions reaching constitutional dimensions is unnecessary for disposition of Barker's appeal, the expression in *Gardner, supra*, does emphasize the unquestioned importance of the sentencing process in the criminal justice system.

Characterizing the burden of proof for a motion to

disqualify a judge, we have stated: " ' "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. Dondlinger*, 222 Neb. 741, 751, 386 N.W.2d 866, 872 (1986) (quoting from *State v. Gillette*, 218 Neb. 672, 357 N.W.2d 472 (1984)).

> "A motion to disqualify a trial judge on account of prejudice is addressed to the sound discretion of the trial court. . . . Generally, the ruling on a motion to disqualify a trial judge on the ground of bias and prejudice will be affirmed on appeal unless the record establishes bias and prejudice as a matter of law."

State v. Dondlinger, supra at 751, 386 N.W.2d at 872-73 (quoting from *In re Estate of Odineal*, 220 Neb. 168, 368 N.W.2d 800 (1985)).

To support its argument, the State directs us to *The People v. Hicks*, 44 Ill. 2d 550, 256 N.E.2d 823 (1970), which involved a conviction for murder and the trial judge's unsolicited ex parte contact with a prospective witness, who was alleged to be a relative of the homicide victim and who asked to be allowed to sit in the front of the courtroom. The Illinois Supreme Court found that the questioned contact did not prevent a fair trial for the defendant and explained:

> In our opinion the judge's conversations with [the prospective witness] . . . did not give cause for his disqualification, or give rise either to unfairness or a probability of unfairness which fatally infected the trial. Most certainly the occurrences relied upon do not support the major premise of defendant's argument here, *viz.*, that the judge "entertained members of the deceased's family in his chambers prior to trial." To say that any involuntary meeting or conversation, no matter how trivial, gives rise to cause for disqualification would present too easy a weapon with which to harass the administration of criminal justice and to obtain a substitution of judges.

44 Ill. 2d at 557, 256 N.E.2d at 827.

The State also suggests that *People v. Dunigan*, 96 Ill. App. 3d 799, 421 N.E.2d 1319 (1981), is applicable regarding recusal of a sentencing judge. After the jury found Dunigan guilty of

several felonies, the judge fortuitously met the victims at a local tavern and discussed "generalities" with them, which did not relate to any aspect of Dunigan's trial. In *Dunigan* the court expressed: "[T]he involuntary meeting that occurred between the judge and the victims of the crime did not, in itself, disqualify him from presiding at the sentencing hearing." 96 Ill. App. 3d at 813, 421 N.E.2d at 1330.

The State believes that the appropriate standard to determine whether prejudice has resulted from an ex parte communication with a presiding judge is expressed in *State ex rel. Irby v. Israel*, 100 Wis. 2d 411, 302 N.W.2d 517 (1981): "An ex parte communication, moreover, is a material error only if the adverse party is prejudiced by an inability to rebut the facts communicated and if improper influence on the decision maker appears with reasonable certainty to have resulted." 100 Wis. 2d at 425, 302 N.W.2d at 525.

Finally, the State then refers to *State v. Packett*, 206 Neb. 548, 294 N.W.2d 605 (1980), in which a prosecutor initiated an ex parte communication with the trial judge and complained about the latitude extended to the defendant's lawyer on cross-examination. Finding that the ex parte contact did not warrant reversal of the defendant's conviction, this court stated:

> It would appear that objections to, arguments about, or evidence affecting the limits of cross-examination ought to be made only in the presence of, or after appropriate notice to, opposing counsel. In this case, however, there is nothing in the record from which it may be reasonably inferred that prejudice resulted to the defendant. The record does not show that the defense was subsequently improperly restricted in either direct or cross-examination.

206 Neb. at 552, 294 N.W.2d at 608.

To counter the State's argument, Barker calls our attention to cases such as *State v. Valencia*, 124 Ariz. 139, 602 P.2d 807 (1979). In *Valencia*, which was a murder case, a relative of the homicide victim contacted the judge before sentencing and suggested what penalty should be imposed in view of the defendant's other convictions. In determining that the

sentencing judge, when requested by the defendant, should have recused himself from the sentence hearing, the Arizona Supreme Court, holding that a judge should not initiate, invite, or consider ex parte communication concerning a pending or impending proceeding before the judge, concluded that "[s]uch a rule is a requisite to the orderly administration of justice in any judicial system." 124 Ariz. at 140, 602 P.2d at 808. See, also, *State v. Leslie*, 136 Ariz. 463, 666 P.2d 1072 (1983) (after the jury found defendant guilty but before sentencing, the judge solicited contact with the victim's relatives; held: contact with the victim's relatives necessitated the judge's disqualification from the proceedings).

The cases presented by the State regarding a judge's ex parte communication are readily distinguishable from the situation now before us, that is, Barker's case involves an ex parte communication which was responsively invited by the sentencing judge and, therefore, was a voluntary and intentional or deliberate meeting between the sentencing judge and the victim's family. If a litigant should not have to face a judge when there is a reasonable question of the judge's impartiality, none would rationally deny the validity of the general rule expressed in *State v. Valencia, supra*: A judge should not initiate, invite, or consider an ex parte communication concerning a pending or impending proceeding before the judge.

After Barker's conviction, the focal point of the proceedings became the sentence hearing, a proceeding in which a sentencing judge should display equanimity. An ex parte communication, as an extrajudicial source of information imparted to a judge, reasonably raises a question about the judge's impartiality in disposing of questions germane to the subject of the extrajudicial communication. Therefore, we hold that a judge, who initiates or invites and receives an ex parte communication concerning a pending or impending proceeding, must recuse himself or herself from the proceedings when a litigant requests such recusal.

Why is there no requirement that a litigant must show a judge's prejudice from a judicially initiated or invited ex parte communication? For the rule we have adopted today, a

rationale lies within Neb. Evid. R. 605: "The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point." Neb. Rev. Stat. § 27-605 (Reissue 1985).

Neb. Evid. R. 605 is a verbatim counterpart of Fed. R. Evid. 605. The advisory committee's note supplies insight into the purpose of Fed. R. Evid. 605 and, correspondingly, Neb. Evid. R. 605:

> The solution here presented is a broad rule of incompetency, rather than such alternatives as incompetency only as to material matters leaving the matter to the discretion of the judge, or recognizing no incompetency. The choice is the result of inability to evolve satisfactory answers to questions which arise when the judge abandons the bench for the witness stand. Who rules on objections? Who compels him to answer? Can he rule impartially on the weight and admissibility of his own testimony? Can he be impeached or cross-examined effectively? Can he, in a jury trial, avoid conferring his seal of approval on one side in the eyes of the jury? Can he, in a bench trial, avoid an involvement destructive of impartiality? . . .
>
> The rule provides an "automatic" objection. To require an actual objection would confront the opponent with a choice between not objecting, with the result of allowing the testimony, and objecting, with the probable result of excluding the testimony but at the price of continuing the trial before a judge likely to feel that his integrity had been attacked by the objector.

Fed. R. Evid. 605 advisory committee's note.

According to Weinstein, "Rule 605 was drafted as a broad rule of incompetency designed to prevent a judge presiding at a trial from testifying as a witness in that trial on any matter whatsoever." 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 605[01] at 605-3 (1987).

An explanation for Rule 605 is found in the observation by McCormick: "[W]hen a judge is called as a witness in a trial before him, his role as witness is manifestly inconsistent with his customary role of impartiality in the adversary system of trial."

McCormick on Evidence § 68 at 164 (E. Cleary 3d ed. 1984).

As noted in *Terrell v. United States*, 6 F.2d 498, 499 (4th Cir. 1925):

> "Indeed, a judge presiding at a trial is not a competent witness, for the duties of a judge and a witness are incompatible. If he testifies he would have to pass upon the competency of his own testimony; and as a witness he might be regarded a partisan, and would be subject to embarrassing conflicts with counsel. The danger to the dignity of the bench, of subjecting its impartiality to doubt and of placing the defendant at an unfair disadvantage by admitting the presiding judge as a witness is very obvious. . . ."

Although a judge is not sworn as a witness, Neb. Evid. R. 605 contains a bar to the judge's testifying and disqualifies the judge as a competent witness in proceedings over which the judge presides. See *Cline v. Franklin Pork, Inc.*, 210 Neb. 238, 313 N.W.2d 667 (1981). See, also, *Terrell v. United States, supra* (questioning by a judge amounted to his testifying). Weinstein also concludes that a judge acts as a witness within the purview of Rule 605, although the judge does not formally take the witness stand:

> During a trial, a judge, although he is neither called to testify nor voluntarily takes the stand, may nevertheless assume the role of a witness. Such behavior by a judge is at variance with the policy expressed in Rule 605 and should be treated analogously to direct violation of the Rule. That is, the appellate court must examine the particular circumstances of the case to determine whether the judge's behavior was so prejudicial to the substantial rights of the parties as to merit a reversal. At times, particularly in a criminal case, reversal will be mandatory.

3 J. Weinstein & M. Berger, *supra* at ¶ 605[04] at 605-14.

In *Price Bros. Co. v. Philadelphia Gear Corp.*, 629 F.2d 444 (6th Cir. 1980), the court applied Fed. R. Evid. 605 in considering the conduct of a judge in a bench trial. *Price Bros.* was an action for breach of contract and warranties concerning a pipe-wrapping machine manufactured by Price Brothers Company. The judge's law clerk visited Price Brothers' plant,

observed Price Brothers' malfunctioning pipe-wrapping machine, and, apparently, reported to the judge concerning the clerk's observations at the plant. The appeals court recognized the judicial duty to avoid off-the-record contacts that might be influential in the outcome of a bench trial and concluded:

> In a case analogous to the one before us, the Fifth Circuit reversed a jury verdict for the plaintiff where the trial court permitted its law clerk to testify to what he saw at a curiosity-inspired private view of the scene of a slip-and-fall injury. *Kennedy v. Great Atlantic & Pacific Tea Co.*, 551 F.2d 593 (5th Cir. 1977). . . . The trial judge repeatedly cautioned the jury not to attach any special significance to his law clerk's testimony. The Court of Appeals, nevertheless, held that it was required to vacate the judgment in the exercise of its supervisory power. . . . Reasoning that the finder of fact must be " 'free from external causes tending to disturb the exercise of deliberate and unbiased judgment,' " and that the courts must not tolerate " 'any ground of suspicion that the administration of justice has been interfered with,' " quoting *Mattox v. United States*, 146 U.S. 140, 149, 13 S.Ct. 50, 53, 36 L.Ed. 917 (1892), the appeals court concluded that the potential for prejudice resulting from the identification of the witness with the trial court was so great that the verdict could not be permitted to stand. . . .
>
> . . . .
>
> . . . The problem attendant to a judge having personal knowledge of the facts is that he may thereby be transformed into a witness for one party. Where the trial is to a jury, explicit rules provide some protection. If a judge is to preside, he may not testify. Rule 605, Fed.R.Evid. . . . A rule that merely prohibits a presiding judge from testifying in open court, however, does not insure that the fact finder will be "free from external causes tending to disturb the exercise of deliberate and unbiased judgment," [citation omitted], where the trial is to the bench. Whether, in a bench trial, a judge can avoid an involvement destructive of impartiality where he has personal knowledge of material facts in dispute is a

> question that cannot be answered satisfactorily, *see* Advisory Committee's Notes, Rule 605, Fed.R.Evid., and, therefore, a judge should recuse himself in such circumstances. [Citation omitted.]

629 F.2d at 446-47.

A trial judge's use of reports from a "monitoring-team," which included the trial judge, required reversal in *Cline v. Franklin Pork, Inc.*, 210 Neb. 238, 313 N.W.2d 667 (1981). This court stated in *Cline*:

> The purpose of Rule 605 was to avoid embarrassing the court, the hindrance of justice, scandals in the courts, and to avoid any appearance of impropriety or partiality. The reason that no objection is required is to eliminate the possibility of any hostility arising between the trial judge and counsel. . . . The functions of a judge and a witness are incompatible and it is utterly impossible for one to exercise the rights of a witness and to perform the duties of a judge at one and the same time.

210 Neb. at 244, 313 N.W.2d at 671.

In *Cline, supra*, this court observed that "[f]rom a practical point of view, it would be nearly impossible for the presiding judge to be cross-examined" on the reports utilized in the proceedings, *id.*, and concluded: "Can the parties waive the disqualification of the judge under § 27-605? We are persuaded that for the sake of the orderly administration of justice and meaningful review, they cannot." 210 Neb. at 246, 313 N.W.2d at 672.

> "Indeed, a judge presiding at a trial is not a competent witness, for the duties of a judge and a witness are incompatible. If he testifies he would have to pass upon the competency of his own testimony; and as a witness he might be regarded a partisan, and would be subject to embarrassing conflicts with counsel. The danger to the dignity of the bench, of subjecting its impartiality to doubt and of placing the defendant at an unfair disadvantage by admitting the presiding judge as a witness is very obvious."

Tyler v. Swenson, 427 F.2d 412, 415-16 (8th Cir. 1970) (quoting from *Lepper v. United States*, 233 F. 227 (4th Cir. 1916)

(Woods, Circuit Judge, concurring)). See, also, *State v. Eubanks*, 232 La. 289, 300, 94 So. 2d 262, 266 (1957) (trial court can refuse to testify regarding his method of selecting members of a grand jury, because "he could not act both as a judge and as a witness").

In *United States v. Heldt*, 668 F.2d 1238 (D.C. Cir. 1981), the appeals court considered a disqualification statute in determining whether the trial judge should have recused himself on the defendants' request. The pertinent part of 28 U.S.C. § 455 (1982) provided:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding . . . .

Acknowledging the rule adopted in several other circuits, the District of Columbia circuit held:

> [A] showing of an *appearance* of bias or prejudice sufficient to permit the average citizen reasonably to question a judge's impartiality is all that must be demonstrated to compel recusal under section 455. A showing of the appearance of bias or prejudice would seem necessarily to raise a reasonable question concerning the judge's impartiality.

(Emphasis in original.) 668 F.2d at 1271.

If a trial judge were allowed to testify concerning a matter in the proceedings over which that judge was presiding, then, in Alice's words in Alice's Adventures in Wonderland, the situation becomes "Curiouser and curiouser!" Weinstein makes the acute observation: "Permitting a judge to testify raises perplexing questions of who will rule on objections, who will compel answers, what will be the scope of cross-examination, and how counsel is to maintain a proper relationship with the court." 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 605[01] at 605-4 (1987). On the other hand, if the trial judge's comments about his conduct cannot be

challenged, the judge's comments are, in effect, a soliloquy shared with counsel. Thus, the bar or disqualification under Neb. Evid. R. 605 spares a litigant from the dilemma of allowing a judge's prejudicial testimony to remain unchallenged or, by questioning the judge, risking the wrath of a judge whose impartiality has been attacked.

In Barker's case, whether the sentencing judge was influenced by his meeting with the victim's family became the crucial question. Basically, the question is: Did the sentencing judge have some preconceived opinion or disposition toward the sentence to be imposed on Barker? Although other participants in the questioned meeting might have provided some information, the judge's "testimony" was extremely important, if not indispensable, in establishing an accurate and complete portrayal of events and statements during the visit with the victim's family. In the final analysis, who other than the judge could better testify about the judge's attitude or mental disposition toward sentencing in this case? At that point, the judge, unfortunately but necessarily, was required to assume dual and simultaneous roles—witness and judge—and perhaps quite naturally required to assume the ultimate role of advocate in defense of his own impartiality which had been brought into question. Those incompatible roles, witness as well as judge, are inconsistent with and even antagonistic to a fair and safe administration of criminal justice.

Moreover, imposing a burden on a litigant to prove prejudice through the testimony of one disqualified from testifying is an impossible standard. In Barker's case, obtaining the judge's testimony concerning his attitude or disposition toward sentencing contravenes the testimonial bar and witness disqualification imposed by Neb. Evid. R. 605. Yet, without the judge's testimony, the question about the judge's possible prejudice could not be resolved, irresolution which thereby prevented determining whether Barker was sentenced by an impartial court.

Also, as a matter of judicial economy, the problem of trials within trials, such as a hearing to determine whether a judge was improperly influenced by an ex parte communication initiated or invited by the judge, ought to be avoided and

eliminated if possible. We believe that the recusal rule we have adopted today will help solve such a problem by discouraging the cause of the problem.

We realize that the Nebraska Evidence Rules are inapplicable at a sentence hearing. See Neb. Evid. R. 1101(4)(b) (Neb. Rev. Stat. § 27-1101(4)(b) (Reissue 1985)). See, also, *State v. Dillon*, 222 Neb. 131, 382 N.W.2d 353 (1986). However, the question about the judge's prejudice arose at a hearing distinct from the sentencing and involved a question about impartiality of the one who would impose sentence rather than a question about the type of sentence which would be appropriate in a given case.

Most assuredly, we appreciate the trial judge's predicament precipitated by the prosecutor in this case. The judge's declination of the meeting would have the appearance of absolute apathy for the distraught family. However, we must also appreciate that an appearance of partiality from the meeting immeasurably outweighs any appearance of insensitivity.

Consequently, we set aside the sentence imposed on Barker and remand this matter to the district court for further proceedings, namely, a sentence hearing to be conducted and sentence imposed by a judge other than the judge who imposed sentence on Barker.

SENTENCE VACATED, AND CAUSE REMANDED WITH DIRECTION.

BOSLAUGH, J., concurring.

I concur in the judgment of the court and that part of the opinion which holds that a judge should not initiate or invite an ex parte communication concerning a pending or impending proceeding.

Although the majority opinion does not hold that a judge may not consider an ex parte communication concerning a proceeding pending before him, the opinion appears to rely to some extent upon authorities to that effect.

I think it is important to remember that presentence reports consist largely of hearsay and ex parte statements, all of which are proper for consideration by the court. In *State v. Rose*, 183 Neb. 809, 164 N.W.2d 646 (1969), we noted that a trial judge has a broad discretion in the source and type of evidence he may

use to assist him in determining the kind and extent of punishment to be imposed.

> Highly relevant, if not essential, to his determination of an appropriate sentence is the gaining of knowledge concerning defendant's life, character, and previous conduct. In gaining this information, the trial 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. The rules governing due process with respect to the admissibility of evidence are not the same in a presentence hearing as in a trial in which guilt or innocence is the issue. 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.

(Citations omitted.) *Id.* at 811, 164 N.W.2d at 648-49.

The rules of evidence and the right of confrontation do not apply to sentencing proceedings. As the U.S. Supreme Court held in *Williams v. New York*, 337 U.S. 241, 246-47, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949):

> Tribunals passing on the guilt of a defendant always have been hedged in by strict evidentiary procedural limitations. But both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law. Out-of-court affidavits have been used frequently, and of course in the smaller communities sentencing judges naturally have in mind their knowledge of the personalities and backgrounds of convicted offenders. . . .
>
> . . . A sentencing judge, however, is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant—if not essential—to his selection of an

appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.

COLWELL, D.J., Retired, joins in this concurrence.

SHIRLEY A. JUSTICE, APPELLANT, V. GREGORY H. HAND, APPELLEE.

420 N.W.2d 704

Filed March 18, 1988. No. 87-274.

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

Shirley A. Justice, pro se.

William J. Elder of McCormack, Cooney, Mooney & Hillman, and R. Joseph Henatsch of Katskee & Henatsch, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

PER CURIAM.

Shirley A. Justice appeals from the judgment for Gregory H. Hand in an automobile negligence action. In the county court, the parties presented evidence supporting their respective contentions. The trial court dismissed Justice's petition and found for Hand on his counterclaim for $1,492.06. On appeal, the district court affirmed the county court's judgment.

> 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. . . . "In reviewing a judgment awarded in a bench trial, the Supreme Court does not reweigh evidence but considers the judgment in a light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. [Citations omitted.]"

Lynn v. Metropolitan Utilities Dist., 225 Neb. 121, 125, 403 N.W.2d 335, 338-39 (1987) (quoting from *Alliance Nat. Bank v. State Surety Co.*, 223 Neb. 403, 390 N.W.2d 487 (1986)).

> On appeal of a county court's judgment rendered in a bench trial of a law action, the district court reviews the "case for error appearing on the record made in the county court." Neb. Rev. Stat. § 24-541.06 (Reissue 1985). A county court's factual findings in a bench trial of a law action have the effect of a verdict and will not be set aside unless such findings are clearly erroneous.

Holden v. Urban, 224 Neb. 472, 474, 398 N.W.2d 699, 701 (1987).

There is evidence to support the trial court's findings, which are not clearly erroneous.

AFFIRMED.

IN RE INTEREST OF L.H., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. M.H., APPELLANT.

420 N.W.2d 318

Filed March 18, 1988. No. 87-375.

1. **Parental Rights: Juvenile Courts.** A juvenile court has the discretionary power to prescribe a reasonable plan for parental rehabilitation to correct the conditions underlying the adjudication that a child is a juvenile within the Nebraska Juvenile Code, Neb. Rev. Stat. §§ 43-245 et seq. (Reissue 1984 & Cum. Supp. 1986).
2. **Parental Rights.** When a parent fails to make reasonable efforts to comply with

the court-ordered rehabilitative plan, the parent's failure presents an independent reason justifying termination of parental rights.

3. **Parental Rights: Evidence: Proof.** In the absence of any reasonable alternative and as the last resort to dispose of an action brought pursuant to the Nebraska Juvenile Code, termination of parental rights is permissible when the basis for such termination is proved by clear and convincing evidence.
4. _____: _____: _____. Regarding parental noncompliance with a court-ordered rehabilitative plan, under Neb. Rev. Stat. § 43-292(6) (Reissue 1984) as a ground for termination of parental rights, the State must prove by clear and convincing evidence that (1) the parent has willfully failed to comply, in whole or in part, with a reasonable provision material to the rehabilitative objective of the plan and (2) in addition to the parent's noncompliance with the rehabilitative plan, termination of parental rights is in the best interests of the child.

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

Edward F. Noethe of Sodoro, Daly & Sodoro, for appellant.

Ronald L. Staskiewicz, Douglas County Attorney, and Maria R. Leslie, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

PER CURIAM.

M.H. appeals from an order of the separate juvenile court of Douglas County, which terminated M.H.'s parental rights in her daughter, L.H., as the result of the mother's failure to correct conditions leading to adjudication that L.H. was a juvenile within the Nebraska Juvenile Code, Neb. Rev. Stat. §§ 43-245 et seq. (Reissue 1984 & Cum. Supp. 1986).

> "In an appeal from a judgment terminating parental rights, the Supreme Court tries factual questions de novo on the record, which requires the Supreme Court to reach a conclusion independent of the findings of the trial court, but, where evidence is in conflict, the Supreme Court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts rather than another."

In re Interest of J.S., A.C., and C.S., ante p. 251, 256, 417 N.W.2d 147, 152 (1987) (quoting *In re Interest of T.C.*, 226 Neb. 116, 409 N.W.2d 607 (1987)).

On February 9, 1984, the State petitioned the juvenile court, claiming that the child, L.H., lacked proper parental care by reason of the faults and habits of her mother and was, therefore, a juvenile within § 43-247(3)(a) (Reissue 1984) of the Nebraska Juvenile Code. Specifically, the State alleged that M.H. had failed to provide L.H. with a suitable home, had left the child for prolonged periods with M.H.'s friends, and had failed to provide L.H. with parental supervision, protection, and care.

A preadjudication detention hearing established that the mother and child lived either in a foster home or with three friends in a one-bedroom apartment. During that time, the child received a cigarette burn, had severe diaper rash, and suffered a second degree burn on her face when the mother was in another room and the child pulled a pot of hot water off the kitchen table. Also, glass from a shattering mirror cut L.H., requiring 36 stitches in her abdomen. The mirror, being used by the mother, fell and broke, sending flying glass into the child's body. On another occasion, L.H. accidentally burned herself with a hot iron, although the mother had warned the child not to touch the iron. At the conclusion of the hearing and for the urgent protection of L.H., the court placed temporary custody of the child with the Department of Social Services, pending the adjudication hearing scheduled for April 3, 1984. At the adjudication hearing, M.H. appeared with her lawyer and admitted the allegations in the State's petition. The court found that L.H. was a juvenile within the act, continued the child's custody in the Department of Social Services, and set the matter for a dispositional hearing on August 1, 1984. Evidence at the dispositional hearing again related to the incidents involving the burn from the iron and scalding of the child, as previously described in the preadjudication hearing. Evidence also pertained to M.H.'s continued unemployment, unsuitable housing, unstable lifestyle, and lack of supervision over the child, which was a contributing factor to L.H.'s physical injuries. The court ordered a rehabilitation plan, requiring that M.H. provide suitable housing for herself and the child, obtain employment, attend parenting classes, receive psychiatric and psychological evaluations arranged through the court, and

receive counseling. The court granted M.H. the right to visit L.H. Thereafter, between November 15, 1984, and January 16, 1987, the court held eight review hearings concerning M.H.'s compliance with the original rehabilitation plan and added new provisions in the light of circumstances arising after the initial plan ordered on August 1, 1984. As examples of supplemental or additional provisions to the initial plan, after a review hearing in July 1985, the court required that M.H. obtain suitable housing within 60 days, receive budget counseling, undergo a chemical dependency evaluation, and notify the court within 48 hours of any changed address of the mother's residence. After a further review hearing in October 1985, the court required M.H. to secure suitable housing within 30 days, notify the court before any change in her residence, supply rent receipts to M.H.'s probation officer, and exercise extended visitation of L.H. as arranged by a child protection worker.

In its petition to terminate parental rights, the State alleged that M.H. had failed to comply with the court-ordered rehabilitation plan, see § 43-292(6) (Reissue 1984), concerning M.H.'s employment, housing, rent receipts, changes of address, and visitation of L.H.

As required by the rehabilitation plan, M.H. had submitted to psychiatric and psychological examinations in which M.H. was diagnosed as an "easygoing and permissive" individual with a "normal young adult personality." However, the psychological report noted that M.H. is "undisciplined" and acts "without thinking of consequences."

M.H. frequently moved from one residence to another and lived in a variety of residences, ranging from a one-bedroom apartment with her boyfriend to her mother's home, where M.H. and her boyfriend lived in a bedroom with her brother or uncle. Although the caseworker continually admonished M.H. to obtain adequate housing, M.H. usually complained that she did not have the money for such housing. Over the 2 years during which the court conducted review hearings, the longest that M.H. remained in any one residence was 4 months. For most of the time throughout the periodic review hearings, M.H. lived at her mother's home, hotels, and at the homes of various relatives. When M.H. lived with her boyfriend, the couple

either lived at the home of another couple or in a one-bedroom apartment. M.H. consistently failed to notify anyone of her moves from one residence to another. Notwithstanding the court's requirement that M.H. find suitable housing within the time limits specified in the court's orders concerning housing, M.H. failed to acquire suitable housing. M.H. admitted that her transient lifestyle would not provide a stable and suitable environment for L.H. and that she had not provided a permanent and stable home for herself and L.H. independent of M.H.'s boyfriend.

Over the 2-year timeframe for the review hearings, M.H. had at least 10 part-time jobs which lasted for short periods. M.H.'s employment did not cover the basic costs for adequate and suitable housing for herself and L.H. M.H. was fired from a telemarketing job because she failed to make enough sales. M.H.'s only verification of her employment occurred in February and March of 1986, when she provided three pay stubs to her probation officer. Although the probation officer explained to M.H. that she must obtain stable employment, M.H. failed to obtain steady employment. Between May 16, 1986, and the termination hearing, M.H. held three different jobs. Also, M.H. failed to comply with the court's order, contained in the rehabilitation plan, that M.H. receive budget counseling in view of her financial condition.

A counselor-therapist taught M.H. basic parenting techniques in child raising. Because of M.H.'s failure to consistently attend the parenting classes, the counselor considered discontinuing the sessions with M.H. M.H.'s attendance at counseling sessions and parenting classes was "sporadic."

M.H. frequently would confirm her expected visitation of L.H. at a foster home and then fail to keep the visitation. In these situations, L.H. would be brought to the visitation room, and, when M.H. did not arrive for visitation after a 30-minute wait, would be returned to the child's living quarters. Under those circumstances, L.H. became angry and frustrated as the result of M.H.'s failure to keep the visitation. On occasions when M.H. did visit the child, there were instances demonstrating a lack of concern for, or supervision over, the

child. For example, on one occasion, when the child asked for a drink of water, the mother gave the child a cup containing water and a metal screw. Other incidents evidenced M.H.'s lack of supervision over her child and lethargy toward the child during periods of visitation.

When L.H. was enrolled in the Head Start program, the child was referred to a family therapist in November 1986, because the child was "kicking, spitting, and throwing tantrums" around other children. L.H. refused to talk about M.H. and became agitated in conversations about her mother. According to the therapist, L.H. was confused and angry with her mother, especially because M.H. frequently missed planned visitations with the child. At the time of the termination hearing, L.H. considered her foster mother as her real mother.

In connection with the rehabilitation plan, M.H. was directed to Family Intensive Treatment Service (FITS) for a program which included budgeting, household management, parenting skills, and communication. M.H. was aware that, in connection with the FITS program, she was required to obtain housing independent from her boyfriend so that FITS personnel could work with her. M.H. failed to obtain such housing, and the FITS program was terminated. During this period, M.H. was moving back and forth between her relatives' homes.

After noting that L.H. had been in a foster home for an extended period of time (since January 1984) and that the court-directed reasonable efforts to correct M.H.'s problems were of no avail, the court found that it was in L.H.'s best interests that M.H.'s parental rights be terminated and that L.H. be placed in the custody of the Department of Social Services for the purpose of adoption.

M.H. contends that the evidence does not establish that she has failed to comply with the rehabilitation plan and thereby has failed to correct the conditions leading to the adjudication in these proceedings. Also, M.H. claims that the juvenile court erred in finding that the best interests of L.H. require termination of M.H.'s parental rights.

Section 43-292 provides in part:

> The court may terminate all parental rights between the

> parents [and a] juvenile when the court finds such action to be in the best interests of the juvenile and it appears by the evidence that one or more of the following conditions exist:
>
> . . . .
>
> (6) Following a determination that the juvenile is one as described in subdivision (3)(a) of section 43-247, reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the determination.

A juvenile court has the discretionary power to prescribe a reasonable plan for parental rehabilitation to correct the conditions underlying the adjudication that a child is a juvenile within the Nebraska Juvenile Code. *In re Interest of T.C.*, 226 Neb. 116, 409 N.W.2d 607 (1987). See, also, § 43-292 (termination of parental rights; failure to correct conditions leading to adjudication). When a parent fails to make reasonable efforts to comply with the court-ordered rehabilitative plan, the parent's failure presents an independent reason justifying termination of parental rights. *In re Interest of J.S., A.C., and C.S.*, *ante* p. 251, 417 N.W.2d 147 (1987); *In re Interest of J.W.*, 224 Neb. 897, 402 N.W.2d 671 (1987); *In re Interest of L.J., J.J., and J.N.J.*, 220 Neb. 102, 368 N.W.2d 474 (1985). "When parents cannot rehabilitate themselves within a reasonable time, the best interests of a child require that a final disposition be made without delay." *In re Interest of W.*, 217 Neb. 325, 330, 348 N.W.2d 861, 865 (1984).

> In the absence of any reasonable alternative and as the last resort to dispose of an action brought pursuant to the Nebraska Juvenile Code, Neb. Rev. Stat. §§ 43-245 to 43-2,129 (Cum. Supp. 1982 & Reissue 1984), termination of parental rights is permissible when the basis for such termination is proved by clear and convincing evidence.

In re Interest of T.C., supra at 117, 409 N.W.2d at 609. "A juvenile's best interests are the primary considerations in determining whether parental rights should be terminated as authorized by the Nebraska Juvenile Code." *In re Interest of J.S., A.C., and C.S., supra* at 267, 417 N.W.2d at 158.

In *In re Interest of J.S., A.C., and C.S., supra*, we expressed

the following regarding termination of parental rights under § 43-292(6) of the Nebraska Juvenile Code:

> [I]f a circumstance designated in subsections (1) to (6) is evidentially established, there must be the additional showing that termination of parental rights is in the best interests of the child, the primary consideration in any question concerning termination of parental rights. The standard of proof for each of the two preceding requirements prescribed by § 43-292 is evidence which is "clear and convincing."
>
> Therefore, regarding parental noncompliance with a court-ordered rehabilitative plan, under § 43-292(6) as a ground for termination of parental rights, the State must prove by clear and convincing evidence that (1) the parent has willfully failed to comply, in whole or in part, with a reasonable provision material to the rehabilitative objective of the plan and (2) in addition to the parent's noncompliance with the rehabilitative plan, termination of parental rights is in the best interests of the child.

Ante p. 267, 417 N.W.2d at 158.

In *In re Interest of D.*, 218 Neb. 23, 29, 352 N.W.2d 566, 570 (1984), this court expressed:

> " ' "[W]e will not gamble with the child's future." ' " In our system of law directed toward the best interests of a juvenile, termination of parental rights is not a penalty imposed on account of poverty. Parental inability to reach heights of economic success is no basis to sever the precious relationship which normally exists between parent and child. However, that same system of laws pertaining to juveniles cannot reward parental bankruptcy evidenced by indifference or inexcusable lethargy adversely affecting the life and living conditions demanded by a child's personal dignity.

The evidence in the present case establishes that M.H. has, at best, sporadically complied with the rehabilitation plan ordered by the court. M.H.'s lethargic attitude toward her child, in addition to her complete failure to obtain suitable housing and stable employment, has psychologically harmed the child. As the family therapist testified, the child becomes extremely

angry and confused because of M.H.'s infrequent visitations and frequent failure to keep the visitation appointments. Furthermore, M.H.'s failure to obtain counseling and attend parenting classes has not corrected a condition, that is, M.H.'s lack of supervision over the child, which led to the adjudication that L.H. is a neglected child. Finally, the record of the numerous review hearings held by the juvenile court contains a sufficient basis for concluding that the State has adduced clear and convincing evidence that (1) M.H. has willfully failed to comply with the numerous provisions in the rehabilitation plans ordered by the court and (2) termination of parental rights is in the best interests of the child. L.H. should not be confined in indeterminate foster care and has already waited over 3 years for her mother to correct the situation which led to the adjudication in this case. As this court has repeatedly stated: "[A] child cannot, and should not, be suspended in foster care, nor be made to await uncertain parental maturity." *In re Interest of Z.R.*, 226 Neb. 770, 786, 415 N.W.2d 128, 138 (1987). Therefore, we find clear and convincing evidence that M.H. has willfully failed to comply with the rehabilitative program ordered by the juvenile court to correct the conditions underlying the adjudication that L.H. is a juvenile within the Nebraska Juvenile Code and that termination of parental rights is in the best interests of L.H. The juvenile court's judgment, terminating M.H.'s parental rights in L.H., is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES L. SOWELL, APPELLANT.
420 N.W.2d 704

Filed March 18, 1988. No. 87-523.

1. **Postconviction.** When a motion for postconviction relief and the files and records show that a defendant is not entitled to relief, no evidentiary hearing is required.

2. **Postconviction: Appeal and Error.** A defendant seeking postconviction relief has the burden of establishing a basis for such relief, and the findings of the district court in denying relief will not be disturbed on appeal unless they are clearly erroneous.
3. **Effectiveness of Counsel: Proof.** This court has adopted a two-part test to determine whether a defendant received effective counsel: first, the attorney must perform at least as well as an attorney in that area with ordinary skill in criminal law; and second, the attorney must conscientiously protect the client's interests. Additionally, the defendant must show that there is a reasonable probability that, but for the attorney's error, the result of the case would have been different.

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

James L. Sowell, pro se.

Robert M. Spire, Attorney General, and LeRoy W. Sievers, for appellee.

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

FAHRNBRUCH, J.

Defendant James L. Sowell's motion for postconviction relief was denied without an evidentiary hearing by the Douglas County District Court. Sowell appeals. We affirm.

In his postconviction relief motion, Sowell claimed that his counsel in the district court was ineffective. It appears the defendant claimed that his counsel failed to prove that Sowell, due to prior substance abuse, was incapable of forming the necessary intent to commit the crime of robbery. The record reflects that although the defendant discussed that defense with his lawyer and he was again made aware of it by the judge, Sowell freely, voluntarily, knowingly, and intelligently gave up that defense before his plea of guilty was accepted by the district court. In his assignments of error, Sowell claims the trial court erred in not granting him an evidentiary hearing on the postconviction relief motion.

Postconviction proceedings are provided for in Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1985). Those statutes do not require an evidentiary hearing before the district court disposes of a postconviction relief motion. We have held that if " 'the

files and records show that a defendant is not entitled to relief, no evidentiary hearing is required.' " *State v. Rivers*, 226 Neb. 353, 354, 411 N.W.2d 350, 352 (1987); *State v. Jackson*, 226 Neb. 857, 415 N.W.2d 465 (1987); *State v. Williams*, 218 Neb. 618, 358 N.W.2d 195 (1984). We have also held that the findings of the district court in denying postconviction relief will not be disturbed on appeal unless they are clearly erroneous. *State v. Rivers, supra; State v. Galvan*, 222 Neb. 104, 382 N.W.2d 337 (1986); *State v. Moore*, 217 Neb. 609, 350 N.W.2d 14 (1984).

Originally, after a plea of guilty to a felony robbery charge, Sowell was sentenced to an indeterminate term of not less than 7 nor more than 12 years to the state Department of Correctional Services. Sowell's direct appeal to this court on excessive sentence was dismissed as being wholly frivolous, he previously having been convicted of four felonies. Sowell then filed a postconviction relief motion.

Before denying Sowell's postconviction relief motion, the district judge painstakingly examined not only the motion, but also the files and bill of exceptions which contained the defendant's plea and sentence. The district judge then entered a comprehensive order, ruling on each contention contained in the eight numbered paragraphs of defendant's motion. We too have examined defendant's motion, the files, and the bill of exceptions. The bill of exceptions reflects that the defendant freely, voluntarily, knowingly, and intelligently entered a plea of guilty to the robbery charge.

The record refutes any suggestion that Sowell was suffering from a diminished mental capacity at the time he entered his guilty plea. When questioned by the court at the time of his guilty plea, the defendant admitted unequivocally that he committed each and every element of the crime charged. In his own words, Sowell confessed in open court how by force and violence on October 19, 1985, he stole a car located at a gas station at 80th and Dodge Streets in Omaha, Douglas County, Nebraska. While Sowell's motive for stealing the car was not legally justified, it had rationality and was purposeful. Sowell said that while taking the car, he slapped a lady in the face and "probably" placed her in fear. The prosecution stated he hit the lady more than once. Defendant's plea of guilty was made

pursuant to a plea bargain whereby Sowell avoided having the State pursue a habitual criminal charge against him.

At the time of his plea, the defendant stated that he was not under the influence of any alcohol, drugs, narcotics, or other pills and that he had not taken any of those items during the previous 24 hours. The district judge advised Sowell that excessive intoxication at the time of the crime could obviate the element of intent required for conviction in a robbery case. The defendant stated that he discussed that defense with his counsel. Sowell never asked to withdraw his guilty plea, although he was given the opportunity to do so.

In his motion for postconviction relief, the defendant now claims that his counsel was ineffective. Before accepting Sowell's plea, the trial judge explained the defendant's rights to him in detail. Sowell at that time acknowledged he fully understood his rights and had discussed them with his lawyer. Sowell further told the court that he had also discussed with his lawyer how he could "beat the charge." There were no defenses he thought he had that were not talked over with his lawyer. Sowell stated that he was satisfied with the job his lawyer had done for him and that the lawyer was competent and knew what he was doing. The defendant further said that he had had enough time to discuss his case with his lawyer.

To assert a successful claim of ineffective assistance of counsel, a defendant must prove (1) that his attorney failed to perform as well as an attorney with ordinary training and skill in the criminal law in the area; (2) that his interests were not conscientiously protected; and (3) that if his attorney had been effective, there is a reasonable probability that the results would have been different. *State v. Costanzo, ante* p. 616, 419 N.W.2d 156 (1988); *State v. Jackson*, 226 Neb. 857, 415 N.W.2d 465 (1987); *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

When arrested, the defendant gave the police a detailed statement of his involvement in the crime charged. There was a *Miranda* hearing in which the court ruled that certain parts of statements made by the defendant were not admissible and could not be used against him at trial. Admittedly, Sowell's counsel discussed every aspect of the case with the defendant.

The record reflects that his counsel conscientiously protected Sowell's interests. The record further reflects that Sowell's counsel performed as well as an attorney with ordinary training and skill in the criminal law in the area. Because of the overwhelming evidence against him, and because of his prior criminal record, regardless of what lawyer represented Sowell, the results of this case would have been the same. Sowell's counsel was effective. Had it not been for his counsel's efforts, Sowell would have also been convicted of being a habitual criminal, which would have resulted in a more lengthy sentence. There is no substance to Sowell's assignments of error or to his motion for postconviction relief.

The findings and order of the district court are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. COLLIN D. SPOTTED ELK, APPELLANT.

420 N.W.2d 707

Filed March 18, 1988. No. 87-524.

1. **Criminal Law: Sentences: Judgments: Words and Phrases.** In criminal cases it is the sentence which is the judgment.
2. **Criminal Law: Sentences: Time.** Neb. Rev. Stat. § 29-2308.01(1) (Cum. Supp. 1986) grants to those sentenced pursuant to a criminal conviction the right to petition the sentencing court for reconsideration of the sentence within 120 days of the imposition of the sentence or the revocation of probation.
3. **Criminal Law: Sentences: Time: Appeal and Error.** The filing of a motion to reconsider a sentence, made pursuant to the provisions of Neb. Rev. Stat. § 29-2308.01(1) (Cum. Supp. 1986), does not affect the time within which a notice of appeal must be filed under the provisions of Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 1986).
4. **Courts: Jurisdiction: Appeal and Error.** The filing of a notice of appeal, together with payment of fees unless fees are waived for cause, removes jurisdiction of the cause from the district court to this court.
5. _____: _____: _____. Once jurisdiction has been removed to this court, the district court has no jurisdiction over the cause unless and until remand by this court.
6. **Criminal Law: Effectiveness of Counsel.** A criminal defendant who proceeds

pro se is held to the same trial standard as if he or she were represented by counsel.

7. **Sentences.** As a practical matter it is the minimum portion of an indeterminate sentence which measures its severity.
8. **Sentences: Appeal and Error.** In reviewing a sentence the question is whether the defendant in question received an appropriate one, not whether someone else received a lesser sentence.
9. **Sentences: Evidence: Appeal and Error.** The mere fact that a defendant's sentence differs from those which have been imposed upon the coperpetrators in the same court does not, in and of itself, make the imposition of defendant's sentence an abuse of discretion; each defendant is unique; evidence as to each defendant's life, character, and previous conduct may be considered in determining the propriety of the sentence.
10. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion.

Appeal from the District Court for Sheridan County: PAUL D. EMPSON, Judge. Affirmed in part, and in part vacated and set aside.

James R. Wefso, for appellant.

Robert M. Spire, Attorney General, and Mark D. Starr, for appellee.

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

CAPORALE, J.

In this criminal case, defendant, Collin D. Spotted Elk, pled guilty to a charge of attempted burglary, a violation of Neb. Rev. Stat. §§ 28-201 and 28-507 (Reissue 1985), was so adjudged and thereafter sentenced to 5 years' imprisonment, and was ordered to pay restitution in the sum of $761.12. Defendant then filed a timely notice of appeal of the sentence of imprisonment to this court. He later filed a motion in the district court asking that his sentence be reconsidered under the provisions of Neb. Rev. Stat. § 29-2308.01 (Cum. Supp. 1986). The district court then purported to reduce the original sentence and sentenced defendant to a period of imprisonment for a term of 4 years. Although defendant filed no new notice of appeal with respect to the reduced sentence, he asks this court to hold it to be excessive. Since the district court lacked jurisdiction to reduce its original sentence and the record shows

the original sentence to have been within the applicable statutory limits and not to have constituted an abuse of discretion, we vacate and set aside the purported reduced sentence and affirm the original sentence.

At 5 o'clock on the morning of March 8, 1987, Deputy Sheriff David Lyon, while driving through the town of White Clay, Nebraska, noticed tire tracks in freshly fallen snow in the driveway at the Roy Smith residence. Knowing the Smiths' residence to be temporarily vacant, Lyon investigated. He found two sets of footprints in the snow leading from the location of the tire tracks, one set to the front door of the residence and one set to the rear. Upon examination, it became clear that the residence had been entered through the front door, which had been locked.

Lyon followed the tire tracks from the Smiths' driveway onto the highway and to a vacant field or lot south of the Smith residence. There he found parked a green Ford Torino, disabled by an engine fire, within which were Darrell Spotted Elk, Phillip Elk Boy, and a gilt-edged cut glass wine decanter. Following conversation with Darrell Spotted Elk and Elk Boy, Lyon placed both under arrest. Investigating further, Lyon traveled to Pine Ridge, where he encountered Geraldine Blue Bird, who informed him that the Ford Torino belonged to her and had been loaned to her nephew, the defendant herein. When Lyon stated to defendant, "If you were there when the car broke down, then you were there when the burglary happened," defendant answered, "Okay. I was there." Lyon then placed defendant under arrest.

Later, Mrs. Smith examined the house and noted that several table lamps and additional decanters were missing. Lyon located many of the missing items in a ditch near the place where he had found the Ford Torino, and he noted "numerous footprints back and forth between the car and where those items were cached."

Meanwhile, Elk Boy waived his *Miranda* rights and told Lyon that he, Darrell Spotted Elk, and defendant had driven to White Clay and that defendant had entered the Smith house.

Defendant was initially charged with burglary, a Class III felony, § 28-507. Subsequently, pursuant to a plea agreement,

the charge against defendant was amended to attempted burglary, a Class IV felony, § 28-201. At the hearing of March 31, 1987, the district court accepted defendant's guilty plea, continued the matter for sentencing, and ordered a presentence investigation and report.

The sentencing phase of the trial was held on May 5, 1987. Neither defendant himself nor his attorney offered any corrections to the presentence report; indeed, defendant's attorney noted that "defendant has a long record," but argued that "it is a matter of opinion how serious it is." Defendant was thereupon sentenced as stated in the first paragraph of this opinion.

On June 4, 1987, defendant filed, with the help of the prison "offender legal aid office," a notice of appeal of the prison sentence to this court.

Later, on June 26, 1987, defendant, by his attorney, filed a motion asking the district court to reconsider its sentence.

On July 14, 1987, the district court held a hearing on that motion. The gist of the argument made by defendant's attorney was, as it is in this court, that defendant's sentence of 5 years' imprisonment is disproportionate to the sentences meted out to the coperpetrators, Darrell Spotted Elk and Phillip Elk Boy. The district court then reduced defendant's sentence to 4 years' imprisonment. The record suggests, and defendant confirms in his reply brief, that no additional notice of appeal was filed following the reconsideration hearing of July 14, 1987.

The record further reflects that coperpetrator Darrell Spotted Elk pled guilty to attempted burglary, was later sentenced to 3 years' probation subject to conditions, and was ordered to make restitution to the Smiths in the amount of $761.12 within 6 months. Similarly, the record reflects that coperpetrator Phillip Elk Boy pled guilty to attempted burglary, was later sentenced to 1 year in the Nebraska Penal and Correctional Complex, and was ordered to make restitution to the Smiths in the amount of $761.12.

Before reaching the merits of defendant's challenge to the severity of his sentence, whatever that sentence might be, we must first consider the question of the jurisdiction of this court at this time and that of the district court when it purported to

reduce the sentence as originally imposed.

Neb. Rev. Stat. § 25-1912 (Cum. Supp. 1986) provides in relevant part as follows:

> (1) Except as provided in section 29-2308.01, the proceedings to obtain a reversal, vacation, or modification of judgments and decrees rendered or final orders made by the district court, including judgments and sentences upon convictions for felonies and misdemeanors under the criminal code, shall be by filing in the office of the clerk of the district court in which such judgment, decree, or final order was rendered, within thirty days after the rendition of such judgment or decree or the making of such final order, a notice of intention to prosecute such appeal signed by the appellant or appellants or his, her, or their attorney of record and, except as otherwise provided in sections 29-2306 and 48-641, by depositing with the clerk of the district court the docket fee required by law in appeals to the Supreme Court.
>
> (2) The running of the time for filing a notice of appeal shall be terminated as to all parties (a) by a motion for a new trial under section 25-1143, if such motion is filed by any party within ten days after the verdict, report, or decision was rendered, or (b) by a motion to set aside the verdict or judgment under section 25-1315.02, if such motion is filed by any party within ten days after the receipt of a verdict, and the full time for appeal fixed in subsection (1) of this section commences to run from the entry of the order ruling upon the motion filed pursuant to subdivision (a) or (b) of this subsection. When any motion terminating the time for filing a notice of appeal is timely filed by any party, a notice of appeal filed before the entry of the order ruling upon the motion shall have no effect, whether filed before or after the timely filing of the motion. A new notice of appeal shall be filed within the prescribed time from the ruling on the motion. No additional fees shall be required for such filing.
>
> (3) Except as otherwise provided in subsection (2) of this section and sections 29-2306 and 48-641, an appeal

> shall be deemed perfected and the Supreme Court shall have jurisdiction of the cause when such notice of appeal shall have been filed and such docket fee deposited in the office of the clerk of the district court, and after being so perfected no appeal shall be dismissed without notice, and no step other than the filing of such notice of appeal and the depositing of such docket fee shall be deemed jurisdictional.

Neb. Rev. Stat. § 29-2306 (Reissue 1985) deals with waiver of docket fees for cause, and Neb. Rev. Stat. § 48-641 (Reissue 1984) deals with appeals under this state's employment security law; neither provision is of concern in this case.

Section 29-2308.01 provides:

> Any court which imposes a sentence for a criminal offense may reduce such sentence within one hundred twenty days after (1) the sentence is imposed or probation is revoked or (2) receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal. No hearing shall be required concerning any request for reduction denied under this section.

Application of subdivision (2) of § 29-2308.01 is triggered when the lower court receives "a mandate issued [by the reviewing court] upon affirmance of the judgment or dismissal of the appeal." Inasmuch as the district court has as yet received no mandate from this court, we are here concerned only with subdivision (1) of the foregoing statute; although subdivision (2) may pose questions regarding the finality of judgments, those questions are not yet before us.

At issue and of current concern is the relationship between §§ 25-1912(1) and 29-2308.01.

Section 25-1912(1) establishes the manner in which "proceedings to obtain a reversal, vacation, or modification of judgments and decrees . . . or final orders" may be instituted. Except as provided in § 29-2308.01, such proceedings are to be instituted "by filing in the office of the clerk of the district court in which such judgment, decree, or final order was rendered, within thirty days after the rendition of such judgment or decree or the making of such final order, a notice of intention to prosecute such appeal," together with the applicable fees,

unless fees are waived for cause. In criminal cases it is the sentence which is the judgment. *In re Interest of Wolkow*, 206 Neb. 512, 293 N.W.2d 851 (1980); *State v. Long*, 205 Neb. 252, 286 N.W.2d 772 (1980).

Section 25-1912(2) provides that the 30-day appeal deadline clock created in § 25-1912(1) is stopped and reset by either of only two occurrences: filing a motion for new trial, pursuant to Neb. Rev. Stat. § 25-1143 (Reissue 1985), within 10 days after the "decision was rendered"; or making a motion for judgment notwithstanding the verdict, pursuant to Neb. Rev. Stat. § 25-1315.02 (Reissue 1985), within 10 days of receipt of the verdict. Sections 25-1143 and 25-1315.02 deal with matters of civil, not criminal, procedure and thus have no application to a criminal case. A motion for a new trial in a criminal case is controlled by Neb. Rev. Stat. §§ 29-2101 through 29-2103 (Reissue 1985). *State v. Daly, ante* p. 633, 418 N.W.2d 767 (1988). There is no criminal equivalent of a motion for judgment notwithstanding the verdict such as is contemplated by § 25-1315.02 in a civil case. (See, however, Neb. Rev. Stat. §§ 29-2104 through 29-2106 (Reissue 1985), which deal with a motion for arrest of a criminal judgment.) In any event, at no time was a motion for new trial or to arrest the judgment made in this case.

The only posttrial motion filed in the district court asked for reconsideration of the sentence originally imposed. Clearly, § 29-2308.01 grants to those sentenced pursuant to a criminal conviction the right to petition the sentencing court for reconsideration of the sentence. Under § 29-2308.01(1) this right must be exercised within 120 days of the imposition of the sentence or the revocation of probation, or it is lost. Equally clearly, however, § 25-1912(2) makes no provision to stop and reset the 30-day appeal deadline clock upon the filing of a motion to reconsider sentence pursuant to § 29-2308.01.

It follows, therefore, that the enactment of § 29-2308.01 in no way alters the jurisdictional significance of the act of filing a notice of appeal. Under subsection (3) of § 25-1912, filing a notice of appeal, together with payment of fees unless fees are waived for cause, removes jurisdiction of the cause from the district court to this court, "and no step other than the filing of

such notice of appeal and the depositing of such docket fee shall be deemed jurisdictional." See, e.g., *State v. Reed*, 226 Neb. 575, 412 N.W.2d 848 (1987); *In re Interest of C.M.H. and M.S.H., ante* p. 446, 418 N.W.2d 226 (1988); *State v. Kelly*, 200 Neb. 276, 263 N.W.2d 457 (1978). Once jurisdiction has been removed to this court, the district court has no jurisdiction over the cause unless and until remand by this court. *State v. Battershaw*, 220 Neb. 661, 371 N.W.2d 313 (1985); *State v. Ditter*, 209 Neb. 452, 308 N.W.2d 350 (1981).

Accordingly, jurisdiction over this cause was in this court from and after June 4, 1987, when defendant filed his notice of appeal. The district court thus lacked jurisdiction to act upon defendant's June 26, 1987, motion asking the district court to reconsider his sentence. The district court's purported act of reducing defendant's sentence from 5 years' imprisonment to 4 is therefore a nullity and of no force or effect.

In his reply brief in this court defendant makes frequent reference to the fact that his notice of appeal was filed pro se, while his motion to reconsider sentence was filed by counsel. This is of no consequence inasmuch as a criminal defendant who proceeds pro se is held to the same trial standard as if he or she were represented by counsel. *State v. Stickney*, 222 Neb. 465, 384 N.W.2d 301 (1986).

Having determined that jurisdiction over the cause is properly in this court and that the district court's purported reduction of defendant's sentence is a nullity, we turn now to consideration of defendant's claim that in light of the sentences imposed upon his coperpetrators, the district court abused its discretion in originally sentencing him to imprisonment for 5 years.

First of all, it must be noted that as a Class IV felony a conviction for attempted burglary requires no minimum punishment, but authorizes imprisonment for up to 5 years, or a $10,000 fine, or both such imprisonment and fine. Neb. Rev. Stat. § 28-105 (Reissue 1985). As a consequence of the district judge's election not to specify a minimum period of imprisonment, defendant's actual sentence is an indeterminate one of from 0 to 5 years, less certain good-time computations. In point of fact, the Department of Correctional Services is free

to discharge defendant from his prison obligation at any time and was so from the moment defendant arrived at the prison gates. Neb. Rev. Stat. §§ 83-1,105, 83-1,107, 83-1,107.01, and 83-1,108 (Reissue 1987); *State v. Ryan*, 222 Neb. 875, 387 N.W.2d 705 (1986). Thus, while it is true that defendant was potentially sentenced to the maximum period of imprisonment allowable, he was not sentenced to the longest minimum period of imprisonment allowable, one-third of 5 years, or 20 months.

As we have noted in the past, as a practical matter it is the minimum portion of an indeterminate sentence which measures its severity. *State v. Sianouthai*, 225 Neb. 62, 402 N.W.2d 316 (1987); *State v. King*, 196 Neb. 821, 246 N.W.2d 477 (1976). It can hardly be said that a sentence involving no judicially imposed minimum period of imprisonment is excessive under the circumstances of this case.

Moreover, as has been noted in the past, the issue in reviewing a sentence is whether the defendant in question received an appropriate sentence, not whether someone else received a lesser one. *State v. Carlson, ante* p. 503, 418 N.W.2d 561 (1988); *State v. Sianouthai, supra; State v. Morrow*, 220 Neb. 247, 369 N.W.2d 89 (1985). Similarly, the mere fact that a defendant's sentence differs from those which have been issued to the coperpetrators in the same court does not make the imposition of defendant's sentence an abuse of discretion. Each defendant is unique; evidence as to each defendant's life, character, and previous conduct may be considered in determining the propriety of the sentence. *State v. Patrick, ante* p. 498, 418 N.W.2d 253 (1988); *State v. Costanzo, ante* p. 616, 419 N.W.2d 156 (1988).

There is nothing in the record to suggest the sentence originally imposed in any sense constituted an abuse of discretion. That being so, and that sentence being within statutory limits, the sentence of imprisonment for a period of 5 years as originally imposed is affirmed. *State v. Costanzo, supra.*

AFFIRMED IN PART, AND IN PART VACATED AND SET ASIDE.

STATE OF NEBRASKA, APPELLEE, V. ROBERT MICHAEL FLYING HAWK, APPELLANT.

420 N.W.2d 323

Filed March 18, 1988. No. 87-556.

1. **Sentences: Time: Appeal and Error.** The filing of a motion to reconsider a sentence, made pursuant to the provisions of Neb. Rev. Stat. § 29-2308.01(1) (Cum. Supp. 1986), does not affect the time within which a notice of appeal must be filed under the provisions of Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 1986).
2. **Jurisdiction: Time: Appeal and Error.** The notice of appeal required by Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 1986) is mandatory and jurisdictional and must be filed within the time required by statute; where such notice of appeal is not filed within 30 days from the entry of the judgment, decree, or final order appealed from, as required by § 25-1912(1), this court obtains no jurisdiction to hear the appeal, and the appeal must be dismissed.

Appeal from the District Court for Sheridan County: PAUL D. EMPSON, Judge. Appeal dismissed.

James R. Wefso, for appellant.

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

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

CAPORALE, J.

Defendant, Robert Michael Flying Hawk, pled guilty to a charge of attempted burglary, a violation of Neb. Rev. Stat. §§ 28-201 and 28-507 (Reissue 1985), was so adjudged, and was thereafter sentenced to imprisonment for a period of 30 months and ordered to pay restitution in the amount of $901.10. More than 30 days later, he, without having previously filed a motion for new trial, filed a notice of appeal to this court. Defendant thereafter filed in the district court a motion seeking reconsideration of his sentence. Lacking jurisdiction, we dismiss.

Defendant entered his plea on March 26, 1987. On May 5, 1987, the district court sentenced defendant as aforesaid. On June 8, defendant filed a notice of appeal to this court. On August 10, 1987, defendant filed in the district court a motion asking that court to reconsider the sentence it had imposed. The

motion was denied on August 25. The record contains no notice of appeal from that order of denial, and defendant confesses that no such notice has been filed.

Neb. Rev. Stat. § 25-1912 (Cum. Supp. 1986) provides in relevant part as follows:

> (1) Except as provided in section 29-2308.01, the proceedings to obtain a reversal, vacation, or modification of judgments and decrees rendered or final orders made by the district court, including judgments and sentences upon convictions for felonies and misdemeanors under the criminal code, shall be by filing in the office of the clerk of the district court in which such judgment, decree, or final order was rendered, within thirty days after the rendition of such judgment or decree or the making of such final order, a notice of intention to prosecute such appeal signed by the appellant or appellants or his, her, or their attorney of record and, except as otherwise provided in sections 29-2306 and 48-641, by depositing with the clerk of the district court the docket fee required by law in appeals to the Supreme Court.

Neb. Rev. Stat. § 29-2306 (Reissue 1985) deals with waiver of docket fees for cause, and Neb. Rev. Stat. § 48-641 (Reissue 1984) deals with appeals under this state's employment security law; neither provision need concern us here.

Defendant urges that "the 30 day Notice of Appeal requirement does not apply to the Notice of Appeal of Sentence in his case because he eventually filed a Motion to Reconsider Sentence within 120 days of his original sentencing," pursuant to the provisions of Neb. Rev. Stat. § 29-2308.01 (Cum. Supp. 1986). Reply brief for Appellant at 6. As noted in *State v. Spotted Elk, ante* p. 869, 875-76, 420 N.W.2d 707, 712 (1988):

> It follows, therefore, that the enactment of § 29-2308.01 in no way alters the jurisdictional significance of the act of filing a notice of appeal. Under subsection (3) of § 25-1912, filing a notice of appeal, together with payment of fees unless fees are waived for cause, removes jurisdiction of the cause from the district

court to this court, "and no step other than the filing of such notice of appeal and the depositing of such docket fee shall be deemed jurisdictional." See, e.g., *State v. Reed*, 226 Neb. 575, 412 N.W.2d 848 (1987); *In re Interest of C.M.H. and M.S.H., ante* p. 446, 418 N.W.2d 226 (1988); *State v. Kelly*, 200 Neb. 276, 263 N.W.2d 457 (1978). Once jurisdiction has been removed to this court, the district court has no jurisdiction over the cause unless and until remand by this court. *State v. Battershaw*, 220 Neb. 661, 371 N.W.2d 313 (1985); *State v. Ditter*, 209 Neb. 452, 308 N.W.2d 350 (1981).

As noted previously in this opinion, defendant was sentenced on May 5, 1987; it is from that judgment that defendant attempted to appeal. *State v. Spotted Elk, supra; In re Interest of Wolkow*, 206 Neb. 512, 293 N.W.2d 851 (1980). The notice of appeal filed June 8, 1987, is beyond the 30-day limit found in § 25-1912(1). It is mandatory and jurisdictional that the notice of appeal be filed within the time required by statute; where a notice of appeal is not filed within 30 days from the entry of the final order appealed from, as required by § 25-1912(1), this court obtains no jurisdiction to hear the appeal, and the appeal must be dismissed. *In re Interest of C.M.H. and M.S.H., ante* p. 446, 418 N.W.2d 226 (1988); *State v. Reed*, 226 Neb. 575, 412 N.W.2d 848 (1987). See, also, *State v. Spotted Elk, supra.*

Accordingly, this purported appeal must be, and hereby is, dismissed.

APPEAL DISMISSED.

DONALD KALHORN, APPELLEE, V. CITY OF BELLEVUE, APPELLANT.
420 N.W.2d 713

Filed March 18, 1988. No. 87-576.

1. **Workers' Compensation: Appeal and Error.** The findings of fact of the Nebraska Workers' Compensation Court have the same force and effect as a jury verdict in a civil case and will not be set aside where they are supported by credible evidence and are not clearly wrong.

2. **Workers' Compensation: Words and Phrases.** An intraocular lens implant is treated like contact lenses or glasses for purposes of awarding benefits under Nebraska's workers' compensation law; therefore, benefits are awarded based on the uncorrected visual acuity prior to implantation of the lens.
3. **Workers' Compensation: Appeal and Error.** The Nebraska Workers' Compensation Court three-judge panel's determination as to an employee's ability to return to the work in which he was previously skilled is a factual question which will not be disturbed on appeal to this court unless clearly wrong.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

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

Michael G. Goodman of Matthews & Cannon, P.C., for appellee.

HASTINGS, C.J., WHITE, SHANAHAN, and FAHRNBRUCH, JJ., and BLUE, D.J.

FAHRNBRUCH, J.

This is a case of first impression to determine whether a worker whose eye was damaged in a work-related accident should be compensated on the basis of his condition before or after the natural lens was replaced by a synthetic lens.

The employer, City of Bellevue, defendant, appeals an award on rehearing by a three-judge panel of the Nebraska Workers' Compensation Court granting benefits on the basis of the worker's condition before a synthetic lens was implanted.

The compensation court found that Donald Kalhorn, plaintiff-appellee, sustained a 100-percent permanent partial disability to his left eye, entitling him to benefits of $160.60 per week for 20 2/7 weeks of temporary total disability, and a like sum per week for an additional 125 weeks for permanent partial disability, together with vocational rehabilitation benefits. We affirm.

The City of Bellevue claims that the Nebraska Workers' Compensation Court erred in three particulars: (1) in disregarding the permanent restoration of Kalhorn's visual acuity to 20/40 without the use of eyeglasses or contact lenses following implantation of a synthetic lens; (2) in failing to find that the City of Bellevue was entitled to reimbursement of

$5,864.30 for overpayment of permanent partial disability benefits; and (3) in finding Kalhorn was entitled to vocational rehabilitation benefits.

Our review of this case is governed by the following well-established legal principle. The findings of fact of the Workers' Compensation Court have the same force and effect as a jury verdict in a civil case and will not be set aside where they are supported by credible evidence and are not clearly wrong. See, Neb. Rev. Stat. § 48-185 (Cum. Supp. 1986); *Kingslan v. Jensen Tire Co., ante* p. 294, 417 N.W.2d 164 (1987); *Kleiva v. Paradise Landscapes, ante* p. 80, 416 N.W.2d 21 (1987).

The parties agree that on August 24, 1984, Kalhorn sustained an injury to his left eye as a result of an accident arising out of and in the course of his employment with the City of Bellevue. At the time of his injury, Kalhorn was employed as a maintenance mechanic, earning an average weekly wage of $240.90.

Prior to the accident, Kalhorn used no devices to correct his vision. Kalhorn's uncorrected visual acuity in his left eye decreased to 20/200 as a result of the accident.

When a cataract developed which was severe enough for removal, his initial treating physician recommended that Kalhorn consult a specialist. Dr. John J. Fitzpatrick, the specialist, recommended that Kalhorn undergo surgery, have the damaged eye's natural lens removed, and replace it with a synthetic intraocular lens. Without surgery, Kalhorn's cataract would have completely opacified the natural lens, resulting in Kalhorn's having only perception of light in the left eye, Dr. Fitzpatrick testified. The intraocular lens implantation was performed on September 6, 1985.

Kalhorn's corrected left eye visual acuity improved to 20/40 following the implant and two laser surgeries. The compensation court found that Kalhorn's left eye disability was reduced to 23.5 percent by the lens implant and followup treatments. The City of Bellevue claims that Kalhorn should have been awarded benefits on the 23.5-percent disability, rather than on a 100-percent uncorrected disability.

This case is similar to the Ohio case of *State, ex rel. Kroger, v.*

Stover, 31 Ohio St. 3d 229, 510 N.E.2d 356 (1987). There, the employee, Stover, sustained severe burns to multiple parts of his body as a result of ammonia exposure in the course of his employment. His injuries included corneal burns to both eyes. The Ohio Industrial Commission refused to consider the improvement of Stover's vision by virtue of corneal transplants. The commission reasoned that " 'surgical repair of vision is "correction". . . and not taken into account in making an award . . . .' " *Id.* at 233, 510 N.E.2d at 360. The intermediate Ohio Court of Appeals held that glasses, contact lenses, and corneal transplants are all means by which vision is corrected.

Stover's employer argued that there is a distinction between corneal transplants and optical prostheses, such as eyeglasses or contact lenses. The Ohio Supreme Court stated, "Such a distinction could be made and presents a close case of first impression for this court. To make the distinction [the employer] asks would require us to find that a corneal transplant is not merely corrective, but restores vision permanently. We decline to accept that position." *Id.* at 233-34, 510 N.E.2d at 360.

The Ohio Supreme Court acknowledged that medical technology advances might, at some future time, permit a conclusion that a corneal transplant eliminates the loss (as, for example, the resetting of broken bones could). "But, at the present and on this record, a corneal transplant is no more than a correction to lost vision." *Id.* at 234, 510 N.E.2d at 361.

The Ohio highest court held that "the improvement of vision resulting from a corneal transplant is a correction to vision and, thus, shall not, on the current state of the medical art, be taken into consideration in determining the percentage of vision actually lost . . . ." *Id.*

Nebraska's Supreme Court has not heretofore addressed the issue of how to compensate correction by an intraocular lens implant, as opposed to compensation for external correction of vision with eyeglasses and contact lenses. The first Nebraska case addressing a similar issue of compensation for loss of vision of an eye is *Otoe Food Products Co. v. Cruickshank*, 141 Neb. 298, 3 N.W.2d 452 (1942). See, also, *Gruber v.*

Stickelman, 149 Neb. 627, 31 N.W.2d 753 (1948); *Bolen v. Buller*, 143 Neb. 237, 9 N.W.2d 204 (1943). The specific issue in *Otoe* was whether, in determining loss of vision, restoration or correction by use of glasses should be considered under the compensation laws.

This court in *Otoe* held that permanent disability to an eye should be awarded on the basis of uncorrected vision. Across the nation, "the usual holding is that loss of use should be judged on the basis of uncorrected vision . . . and that therefore loss of use will not be ruled out because some correction is achieved" through eyeglasses or contact lenses. 2 A. Larson, The Law of Workmen's Compensation § 58.13(f) at 10-344.23 (1987).

In its *Otoe* opinion, this court stated:

> In an analysis of Section 48-121, Comp. St. 1929, we see nothing in the act indicating an intention on the part of the legislature that disability after correction should be the basis for awarding compensation, where there has been an eye injury. If such had been the legislative intent, the act would no doubt have been drafted to so provide. We should not, by construction, put into a law provisions which it does not contain, nor read into it a meaning not intended by the legislature. If the act is faulty, the correction should be made by the legislature and not by the court. We see no more logic in holding that the legislature intended to base disability in an eye case on the condition of the eye after correction than in a leg or arm case where compensation should be awarded on the extent of disability after the attachment of a brace or other appliance. The fact that glasses are required to restore vision is evidence of the permanency of the injury, and whether artificial means may partially or even wholly restore sight, it nevertheless cannot obliterate the effect of the accident causing injury.

141 Neb. at 305, 3 N.W.2d at 455-56.

The applicable portion of the workers' compensation law regarding loss of an eye has not been materially altered since the *Otoe* case. Neb. Rev. Stat. § 48-121(3) (Reissue 1984).

In this case, we follow the *Otoe* rule that disability benefits

should be awarded based on uncorrected vision. That is because the evidence demonstrates significant difficulties with Kalhorn's intraocular lens implant and because there is no evidence that such intraocular lenses will be risk-free in the future. Synthetic intraocular lenses are made of the same type of plastic material as are contact lenses. Kalhorn's synthetic lens, just like a contact lens, was specially prepared for his left eye, but is expected to be a permanent replacement lens. The evidence shows that unlike a human lens, the plastic lens is monofocused, meaning that it focuses only at one distance. A human lens has the capability of changing its focus. The human lens differs from a plastic lens because the human lens has some ability to filter out light. The implant does not have any filtering powers. Therefore, the eye may become sensitive to bright light, according to expert testimony.

Prior to the implant surgery, Kalhorn was required to sign a consent form which set forth the risks involved with the lens implant. Dr. Fitzpatrick confirmed that the consent form generally describes the nature of the implant operation, its possible benefits, and its possible side effects. Significantly, the consent form states that the long-term effect of a lens implantation is not known at the present time, nor is it known how long the eye can tolerate an intraocular lens implant. Some of the complications listed on the consent form are: infection, retinal detachment, corneal edema, edema of the macula, hemorrhage inside the eye, iris atrophy, glaucoma, and dislocation of the implant.

Dr. Fitzpatrick testified that the purpose of eyeglasses and contact lenses is to refocus light rays properly onto the retina. This is called corrected vision. In Dr. Fitzpatrick's opinion, there is no distinction between the function of a contact lens or eyeglass lens and that of Kalhorn's plastic lens implant.

Before the three-judge panel, Kalhorn testified to ongoing problems with his left eye. He stated that the vision in his left eye was still blurry; that he had difficulty seeing things up close; that heavy vibrations, such as working with a jackhammer, resulted in severe headaches; that he had difficulty looking at bright lights and with glare; that it took a longer time for his eyes to adjust to a darker environment; and that his left eye

vision was "like looking through a fog, a room full of smoke." Kalhorn said his eye problem prevented him from welding, using abrasive tools, using a needle gun, and using paint strippers because of the airborne particles produced by these pieces of equipment.

Dr. Fitzpatrick confirmed that Kalhorn's left eye is now more sensitive than a normal eye to changes in temperature; to wind, light, dust, pollen, airborne-type particles, and heavy vibrations; and possibly to fumes from chemicals.

Based upon the record, because of Kalhorn's ongoing problems and because of the risk of future problems arising from the implant surgery, the award to him by the compensation court is not clearly wrong. We recognize, as did the Ohio Supreme Court in *State, ex rel. Kroger, v. Stover*, 31 Ohio St. 3d 229, 510 N.E.2d 356 (1987), that medical technology may advance to where an intraocular lens implant eliminates the vision loss without difficulties or future risk. The record in this case does not reflect such advancement at this time. Based upon the record, at this time the implant cannot be considered as any more than a correction.

In resolving this case, we have not overlooked the case of *Lee Connell Construction Company v. Swann*, 254 Ga. 121, 327 S.E.2d 222 (1985). There, in a split decision, Georgia's Supreme Court held that an award for loss of vision should be based upon corrected vision after a lens implant. The opinion was based upon the "facts of the case," which were not recited in the opinion. Without citing authority for the proposition or defining them, the opinion was also based upon "advances in medical science." *Id.* at 121, 327 S.E.2d at 223. Because the facts of *Lee Connell* are not recited and because the "advances in medical science" are not attributed to recognized scientific authority, the *Lee Connell* opinion is not persuasive.

As a result of this court's affirming the award of 100 percent permanent partial disability benefits, the City of Bellevue's second assignment of error, regarding overpayment for benefits, has no merit.

The defendant's third assignment of error, addressing the award of vocational rehabilitation benefits, is also without merit. The compensation court panel found that "[t]here is a

reasonable probability that with appropriate training, rehabilitation or education, the plaintiff may be rehabilitated to the extent that he can significantly increase his earning capacity . . . ."

The compensation court three-judge panel's determination as to an employee's ability to return to the work in which he was previously skilled is a factual question which will not be disturbed on appeal to this court unless clearly wrong. *Nice v. IBP, Inc.*, 226 Neb. 538, 412 N.W.2d 477 (1987); *Hewson v. Stephenson*, 225 Neb. 254, 404 N.W.2d 35 (1987); *McGee v. Panhandle Technical Sys.*, 223 Neb. 56, 387 N.W.2d 709 (1986). The compensation court determined that the plaintiff was entitled to rehabilitation services, as provided in Neb. Rev. Stat. § 48-162.01 (Reissue 1984). We agree.

Kalhorn has an 11th grade education. He was employed by Peter Pan Bakery for 10 years and then at Wonder Bread Bakery for 2 years. After leaving Wonder Bread, he was a truckdriver for 1 to 1 1/2 years and then self-employed as a siding applicator for 25 years. Kalhorn quit the siding business in 1983 when he was hired by the City of Bellevue as a maintenance mechanic. He worked in the latter capacity until he quit in December of 1986. This was because of his inability to perform some of the jobs that he could perform prior to his injury. Kalhorn testified he was told by his supervisors that because of his injury, he could not perform the job that he was hired to do. He said he was told that he would be better off to "get out." Kalhorn claimed he was given jobs such as raking the yard with a hand rake, pushing a broom, and cleaning engines as a result of his inability to do the jobs for which he was originally hired. Kalhorn felt that he was unable to return to the siding business due to dust from the saw work required. A constant companion would be needed to do the sawing tasks, the plaintiff testified. Kalhorn declared he would not even try to return to a previous job as an over-the-road trucker because of the glare and light sensitivity in his eye. He did not feel that he could safely handle a truck on the road.

The compensation court was not clearly wrong in determining that Kalhorn was unable to return to work in which he was previously skilled. The order of the Workers'

Compensation Court is correct in every respect and is affirmed.

Because the City of Bellevue has failed to reduce the award after rehearing, Kalhorn is allowed $2,000 for services of his attorney in this court. See Neb. Rev. Stat. § 48-125 (Cum. Supp. 1986).

AFFIRMED.

IN RE INTEREST OF A.M.K., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. R.W.K. AND E.E.K., APPELLANTS.

420 N.W.2d 718

Filed March 18, 1988. No. 87-610.

1. **Courts: Guardians Ad Litem.** Every court has inherent power to appoint a guardian ad litem to represent an incapacitated person in that court.
2. **Guardians Ad Litem: Service of Process: Notice.** Although Neb. Rev. Stat. § 25-508.01(3) (Reissue 1985) requires that where summons is served on an incapacitated person, notice of such service shall be given to the guardian, it also provides that failure to give such notice will not affect the validity of the service.
3. **Parental Rights.** Where a parent is unable to discharge parental responsibilities because of mental deficiency, and where there are reasonable grounds to believe that such condition will continue for a prolonged and indeterminate period, the parental rights may be terminated when such action is found to be in the best interests of the child or children.

Appeal from the County Court for Richardson County: THOMAS J. GIST, Judge. Affirmed.

Louie M. Ligouri, for appellants.

Douglas E. Merz, Richardson County Attorney, and Curtis L. Maschman, guardian ad litem, for appellee.

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

HASTINGS, C.J.

This is an appeal by the parents of A.M.K., seeking to reverse an order of the county court, juvenile division, which terminated their parental rights. The parents insist that the order is not sustained by the evidence.

Both of the parents are of limited intellectual ability; the father is mildly mentally retarded and possibly has an underlying personality disorder, while the mother is in the dull normal to borderline range of intellectual functioning, with an IQ ranging in the low 80s.

Although no question of jurisdiction has been raised, we note the fact that on September 12, 1983, the father appeared in county court with his guardian ad litem, Willis G. Yoesel; it was found that the father was incapacitated, and a guardian, other than the guardian ad litem, was appointed to provide for the care and supervision of the father. The named guardian has not been a party to these termination proceedings. The record does not disclose whether the guardian is still acting. However, both parents have been represented by Willis Yoesel as court-appointed counsel throughout the proceedings in county court. On January 21, 1987, following the filing of the motion to terminate parental rights, Willis Yoesel was appointed as guardian ad litem to represent both parents. The child also had a guardian, who joins with the position of the State. The record does not contain copies of any summons or other process that may have been served; however, the parents appeared at all hearings together with Willis Yoesel.

Every court has inherent power to appoint a guardian ad litem to represent an incapacitated person in that court. *In re Guardianship of Jonas*, 211 Neb. 397, 318 N.W.2d 867 (1982). "If the person to be served [by summons] is an incapacitated person for whom a . . . guardian has been appointed . . . notice of the service shall be given to the . . . guardian . . . . *Failure to give such notice does not affect the validity of the service on the incapacitated person.*" (Emphasis supplied.) Neb. Rev. Stat. § 25-508.01(3) (Reissue 1985).

The minor child, who was born on June 10, 1985, also has special needs. She is handicapped, with both developmental and physical disabilities which require an extraordinary

amount of time and effort on the part of those who care for her. The issue, then, is whether the parents are equipped to handle the special demands placed on them by virtue of their daughter's problems.

Shortly after A.M.K.'s birth, a registered nurse was assigned to supervise her care at home. The appellants cared for their daughter in their home until July 31, 1985, when the nurse noticed that the girl's leg was extremely swollen. The diagnosis was a spiral fracture of the femur. The child was subsequently placed in the care of the Department of Social Services, and a motion to terminate parental rights was filed.

The juvenile court subsequently ordered a reunification plan. As part of this plan, supervised visitations began under the direction of social services. This continued until May 1986, with the goal being to help the parents develop the necessary parenting skills needed to care for their daughter. Additionally, they were to be instructed in how to administer the physical therapy which was needed by their daughter. This therapy would take several hours per day to administer.

The child was returned for an overnight, unsupervised visit with her parents on May 15, 1986. After this visit, red marks were noticed on her chest, and she was again placed in foster care.

The parents were also to attend sessions with a physical therapist so he could teach them how to conduct the physical therapy procedures required by their daughter. The parents attended only two of these sessions, and the mother refused to attempt any of the procedures on her own, later explaining that she was afraid to do so.

The trial court found that although it appeared the appellants had attempted to cooperate and to improve themselves so they would be able to care for their daughter, they had been unable to do so, given their limited abilities and the special care required by their daughter.

Experts testified that the parents' mental deficiencies would be expected to continue indefinitely. There was also testimony to the effect that above-average parenting skills would be needed to properly care for the child. Additionally, a doctor testified that neither parent would be able to adequately

discharge his or her parental responsibilities toward the daughter. The juvenile court ordered that it would be in the best interests of the child to terminate the appellants' parental rights.

Neb. Rev. Stat. § 43-292(5) (Reissue 1984) provides that the court may terminate parental rights when it is in the best interests of the child to do so and "[t]he parents are unable to discharge parental responsibilities because of mental illness or mental deficiency and there are reasonable grounds to believe that such condition will continue for a prolonged indeterminate period."

There was substantial evidence that the parents' mental deficiencies would be continued for a prolonged and indeterminate period of time. There does not seem to be any substantial issue regarding that fact. The parents' appeal, rather, hinges on whether these deficiencies were sufficient to cause an inability to care for their daughter. The testimony of Dr. Collamer was that their deficiencies would cause such an inability. Furthermore, the physical therapist stated that the child would require physical therapy for the rest of her life and that it is needed daily at this point. She will always need aid from someone to accomplish this therapy. The physical therapist testified that neither parent would be able to provide this assistance. In addition, there was evidence that on at least two occasions the child suffered injuries while under her parents' care, one of these injuries being very serious.

In the appellants' favor, they had shown some improvement in their parenting skills. The child was apparently always clean and dry while in their care, and there was no evidence that the child ever went without food or shelter.

In *In re Interest of Wanek*, 212 Neb. 394, 322 N.W.2d 803 (1982), this court terminated the parental rights of a mother who was mildly retarded and functionally illiterate. The mother also had a severe alcohol problem. The evidence showed that she was unable, without daily supervision, to care for the needs of her children, one of whom was borderline retarded. The court concerned itself with the best interests of the children, finding that overwhelming evidence showed that, unsupervised, neither parent could ever be responsible for the

care of the children because of mental or psychological deficiencies. The court stated:

> We have held before that where a parent is unable to discharge parental responsibilities because of mental deficiency, and where there are reasonable grounds to believe that such condition will continue for a prolonged and indeterminate period, the parental rights may be terminated when such action is found to be in the best interests of the child or children.

Id. at 398, 322 N.W.2d at 806. This position was reiterated by the court in *In re Interest of Fant*, 214 Neb. 692, 335 N.W.2d 314 (1983), in which the appellant had a borderline personality disorder and a severe mental disorder which rendered her incapable of effectively caring for her children.

Evidently, most of the cases decided under § 43-292(5) deal with a mental illness, rather than low intelligence. For instance, in *In re Interest of B.F.R.*, 217 Neb. 94, 348 N.W.2d 125 (1984), the mother suffered from schizophrenia and paranoia, and was able to control her life only in the most minimal sense and only with the help of large amounts of medication. The court found that the child could not "be made to face this uncertainty. His best interests and his future stability require that parental rights be terminated." *Id.* at 96, 348 N.W.2d at 127.

Similarly, in *In re Interest of Farmer*, 210 Neb. 500, 315 N.W.2d 454 (1982), the mother was unable to discharge her parental responsibilities because of schizophrenia. The court held that where the natural parent cannot rehabilitate herself within a reasonable time, the best interests of the child require that a final disposition be made without delay.

Thus, the standard is whether it would be in the best interests of the minor child to terminate the appellants' parental rights. That is, the evidence must show that because of the appellants' mental deficiencies, they are unable, and will be unable for a prolonged and indeterminate period of time, to properly care for their daughter's special needs.

The facts in this case demonstrate an impossible situation, and there is no realistic hope that these parents will ever be able to discharge their parental duties in a manner satisfactory to the best interests of the child.

The judgment of the juvenile court is affirmed.

AFFIRMED.

CAPORALE, J., dissenting.

I must dissent, not only because I have procedural concerns, but because in my view the majority's substantive disposition is legally incorrect.

I first question whether the guardian ad litem appointed for a mentally ill or deficient parent, as required by the provisions of Neb. Rev. Stat. § 43-292 (Reissue 1984), can properly be the same individual as the one serving in the capacity of legal counsel to the parent. In *Orr v. Knowles*, 215 Neb. 49, 337 N.W.2d 699 (1983), we, in the context of considering the functions of a guardian ad litem for a minor seeking an abortion, vis-a-vis the functions of one serving as legal counsel to the minor, held that the duties of a guardian ad litem are not coextensive with those of legal counsel. The *Orr* opinion explained that it is not an attorney's role, when acting as legal counsel, to independently determine what is in his or her client's best interests but, rather, to act in accordance with the client's wishes, provided those wishes are within an attorney's ethical obligations; a guardian ad litem, on the other hand, may determine his or her ward's best interests without reference to the ward's wishes.

Just as an independent investigation might reveal a minor's wish to have an abortion not to be in her best interests, so, too, might an independent investigation reveal a mentally ill or deficient parent's wish to preserve his or her status as a parent not to be in his or her best interests. The question of such a parent's best interests is different than what is in the best interests of his or her child, the only interest which the juvenile court may adjudicate.

There may be some, perhaps many, who would opine that providing a mentally ill or deficient parent with a guardian ad litem as well as a separate attorney is unnecessary and a needless expenditure of funds, public or otherwise. The fact remains, however, that the question is one of public policy which the Legislature and our law seem to have decided. I am not unmindful that, ordinarily, when a guardian ad litem is to be appointed for a juvenile under Neb. Rev. Stat. § 43-272

(Reissue 1984), the guardian is to be an attorney and that such appointee is to act as his or her own legal counsel, as well as that of the juvenile. Even that statute recognizes, however, that a particular case may present special circumstances requiring the guardian ad litem or the juvenile, or both, to have separate counsel. Nor does *Chalupa v. Chalupa*, 220 Neb. 704, 371 N.W.2d 706 (1985), which holds that in the usual dissolution case adequate legal representation of the competing interests of the parties makes unnecessary the extra expense and delay of appointing separate counsel to represent the interests of the children, answer the question which concerns me. While *Chalupa* seems to assume that legal counsel and a guardian ad litem perform the same function, it neither analyzes the issue nor refers to the earlier holding in *Orr v. Knowles, supra.*

Having pointed out the confusion that surrounds the responsibilities, obligations, and duties of attorneys who permit themselves to be put in the position of attempting to serve potentially conflicting interests as both legal counsel and guardians ad litem, a confusion which may arise from the effort to turn courts of law into social services agencies, I turn my attention to the substantive issues presented by this case and leave the procedural concerns for resolution in a case which squarely presents and briefs the procedural problem.

The subject parents are both 38 years old. A.M.K. was born on June 10, 1985. Sadly, the child suffers from "developmental delays, and spasticity." She also exhibits signs of microcephaly (an abnormal smallness of the head, usually associated with mental retardation), seizure disorders, and cerebral palsy. In the opinion of Dr. William Collamer, a psychologist who served as the State's expert witness in the juvenile court, the child has some "physical problems [and] . . . developmental delays in terms of cognitive skills and intellectual functions." Nevertheless, the child generally presents the appearance of a healthy, attractive, and happy baby.

The father has been described as "mildly mentally retarded." Yet, he has found seasonal or periodic employment as a farm laborer. The mother has a speech impediment and has been described as "between the dull normal to borderline range of intellectual functioning," having scored between 81 and 85 in

an intelligence test. Collamer testified that persons with intelligence quotient test scores in the range of 80 to 90 would be considered "dull normal." In the population as a whole, one would "expect one half of the scores to be above 100, and one half of the scores to be below 100." The meaning of these numbers is further clarified by Collamer's testimony that "probably" 76 percent of the population falls in the 85 to 115 range of scores and his admission that the ability to be a parent cannot be determined from "an intelligence score, you have to look at all of the capabilities."

The father has an academic achievement comparable to that of the typical fourth grade student, while the mother has an academic achievement comparable to that of the typical eighth grade student. The record clearly discloses that the mother has adequate academic ability to write thoughtful and reasonably well-written letters protesting her forced separation from her daughter.

Apparently owing to the child's developmental difficulties, she came to the attention of this state's social services providers on the day after her birth. At that time, specialists began evaluating and treating the child, and the parents were furnished with a number of services. The parents have taken parenting classes, have participated in home-based family therapy, have undergone psychological evaluations, and have been exposed to a variety of family support workers, including some who worked with the parents in their home.

According to David Nachtigal, a physical therapist who has worked with the child since her early days, correcting her disabilities will require ongoing physical therapy into adulthood. Among other things, the child must presently be positioned and maneuvered so that she may learn to use her hands and legs. The nature of the therapy required will change at frequent, perhaps weekly, intervals as the child matures.

Nachtigal spent only two 1-hour sessions with the parents to teach them what had to be done. Janice Sanchez, a state protective services caseworker responsible for the child's case, testified she did not know why the parents did not spend more time in the therapy sessions with their daughter. The mother testified to the effect that neither she nor the father realized that

they were invited to attend further sessions. On both days that the parents met with Nachtigal, the father performed exercises with his daughter under Nachtigal's direction, but the mother preferred to just observe. Nachtigal also testified that "[i]t definitely would take more than two sessions to be able to learn this type of activity" and that the father was not yet able to perform the techniques to Nachtigal's satisfaction, but that at least he did try. The mother, who expressed confidence in her ability to learn the exercises, given training, indicated she did not participate in exercising the child because she did not fully understand the exercises at that time and wanted to avoid doing anything that might injure the child. The record reveals the exercises were very complex and require placing the child in weight-bearing positions.

The child came to the attention of the juvenile court and was removed from the parental home and placed in foster care on July 31, 1985, when, at age 7 weeks, she suffered a spiral fracture of the femur. The record does not tell us how the injury occurred, nor what its manifestations were. The record does, however, reflect that while in the parents' possession and care, the child "was clean and dry. They [the parents] were a little rough in handling the child, and had to be reminded several times to support her head." They were able to feed the child properly and maintained their home in reasonably good order.

In the early period of foster care the child was transported to the parents' home by Betsy Mack, an employee of the state Department of Social Services, who supervised the child's weekly visit with her parents and instructed the parents in parenting skills. In Mack's words,

> I didn't actually do very many things myself; I was more observing; a little bit of showing how; but, it was pretty much they did the things, did what needed to be done. We worked on feeding; she was hard to feed, she would choke, just on a bottle, even; it was — you'd have to be very careful feeding her a bottle or she would choke. Also, I tried to teach just how persistive they would have to be doing this, and consistent to just do the same things over and over.

During these visits, the mother would bathe her daughter and

usually took the responsibility for hand-feeding the child her solid baby food. Each parent took turns bottle-feeding the child. Mack observed that the parents seemed apprehensive about engaging in the child's exercise routines and did not do so frequently. However, Mack herself seems to have experienced some apprehension regarding her own ability to engage the child in her exercises, noting, "Well, really, in three visits [with the physical therapist] I prob- — wasn't knowledgeable enough to have done it on a continual basis; I would of had to have learned a lot more."

At one point the father had to be told not to give his daughter her medication twice in one day, rather than the prescribed single administration, in the hope that "this way she could get well quicker."

Following her first unsupervised overnight visit with her parents, the child was returned to her foster family at 8:30 in the morning on May 16, 1986. At 10:30 a.m., red marks were noticed on the child's chest. The child was examined by a physician, who concluded the marks were not signs of any serious injury. The mother noted that she had taken the child outside in a stroller twice during the day of the unsupervised home visit, and speculated that perhaps the red marks resulted from the child's being bounced about a bit while strapped in a baby stroller for a walk over an uneven sidewalk. The photographs contained in the record depict marks which are consistent with the mother's speculation as to their cause. Nonetheless, because of these red marks, the parents were allowed no further unsupervised visits with their daughter and only drastically curtailed supervised visits.

The record reflects the mother recognizes that she needs help to take care of her child. Collamer and a Dr. Robert Heins, a psychiatrist, are of the opinion that the mother is not competent to care for the child by herself on a daily basis, although Heins states no independent basis for his opinion apart from one "session with her today." The record demonstrates, however, that both the mother's and father's parental skills have shown consistent improvement.

The record also demonstrates that the parents have been consistent and insistent in their desire for more contact with

their daughter and that both parents have cooperated with the Department of Social Services in carrying out their treatment plan.

In an appeal from a judgment terminating parental rights, we are obligated to try the factual questions de novo on the record and reach a conclusion independent of the findings of the trial court but, where evidence is in conflict, consider and may give weight to the trial court's observation of the witnesses and acceptance of one version of the facts rather than another. *In re Interest of L.H., ante* p. 857, 420 N.W.2d 318 (1988); *In re Interest of J.S., A.C., and C.S., ante* p. 251, 417 N.W.2d 147 (1987).

As this court recently observed, the unequivocal language of § 43-292 imposes two requirements before parental rights may be terminated. The evidence must clearly and convincingly establish, first, that there exists a legal ground for terminating parental rights and, second, that such termination is in the child's best interests. *In re Interest of L.H., supra; In re Interest of J.S., A.C., and C.S., supra.*

There is no doubt but that the parents suffer from "mental deficiency and there are reasonable grounds to believe that such condition will continue for a prolonged indeterminate period." § 43-292(5). However, the record does not support a finding that it is for this reason the parents are unable to discharge their parental responsibilities, nor does it establish that termination of the parents' rights to their daughter is in the child's best interests.

With regard to the question of causality, the record clearly demonstrates that the child's special needs are such that even many intellectually gifted parents would not be able, without assistance, to provide the care that the child requires. Specialists will be required to assess the child's ongoing therapy program on a regular and continuing basis. These experts will need to modify the child's therapy as her needs change, and they will then be required to teach these new therapeutic exercise programs to the child's caregivers, whoever they may be. The mere fact that the child's natural parents may learn these exercise programs more slowly than might some other person does not, of itself, provide a basis for terminating their parental

rights. Furthermore, it stretches the imagination to think that even most intellectually gifted parents would have the time to oversee all of the child's inhome therapy by themselves; like the parents, any other homemaker would require outside help to meet the child's special need for daily physical therapy.

Therefore, it cannot be said that the parents' inability to provide for their daughter's needs results from their mental deficiencies; rather, their inability to provide for the child's needs by themselves results from the fact that these needs are special. Our statutes make no provision for termination of parental rights on the basis of a child's special needs.

Furthermore, the record fails to clearly and convincingly establish that termination of her parents' rights will be in the child's best interests. Rather, the reverse is true; the record clearly and convincingly demonstrates that these parents love their daughter and, yet, under circumstances of great stress, recognize their own limitations and are willing to work to overcome them. I do not overlook the fact that there is no explanation for the fracture the child sustained. I suggest, however, that the fact the child sustained a fracture while in her parents' care does not prove the parents to be unfit to retain their legal ties to their daughter. Human experience is replete with examples of children injured while in the possession, care, and control of intelligent, competent, loving, and nurturing parents. Neither is the failure of intelligent, competent, loving, and nurturing parents to recognize a fracture as early as one might wish outside the range of normal human experience. Nor is overmedication in the hope of speeding recovery unknown among otherwise intelligent people. While these occurrences establish that the child is in a situation injurious to her health and thus, under the provisions of Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 1986), present a basis for the juvenile court to assert jurisdiction and place her in foster care, they do not furnish a legal ground for terminating parental rights.

The policy of this state regarding termination of parental rights has been set out in Neb. Rev. Stat. § 43-246 (Cum. Supp. 1986), which provides that the goals of "assur[ing] the rights of all juveniles to care and protection and a stable living environment and to development of their capacities for a

healthy personality, physical well-being, and useful citizenship," are to be pursued through methods which

> separat[e] the juvenile from his or her parent only when necessary for his or her welfare or in the interest of public safety and, when temporary separation is necessary, to consider the developmental needs of the individual juvenile in all placements and to assure every reasonable effort possible to reunite the juvenile and his or her family.

It is not the policy of this state to separate children from their natural parents merely because the parents are "mildly mentally retarded" or the children "developmentally disabled." Rather, it is axiomatic that once there has been the adjudication that a child is a juvenile within the meaning of the act, the foremost purpose or objective of the Nebraska Juvenile Code is promotion and protection of a juvenile's best interests, with preservation of the juvenile's familial relationship with his or her parent(s) where continuation of the parental relationship is proper under the law. *In re Interest of J.S., A.C., and C.S.*, *ante* p. 251, 417 N.W.2d 147 (1987).

Termination of parental rights is permissible when there exists no other reasonable alternative in the best interests of the child and only as a last resort when the basis for such is proved by clear and convincing evidence. *In re Interest of J.S., A.C., and C.S., supra; In re Interest of T.C.*, 226 Neb. 116, 409 N.W.2d 607 (1987). In my view the record does not demonstrate the absence of any reasonable alternative. Quite the contrary, the record demonstrates that the child faces exactly the same alternatives regardless of whether the rights of her parents are terminated; the child will need to be provided intensive special services, most likely at public expense, by specialists both inside and outside her home, for years to come.

Under these circumstances, I cannot conclude it is better for the child to grow up without legal ties to her natural parents, even if those natural parents' human frailties are perhaps somewhat more apparent than most. Certainly, childhood with loving natural parents, even if one cannot live with those parents, is far preferable to childhood without them. Indeed, if a child such as A.M.K. were voluntarily institutionalized by intellectually gifted parents, we would not terminate their

parental rights on the ground they had proved themselves incapable of taking care of the child in their home. In my view the best interests of A.M.K. demand that she travel the path fate has decreed for her, if not in the company, then with the emotional support, of her parents, their own frailties notwithstanding.

I would therefore reverse the judgment of the juvenile court and continue foster care for the child.

SHANAHAN, J., joins in this dissent.

WHITE, J., dissenting in part.

Although I agree with the majority's disposition of this case, I join with that part of the dissent which questions whether a guardian ad litem and legal counsel can be one and the same person in cases adjudicated pursuant to Neb. Rev. Stat. § 43-292(5) (Reissue 1984).

I am of the opinion that our analysis and holding in *Orr v. Knowles*, 215 Neb. 49, 337 N.W.2d 699 (1983), is dispositive of the question. If one compares the societal and individual interests involved in cases of minors seeking abortions with cases where parental rights may be terminated due to a parent's prolonged mental illness or mental deficiency, it seems that the function and necessity of a guardian ad litem in these cases is analogous, if not identical. Therefore, eadem est ratio, eadem est lex (the reason being the same, the law is the same). In both cases the duties of a guardian ad litem are not coextensive with those of legal counsel.

STATE OF NEBRASKA, APPELLANT, V. DIANE L. MONZU, APPELLEE.
420 N.W.2d 726

Filed March 18, 1988. No. 87-1143.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Affirmed.

J. Patrick Kelly, Sarpy County Attorney, and John F. Irwin, for appellant.

Martin J. Kushner of Fiedler, Kushner & Pred, for appellee.

WHITE, J.

This is an appeal to one judge of the Nebraska Supreme Court by the State of Nebraska, pursuant to Neb. Rev. Stat. § 29-824 (Reissue 1985), from an order of the district court for Sarpy County suppressing evidence seized and observations made by witnesses with respect to the defendant, Diane L. Monzu.

The record shows that on May 28, 1987, shortly before 8 a.m., Agent Bernam of the Federal Bureau of Investigation and Deputy DeLaCastro, Deputy Lyle, and Sergeant Davis of the Sarpy County Sheriff's Department went to the residence of William and Diane Monzu to execute an arrest warrant. Although it was not made a part of the record, the warrant apparently named only William Monzu as the subject of the arrest. Agent Bernam knocked three separate times on the door. After the first knock, DeLaCastro observed a female look out a window of the Monzu residence and all of the officers heard what sounded like loud footsteps on a stairway. After the third knock, the door opened on its own, apparently from the force of the knock. As the officers entered the residence, William Monzu was immediately visible and was placed under arrest. Sergeant Davis heard running water coming from the upstairs area and proceeded immediately up the stairway in order to, in his words, "secure the rest of the house." Upon reaching the top of the stairs, Davis observed the defendant, Diane Monzu, in the bathroom, standing over the toilet. Davis went into the bathroom, reached into the toilet, and recovered several plastic baggies containing suspected controlled substances. Davis took

Diane Monzu to the kitchen and then phoned his superior to request a search warrant based upon his observations. Thereafter, a search warrant was issued and executed, and the plastic baggies, along with a number of other items, were seized.

The district court found that although the officers' initial entrance into the residence was reasonable pursuant to the warrant for arrest, the subsequent act of proceeding upstairs was unreasonable and violative of the defendant's rights. The court ruled that the search warrant was tainted by the initial illegal search and seizure and granted the defendant's motion to suppress.

On this appeal, the State's primary argument is that, having entered the Monzu residence lawfully to arrest William Monzu, the officers had the right to conduct a quick and cursory search of the dwelling for the presence of others who might present a security risk.

The State relies on a number of federal circuit court decisions which recognize a "security check" or "protective sweep" exception to the warrant rule and asks this court to adopt the doctrine. See, *United States v. Rich*, 518 F.2d 980 (8th Cir. 1975), *cert. denied* 427 U.S. 907, 96 S. Ct. 3193, 49 L. Ed. 2d 1200 (1976); *United States v. Briddle*, 436 F.2d 4 (8th Cir. 1970), *cert. denied* 401 U.S. 921, 91 S. Ct. 910, 27 L. Ed. 2d 824 (1971); *United States v. Bowdach*, 561 F.2d 1160 (5th Cir. 1977). The following language from *Bowdach, supra* at 1168-69, succinctly states the security check rule:

> [T]he purpose of this cursory search is to check for persons, not things, and the search is only justified when it is necessary to allow the police officers to carry out the arrest without fear of violence. The exigent circumstances presented by this reasonable fear of violence distinguishes this factual setting from *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969) and *Vale v. Louisiana*, 399 U.S. 30, 90 S.Ct. 1969, 26 L.Ed.2d 409 (1970)....

Despite the widespread acceptance of the doctrine in the federal circuit courts, no decision of the U.S. Supreme Court supports the existence of a "security check" exception to the warrant

requirement. See *Vasquez v. United States*, 454 U.S. 975, 102 S. Ct. 528, 70 L. Ed. 2d 396 (1981) (Justice Brennan, with whom Justice White and Justice Marshall join, dissenting from the denial of certiorari).

In the instant case, the district court judge appeared to have the security check rule in mind when he said, at the hearing on the motion to suppress, "[I]t's hard for the Court to understand how the safety of the officer is concerned with running up the stairs. Safety is staying downstairs and not going up that far." The judge clearly did not feel that there was an objective basis for the officer's decision to conduct a security check.

In reviewing the 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. *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987). On these facts it is unnecessary to determine the wisdom of either accepting or rejecting the security check doctrine as it has been fashioned in the federal circuit courts. The trial court's finding that Sergeant Davis acted unreasonably is not clearly erroneous. Thus, even if this court were to accept the security check doctrine, the State's case would fail to meet the burden of proving that the search was warranted. The arrest in this case could have been safely conducted without further intrusion into the home. William Monzu was found near the door as the officers entered and was immediately secured. At that time the reason for the officers' presence ceased and Monzu should have been removed from the premises. The State's first contention is without merit.

The State's second contention is that Sergeant Davis had reason to believe that narcotics were present and in danger of being removed or destroyed, and that in such an exceptional circumstance the warrantless search and seizure was justified. The State, however, cites no objective facts which would have led Davis to believe that narcotics were present and being destroyed. This argument contradicts the State's first argument and also contradicts Sergeant Davis' testimony that the reason for going upstairs was to ensure safety and that his action would have been the same regardless of the fact that he heard water running. It is therefore unnecessary to determine whether the probability of narcotics' being destroyed constitutes an

exceptional circumstance allowing a warrantless search.

The State's final assignment of error is premised on the validity of its first contention and is therefore without merit. The order of the district court is affirmed.

AFFIRMED.

HEADNOTES

Contained in this Volume