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STATE OF NEBRASKA, APPELLEE, V. MICHAEL S. PRICE, APPELLANT.

427 N.W.2d 81

Filed August 5, 1988. No. 87-1022.

1. **Motions to Suppress: Appeal and Error.** In determining the correctness of a trial court's ruling on a motion to suppress, this court will uphold a trial court's findings of fact unless those findings are clearly erroneous.
2. _____: _____. In determining whether a trial court's findings are clearly erroneous, this court recognizes the trial court as the trier of fact and takes into consideration that the trial court has observed the witnesses testifying regarding a motion to suppress.
3. **Criminal Law: Identification Procedures.** In the use of photographic arrays, the determination as to whether the identification procedures were unduly suggestive and conducive to a substantial likelihood of irreparable mistaken identification is to be made by a consideration of the totality of circumstances surrounding the procedures.

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

Thomas M. Kenney, Douglas County Public Defender, and Brian S. Munnelly for appellant.

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

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

GRANT, J.

This is an appeal from the district court for Douglas County. After trial to a jury, the defendant, Michael S. Price, was found guilty of robbery and the use of a firearm to commit a felony. On the robbery charge, the defendant was sentenced to 3 to 7 years' incarceration, and on the firearms charge, the defendant was sentenced to 1 to 3 years, with the sentences to run consecutively. Defendant appeals, contending that the district court committed reversible error in overruling defendant's motion to suppress identification and that the sentence imposed was excessive. We affirm.

The record shows that on the morning of February 23, 1987, the victim, Theresa Tilford, was at her home in Omaha with her 1½-year-old daughter. At approximately 8:30 a.m., Tilford

awoke and opened up the kitchen curtains and shades. She then returned to her bedroom and lay down on her bed. Tilford's daughter was in a separate bedroom.

At approximately 9:15 a.m., Tilford heard a "loud boom" which sounded like someone kicking in the side door of her home. She became frightened and hid under her bedcovers. Through a 1 1/2- to 2-foot opening in the bedroom doorway, Tilford heard the voices of two men who had entered her home. Tilford testified that she recognized one of the voices as that of Ken Cammerer, who was sometimes known as "Roy." She had met Cammerer, who was the boyfriend of one of Tilford's friends. Tilford testified regarding the conversation between the men:

> I heard Ken say, "I'll get the TV, Monk, you get the VCR." And, ah, I heard—it sounded like my TV dropped. And, um, later I saw a hole in my coffee table from something hitting it. And, ah, I heard them say, um, "Roy, do they have any money? What else did you want me to take—these speakers?" And he said, "Yeah, Monk, go ahead and take them out."

The two men then began carrying various items belonging to Tilford out of the house. At that point, Tilford testified, her daughter started to cry. Through the opening of her bedroom door, Tilford saw the defendant standing in the hallway leading into her bedroom. He had a handgun. She next saw the defendant kick her daughter's bedroom door open and heard the defendant say, "Here's the kid. Where's the bitch?" She then heard footsteps, and Cammerer then entered her bedroom and aimed a shotgun at her. The defendant followed Cammerer into her bedroom and stood next to Cammerer. Tilford testified that she was able to observe the defendant's face for approximately 30 to 45 seconds. She pleaded with the men not to hurt her, and Cammerer warned her that if she called the police, he would "come back and blow your ------- head off."

After the warning, the two men then left her home and drove away, taking with them Tilford's television set, VCR, cassette player, and stereo speakers. Tilford saw the car leave with her possessions sticking out of the car trunk. Tilford then called the police and informed them that she had been robbed. When the

police arrived, she gave them the name of Ken Cammerer as one of the suspects and later described the second suspect as "a light male in his thirties, six foot, 190 pounds, dark hair with a full beard, clothing would have been flannel shirt . . . ." Officer Hunt requested Tilford to talk to some of her friends to determine "who would be running with Ken Cammerer as a possible suspect."

On February 24, 1987, Tilford identified Cammerer as the individual depicted in the second photograph of an eight-person photographic lineup prepared by Officer Hunt and shown to Tilford. At some time during the next week, Tilford called Officer Hunt and gave him the name of the second suspect, the defendant, Michael Price. Tilford had heard that Cammerer had a friend nicknamed "Monk" whose real name was Michael Price. In police files, Officer Hunt found a picture of a Michael Price who fit the physical description given to him by Tilford. The officer prepared a second eight-person photographic array, which was shown to Tilford on March 2, 1987. Tilford identified the defendant as the individual depicted in the second position on the photographic array. As a result of the identification, a warrant was issued, and the defendant was arrested on April 3, 1987.

In his first assignment of error, defendant contends that the district court committed reversible error in overruling the defendant's motion to suppress identification testimony of the victim. Defendant argues that the positioning of the photographs, and not any independent recall, caused Tilford to identify defendant and that, as a result, Tilford's later in-court identification during trial was unreliable.

In determining the correctness of a trial court's ruling on a motion to suppress, this court will uphold a trial court's findings of fact unless those findings are clearly erroneous. *State v. Holman, ante* p. 57, 424 N.W.2d 627 (1988); *State v. Rowe*, 228 Neb. 663, 423 N.W.2d 782 (1988). In determining whether a trial court's findings are clearly erroneous, this court recognizes the trial court as the trier of fact and takes into consideration that the trial court has observed the witnesses testifying regarding such motion to suppress. *State v. Hayes, ante* p. 53, 424 N.W.2d 624 (1988); *State v. Boysaw*, 228 Neb.

316, 422 N.W.2d 346 (1988).

The record shows that, prior to trial, the defendant filed a motion to suppress the testimony identifying the defendant, claiming that the procedures used to conduct the lineup were unduly suggestive and that any identification testimony "would be tainted by the improper and suggestive pretrial identification procedures employed." At the suppression hearing, held on June 29, 1987, Tilford testified as to the identification procedures used by Officer Hunt for the photographic array on March 2. Tilford testified that Officer Hunt instructed her that he wanted her to look at a series of eight photographs to see "if any one of these guys was him." Officer Hunt testified that Tilford looked at all photographs and identified the defendant "[a]lmost immediately."

With regard to the use of photographic arrays, we have held that the determination as to whether the identification procedures were unduly suggestive and conducive to a substantial likelihood of irreparable mistaken identification is to be made by a consideration of the totality of circumstances surrounding the procedures. *State v. Swoopes*, 223 Neb. 914, 395 N.W.2d 500 (1986). In *Swoopes*, we held at 918, 395 N.W.2d at 504: "It seems to the court relatively clear that an array of five photographs is sufficient to constitute a fair and adequate array when attempting to identify a single perpetrator."

Our review of the record fails to support defendant's contention that the identical positioning of Cammerer and the defendant in the different photographic arrays was unduly suggestive. There is nothing in the record to indicate that the positioning of the photographs was other than a mere coincidence. Officer Hunt testified that he chose photographs from the police file from "the same age group, color of hair, facial hair, the roundness of the face, if they're heavy." Our examination of the eight photographs shows that the individuals depicted in the photographs had dark hair and beards and appeared to be of the same age group, and that the array very accurately portrayed persons of a general group very similar to defendant in appearance. When confronted with the defendant's photograph, Officer Hunt testified, Tilford

became very agitated and exclaimed, "This is the guy, oh my God." Defendant's contention that the photographic lineup was unduly suggestive is without merit.

Even if the array had been improper, Tilford's identification of the defendant at trial was completely supported, independently, by Tilford's observations at the time of the robbery. In that connection, the totality of circumstances supports the finding of the trial court that the identification was based on her observation of the defendant during the robbery and was the basis for the subsequent identification. See *State v. Richard*, 228 Neb. 872, 424 N.W.2d 859 (1988). Tilford testified at trial that she "won't forget [defendant's] face." She described how the defendant appeared different at trial because "he doesn't have a beard today and his hair isn't really dirty and straggly as it was." The in-court identification was based independently on Tilford's ability to observe the defendant during the commission of the crime.

As the identification procedures used in the present case were not unduly suggestive, and Tilford's identification of the defendant at trial was based on independent recall, defendant's first assignment of error is without merit.

In defendant's second assignment of error, he contends that the sentence imposed was excessive. The defendant was found guilty of robbery, pursuant to Neb. Rev. Stat. § 28-324 (Reissue 1985). Robbery is a Class II felony, punishable by a minimum 1 year's imprisonment to a maximum 50 years' imprisonment. The defendant was also found guilty of the use of a firearm to commit a felony, pursuant to Neb. Rev. Stat. § 28-1205 (Reissue 1985), which is a Class III felony, punishable by a minimum 1 year's imprisonment to a maximum 20 years' imprisonment. The defendant was sentenced to 3 to 7 years on the robbery charge and 1 to 3 years on the firearms charge, with the sentences to be served consecutively.

The sentences imposed were well within the statutory limits. It is settled that a sentence imposed within the limits prescribed by statute will not be set aside as excessive absent an abuse of discretion on the part of the sentencing judge. *State v. Ladehoff, ante* p. 111, 425 N.W.2d 352 (1988); *State v. Clark*, 228 Neb. 599, 423 N.W.2d 471 (1988). The trial court did

not abuse its discretion in imposing the sentence it did. Defendant's second assignment of error is without merit.

The judgment of the district court is affirmed.

AFFIRMED.

ROBERT W. FISBECK, APPELLANT, V. SCHERBARTH, INC., A NEBRASKA CORPORATION, APPELLEE.

428 N.W.2d 141

Filed August 12, 1988. No. 86-742.

1. **Breach of Contract: Damages.** A suit for damages arising from breach of a contract presents an action at law.
2. **Appeal and Error.** Where a law action is tried to the court without a jury, the finding of the court has the effect of a verdict and will not be disturbed on appeal 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. **Foreclosure: Equity.** A suit in foreclosure is equitable in nature.
5. **Equity: Appeal and Error.** In an appeal of an equity action, 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 credible evidence is in conflict on a material issue of fact, the Supreme Court considers and may give weight to the fact that the trial court heard and observed witnesses and accepted one version of the facts rather than another.
6. **Pleadings: Equity: Trial.** When legal matters are presented in a petition and equitable matters presented in a counterclaim, questions of fact arising from the counterclaim are to be determined first by the court sitting as a court in equity; if these determinations do not conclude the entire litigation, then factual questions arising from other pleadings, those in law, may be submitted to a jury or to the court as finder of fact in law, as the parties see fit.
7. **Pleadings: Equity: Trial: Appeal and Error.** It is not error to deny a motion which cannot be allowed in toto; where the petition states an action in law, the counterclaim one in equity, and demand is made to try all factual issues to a jury, it is not error for the trial court to refuse such demand in its entirety, and to try all issues to the court.

8. **Appeal and Error.** Regardless of the applicable standard of review in a given case, the Nebraska Supreme Court has an obligation to reach an independent conclusion on a question of law.
9. **Jury Trials: Waiver.** One entitled to a trial by jury waives such right by acquiescing in a trial by the court.
10. **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.
11. **Contracts.** The determination as to whether an ambiguity exists in a contract is to be made on an objective basis, not by the subjective contention of the parties; thus, the fact that the parties urge opposing interpretations does not necessarily indicate a document is ambiguous.
12. _____. A contract must be read as a whole, and, if possible, effect must be given to every part thereof.
13. _____. In the absence of anything indicating 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 together as if they were as much one in form as they are in substance.

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

William J. Panec for appellant.

Ronald R. Brackle for appellee.

HASTINGS, C.J., CAPORALE, GRANT, and FAHRNBRUCH, JJ., and JOHN MURPHY, D.J.

CAPORALE, J.

Appellant, Robert W. Fisbeck, sued his former employer, appellee, Scherbarth, Inc., a Nebraska corporation, alleging the latter breached its written employment contract with Fisbeck, as the result of which Fisbeck was damaged in that he (a) was deprived of an interest in land he otherwise would have acquired without payment, (b) lost salary he otherwise would have earned, and (c) was not paid wages for certain hours of work. The employer denied Fisbeck's averments and counterclaimed for foreclosure of Fisbeck's interest in the subject land. The district court concluded that there was no written employment contract; that while Fisbeck was entitled to payment for salary he earned but was not paid, his other two claims of damage were without merit; and that the employer

was entitled to foreclose its lien on Fisbeck's undivided one-half interest in the subject land. Fisbeck appeals from the judgment of the district court entered in accordance with its conclusions and assigns seven errors, which may be summarized as claiming that (1) the district court's findings are not supported by the record and (2) the district court erred in computing the amounts owed by the parties to each other. We affirm as modified.

Facts

Fisbeck began working for the employer while he was still in high school, in 1957 or 1958. In 1969 or 1970, he became a construction crew foreman. Late in 1975, Fisbeck and the employer entered into an arrangement whereunder Fisbeck was to acquire certain land from his employer, on which the Fisbeck home appears to have been built. In this connection the record contains a document captioned "Agreement Secured by Real Estate Mortgage," bearing no date of execution but bearing a notary's stamp dated December 29, 1975, and bearing the signatures of Fisbeck and a Leta R. Fisbeck, as buyers, and of the employer by its president, as seller, and impressed with the employer's corporate seal. The document, henceforth referred to as the "agreement," recites the legal description of a certain lot in Jefferson County and provides the following, notwithstanding the fact that Leta Fisbeck was never shown to have been a member of the employer's work force:

> 1. All parties hereto agree that the value of the above described real estate is mutually appraised by the parties and has a fair market value at the time of conveyance of the above described real estate in excess of THREE THOUSAND SIX HUNDRED NINETY FIVE AND NO/100 ($3,695.00) DOLLARS.
>
> 2. Buyers agree that in return for the deed to the above described real estate, Buyers will repay Scherbarth Inc., by continuing in the employment of Scherbarth Inc., in a satisfactory manner for a period of Ten (10) years.
>
> 3. In the event Buyers wishes [sic] to terminate their employment with Scherbarth Inc., for any reason prior to expiration of the ten year period, Buyers agree to repay the sum of THREE THOUSAND SIX HUNDRED NINETY FIVE AND NO/100 ($3,695.00) DOLLARS to

Scherbarth, Inc. This amount can be repaid at the option of Buyers in full immediately or in Five (5) equal annual installments, the first such installment to be paid within Thirty (30) days after termination of employment. Annual installments thereafter shall be on the same date of each year thereafter until said amount is paid in full. Interest shall accrue on the unpaid principal balance at the rate of 8.5% per annum on the unpaid principal balance. Interest shall commence to accrue on the date of termination of employment. Accrued but unpaid interest shall be paid annually on principal payment dates.

4. If Buyers employment is terminated by Scherbarth, Inc. through a lay-off occasioned by a decline in business, termination, or sale of the corporation, such aforementioned condition to be determined solely by appropriate resolution of the Board of Directors for said corporation, at any time during the above ten year period, the amount due to Scherbarth, Inc. shall be THREE THOUSAND SIX HUNDRED NINETY FIVE AND NO/100 ($3,695.00) DOLLARS less a prorated amount as credit for that portion of the ten year period that has expired.

This amount can be repaid at the option of Buyers in full immediately or in Five (5) equal annual installments, the first such installment to be paid within Thirty (30) days after termination of employment. Annual installments thereafter shall be on the same date of each year thereafter until said amount is paid in full. No interest shall accrue on the unpaid principal balance.

5. Buyers agree that if at any time within the Ten (10) year period above specified the above described real estate is sold or transferred by Buyers to any other persons, firm or corporation, the total amount of THREE THOUSAND SIX HUNDRED NINETY FIVE AND NO/100 ($3,695.00) DOLLARS would be due to Seller immediately unless an express written mutual agreement to the contrary is made between Seller and Buyers.

6. Time is of the essence of each and every term and condition of this agreement. If Buyers fail to pay any

> amounts due under this agreement or if Buyers fail to perform any of the other terms, covenants and conditions of this agreement or if Buyers shall abandon the real estate, the whole of the indebtedness due under this agreement shall become and be immediately due and payable at the option of Seller without further notice or demand by Seller to Buyers, the said Buyers expressly waiving all notices required by law to be served upon Buyers, and Seller may proceed to foreclose this agreement, promissory note or mortgage in any manner provided by law or to utilize any other remedies allowed Seller by law.

In his testimony Fisbeck characterized the agreement as "a mortgage on the — it's a work agreement. If I'd have been employed there for ten years, I wouldn't have to pay for the land that I purchased from Ted Scherbarth." Fisbeck also testified that his understanding of the agreement at the time he signed was that "I'd stay there ten years and the land would be paid for. If I stayed employed with him for ten years, the land would be paid for." He also testified that the only benefit he received when he "bought" the property was his right to continue his employment. The employer conveyed the subject land in fee simple absolute to "Robert W. Fisbeck and Leta R. Fisbeck . . . as joint tenants with right of survivorship, and not as tenants in common." Fisbeck's uncontroverted testimony is that the deed was executed before he was called upon by the employer's president to execute the agreement.

Fisbeck and Leta Fisbeck also signed a "Promissory Note Secured by Real Estate Mortgage" dated December 29, 1975. This document, henceforth referred to as the "note," which Fisbeck testified he signed in connection with the execution of the previously described agreement, incorporates the agreement by reference, sets interest on Fisbeck's debt to Scherbarth "after default or maturity" at 9 percent per annum, and contains an acceleration clause.

The next document, captioned "Real Property Mortgage," henceforth referred to as the "mortgage," recites the legal description of the subject property and names the employer as mortgagee and Fisbeck and Leta Fisbeck as mortgagors.

Fisbeck testified the mortgage was actually signed somewhat later than the December 29, 1975, date it and the notary's certificate bear, but admitted that, in any event, he understood that the mortgage was related to the agreement and the note and to his purchase of the property.

After signing the agreement, Fisbeck continued working for the employer until at least December 3, 1976, at which time he quit, and after which he made one payment of $739 on the agreement. By not later than September 1978, the employer rehired Fisbeck in his former position of crew foreman. The employer at that time, through its president, Theodore C. Scherbarth, agreed to reaffirm and reinstate the terms of the arrangement entered into in 1975.

The employer provided Fisbeck with a pickup truck, which he drove in connection with the employer's business and which he was privileged to use in connection with his own affairs. Although everyone agrees that the employer's policy was to start paying wages when an employee arrived at a particular jobsite, there is some evidence that all employees were required to report to the employer's headquarters in Fairbury at 7 o'clock in the morning and go from there to the various jobsites. Fisbeck claims that he carried the employer's tools and materials to the jobsite in the company pickup and considered himself responsible for the work crew from the time he left the employer's headquarters until all returned at the end of the day. There is also evidence, however, that there were times when other arrangements were made to transport employees to a jobsite. Moreover, although he quickly retracted it, at one point Fisbeck testified that his hourly rate of pay was increased at least in part to cover the time spent traveling from the employer's headquarters to the various jobsites.

On April 18, 1983, Fisbeck, according to the employer's "engineer manager," Daryl Drewes, angrily refused to perform job tasks assigned to him. However, David Taylor, whom Drewes said had been present, denied any memory of the incident.

On April 23, 1983, a Saturday, Fisbeck was to have worked a full day on a rush project known as the Roode job. The employer's president learned after the fact that Fisbeck had left

the Roode job that Saturday after only a short period of work. According to the employer's president, on Tuesday, April 26, 1983, following a nearly daylong discussion of these events between himself and Fisbeck, it was determined that Fisbeck's relationship with the employer would end. Armondo Leurma, Oscar Meyn, and Taylor, all of whom worked for the employer at the time of the event but none of whom did at the time of trial, testified that they overheard a discussion at a worksite that day, during which the employer's president told Fisbeck, "You're fired." The employer's president testified he did not tell Fisbeck he was fired but that Fisbeck said he would not work on the employer's projects until he had completed an independent project of his own.

Scope of Review

As a preliminary matter we must establish the scope of this court's review of the district court's factual determinations. Both Fisbeck and the employer assert that by reason of the employer's counterclaim, which involves the foreclosure of a land contract, this case is one in equity to be reviewed de novo on the record. In support of this contention the parties cite *Nixon v. Harkins*, 220 Neb. 286, 369 N.W.2d 625 (1985). *Nixon* involved a suit for specific performance of a contract; as this court noted there, a suit for specific performance is equitable in nature. In this case, however, Fisbeck sued for damages arising from breach of contract; such a suit is clearly legal in nature. See, e.g., *Communications Workers of America v. Abrahamson*, 228 Neb. 335, 422 N.W.2d 547 (1988); *Buell, Winter, Mousel & Assoc. v. Olmsted & Perry*, 227 Neb. 770, 420 N.W.2d 280 (1988). Where a law action is tried to the court without a jury, the finding of the court has the effect of a verdict and will not be disturbed on appeal unless clearly wrong. *Republican Valley Bank v. Security State Bank, ante* p. 339, 426 N.W.2d 529 (1988); *Kramer v. Mid-Western Development, Inc., ante* p. 86, 425 N.W.2d 336 (1988); *McKinstry v. County of Cass*, 228 Neb. 733, 424 N.W.2d 322 (1988). 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. *McKinstry v. County of Cass, supra; Kubista v. Jordan*, 228 Neb. 244, 422 N.W.2d 78 (1988).

Yet, as the parties correctly note, a suit in foreclosure is equitable in nature. *Western Fertilizer v. BRG*, 228 Neb. 776, 424 N.W.2d 588 (1988); *Graff v. Burnett*, 226 Neb. 710, 414 N.W.2d 271 (1987). In an appeal of an equity action, the Supreme Court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court; provided, where credible evidence is in conflict on a material issue of fact, the Supreme Court considers and may give weight to the fact that the trial court heard and observed witnesses and accepted one version of the facts rather than another. *Southern Lumber & Coal v. M. P. Olson Real Est., ante* p. 249, 426 N.W.2d 504 (1988); *Kula v. Prososki*, 228 Neb. 692, 424 N.W.2d 117 (1988); *Ames v. George Victor Corp.*, 228 Neb. 675, 424 N.W.2d 106 (1988). In this case we have not a suit in foreclosure, but a counterclaim for foreclosure. It is apparent that *Nixon, supra*, does not address the question presented by this case, namely, What is the scope of review accorded a case brought as a matter of law in which a counterclaim in equity has been asserted?

This court appears to have considered precisely this question in four vintage cases. In the earliest of these, *Hotaling v. Tecumseh Nat. Bank*, 55 Neb. 5, 7-8, 75 N.W. 242, 243 (1898), we said:

> The refusal of the trial court to submit the issues to a jury is the first error assigned. The case made by the petition was an ordinary legal action to recover damages for breach of contract, and the issues of fact raised therein were, of course, triable to a jury. . . . But the answer presented an equitable counter-claim. . . . These allegations of the answer were traversed by the reply, and the issues of fact thus arising were triable to the court without a jury. In 7 Ency. Pl. & Prac. 810, the rule is thus stated: "When an equitable defense is presented, it is to be decided by the court as if it were an equitable proceeding, before other issues are determined, because the

> determination of the equitable issues in favor of the defendant would put an end to the litigation, and obviate the necessity of trying the legal issues involved." And in *Peden v. Cavins*, 134 Ind. 494, it is said that "a demand for a jury trial should only include a demand for the trial of such issues as are triable by a jury, and when several issues are joined in a cause, some triable by jury and some by the court, and a demand for a jury to try all the issues is made, it is not error to refuse it." . . . The action of the trial court in trying the issues without a jury was, therefore, not erroneous.

The next case to consider our problem was *Jewett v. Black*, 60 Neb. 173, 82 N.W. 375 (1900). There, Jewett sold an undeveloped piece of real estate to Sanford on a land contract. Sanford then sold the real estate to Black, also by land contract. Black erected considerable improvements, including two dwelling houses. Sanford then defaulted on his contract with Jewett and subsequently surrendered his contract to Jewett, who brought an action in ejectment against Black. Black counterclaimed, "demanding a specific execution of the surrendered contract," *id.* at 176, 82 N.W. at 376, a demand which both the trial court and this court considered equitable in nature. The trial court ruled for Black on the counterclaim, Jewett appealed, and in an interesting variation from the facts in the case presently before us,

> [c]ounsel for [Black] contend that the petition determines the character of the action, and that the plaintiff having sued for the possession of the property in controversy, the judgment rendered in the action is not subject to review by appeal. To this proposition we can not agree. The answer of the defendant states facts which it is claimed constitute a cause of action against the plaintiff for specific performance of a contract. That is the action which has been tried; it is the action in which judgment has been rendered. It is the case presented by the record for review. Upon this point the decision in *Hotaling v. Tecumseh Nat. Bank*, 55 Nebr. 5, [75 N.W. 242 (1898),] is of controlling authority.

Id. at 176-77, 82 N.W. at 376.

Some time later, in *Card v. Deans*, 84 Neb. 4, 5, 120 N.W. 440, 441 (1909), this court stated:

> Plaintiff complains because he was refused a jury trial. The petition was such as is usual in actions in ejectment, but the defendant alleged ownership of the real estate, and prayed for affirmative equitable relief, which could not be granted in a jury trial. This court has held that in a law action where the answer sets up an equitable counterclaim the cause is triable to the court. *Hotaling v. Tecumseh National Bank*, 55 Neb. 5 [75 N.W. 242 (1898)]. In *Jewett v. Black*, 60 Neb. 173, [82 N.W. 375 (1900),] it was held that in an action in ejectment where the defendant prays for affirmative equitable relief, and pleads facts entitling him thereto, the issues are triable to the court without a jury. The case at bar falls within this rule, and a jury trial was properly denied.

More recently, in *Van Horn v. Lincoln Sales Outlet Co.*, 127 Neb. 301, 255 N.W. 36 (1934), Van Horn sued for damages for breach of an employment contract, and the defendants, alleging that Van Horn had been a partner in the firm, counterclaimed for an accounting. Van Horn demurred to the cross-petition; the demurrer was sustained; and the defendants appealed. Reasoning that Van Horn's demurrer constituted an admission of the defendants' allegation that he had been a partner in the firm, this court, citing *Hotaling, supra, Jewett, supra*, and *Brown v. Keith*, 1 Neb. (Unoff.) 649, 96 N.W. 59 (1901), about which more will be written shortly, concluded:

> The answer standing unattacked by demurrer of course would constitute a defense. The cross-petition raises the right of equitable relief, affirmatively prayed for. We are not deciding what the lower court should or should not have done on the motion to strike the cross-petition, but decide this matter solely on the basis of the demurrer filed. In view of the holdings of this court, we are of the opinion that the demurrer should have been overruled and the cause should be tried to the court as an equity action.

127 Neb. at 307, 255 N.W. at 39.

The cases reviewed above state or cite to the rule we are exploring in essentially these terms: "Where the answer to a

petition in law presents an equitable counterclaim, which is traversed by a reply, the issues of fact thus arising are triable to the court without a jury." Unfortunately, standing alone, this formulation of the rule leaves somewhat ambiguous which issues of fact are to be tried without a jury: those raised by the counterclaim only, or those raised by all the pleadings. In other words, this statement of the rule, standing alone, leaves unanswered the question, Does presentation of an equitable counterclaim convert the entire action into one in equity, or is the separate law character of the other pleadings preserved? As this court pointed out in its first pronouncement on the matter, " 'a demand for a jury should only include a demand for the trial of such issues as are triable by a jury . . . .' " *Hotaling v. Tecumseh Nat. Bank*, 55 Neb. 5, 7, 75 N.W. 242, 243 (1898). *Hotaling* teaches that when legal matters are presented in a petition and equitable matters presented in a counterclaim, questions of fact arising from the counterclaim are to be determined first by the court sitting as a court in equity; if these determinations do not conclude the entire litigation, then factual questions arising from other pleadings, those in law, may be submitted to a jury or to the court as finder of fact in law, as the parties see fit. However, it is not error to deny a motion which cannot be allowed in toto. *Vore v. State*, 158 Neb. 222, 63 N.W.2d 141 (1954); *Draper v. Taylor*, 58 Neb. 787, 79 N.W. 709 (1899). Thus, as *Hotaling v. Tecumseh Nat. Bank, supra*, held, where the petition states an action in law, the counterclaim one in equity, and demand is made to try all factual issues to a jury, it is not error for the trial court to refuse such demand in its entirety and to try all issues to the court. This, then, is the rule in Nebraska.

Nebraska is not alone in adhering to this rule. See, e.g., *Turner v. Burlington Northern R. Co.*, 771 F.2d 341 (8th Cir. 1985) (questioned on an unrelated issue in *Kansas City Laborers Pension F. v. Paramount Indus.*, 829 F.2d 644 (8th Cir. 1987)); *Atlantic Veneer Corporation v. Sears*, 232 N.W.2d 499 (Iowa 1975); *Sowles v. Beaumier*, 227 A.2d 473 (Me. 1967); *Quine et ux v. Sconce*, 209 Or. 486, 306 P.2d 420 (1957).

Of the Nebraska cases reviewed above, only *Jewett v. Black*, 60 Neb. 173, 82 N.W. 375 (1900), may be said to apply the rule

under consideration in a manner consistent with its expression in *Hotaling, supra*. *Card v. Deans*, 84 Neb. 4, 120 N.W. 440 (1909), suggests too broad an interpretation of the *Hotaling* rule, for *Hotaling* never intended the mere filing of a counterclaim in equity to deny a plaintiff in law the right to a jury trial. Language in *Card* which so suggests is inaccurate. The same is true of the language in *Van Horn* which suggests a like result. See, also, *Simmons v. Baker*, 109 Neb. 853, 192 N.W. 511 (1923), in which the trial court accommodated the various parties' rights through use of an advisory jury; the statement there, however, that "[t]he issue, therefore, became triable to the court without a jury," is improvident. *Id.* at 853-54, 192 N.W. at 511.

Returning, as promised, to *Brown v. Keith*, 1 Neb. (Unoff.) 649, 96 N.W. 59 (1901), we note that this case too presents an opportunity for confusion, which we here forestall. In *Brown*, the plaintiff alleged breach of an employment contract and prayed for damages. "To this, and the other counts of this petition, the defendant answered setting up an equitable defense, and the reply of the plaintiff thereto was a general denial." *Id.* at 650, 96 N.W. at 60. Although it appears that in the older cases the notion of "equitable defenses" may have included equitable counterclaims, see, e.g., *Hotaling v. Tecumseh Nat. Bank, supra*, such is not the case today. As this court noted in *McGerr v. Marsh*, 148 Neb. 50, 58, 26 N.W.2d 374, 378 (1947):

> The term counterclaim is broader and more comprehensive than recoupment, set-off, or cross-action, and, subject to statutory limitations, secures to defendant the full relief which a separate action at law or in equity would have secured. . . .
>
> Such claim or demand must be more than a mere defense to plaintiff's cause of action, or in reduction of his damages; "it must be an existing, valid, and enforceable cause of action in favor of the defendant against the plaintiff."

(Citations omitted.) Clearly, the rules regarding equitable defenses are not necessarily the same as those regarding equitable counterclaims. See, e.g., *White v. Medico Life Ins.*

Co., 212 Neb. 901, 327 N.W.2d 606 (1982); *The Tilden Bank v. Retzlaff*, 188 Neb. 834, 199 N.W.2d 734 (1972).

It is also clear that the *Hotaling* rule under consideration does not alter the equally time-honored principle that if a court of equity has properly acquired jurisdiction in a suit for equitable relief, it may make complete adjudication of all matters properly presented and involved in the case and grant relief, legal or equitable, as may be required and thus avoid unnecessary litigation. See, e.g., *Kuhlman v. Cargile*, 200 Neb. 150, 262 N.W.2d 454 (1978) (presents an obverse situation to that presented here: plaintiff Kuhlman had filed suit in equity, and defendants Cargile had filed a counterclaim sounding in law). Similarly, where the proof fails to establish a right to equitable relief, the court will nonetheless retain jurisdiction for the purpose of administering complete relief between the parties with respect to the subject matter. *Trump, Inc. v. Sapp Bros. Ford Center, Inc.*, 210 Neb. 824, 317 N.W.2d 372 (1982). In Nebraska, equity acquires jurisdiction over the action when the averments of the pleadings and the relief sought indicate that the main object of the action is equitable in nature. See, e.g., *Buell, Winter, Mousel & Assoc. v. Olmsted & Perry*, 227 Neb. 770, 420 N.W.2d 280 (1988) (and cases cited therein); *Holman v. Papio Nat. Resources Dist.*, 228 Neb. 94, 421 N.W.2d 430 (1988) ("Although the plaintiff sought damages for an alleged taking and damaging of his property in violation of Neb. Const. art. I, § 21, we treat the case as an action in equity for injunctive relief." *Id.* at 95, 421 N.W.2d at 432). Furthermore, as this court observed in *Klitzing v. Didier*, 215 Neb. 122, 337 N.W.2d 418 (1983), new and distinct matter not maintainable as a counterclaim under statutory provisions and not involved in a proper termination of the subject matter of the original suit must be litigated in a separate action.

It is apparent that in the district court, Fisbeck, had he sought a jury trial on his petition, would have been entitled to one, although factual issues arising in the context of the employer's counterclaim would have been submitted first to the court in equity. Fisbeck, however, suffered his claims to be tried to the court, thereby waiving his right to a jury. *Trump, Inc. v. Sapp Bros. Ford Center, Inc., supra*; *McKinney v. County of*

Cass, 180 Neb. 685, 144 N.W.2d 416 (1966); *Miller v. Knight*, 146 Neb. 207, 19 N.W.2d 153 (1945); *Helming v. Forrester*, 87 Neb. 438, 127 N.W. 373 (1910), *overruled on other grounds Criswell v. Criswell*, 101 Neb. 349, 163 N.W. 302 (1917). On facts such as these, it is entirely appropriate for the trial court to consider all factual issues at one time, bearing in mind that it speaks as a court of law regarding issues of fact arising from the pleadings in law, and as a court of equity regarding issues of fact arising from the equitable counterclaim.

Applying the *Hotaling* rule to the facts of the present case, we see that Fisbeck's suit, representing an action at law, and the employer's counterclaim, representing an action in equity, must be reviewed separately in this court, with the legal standard of review applied to the district court's determinations of Fisbeck's action, and the equitable or de novo on the record standard applied to the employer's counterclaim. See *Atlantic Veneer Corporation v. Sears*, 232 N.W.2d 499 (Iowa 1975). See, also, *Allen v. AT&T Technologies*, 228 Neb. 503, 423 N.W.2d 424 (1988) (according differing standards of review to separate law and equity actions consolidated for trial).

Analysis

Having at last determined the scope of this court's review, we proceed to a consideration of Fisbeck's assignments of error.

Fisbeck's claim that he was damaged because the termination of his employment deprived him of the ability to acquire the subject land without further payment rests on the premise that the agreement required the employer to keep him employed for a period of 10 years absent occurrence of the events contemplated by paragraph 4 of the agreement. The employer's claim of foreclosure in turn rests on the premise that there was no such obligation on its part. Thus, as established in the *Scope of Review* section of this opinion, to the extent factual questions may be involved, Fisbeck's employment claim is to be reviewed under a different standard than is the employer's foreclosure counterclaim. However, regardless of the differing standards of review accorded factual questions, this court has an obligation to reach an independent conclusion on a question of law. *Monahan v. School Dist. No. 1, ante* p. 139, 425 N.W.2d 624 (1988); *Ames v. George Victor Corp.*, 228 Neb.

675, 424 N.W.2d 106 (1988); *Communications Workers of America v. Abrahamson*, 228 Neb. 335, 422 N.W.2d 547 (1988). Moreover, 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. *Lueder Constr. Co. v. Lincoln Electric Sys.*, 228 Neb. 707, 424 N.W.2d 126 (1988); *Osmond State Bank v. Uecker Grain*, 227 Neb. 636, 419 N.W.2d 518 (1988); *State ex rel. NSBA v. Douglas*, 227 Neb. 1, 416 N.W.2d 515 (1987); *Washington Heights Co. v. Frazier*, 226 Neb. 127, 409 N.W.2d 612 (1987). The determination as to whether an ambiguity exists in a contract is to be made on an objective basis, not by the subjective contention of the parties; thus, the fact that the parties urge opposing interpretations does not necessarily indicate a document is ambiguous. *Lueder Constr. Co. v. Lincoln Electric Sys., supra*; *Luschen Bldg. Assn. v. Fleming Cos.*, 226 Neb. 840, 415 N.W.2d 453 (1987). Nor may a party be permitted to pick and choose among the clauses of a contract, accepting only those which advantage it; thus, a contract must be read as a whole, and, if possible, effect must be given to every part thereof. *Lueder Constr. Co. v. Lincoln Electric Sys., supra*. Finally, in the absence of anything indicating 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 together as if they were as much one in form as they are in substance. *Kearney Centre Inv. v. Thomas, ante* p. 21, 424 N.W.2d 620 (1988); *Peterson v. Hynes*, 220 Neb. 573, 371 N.W.2d 664 (1985).

Employment

Applying those rules concerning the reading of contracts to the documents before us compels the conclusion, as a matter of law, that the employer was not obligated to keep Fisbeck on its work force for any period of time. The agreement and related instruments merely evidence an arrangement to buy and sell real estate, provide for alternate methods of payment, and secure the seller until fulfillment of the arrangement. Thus, the district court's legal conclusion that Fisbeck had no written

contract for a specific period of employment is correct. The district court's factual finding that Fisbeck was properly fired is not clearly wrong. Accordingly, Fisbeck is entitled to no damages on his theory that he lost salary he would have earned under the agreement.

Foreclosure

This brings us to the employer's counterclaim. Our de novo review of the record convinces us that the agreement was entered into on December 29, 1975; thus, the 10-year period would have ended on December 29, 1985.

It is clear that Fisbeck was employed for at least 11 months following execution of the agreement with the employer, and for 55 months from the time of his return in 1978 until he was fired in 1983. Fisbeck is therefore entitled under the terms of the agreement to prorated credit for 66 months of employment; this represents 55 percent of the 120 months making up the stated 10-year term of the agreement. Fisbeck's debt to the employer is therefore reduced to $1,662.75, and further reduced by the amount paid by Fisbeck to the employer, under the agreement, on December 23, 1976, $739, leaving Fisbeck indebted to the employer in the amount of $923.75. The agreement provides that no interest is to accrue on this amount until default, after which interest is to accrue at the rate of 9 percent per annum. Fisbeck was to have paid the $923.75 to the employer immediately upon termination, or to have made the first of five equal annual installment payments within 30 days after termination, or by May 26, 1983. Fisbeck did not do so and has been in default on the agreement since. Fisbeck therefore owes the employer the amount of $923.75, with interest accruing at the rate of 9 percent per annum from May 26, 1983, until payment, and the employer has a lien against the land in that amount rather than the $3,738.69 with interest from June 5, 1986, as found by the district court. Since Leta Fisbeck was not made a party to this action, the lien, as properly determined by the district court, extends only to Fisbeck's individual one-half interest in the property.

Hours Worked

Finally, Fisbeck asserts he is entitled to wages he earned by performing work-related tasks at the employer's headquarters

many mornings prior to his departure for and arrival at various jobsites, but for which he was not paid. Notwithstanding the district court's factual finding that Fisbeck knew that under the terms of his employment he was to draw wages only from the time he arrived at a jobsite, it awarded him $92.80 under the authority of the federal Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq. (1982). That act requires that employers subject to its provisions pay each covered employee specified wages for all hours worked. In oral argument before this court, however, Fisbeck conceded that there is absolutely nothing in the record to indicate that the employer is involved in interstate commerce and thus subject to the provisions of the act. Indeed, the record does not tell us the exact nature of the employer's business; it only tells us that the employer is engaged in constructing or erecting something. Without at least some minimal showing as to the employer's relationship to interstate commerce, the Fair Labor Standards Act cannot be said to apply. See, e.g., *Banks v. Mercy Villa Care Center*, 225 Neb. 751, 407 N.W.2d 793 (1987). Thus, it must be concluded that the district court erred as a matter of law in entering judgment in favor of Fisbeck under the authority of that act.

Nevertheless, Fisbeck cites *Bolan v. Boyle*, 218 Neb. 85, 352 N.W.2d 586 (1984), and *North v. City of Omaha*, 215 Neb. 107, 337 N.W.2d 409 (1983), as supporting this claim for wages.

In *Bolan v. Boyle, supra*, the plaintiff civilian employees of the city of Omaha worked under a written contract of employment, arrived at through collective bargaining with their union, which provided in relevant part:

> "Employees of the Public Safety Department shall receive a one-half (1/2) hour meal period without pay, and such meal period shall not be considered as time worked, except for those employees who by the nature of their work are required to be on duty for eight (8) consecutive hours, in which case they shall receive a one-half (1/2) hour meal period with pay and such time shall be considered as time worked."

(Emphasis omitted.) *Id.* at 87, 352 N.W.2d at 588. The issue *Bolan* presented was whether the plaintiffs were "employees who by the nature of their work are required to be on duty for

eight (8) consecutive hours." This court found that they were and that they were entitled to compensation *under the terms of their contract.*

While in *North v. City of Omaha, supra*, we noted that substantial authority exists for the proposition that work not requested but permitted is worktime and compensable, the case rested on the provisions of the ordinances which delineated the terms of the city's employment contract with its auto repair foremen. These ordinances provided, among other things:

> "Eight (8) hours shall constitute a day's work and five (5) calendar days shall constitute a week's work for all municipal employees . . . .
>
> ". . . Overtime worked by municipal employees shall be compensated by pay or compensatory time off in accordance with the following procedures . . . . Work performed in excess of forty (40) hours per week shall be compensated at the rate of time and one-half for the number of hours of overtime worked . . . ."

Id. at 108, 337 N.W.2d at 410. In *North*, the question was, Is lunch time and the period prior to the start of the workday, during which the employer permitted the plaintiffs to work, compensable under the employment terms of the quoted ordinances? This represents a situation quite different from that presented in this case. In this case the contract of employment to which Fisbeck agreed when he returned to work for the employer in September 1978 provided that he was not to receive compensation for tasks performed prior to arrival at the jobsite. There is, however, evidence from which a trier of fact could find that in recognition of the work performed by Fisbeck prior to arrival at the jobsite, the employer had increased the wages paid him while at the jobsite. Thus, under the terms of his contract with the employer, Fisbeck's claim in this regard must fail.

Decision

Accordingly, the judgment of the district court is affirmed as modified in this opinion.

AFFIRMED AS MODIFIED.

WILLIAM J. McGOWEN AND MARILYN McGOWEN, APPELLEES AND CROSS-APPELLANTS, V. NEBRASKA STATE BANK, A NEBRASKA BANKING CORPORATION, APPELLANT AND CROSS-APPELLEE.

427 N.W.2d 772

Filed August 12, 1988. No. 86-923.

1. **Statutes.** Statutes relating to the same subject are in pari materia and should be construed together.
2. **Uniform Commercial Code: Liens: Words and Phrases.** The "any loss" provision of Neb. U.C.C. § 9-507(1) (Reissue 1980), as to junior lienholders, refers to the loss of any surplus proceeds due to an improper disposition of repossessed collateral.
3. **Liens: Sales: Words and Phrases.** Surplus proceeds means the difference between the fair market value of the collateral, if sold at a proper sale, and the amount required to satisfy the senior lien.
4. **Uniform Commercial Code: Liens: Notice: Sales.** A junior lienholder can only be said to suffer a loss due to lack of notice, pursuant to Neb. U.C.C. § 9-507(1) (Reissue 1980), if a commercially reasonable sale would have produced an amount in excess of the senior lien.

Appeal from the District Court for Dakota County: ROBERT E. OTTE, Judge. Reversed and remanded with directions.

Daniel L. Hartnett, of Crary, Huff, Clem, Raby & Inkster, P.C., for appellant.

E. Terry Sibbernsen and Debra R. Nickels, of Welsh & Sibbernsen, for appellees.

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

WHITE, J.

This case involves a dispute between a senior secured creditor, Nebraska State Bank (hereafter NSB), and a junior lienholder, William and Marilyn McGowen, both NSB and McGowens having secured interests in certain cattle owned by debtor/farmer Paul High. The McGowens filed a petition in the district court for Dakota County alleging that NSB had wrongfully converted certain livestock in which the McGowens held a perfected security interest.

Pursuant to a stipulation of the parties, the trial was bifurcated on the issue of liability and the issue of damages. The trial was before a jury, and most of the evidence was presented

by stipulation. The stipulated facts are as follows. On or about October 8, 1980, the McGowens sold to Paul High various items of personal property and livestock. An exact list of these items was incorporated into a purchase agreement dated October 8, 1980. In that agreement High granted the McGowens a security interest in that personal property and livestock.

On December 18, 1980, High granted to NSB, as consideration for a promissory note in the amount of $86,695.76 executed on that date, a security interest in all his farm products, including but not limited to all of his livestock, i.e., all of his cattle, hogs, etc. By September 5, 1984, High's total indebtedness to NSB apparently amounted to $372,341.95.

NSB perfected its security interest by filing a financing statement with the county clerk in Dakota County on December 20, 1980. The McGowens perfected their security interest by filing a financing statement and security agreement with the county clerk on April 28, 1981.

High defaulted on the purchase agreement entered into with the McGowens and also defaulted on his obligations to NSB. In September of 1984, NSB repossessed and sold 97 head of cattle owned by High. The cattle were sold on September 25, 1984, at Bleil-Chapman Livestock Auction Company in Moville, Iowa, for a total sales price of $28,956.01, with net proceeds of $27,872.29 after expenses. After application of the cattle sale proceeds, and other proceeds not involved in this suit, to High's debt to NSB, the remaining obligation amounted to $314,046.46.

NSB had notice and knowledge of the McGowen security interest from and after March 1984. On September 25, 1984, the date of repossession and sale of the cattle, each of the parties to this suit had a valid and existing security interest in the repossessed collateral.

It was further stipulated that at no time prior to the sale of the cattle did NSB give notice of the repossession or sale to the McGowens. Neb. U.C.C. § 9-504(3) (Reissue 1980) requires a secured creditor to notify "any other secured party" of the intended disposition of repossessed collateral, except in certain

circumstances not applicable to this case.

Following the reading of the stipulated facts to the jury, plaintiffs-appellees, McGowens, moved for a directed verdict on the issue of liability. The court sustained the motion and found, as a matter of law, that NSB failed to give notification of the sale to the McGowens, as required by law.

The only issue submitted to the jury and the only issue before this court on appeal is that of damages. We note that the liability issue (whether notice was required) could have been subject to dispute; however, appellant does not raise the question. Defendant-appellant stipulated away the exceptions to the notice requirement found in § 9-504(3). These exceptions at least raised a question as to whether NSB was required to give notice to the McGowens. Since appellant does not raise the issue, we will not address it, especially in light of this court's rule that a party cannot be heard to complain of error which the party was instrumental in bringing about. *First West Side Bank v. Hiddleston*, 225 Neb. 563, 407 N.W.2d 170 (1987).

The questions presented on appeal require this court to address a narrow issue relating to the measure of damages in cases involving the "any loss" provision of Neb. U.C.C. § 9-507(1) (Reissue 1980). Section 9-507(1) provides, in relevant part:

> If the disposition has occurred the debtor or any person entitled to notification or whose security interest has been made known to the secured party prior to the disposition has a *right to recover* from the secured party *any loss* caused by a failure to comply with the provisions of this part.

(Emphasis supplied.)

Following the court's finding of liability on the part of NSB, the issue of damages was submitted to the jury. Evidence was presented to the jury on the issue of "whether or not [the McGowens] sustained any loss or any damage as a result of the failure [of NSB to give notice], and if they did, the amount of such loss." At the close of all the evidence the jury was instructed by the court, deliberated, and returned a verdict in favor of the McGowens in the amount of $14,000.

At trial and on appeal, McGowens argue that they were

damaged by the failure of notice because they were deprived of the profit they could have realized by buying the livestock themselves at the sale and subsequently reselling it at a higher price. William McGowen testified at trial that the cattle, which sold for $28,956, were in fact worth approximately $50,000. McGowen testified as an expert based on some 30 years' experience as a farmer engaged in raising and selling cattle and pigs. In his opinion, auctions are generally used as a quick way to get rid of cattle and do not produce the best price when selling a herd. McGowen testified that if he had been notified of the sale, he would have tried "[t]o stop the sale . . . and if I couldn't do that I would have tried to buy them back."

The court instructed the jury on plaintiffs' theory of the damages issue. The instruction read in part:

> The plaintiffs claim that by reason of not receiving notice, they were deprived of the opportunity to attend the sale and purchase the cattle, claiming that they were worth more than the sale price, and that they could have made an advantageous purchase, and that they were therefore damaged to the extent of the profit they could have made.

Appellant, NSB, argues that the "any loss" provision of § 9-507(1) must be read in conjunction with Neb. U.C.C. § 9-312 (Cum. Supp. 1984) and § 9-504, the result being that the McGowens have, as a matter of law, sustained no loss. We agree with appellant's position.

As appellant points out, § 9-507(1) does not exist in a vacuum. That section must be read with reference to the other provisions of Neb. U.C.C. art. 9 (Reissue 1980 & Cum. Supp. 1984). Statutes relating to the same subject 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).

Section 9-312(5) contains the first-to-file rule governing priority between conflicting security interests in the same collateral. A fundamental rule of article 9 and its notice filing system is that when a conflict exists between security interests in the same collateral, and the security interests were perfected by filing, the first in time to file a financing statement has priority. *North Platte State Bank v. Production Credit Assn.*, 189 Neb. 44, 200 N.W.2d 1 (1972).

Section 9-504(1) establishes the order in which proceeds are distributed upon the disposition of collateral pledged under article 9. Section 9-504(1) establishes that

> [t]he proceeds of disposition shall be applied in the order following to
>
> (a) the reasonable expenses of retaking, holding, preparing for sale or lease, selling, leasing, and the like and, to the extent provided for in the agreement, the reasonable attorney's fees and legal expenses incurred by the secured party;
>
> (b) the satisfaction of indebtedness secured by the security interest under which the disposition is made;
>
> (c) the *satisfaction of indebtedness secured by any subordinate security interest* in the collateral if written notification or demand therefor is received before distribution of the proceeds is completed. If requested by the secured party, the holder of a subordinate security interest must seasonably furnish reasonable proof of his interest, and unless he does so, the secured party need not comply with his demand.

(Emphasis supplied.)

It is clear from the stipulated facts at trial that NSB filed its financing statement a full 4 months prior to the McGowens' filing. Pursuant to § 9-312(5), NSB's security interest in the cattle is paramount and superior to that of the McGowens. The trial court made such a finding, albeit implicit, when it instructed the jury that "as a matter of law . . . the defendant had a prior or first security interest in the cattle."

Given NSB's superior lien position, § 9-504(1) entitles NSB to credit the amounts realized from the sale to the satisfaction of High's indebtedness to NSB. The "satisfaction of [any] indebtedness secured by any subordinate security interest" is last in priority for distribution of the sale proceeds. If those proceeds are insufficient to satisfy the senior secured party's lien, the junior lienholder takes nothing.

We hold that the "loss" envisioned by § 9-507(1), as to junior lienholders, refers to the loss of any surplus proceeds due to an improper disposition of the collateral. Surplus proceeds in this case means the difference between the fair market value of the

collateral, if sold at a proper sale, and the amount required to satisfy the senior lien. Thus, a junior lienholder can only be said to suffer a loss due to lack of notice if a commercially reasonable sale would have produced an amount in excess of the senior lien.

Our position finds support in the minimal case law and commentary existing on conflicts arising under § 9-507(1) between junior and senior lienholders. In *Food City, Inc. v. Fleming Companies, Inc.*, 590 S.W.2d 754 (Tex. Civ. App. 1979), and *Young v. Golden State Bank*, 41 Colo. App. 480, 589 P.2d 1381 (1978), the courts held that the junior lienholders had suffered no loss if the fair market value of the collateral sold was less than the amount of the senior liens.

We note that one authoritative commentator has also suggested the same result which we reach in this opinion. Nickles, *Rights and Remedies Between U.C.C. Article 9 Secured Parties With Conflicting Security Interests in Goods*, 68 Iowa L. Rev. 217 (1983). As noted by Nickles, calculation of damages under the "any loss" provision of § 9-507(1) is not explained by the section itself or by any other section within article 9. Given that the code does not specify any measure of damages in these cases, it is appropriate to look to precode cases for guidance.

Nickles points out that

> [u]nder pre-Code law, if a senior secured creditor improperly disposed of collateral, his conduct was characterized as a *conversion*. Of course, the junior creditor could not recover the full value of the collateral, but could recover only the value of his interest therein. This value was calculated by determining the market value of the property as of the time of the conversion and subtracting therefrom the amount of the senior creditor's encumbrance. A senior secured party's liability to a subordinate secured party under section 9-507(1) for failing to comply with the provisions of Part 5 also should be calculated in this manner, whether or not the misconduct is technically characterized as a conversion. When a proper sale is conducted, the junior secured party can expect to receive only the surplus proceeds that remain

> after the senior creditor has satisfied the expenses of foreclosure and his own superior security interest. . . . If the senior creditor's sale of the collateral is improperly conducted, *the junior secured party's actual loss is the amount that would have remained after subtracting the legitimate expenses of foreclosure and the senior creditor's security interest from the amount that would have been produced by a proper sale*—the fair market value of the collateral. Measuring the junior secured party's "any loss" under section 9-507 in this way is essentially identical to the method used in pre-Code cases of this sort, and, more important, it will put the subordinate creditor "in as good a position as if the other party [the senior secured party] had fully performed," which is the express purpose of the Code remedies.

(Emphasis supplied.) Nickles, *supra* at 235-36.

The precode measure of damages result set forth in the Nickles article is identical to the precode result reached by Nebraska courts. Disputes between chattel mortgagees were settled according to this principle: "The rule is well settled in this state that if the actual value of the property is applied upon the mortgage, and is insufficient to pay the same the mortgagee cannot be held liable to the mortgagor or subsequent mortgagees in an action for conversion of the property." *Dempster Mill Mfg. Co. v. Wright*, 1 Neb. (Unoff.) 666, 668, 95 N.W. 806, 807 (1901).

Our interpretation of the "any loss" provision of § 9-507(1), based on a necessary reference to §§ 9-312(5) and 9-504(1), is not only consistent with this state's precode case law, but also effectuates the code's desire that the "aggrieved party may be put in as good a position as if the other party had fully performed . . . ." Neb. U.C.C. § 1-106 (Reissue 1980).

In the case at bar McGowens offered testimony alleging that the cattle were worth nearly $50,000, instead of the $28,956 which NSB sold them for at auction. Even if we accept McGowens' value estimate as true, this would not entitle the plaintiffs to any recovery. The evidence indicated that High was indebted to NSB for over $372,000. Applying these facts to our holding regarding the "any loss" provision of § 9-507(1), we

conclude that in the absence of evidence that these cattle were worth over $372,000, i.e., the amount sufficient to satisfy the senior lien, McGowens have suffered no loss.

This case also included a cross-appeal in which the McGowens, as cross-appellants, challenged an order of the district court recalling a writ of execution on the judgment in this case. Although we find no authority for the district court's action, any further disposition of this issue is unnecessary, given our decision on the main issue in this case.

The jury verdict in this case in favor of plaintiffs-appellees must be set aside because, as a matter of law, there was no evidence to support a finding of damages. We reverse, and remand the cause to the district court with directions to enter an order accordingly.

REVERSED AND REMANDED WITH DIRECTIONS.

FIRST NATIONAL BANK OF HAYES CENTER, A NATIONAL BANKING CORPORATION, APPELLANT AND CROSS-APPELLEE, V. RICKEL, INC., A KANSAS CORPORATION, APPELLEE AND CROSS-APPELLANT.

427 N.W.2d 777

Filed August 12, 1988. No. 86-941.

1. **Replevin.** Replevin will not lie against one who is not detaining the property when the writ is sued out.
2. **Collateral Estoppel.** Collateral estoppel may only be applied to an identical issue decided in a prior action.
3. **Trial: Appeal and Error.** An issue not presented to or passed upon by the trial court is not an appropriate issue for consideration on appeal.
4. **Replevin: Time.** Property subject to replevin is to be valued at the time of trial.

Appeal from the District Court for Hitchcock County: JACK H. HENDRIX, Judge. Reversed and dismissed.

Stanley C. Goodwin, of Colfer, Lyons, Wood, Malcom & Goodwin, for appellant.

Royce E. Norman, of Kelley, Scritsmier, Moore & Byrne, P.C., for appellee.

BOSLAUGH, WHITE, and SHANAHAN, JJ., and SPRAGUE and THOMPSON, D. JJ.

SPRAGUE, D.J.

Plaintiff, First National Bank of Hayes Center, perfected a security interest in wheat owned by James Palic in May of 1982. In October of 1982, Palic sold 10,483.83 bushels of the wheat to one Jimmie Sailors.

During the period of October 25 through 27, 1982, Sailors sold the wheat to VerDon Scott, doing business as Beverly Grain Company, and the wheat was delivered at that time.

On November 26, 1982, a shortage of wheat was identified in the Beverly Grain Company elevator, amounting to 41,285 bushels.

On February 8, 1983, First National Bank filed a replevin action against Scott, doing business as Beverly Grain Company, and requested the district court for Hitchcock County to enter judgment for the return of the wheat or the value thereof.

On May 23, 1983, the daily position records of the Beverly Grain Company showed "company-owned" wheat of 11,245.34 bushels, less 41,285 bushels missing since November 26, 1982, which missing bushels were identified in the records under "adjustments."

Scott purchased a leasehold interest in the elevator facilities from Rickel, Inc., on contract on June 6, 1977. Scott independently operated and was in sole possession of the facility from that time until August of 1983.

Rickel took possession of the grain elevator facilities on August 19, 1983. The repossession took place pursuant to a written agreement between Scott and Rickel, wherein it was stated that "as a result of the theft, conversion or loss of large quantities of grain from the Grain Elevator Facility, Scott is no longer able to own, operate, and manage the Grain Elevator Facility." The repurchase of the facilities was a purchase by Rickel of assets only. The only liabilities Rickel agreed to be responsible for were the "open storage," "warehouse receipts," and "Commodity Credit Corporation" obligations then appearing on the records of the Beverly Grain Company.

The U.S. Department of Agriculture conducted an audit of

Scott's elevator on August 18, 1983, including a measurement of the wheat in the elevator at that time. The USDA determined that the elevator contained only 378 bushels of wheat owned by Scott.

Rickel also conducted an audit and measurement of the grain in the elevator on August 18, 1983, and determined that the elevator contained 377.69 bushels of wheat owned by Scott at the end of that working day. Scott's records revealed no ownership interest of wheat in the names of the bank, Jimmie Sailors, or James Palic.

The purchase or repossession of the elevator by Rickel on August 19, 1983, included the purchase by Rickel of all wheat then owned by Scott in the elevator, amounting to 377.69 bushels.

On December 12, 1983, the district court for Hitchcock County, Nebraska, after a hearing in which neither Scott nor his counsel participated, entered judgment for the bank and against Scott for the return of the wheat or $35,120.84. The judgment entered against Scott was based upon the per-bushel price which Sailors agreed to pay Palic in October of 1982.

This replevin action was filed by the bank against Rickel on March 29, 1984, and summons was served on July 24, 1984. The trial court received exhibits and stipulated facts on May 13, 1986, and entered its judgment on August 25, 1986, overruling defendant's motion to dismiss and awarding the bank a judgment against Rickel for the return of 377.69 bushels of wheat or the sum of $1,265.23.

The bank appeals the judgment. The plaintiff contends that the court erred in determining that the defendant, Rickel, was not estopped from denying its possession of wheat in which plaintiff claimed a security interest.

The defendant cross-appeals. The defendant assigns as error that the trial court found defendant possessed wheat subject to the replevin claim and that the court erred in not assessing the value of wheat as its value at the time of trial.

Replevin will not lie against one who is not detaining the property when the writ is sued out. *Arcadia State Bank v. Nelson*, 222 Neb. 704, 386 N.W.2d 451 (1986); *Frank v. Stearns*, 111 Neb. 101, 195 N.W. 949 (1923); *Cromwell v. Ward*,

192 Neb. 178, 219 N.W.2d 446 (1974).

There was no evidence of the defendant's possession or wrongful detention of the wheat when this suit was commenced or, for that matter, at any other time. Therefore, the plaintiff has failed in its primary burden of proof.

Plaintiff urges the court to apply the doctrine of collateral estoppel against Rickel on the theory that Rickel's possession of the wheat was previously determined by the trial court in the bank's action against VerDon Scott. Collateral estoppel may only be applied to an identical issue decided in a prior action. *Stock v. Meissner*, 217 Neb. 56, 348 N.W.2d 426 (1984).

The issue which must be proved by the bank in this case is whether Rickel was in possession of the wheat on the date this action was commenced. That is not the same issue decided in the Scott case, nor does it necessarily cover the same subject matter. The issue of possession in the two cases is not identical as to each defendant. Therefore, the application of the doctrine of collateral estoppel must fail.

The plaintiff also advances the theory that Rickel assumed the liabilities of VerDon Scott when the operation of the elevator was returned to Rickel. Plaintiff raises this theory for the first time on this appeal. An issue not presented to or passed upon by the trial court is not an appropriate issue for consideration on appeal. *Haeffner v. State*, 220 Neb. 560, 371 N.W.2d 658 (1985); *Hasenauer v. Durbin*, 216 Neb. 714, 346 N.W.2d 695 (1984).

The trial court entered judgment for the return of 377.69 bushels of wheat or for the sum of $1,265.23. The court used as its measure of value the valuation arrived upon by the court in the Scott case. There is absent from the record any evidence of the value of the wheat at the time of trial. Property subject to replevin is to be valued at the time of trial. *Community Credit Co. v. Gillham*, 191 Neb. 198, 214 N.W.2d 384 (1974).

The judgment of the district court for Hitchcock County is vacated and this case is dismissed.

REVERSED AND DISMISSED.

STATE OF NEBRASKA, APPELLEE, V. COURTNEY W. STARKS, APPELLANT.

427 N.W.2d 297

Filed August 12, 1988. No. 87-539.

1. **Constitutional Law: Prisoners.** Although prisoners do not forfeit all of their rights under the fourth amendment upon incarceration, they do not retain the same measure of protection afforded nonincarcerated individuals.
2. _____: _____. A prisoner lawfully in custody, and thus deprived of his freedom, has no constitutional basis for complaining about the identity of those assigned by the arresting authority to hold him.
3. **Arrests: Police Officers and Sheriffs: Words and Phrases.** A person who is already under arrest and in police custody cannot be "rearrested." An arrest presumes that the person arrested was at liberty, free from police custody, before the arrest. This premise does not hold when the subject is already in custody of law enforcement officers.
4. **Immunity: Witnesses: Prosecuting Attorneys.** Neb. Rev. Stat. § 29-2011.02 (Reissue 1985) does not authorize a grant of immunity to any witness except upon the motion of the prosecuting attorney.

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 LeRoy W. Sievers for appellee.

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

BOSLAUGH, J.

The defendant, Courtney W. Starks, was convicted of first degree murder and use of a weapon to commit a felony. He was sentenced to life imprisonment for the murder and to 6 2/3 to 20 years on the weapons charge, the sentences to run consecutively.

He has appealed and contends that the trial court erred in failing to suppress his confession because it was the product or "fruit" of an illegal arrest, and in refusing to grant immunity to a defense witness regarding his encounter with the defendant on the night of the crime.

The record shows that on the evening of July 31, 1986, the victim, Linda Wierzbicki, stopped to visit with a friend, Connie

Sutherland. The two decided to meet at Wierzbicki's apartment later that evening for drinks and discussion. Sutherland estimated that Wierzbicki left at approximately 11:45 p.m.

Sometime around midnight, Scott Johnson heard a car pull into the parking lot located north of his apartment. About a minute later he heard a woman scream two or three times from the parking lot area. Johnson looked out his door and saw someone lying or bending over on the parking lot. He went to shut off his living room light so that no one could see him looking out. As he returned to the door to look out, he heard someone running. He looked outside, but did not see anybody. He then decided to look around the parking lot. While in the parking lot, he noticed a person walk past him approximately 5 or 6 feet away. He described the person as a black male, 6 feet tall and approximately 160 pounds, with short hair, dark pants, and a short-sleeved shirt with stripes. Johnson returned to his balcony and then saw a dark-colored Pontiac Trans Am automobile with retractable headlights accelerate rapidly and leave the parking lot. At that time he did not see the victim lying in the parking lot.

Danette Chase, who was staying at Johnson's apartment that evening, also saw a black male approximately 5 feet 10 inches tall, weighing 150 to 160 pounds, with short hair. She saw him get into a dark-colored Pontiac .Trans Am or Firebird automobile and leave the parking lot very fast.

Meanwhile, Sutherland had tried calling the victim's apartment twice and received no answer. She arrived at the apartment building at approximately 1:45 a.m. and parked her car in the parking lot. She started walking toward the building when she saw the victim's body lying halfway under a parked car. An autopsy indicated that the victim had been stabbed repeatedly with a strong, very sharp knife and that her death was caused by external hemorrhaging from these wounds.

Shortly after the murder, at 12:17 a.m., Officer Donald J. Fiala, Jr., of the Omaha Police Division received a call regarding a personal injury motor vehicle accident at 35th and L Streets. Upon arriving, he saw a badly mangled black Pontiac Trans Am automobile. The driver of the vehicle, the defendant Courtney Starks, was taken to University Hospital for

treatment. Starks was informed that he was under arrest for driving while intoxicated, and a blood sample was drawn at the hospital. Sometime after 2 a.m., Officer Fiala transported the defendant to the police station for booking on several outstanding traffic warrants he had discovered. In the morning the defendant was sentenced to 30 days in jail and fined $500, and his license was suspended for 1 year.

That afternoon, as a result of a phone call, Officer James Wilson and Officer Clyde Nutsch attempted to locate defendant and discovered that he was incarcerated at the Douglas County corrections unit on traffic warrants. The officers signed the defendant out of the corrections unit and transported him to the Central Station, about 3 1/2 blocks away. After reaching the station, Officer Wilson informed the defendant of his *Miranda* rights. The defendant did not request an attorney, did not invoke his right to remain silent, and agreed to talk with the officers. During questioning the defendant gave the officers a taped confession regarding the murder, which was received in evidence at trial.

With respect to the first assignment of error, the defendant argues that Officers Wilson and Nutsch arrested him at the Douglas County Correctional Center and transported him to Omaha police headquarters for questioning, when they lacked probable cause to believe he had committed the murder, and therefore his confession was the product of an illegal arrest which should have been suppressed. Specifically, he argues that the only information Wilson and Nutsch possessed at the time they arrested him was a "tip" received from an unknown person.

The record is devoid of any information concerning the specifics of the information given, the identity of the caller, or the reliability of the caller and the information given. The U.S. Supreme Court has held that a person is seized within the meaning of the fourth amendment when he or she is involuntarily taken to a police station for questioning, and therefore probable cause must exist for police officers to make such a seizure. *Dunaway v. New York*, 442 U.S. 200, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979). However, *Dunaway* involved a situation in which the defendant was not in custody prior to

police contact.

Other jurisdictions which have considered this issue have found that persons already in custody do not possess the same fourth amendment rights as those who are not in custody. In *State v. McCarthy*, 197 Conn. 247, 496 A.2d 513 (1985), the defendant was arrested by Westport police on charges unrelated to those at issue in his appeal. The Westport police contacted police in Wilton, Connecticut, where the defendant was a suspect in certain burglaries, and informed them that the defendant was in custody. Two police officers from Wilton spoke with the defendant in the Westport jail, then took him for a drive through Wilton, at which time the defendant incriminated himself in several burglaries. The defendant contended on appeal that the actions of the Wilton police constituted an arrest for which there was no probable cause and that any confession was a direct result of an illegal arrest. The court held that under *Dunaway, supra*, the defendant was under arrest during his trip to Wilton, but that it was *not* an arrest by Wilton police. Instead, the court found that custody had been transferred from the Westport police to the Wilton police and that

> Once a prisoner is lawfully in custody and thus deprived of his freedom, he has no constitutional basis for complaining about the identity of those assigned to hold him by the arresting authority. The temporary transfer of the defendant's custody from the Westport police authorities, who had arrested him legally, to the Wilton officers did not constitute a new arrest requiring those officers to have justification for such an arrest. We conclude that the lawful deprivation of the defendant's liberty resulting from his unchallenged arrest by the Westport police was still in force at the time he made the statements concerning his involvement in the Wilton offenses. Those statements, therefore, were not the product of an illegal arrest, as the defendant asserts and his claim of a fourth amendment violation is without merit.

197 Conn. at 256, 496 A.2d at 518-19.

Similarly, in *Scott v. State*, 726 P.2d 360 (Okla. Crim. 1986),

the court rejected the defendant's argument that his removal from jail to the police station for questioning on an unrelated crime amounted to an illegal arrest. The police had received an anonymous telephone call and, as a result, had taken the defendant to the police station for questioning. The defendant was given his *Miranda* rights and asked if he would submit to giving hair and saliva samples, to which he consented. Those hairs implicated him in a rape committed some 5 months earlier, and he was subsequently convicted. On appeal he argued that the unexplained and uncorroborated phone call did not provide probable cause to arrest him, and therefore the introduction into evidence of the hair samples was the fruit of an illegal arrest. The court disagreed and held that the act of transferring a person in custody at the jail to the police station for questioning did not amount to an arrest under Oklahoma law, which defines arrest as " 'the taking of a person into custody, that he may be held to answer for a public offense.' " *Id.* at 361.

The same rationale was also followed in *United States ex rel. Brown v. Rundle*, 450 F.2d 517 (3d Cir. 1971). Therein, the defendant, who was already confined at the Youth Study Center on an unrelated charge, was implicated by an eyewitness as having been involved in a murder. The defendant was transferred to the police department for questioning and then confessed. On appeal he contended that his removal from the Youth Study Center constituted an illegal arrest. The court rejected his argument and held that because the defendant was already in custody by reason of his commission of another offense, there was no necessity for rearresting him.

Finally, in a factually unsimilar case, the U.S. Court of Appeals for the Eight Circuit has held that a person who is already under arrest and in police custody cannot be "rearrested." In *Garionis v. Newton*, 827 F.2d 306 (8th Cir. 1987), the plaintiff was arrested for an incident at a polling place where he had attempted to vote. The plaintiff had been wearing a small pin on his lapel which demonstrated his opposition to a proposed amendment. When asked by a clerk to remove the pin, he refused. He was then told by a chief election judge that the pin violated an Arkansas law regarding electioneering at polling places. The police were called, and a

Deputy Sheriff Newton requested that the plaintiff either leave the voting line or remove the pin. Upon refusing to do either, he was arrested by Newton and taken outside. The plaintiff was then taken by Police Officer Barr to the police station and booked. On appeal he contended that the second officer lacked probable cause to arrest him. The court rejected his argument and stated:

> The flaw in this argument is that a person who is already under arrest and in police custody cannot be "rearrested." An arrest presumes that the person arrested was at liberty, free from police custody, before the arrest. This premise does not hold when the subject is already in custody of law-enforcement officers, see *Kelley v. Swenson*, 481 F.2d 86, 88 (8th Cir.1973); see also *United States v. Rundle*, 450 F.2d 517, 520 (3d Cir.1971); *Hayes v. United States*, 367 F.2d 216, 221 (10th Cir.1966). At least when, as here, there is no allegation (nor even any basis for an allegation) that Newton released Garionis from custody, there was no subsequent arrest, and no need for probable cause, when Barr took custody of Garionis from Newton.

827 F.2d at 310.

While it is true that prisoners do not forfeit all of their rights under the fourth amendment upon incarceration, they do not retain the same measure of protection afforded non-incarcerated individuals. *State v. Kerns*, 201 Neb. 617, 271 N.W.2d 48 (1978).

The defendant's assignment of error fails because he was not arrested by Officers Wilson and Nutsch when he was taken to Omaha police headquarters for questioning. Since there was no new arrest, legal or otherwise, his confession was not the fruit of an illegal arrest, and the trial court did not err in refusing to suppress the confession.

The second assignment of error relates to the testimony of a defense witness. Eric Turner, an acquaintance of the defendant, testified that on or about the night of the murder, he and the defendant drank alcoholic beverages and smoked marijuana together. Turner denied giving the defendant any of the drug PCP. When Turner was asked by defense counsel whether he

previously had ever used PCP, he invoked his fifth amendment right to remain silent. When defense counsel questioned Turner as to whether he had smoked PCP while in California, where he had been shortly before seeing the defendant on July 31, 1986, Turner again elected to remain silent. Finally, when defense counsel asked Turner if he had brought some controlled substances back from California, Turner again elected to remain silent.

Following Turner's testimony, defense counsel made an offer of proof as to how he believed Turner would testify if he were granted immunity. Based on an alleged conversation with Turner the previous evening, defense counsel stated that he expected that if Turner were granted immunity, he would testify that he had previously used PCP and that he brought back controlled substances, specifically the drug commonly referred to as "crack," from California. Defense counsel did not think Turner would testify that he had brought any PCP back from California.

The county attorney refused to request a grant of immunity and pointed out that Turner had already answered, in the negative, the most pertinent question: whether he had given any PCP to the defendant on the night of the murder. The trial court then stated that in light of Neb. Rev. Stat. § 29-2011.02 (Reissue 1985), the court did not have the authority to grant immunity and order a witness to testify absent a motion to do so by the county attorney or other prosecuting attorney.

Section 29-2011.02 provides:

> Whenever a witness refuses, on the basis of the privilege against self-incrimination, to testify or to provide other information in a criminal proceeding before a court or grand jury, the court, on motion of the county attorney or other prosecuting attorney, may order the witness to testify or to provide other information. The witness may not refuse to comply with such an order of the court on the basis of the privilege against self-incrimination, but no testimony or other information compelled under the court's order, or any information directly or indirectly derived from such testimony or other information, may be used against the witness in any criminal case, except in a

> prosecution for perjury, giving a false statement, or failing to comply with the order of the court.

While recognizing this statute, the defendant nevertheless contends that his due process right to a fair trial gives trial courts inherent authority to confer immunity. In support of his argument he cites to *Government of Virgin Islands v. Smith*, 615 F.2d 964 (3d Cir. 1980), in which the court recognized two situations where the due process clause would compel the granting of immunity to a defense witness. The first involves a situation where the government's decision not to grant immunity is made "with the 'deliberate intention of distorting the judicial fact finding process.' " *Id.* at 966. In such instance the court would have the remedial power to order an acquittal unless the government agreed to grant statutory immunity. This situation would not be applicable in the present case.

In the second situation the need for judicial immunity is triggered not by prosecutorial misconduct or intentional distortion of the factfinding process, but by the fact that the defendant is prevented from presenting exculpatory evidence crucial to his case. It is this second situation, in which the court in the *Smith* case stated that the court has authority to confer judicial (not statutory) immunity, that is at issue here.

Quoting its previous holding in *United States v. Herman*, 589 F.2d 1191 (3d Cir. 1978), *cert. denied* 441 U.S. 913, 99 S. Ct. 2014, 60 L. Ed. 2d 386 (1979), the court explained that

> "while we think that the court has no power to order a remedial grant of statutory immunity to a defense witness absent a showing of unconstitutional abuse, a case might be made that the court has inherent authority to effectuate the defendant's compulsory process right by conferring a judicially fashioned immunity upon a witness whose testimony is essential to an effective defense."

(Emphasis omitted.) 615 F.2d at 969.

The court in the *Smith* case then went on to state that such immunity power by the court must be clearly limited, and required that (1) immunity must be properly sought in the district court; (2) the defense witness must be able to testify; (3) *the proffered testimony must be clearly exculpatory*; (4) *the testimony must be essential*; and (5) there must be no strong

governmental interests which countervail against a grant of immunity.

A number of courts have held there is no authority to grant judicial immunity to defense witnesses. In *United States v. Thevis*, 665 F.2d 616 (5th Cir. 1982), the court held that the district court may not grant immunity to defense witnesses simply because they may have essential exculpatory information which is unavailable from other sources.

> As noted by the Second Circuit in [*United States v. Turkish*, 623 F.2d 769 (2d Cir. 1980)] the two major arguments against granting such judicial use immunity are that the immunity decision would carry the courts into policy assessments which are the traditional domain of the executive branch, and that the immunity would be subject to abuse.
>
> We find these arguments persuasive, and agree that the immunity decision requires a balancing of public interests which should be left to the executive branch. While a grant of use immunity theoretically does not improve the legal position of the person immunized, in that he still can be prosecuted for his crime, in practice the burden placed on the government to prove that any evidence obtained against the immunized suspect is not tainted by the suspect's statement can significantly impair future prosecutions. As the Second Circuit observed, "[C]onfronting the prosecutor with a choice between terminating prosecution of the defendant or jeopardizing prosecution of the witness is not a task congenial to the judicial function." *Turkish, supra*, at 776. *See id.* at 779 (Lumbard, J., concurring in part and dissenting in part). An immunity decision, moreover, would require a trial judge, in order to properly assess the possible harm to public interests of an immunity grant, to examine pre-trial all the facts and circumstances surrounding the government's investigation of the case. Such collateral inquiries would necessitate a significant expenditure of judicial energy, possibly to the detriment of the judicial process overall, and would risk jeopardizing the impartiality and objectivity of the judge at trial. *Id.*

> Nor are we convinced that any safeguards imposed on the grant of judicial use immunity adequately reduces the risk of abuse by co-defendants, co-conspirators, friends, or employees. Whatever may be gained in fairness in a particular trial in which true exculpatory evidence may be obtained only through judicial use immunity, therefore, may well be lost through the subsequent effect of abuse on the integrity of the judicial process as a whole. Finally, we note that the fifth amendment privilege is not the only one which may suppress probative evidence from the judicial process; crucial facts, for example, also may be shielded from disclosure by the attorney-client or doctor-patient privilege. Although abrogating the fifth amendment privilege through general use immunity for exculpatory testimony may conflict less with important public interests than abrogating these other privileges, we conclude that the potential interference is nevertheless great enough that the legislature, rather than the courts, should decide on such a course.

665 F.2d at 639-40.

The U.S. Court of Appeals for the 10th Circuit has also rejected the notion of judicial immunity. In *United States v. Hunter*, 672 F.2d 815 (10th Cir. 1982), the defendant asked the court to follow the rule in *Government of Virgin Islands v. Smith*, 615 F.2d 964 (3d Cir. 1980), and to allow trial judges the authority to confer use immunity on witnesses when necessary to provide a defendant his full panoply of due process protections.

The court rejected the portion of the *Smith* case which gave the district courts such power, and concluded that "courts have no power to independently fashion witness use immunity under the guise of due process." 672 F.2d at 818. The court relied on *United States v. Graham*, 548 F.2d 1302 (8th Cir. 1977), for the proposition that the power to apply for immunity is the sole prerogative of the government.

In *United States v. Graham, supra* at 1315, the court stated: "The power to apply for immunity pursuant to 18 U.S.C. §§ 6002-03 (1970) is the sole prerogative of the Government being confined to the United States Attorney and his superior

officers."

In other decisions the U.S. Court of Appeals for the Eighth Circuit, while not recognizing authority to grant judicial immunity to defense witnesses, has stated that such immunity could be available only where the testimony would be clearly exculpatory.

In *United States v. Hardrich*, 707 F.2d 992 (8th Cir. 1983), the defendant contended on appeal that the trial court's failure to grant judicial immunity to two defense witnesses deprived him of a fair trial. Hardrich was tried and convicted on 11 counts of uttering forged U.S. Treasury checks. During trial he attempted to present the testimony of two witnesses, who both refused to testify on fifth amendment privilege grounds. The court held, on appeal, that "it is doubtful that a district judge may order 'judicial immunity' for a reluctant witness in this circuit." 707 F.2d at 994. For this proposition the court relied on its previous holding in *United States v. Graham, supra.*

Yet the *Hardrich* court, after expressing its doubt over the authority of a district judge to order judicial immunity, went on to state: "*However, assuming the district court has such authority, it is clear that the proffered testimony must be clearly exculpatory*. This showing was absent here. The proffered testimony of the two witnesses merely established incriminating evidence of a third party, but in no way exonerated the defendant here." (Emphasis supplied.) 707 F.2d at 994.

The issue was next raised in *U.S. v. Eagle Hawk*, 815 F.2d 1213 (8th Cir. 1987). The court again did not specifically state whether the district court had such authority, and instead stated:

> This court has previously indicated its doubt that [the] district court can grant judicial immunity. Even if the district court could grant judicial immunity, it should only do so where the evidence is *clearly exculpatory. United States v. Hardrich*, 707 F.2d 992 (8th Cir.), *cert. denied*, 464 U.S. 991, 104 S.Ct. 481, 78 L.Ed.2d 679 (1983). This power is to be sparingly exercised. *Stewart v. Amaral*, 626 F.Supp. 192 (D.Mass.1985).

815 F.2d at 1217. The court went on to find that the witness' testimony was not clearly exculpatory and that therefore the

district court had not erred in refusing to grant judicial immunity.

Finally, in *U.S. v. Doddington*, 822 F.2d 818 (8th Cir. 1987), the court, in a footnote, discussed the issue of judicial immunity, and stated: "Judicial immunity has not been recognized in this Circuit." 822 F.2d at 821 n.1. The court then went on to note the holding in *Hardrich* and disposed of the issue by finding the proffered testimony was not clearly exculpatory.

In view of the facts in this case, we find it is not necessary to decide whether the rules stated in *Government of Virgin Islands v. Smith*, 615 F.2d 964 (3d Cir. 1980), should be adopted by this court. The testimony which defense counsel wanted to obtain from Turner was of doubtful relevance and was neither essential to the defendant's case nor clearly exculpatory.

By Turner's testimony, the defense was attempting to show that the defendant was without the requisite mental intent and was temporarily insane at the time of the murder because he might have smoked a marijuana cigarette laced with PCP. Yet the offer of proof indicated only that the testimony the defense was attempting to offer was that Turner had used PCP while in California and had brought a different drug, crack, back with him from California. This testimony would lend little, if any, support to the defendant's contention that he was mentally impaired at the time of the crime due to PCP, and was not clearly exculpatory.

There being no error, the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. PATRICK J. GREEN, APPELLANT.
427 N.W.2d 304

Filed August 12, 1988. No. 87-859.

1. **Motor Vehicles: Licenses and Permits: Constitutional Law.** Driving a motor vehicle is not a fundamental right, but is a privilege granted by the State.

2. **Implied Consent: Constitutional Law: Blood, Breath, and Urine Tests: Self-Incrimination.** Evidence obtained from a driver by testing body fluids in the implied consent context is not testimonial or communicative in nature and does not fall within the constitutional right against self-incrimination.
3. **Implied Consent: Miranda Rights: Blood, Breath, and Urine Tests.** *Miranda* warnings are not required before a law enforcement officer's request that a driver submit to a chemical analysis under the Nebraska implied consent law.

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

Patrick J. Green, pro se.

Robert M. Spire, Attorney General, and Yvonne E. Gates for appellee.

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

GRANT, J.

Defendant-appellant, Patrick J. Green, was charged in the county court for Platte County in three counts: count I, driving while under the influence of alcoholic liquor, in violation of Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1986); count II, refusal to submit to a chemical test to determine the alcoholic content in his body fluids, in violation of Neb. Rev. Stat. § 39-669.08(4) (Cum. Supp. 1986), second offense; and count III, refusal to submit to a preliminary breath test, in violation of § 39-669.08(3). At his arraignment in county court, defendant pled not guilty and, after being given a full explanation of his legal rights, chose to represent himself and demanded a jury trial. After trial, the jury returned a verdict of not guilty on count I and guilty of the charges in counts II and III. Defendant was sentenced to 30 days in county jail and fined $500 on count II, and was fined $50 on count III. Defendant appealed to the district court for Platte County, where the judgment and sentences were affirmed. Defendant timely appealed.

In this court, defendant assigns four errors. He contends (1) that the sentence imposing incarceration and a fine on defendant constitutes cruel and unusual punishment and is unconstitutional; (2) that "[f]or the State to create and enforce

a statute contrary to the Federal Constitution, constitutes an unconstitutional act"; (3) that "[f]or the State to manifest a contract which includes clauses denying constitutional rights, constitutes an unconstitutional act"; and (4) that the "reading of the Miranda Warnings after the fact that you have already been asked to incriminate yourself, makes the Miranda Warnings null and void." We affirm.

The record shows that at 2 a.m. on September 28, 1986, defendant was in his car alone and was involved in a one-car accident in Columbus, Nebraska. Defendant's car struck a median, overturned, and came to rest on its top. Columbus police officers and Platte County deputy sheriffs arrived at the scene. There they found defendant, smelled the odor of alcohol on his breath, and saw that his face was flushed and his right eye was bloodshot. Testimony showed defendant's left eye is artificial.

At the scene, defendant refused to undergo a preliminary breath test, stating to the deputy sheriff, who was properly certificated to perform such a test, that "he would stand on the Fifth [Amendment] and was not going to take any test."

Defendant was then transported to the police station in Columbus. There he was informed he was under arrest for driving while intoxicated. Defendant was then informed of the implied consent statute, § 39-669.08, and was specifically warned of the consequences of refusing to take a test. Defendant then refused to take a blood or urine test and was charged with refusing to take the offered test.

In this court, defendant does not challenge the facts supporting his conviction, but, as his assigned errors indicate, contends that the statutes requiring motorists to take breath, blood, or urine tests are unconstitutional for many reasons, including that the statutes require a motorist to testify against himself.

Defendant's contentions in his brief are based on the criminal law. Defendant does not recognize that driving a motor vehicle is not a fundamental right, but is a privilege granted by the State. *Porter v. Jensen*, 223 Neb. 438, 390 N.W.2d 511 (1986); *State v. Michalski*, 221 Neb. 380, 377 N.W.2d 510 (1985); *Prucha v. Department of Motor Vehicles*, 172 Neb. 415, 110

N.W.2d 75 (1961).

It is also clear that evidence obtained from a driver by testing body fluids in the implied consent context is not testimonial or communicative in nature and does not fall within the constitutional right against self-incrimination. *Fulmer v. Jensen*, 221 Neb. 582, 379 N.W.2d 736 (1986); *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966).

Finally, we have often held that *Miranda* warnings are not required before a law enforcement officer's request that a driver submit to a chemical analysis under the Nebraska implied consent law. *Heusman v. Jensen*, 226 Neb. 666, 414 N.W.2d 247 (1987); *Guerzon v. Jensen*, 225 Neb. 712, 407 N.W.2d 788 (1987); and cases cited therein.

Defendant's assignments of error are without merit. The judgment of the district court, affirming the judgment and sentences imposed by the county court, is affirmed.

AFFIRMED.

IN RE INTEREST OF KENNETH MCDONELL, ALLEGED TO BE A MENTALLY ILL DANGEROUS PERSON. STATE OF NEBRASKA, APPELLEE, V. KENNETH MCDONELL, APPELLANT.

427 N.W.2d 779

Filed August 12, 1988. No. 88-012.

1. **Mental Health: Words and Phrases.** A mentally ill dangerous person is one who presents a substantial risk of serious harm to another person or persons within the near future as manifested by evidence of recent violent acts or threats of violence or by placing others in reasonable fear of such harm.
2. **Mental Health: Proof: Evidence: Time.** In determining whether a person is dangerous, the focus must be on the subject's condition at the time of the hearing. Actions and statements of a person alleged to be mentally ill and dangerous which occur prior to the hearing are probative of the subject's present mental condition.

3. **Mental Health: Proof: Evidence.** In order for a past act to have any evidentiary value, it must form some foundation for a prediction of future dangerousness and be, therefore, probative of that issue.

Appeal from the District Court for Lancaster County: ROBERT R. CAMP, Judge. Affirmed.

James H. Hoppe for appellant.

David W. Stempson, Deputy Lancaster County Attorney, for appellee.

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

BOSLAUGH, J.

On August 12, 1987, a petition was filed alleging that the appellant, Kenneth McDonell, was a mentally ill dangerous person. After a hearing before the mental health board of Lancaster County, Nebraska, the appellant was, on August 20, 1987, committed to the Department of Public Institutions. On December 7, 1987, the order was affirmed by the district court. McDonell has now appealed from that order to this court.

The appellant contends that the mental health board and the district court erred when they found there was clear and convincing evidence that the appellant was mentally ill and dangerous as defined by Neb. Rev. Stat. § 83-1009(1) (Reissue 1987).

Section 83-1009 defines a mentally ill dangerous person as any "mentally ill person . . . who presents [a] substantial risk of serious harm to another person or persons within the near future as manifested by evidence of recent violent acts or threats of violence or by placing others in reasonable fear of such harm . . . ."

Furthermore, Neb. Rev. Stat. § 83-1035 (Reissue 1987) provides in part:

> A hearing shall be held by the mental health board to determine whether there is clear and convincing proof that the subject of a petition is a mentally ill dangerous person and that neither voluntary hospitalization nor other alternatives less restrictive of his or her liberty than a mental health board-ordered treatment disposition are

available or would suffice to prevent the harm described in section 83-1009.

In reviewing a final order made by the district court in mental health commitment proceedings, this court must affirm the order of the district court unless, as a matter of law, the order is not supported by clear and convincing evidence. *In re Interest of Kinnebrew*, 224 Neb. 885, 402 N.W.2d 264 (1987); *State v. Steele*, 224 Neb. 476, 399 N.W.2d 267 (1987). See, also, Neb. Rev. Stat. § 83-1043 (Reissue 1987).

The appellant has admitted in his brief that "[t]here is no dispute that the appellant is mentally ill," but contests the findings below that the appellant is "dangerous." Brief for appellant at 8.

This court, in *In re Interest of Blythman*, 208 Neb. 51, 302 N.W.2d 666 (1981), provided a detailed analysis of the issue of "dangerousness." We there said:

> For there to be compliance with the fourteenth amendment's due process clause, there must be an independent finding of dangerousness. . . .
>
> . . . .
>
> The key to confinement of one who is mentally ill lies in the finding that he is dangerous, i.e., that absent confinement, he is likely to engage in particular acts which will result in substantial harm to himself or others. Indefinite preventive detention cannot be authorized for those "who have a propensity to behave in a way that is merely offensive or obnoxious to others; the threatened harm must be substantial." . . .
>
> . . . .
>
> To comply with due process, there must be a finding that there is a substantial likelihood that dangerous behavior will be engaged in unless restraints are applied. "While the actual assessment of the likelihood of danger calls for an exercise of medical judgment, the sufficiency of the evidence to support such a determination is fundamentally a legal question. . . . To confine a citizen against his will because he is likely to be dangerous in the future, it must be shown that he has actually been dangerous in the recent past and that such danger was

> manifested by an overt act, attempt or threat to do substantial harm to himself or to another." . . .
>
> In determining whether a person is dangerous, the focus must be on the subject's condition at the time of the hearing. Actions and statements of a person alleged to be mentally ill and dangerous which occur prior to the hearing are probative of the subject's present mental condition. "But a mere recitation of past acts, in the absence of a showing that such clearly forms the foundation for a prediction of future dangerousness, cannot serve as the basis for a finding that one is a mentally ill person . . . ." . . .
>
> In order for a past act to have any evidentiary value it must form some foundation for a prediction of future dangerousness and be therefore probative of that issue.

(Citations omitted.) *Id.* at 55-58, 302 N.W.2d at 670-71.

The record shows that at the hearing before the mental health board, the State called three witnesses, the first of whom was Nancy Johnson, a former high school classmate of the appellant's. Johnson testified that the subject began contacting her in 1968, asking her for dates despite the fact that she was engaged to be married. The appellant's contact with Johnson ceased after her marriage in 1968, but resumed in 1971. Over the course of that year, the appellant had eight contacts with Johnson in the form of letters and phone calls, one call being described by Johnson as threatening in nature. Following these occurrences, Johnson filed a mental health warrant in Cass County against the appellant. According to Johnson, the appellant was then "committed" for treatment. Johnson noted six contacts with the appellant in 1972, which included an appearance at her home, driving repeatedly up and down the street in front of her home, and appearances at the school where she was employed. Similarly, in 1973, Johnson had "several" contacts with the appellant, including letters and being followed by him as she drove her car to and from work. No contacts occurred in 1974, but at least three took place in 1975, most of which involved the appellant's following Johnson. Again, no contacts occurred in 1976 and 1977; three contacts occurred in 1978, comprised of a letter, a phone call, and

following Johnson. No contacts were noted in 1979; numerous telephone calls were made by appellant to Johnson at her school in 1980; several contacts took place in 1981; no contacts were made in 1982 and 1983; six contacts happened in 1984; and several incidents took place in 1985, one of which included her witnessing of the appellant's assault on a police officer at Southeast High School, where she was coaching track. As a result of that incident, the appellant was incarcerated for 22 months immediately preceding the filing of the petition in this case.

Despite the frequency of her contacts with the appellant, Johnson denies ever having been physically assaulted by him, nor did he make physical threats to her person.

Debra Loomis-Wooldridge, a mental health counselor at the Lincoln Correctional Center, stated that she first had contact with the appellant in March of 1986, as he was involved in both individual and group therapy at the correctional center. While participating in these therapy groups, Loomis-Wooldridge had occasion to document her encounters as counselor with the appellant, several of which are relevant to this appeal. On May 12, 1987, Loomis-Wooldridge stated that the appellant was part of a conflict resolution group at the correctional center, and after the group's session, the appellant wanted to read the notes taken by the staff during the session, which reading was denied. She stated that the appellant became very angry, began swearing, and shook his fist at the counselors.

On May 18, 1987, the appellant was speaking with Loomis-Wooldridge in her office regarding his mental health file when he began yelling and shaking his finger at Loomis-Wooldridge, warning her not to say anything bad about him in his file. Loomis-Wooldridge asked the appellant to leave her office, but he continued to yell. After several more requests to leave, the appellant did leave and on his way out stated, "I won't forget you after I leave here." Loomis-Wooldridge interpreted the appellant's statement as a threat and also stated that his behavior caused her to fear a physical assault.

Finally, on August 13, 1987, after becoming aware that a hearing was pending before the mental health board, the

appellant attempted to persuade Loomis-Wooldridge to tell him what she would testify to at the hearing. Loomis-Wooldridge described the appellant's behavior during this confrontation as "intimidating, shouting at me, shaking his finger at me."

On cross-examination, Loomis-Wooldridge denied having been physically assaulted by the appellant and also stated that he had not assaulted any other personnel while at the correctional center.

Dr. Suzanne Bohn, in her capacity as director of mental health at the Department of Correctional Services, testified that she came into contact with the appellant in 1985 and has had contact with him at least every 3 months since that time. Dr. Bohn has conducted several evaluations of the appellant during the course of his confinement in the mental health unit, including clinical interviews, reviews of records, and consultations with other staff members. As a result, Dr. Bohn was able to diagnose the appellant as suffering from paranoid schizophrenia, with a reasonable degree of psychological certainty. Dr. Bohn stated that the appellant has displayed anger when confronted with his problems and on one occasion began yelling, and then stormed out of the room and slammed the door. On July 13, 1987, when Dr. Bohn spoke with the appellant about Nancy Johnson, the appellant became angry and said, "She's not going to make an ass out of me." Dr. Bohn characterized this statement as a threat and felt compelled to warn Nancy Johnson, as she feared for her and her family's safety. In addition to notifying Johnson, Dr. Bohn also notified the chief of police and the Lancaster County attorney's office. When asked if she had an opinion as to whether or not the appellant was a mentally ill dangerous person, she stated, to a reasonable degree of psychological certainty, that "I believe he's definitely mentally ill and I think he's — I feel fairly certain that he's potentially a quite dangerous individual." Dr. Bohn did state that the appellant has never assaulted her, nor had he ever been known to assault others at the institution.

Following presentation of evidence by the State, counsel for the appellant then called Barbara McDonell, the appellant's mother, as a witness. She testified that prior to her son's confinement in 1985, he had lived with her and her husband and

that her son had been involved in "one or two altercations" with her. When specifically asked if the appellant had ever physically assaulted her, Mrs. McDonell responded, "Very, very little," and, "He didn't hurt me. He just kind of shoved me and that was all." Mrs. McDonell stated that this incident occurred about 10 or 15 years ago and that such an incident had not occurred since that time.

The appellant testified and denied assaulting correctional officers at the correctional complex and also denied assaulting staff members.

The mental health board stated the basis for its finding as follows:

> The Board determines that the statements made by the subject to Mrs. Loomis-Wooldrige [sic], considering the context in which they were made, justifiably placed a reasonable fear of harm from a violent act or acts in Mrs. Loomis-Wooldrige [sic]. The Board also determines that the subject's statements made to Dr. Bohn, which were considered by Dr. Bohn, a well qualified and experienced mental health professional, to be serious enough to report to the police and to Mrs. Johnson, are the kind of statements contemplated by Section 83-1009 of the Nebraska Mental Health law as threats of violence.
>
> . . . .
>
> The Board does not place major emphasis on the assault and battery against the policeman in 1985 or the gun incident in 1978, not having before it the full circumstances of either incident. The other testimony of Mrs. Johnson does not, of itself, make out a case of dangerousness to other persons, the Board feels. The Board, however, feels strongly in that the recent statements and actions of the subject occurring in 1987 as outlined above present clear and convincing evidence of a threat of violence to Mrs. Loomis-Wooldrige [sic] and places [sic] her in reasonable fear of violent acts and, in addition, present clear and convincing evidence of a threat of violence to Mrs. Johnson, as so deemed by Dr. Bohn, of the kind contemplated within Section 83-1009 of the Nebraska Mental Health law.

In affirming the order of the mental health board, the district court found:

> The past history established that the petitioner has had a long history of mental illness and of assaultive behavior and also of harrassment [sic] of a specific individual. Present observations are that petitioner has been agitated and very angered and has no insight into his mental illness or to his degree of anger and lack of control. He is on medication but has told the health professionals that if he is released, he would discontinue his medication. He has also made threatening gestures and comments to the health professionals at the time they were attempting to interview and counsel the petitioner. The diagnosis of the petitioner is paranoid schizophrenia.
>
> The evidence presented adequately supports the findings and order of commitment by the Lancaster County Mental Health Board.

We believe the record supports a finding that the appellant was dangerous in the recent past and that such danger was manifested by his threat to Loomis-Wooldridge, "I won't forget you after I leave here," and his statement to Dr. Bohn regarding Nancy Johnson, "She's not going to make an ass out of me." These incidents occurred in May and July of 1987, just prior to the mental health board hearing in August of 1987. These statements are probative of the mental condition and attitude of the appellant at the time of the hearing. These statements, in addition to the intimidating nature of the appellant's behavior as described by both Loomis-Wooldridge and Dr. Bohn, and Dr. Bohn's psychological opinion that the appellant is "potentially a quite dangerous individual," require that the order of the district court be affirmed.

AFFIRMED.

STEVEN L. AUER, APPELLANT, V. BURLINGTON NORTHERN RAILROAD COMPANY, APPELLEE.

428 N.W.2d 152

Filed August 19, 1988. No. 86-320.

1. **Trial: Evidence: Verdicts: Appeal and Error.** In considering whether the evidence in a civil case is sufficient to sustain findings necessary for a verdict, this court will not reweigh the evidence, but considers the verdict in a light most favorable to the successful party and resolves evidential conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
2. **Jury Instructions: Appeal and Error.** It is not error for the trial court to refuse a requested instruction when it has, on its own motion, fairly and fully instructed the jury on a party's theory of the case.
3. **Jurors: Trial.** The retention or rejection of a juror is a matter of discretion with the trial court.
4. **Juror Qualifications.** A party who fails to challenge prospective jurors for qualifications and passes such jurors for cause waives any objection to their selection as jurors.
5. **Evidence: Appeal and Error.** Where evidence is objected to which is substantially identical with evidence admitted and not objected to, prejudicial error will not lie because of its admission.

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

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

Steven D. O'Brien, of Knudsen, Berkheimer, Richardson & Endacott, for appellee.

BOSLAUGH, CAPORALE, SHANAHAN, and GRANT, JJ., and BURKHARD, D.J.

GRANT, J.

This is an appeal from the district court for Lancaster County. Plaintiff-appellant, Steven L. Auer, brought this action pursuant to the Federal Employers' Liability Act, 45 U.S.C. §§ 51 et seq. (1982) (FELA), for injuries sustained in two work-related accidents during the time plaintiff was employed by the defendant-appellee, Burlington Northern Railroad Company. In his first cause of action, plaintiff sought damages for back injuries he alleged were received on October 7, 1981, during his employment while operating an

Electromatic Senior machine. The accident will be referred to as the "Electromatic accident." In his second cause of action, plaintiff sought damages for aggravation of the preexisting injuries. Plaintiff alleged the aggravation was caused by an accident on March 23, 1982, while he was riding as a passenger in a truck operated by an employee of defendant. This accident will be referred to as the "truck accident." The defendant answered, admitting the status of the parties, denying the other allegations of the petition, and alleging contributory negligence on the part of the plaintiff. After trial to a jury, the jury returned a verdict in favor of the defendant on plaintiff's first cause of action, and in favor of plaintiff on the second cause of action in the amount of $5,205.16. Plaintiff appeals from the verdict and judgment on each cause of action.

In his brief, plaintiff assigns five errors, contending that the district court erred (1) in submitting the issue of contributory negligence on both causes of action; (2) in failing to sustain plaintiff's motion for a directed verdict on the question of liability at the conclusion of all the evidence on both causes of action; (3) in failing to instruct the jury that assumption of risk is not a defense under the FELA; (4) in failing to strike juror Steve Bowen for cause, or in the alternative, to declare a mistrial; and (5) in overruling plaintiff's motion in limine during the course of the trial and permitting evidence as to plaintiff's drinking and drug problems. We affirm.

The record reveals that the plaintiff was first employed by defendant in 1974 as a general laborer. He first began to operate the Electromatic Senior in April 1981. The Electromatic is a track maintenance machine which operates on the railroad tracks and raises the track in order to level the track and make it smooth for high-speed rail traffic. When the machine operator activates the hydraulic jacks on the machine, the machine lifts and adjusts the rails and ties in relation to a beam of light projected by the machine. There are safety hooks on the machine designed to hold the jacks up while the machine is moving. If the hydraulic jacks come down while the Electromatic is moving, the machine may derail. The plaintiff testified that in July 1981, he was moving the Electromatic from Lincoln to Seward when the jacks "came down." The plaintiff

was not injured by the incident and "put the jacks back up and went on down the track." The plaintiff testified that he knew the jacks were not supposed to come down while the Electromatic was moving. The plaintiff did not report the malfunction to the defendant that summer.

Testimony at trial showed that, as of August 1981, the safety hooks on the Electromatic had broken off. Testimony at trial was to the effect that the safety hooks would break if the hydraulic jacks were accidentally activated by the machine operator. In August 1981, the plaintiff made a complaint to his section foreman about the absence of the safety hooks on the Electromatic. Other testimony was to the effect that the presence or absence of the safety hooks would not prevent the hydraulic jacks from coming down.

On October 7, 1981, the plaintiff was assigned to move the Electromatic from David City to Seward. In so doing, the machine passed through Ulysses. Plaintiff testified that he was standing in the machine at the time and operating the machine with controls at the end of a cable. Testimony established that, although a seat was provided in the Electromatic, it was customary for the machine operators to stand while the operator was moving the machine from one location to another, because of poor visibility.

Plaintiff testified that as he was operating the Electromatic through Ulysses, he was not looking at the track, but instead was looking off to his right toward the town of Ulysses. As he was traveling through Ulysses, the plaintiff testified that the Electromatic came to a "sudden stop" and derailed. Upon the resulting impact, the plaintiff, who was standing sideways in the machine, struck his back on the control panel of the machine. After the impact, plaintiff dismounted from the machine and saw that all four wheels of the machine were off the track and that the hydraulic jacks were down. The plaintiff saw that approximately 100 gallons of hydraulic fluid had drained out of the machine because one of the oil plugs on the machine had broken.

On November 12, 1981, plaintiff filled out a personal injury report with the railroad. The report did not specifically refer to the derailment incident. In his report, the plaintiff stated:

"While working with Seward Section the last few weeks of Oct, I began having backaches, part time at first Constant Later on." At trial, plaintiff testified as follows:

> Q. Mr. Auer, you do not know whether or not your back injury was the result of that machine incident or doing heavy work in late October, do you?
>
> A. I also did some heavy work that day too, of the accident. I'm not for sure, no.
>
> Q. So, you know that there was a machine accident. You know you have done heavy labor since then but you personally don't know when you injured your back, do you?
>
> A. I know when it started hurting.

After the plaintiff began seeing a doctor, he was transferred to light duty in November.

On March 22 and 23, 1982, the plaintiff was assigned to light-duty work as a flagman with a welder in the Hobson Yards in Lincoln. The welder had made complaints to the section foreman and the roadmaster about the condition of the ungraded roads in the Hobson Yards work area prior to March 23. The roads were customarily traveled by company vehicles on a daily basis. On or about March 23, the welder was driving a company truck through the Hobson Yards. Plaintiff was a passenger in the truck. The welder had on his seatbelt at the time. Plaintiff was not wearing a seatbelt. The welder testified that although he was aware of a rule in the rule books regarding the use of seatbelts, this rule was not enforced. As the welder was driving through the yards at approximately 10 to 12 miles per hour, he "hit some chuckholes that were covered with water and the truck hit with a lot of force," causing the plaintiff to bounce off the seat and strike his head on the roof of the cab. The speed limit at the time was 15 miles per hour. Plaintiff testified that he felt a "pop" in his back and experienced pain in his lower to middle back. On April 5, 1982, the plaintiff filled out a personal injury report with regard to the second incident. Plaintiff described his injuries as "[b]ack strain — continuation of previous injury."

After the second accident, plaintiff testified that his back pain "got much worse" and that he went to several different

doctors for treatment. Plaintiff did not return to work from March 29 through April 13, 1982. Plaintiff returned to light-duty work in April, after defendant's doctor placed him under a 25-pound weight-lifting restriction. Plaintiff worked off and on through November 4, 1983, at which time he was laid off. During 1984 and 1985, plaintiff put in bids for various jobs with the defendant and contacted various outside employers, but was unsuccessful in his attempts to secure employment. In July and December of 1984, however, plaintiff did bid on and receive job awards as a flagman with the defendant. As discussed above and as of July 1985, the defendant's doctors had not lifted the weight-lifting restriction placed on the plaintiff. At the time of trial, plaintiff was employed as a janitor at a local restaurant.

In his first assignment of error, plaintiff contends that the district court erred in submitting the issue of contributory negligence on both causes of action.

In considering whether the evidence in a civil case is sufficient to sustain findings necessary for a verdict, this court will not reweigh the evidence, but considers the verdict in a light most favorable to the successful party and resolves evidential conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 412 N.W.2d 56 (1987); *Alliance Nat. Bank v. State Surety Co.*, 223 Neb. 403, 390 N.W.2d 487 (1986).

Under the FELA, contributory negligence on the part of the plaintiff is not a complete bar to recovery and may only be used to diminish the amount of damages. 45 U.S.C. § 53; *Wilson v. Burlington Northern, Inc.*, 670 F.2d 780 (8th Cir. 1982). The burden of proving contributory negligence is on the defendant. *Birchem v. Burlington Northern R. Co.*, 812 F.2d 1047 (8th Cir. 1987).

As to the Electromatic accident, plaintiff contends that there was insufficient evidence to warrant the contributory negligence instruction to the jury. Plaintiff relies on *Wilson v. Burlington Northern, Inc., supra.* In *Wilson*, the court held that when there is no evidence from which a jury could reasonably find a lack of due care by the plaintiff, it is reversible

error to submit the issue of contributory negligence to the jury.

In the present case, there was sufficient evidence of the plaintiff's contributory negligence to warrant the jury instruction. The court instructed the jury that the jury could find the plaintiff contributorily negligent in one or more of the following particulars:

1. Plaintiff failed to utilize reasonable precautions for his own safety; he failed to adopt safe work habits; and he failed to assume a safe position while performing his assigned duties;

2. Plaintiff failed to institute safe procedures so as to not injure himself in violation of safety rules and common practice;

3. Plaintiff failed to conduct himself in accordance with established customs and practices applicable to those particular duties in the performance of his assigned responsibilities;

4. Plaintiff failed to properly inspect the machine of which he was in charge; and

5. Plaintiff failed to report any alleged defects of the machine of which he was in charge.

In connection with the Electromatic accident, plaintiff testified that he was gazing over to the right looking at the town of Ulysses at the time the derailment occurred. He was not facing forward and was not observing the track. As stated above, there was evidence from the plaintiff that he had driven the Electromatic in July 1981, when the hydraulic jacks drifted down. On that occasion the machine stopped without derailing. Plaintiff did not report this incident to the defendant before the October 1981 accident. There was evidence upon which the jury could have found that the plaintiff was contributorily negligent, unlike the situation in *Wilson*. The instruction was warranted in the present case.

With regard to the contributory negligence instruction as to the truck accident, the jury was instructed that if a preexisting condition was aggravated by the accident, the plaintiff was entitled to recover only for the extent of the aggravation of the preexisting condition. On the second cause of action, the jury returned a verdict in the amount of $5,205.16. Although the

plaintiff does not directly attack that amount of damages awarded by the jury, plaintiff's apparent theory on appeal is that if the jury had not been instructed on the contributory negligence as to the second cause of action, the jury would have awarded the plaintiff greater damages.

Plaintiff contends that as it was the custom of the defendant to disregard the enforcement of the company's seatbelt rule, the plaintiff could not have been contributorily negligent in failing to use the seatbelt on or about March 23, 1982. Defendant contends that a company rule required the wearing of seatbelts. It has been held that the failure of a defendant company to enforce its safety rules constitutes negligence. *Ybarra v. Burlington Northern, Inc.*, 689 F.2d 147 (8th Cir. 1982). It has been held that the employee's failure to obey safety rules may be considered by the jury in assessing contributory negligence. See *Flanigan v. Burlington Northern Inc.*, 632 F.2d 880 (8th Cir. 1980).

The issue of whether the plaintiff was contributorily negligent in failing to wear a seatbelt in this factual situation, involving the alleged violation of a work rule, was a question for the jury. The jury returned a general verdict for the plaintiff, and it is unclear whether or not the jury determined that the plaintiff was contributorily negligent.

There was sufficient evidence upon which to instruct the jury as to plaintiff's contributory negligence on both causes of action. Plaintiff's first assignment of error is without merit.

In his second assignment of error, plaintiff contends that the district court erred in failing to sustain the plaintiff's motion for a directed verdict on the question of liability at the conclusion of all the evidence.

In order to direct a verdict for the plaintiff, there can be but one reasonable conclusion as to the verdict. *Parker v. Seaboard Coastline R.R.*, 573 F.2d 1004 (8th Cir. 1978). This is not a res ipsa loquitur case. Plaintiff must establish negligence on the part of the defendant to prevail. Plaintiff alleged and had the burden of proving that defendant was negligent.

With regard to the Electromatic accident, insofar as the second assignment of error is concerned, there was testimony that the Electromatic had had electrical wiring problems and

had malfunctioned in the past and that safety hooks were not present on the machine at the time of the derailment. There was other testimony that the hooks were not strong enough to hold up the hydraulic jacks if the hydraulic system was activated—either accidentally or intentionally. If the hydraulic jacks were not in an up position, the Electromatic might derail. Other testimony showed the jacks sometimes "drifted down" for no apparent reason. With regard to the derailment itself, there was testimony that derailments were not uncommon and occurred as part of the "the normal course of the business." As there was conflicting evidence as to the exact cause of the derailment, the district court did not err in refusing to grant the directed verdict on the first cause of action.

As to the second cause of action, we first note that the jury returned a verdict in favor of the plaintiff. A party cannot claim that the submission of an issue to the jury is error, where the finding on the issue is favorable to him. *Prell v. Murphy*, 178 Neb. 278, 133 N.W.2d 5 (1965). Plaintiff's second assignment of error is without merit.

In his third assignment of error, the plaintiff contends that the district court erred in failing to instruct the jury that assumption of risk is not a defense under the FELA. Plaintiff argues that without a cautionary instruction explaining that there is a difference between contributory negligence and assumption of risk, the jury could easily confuse the issues.

It is not error for the trial court to refuse a requested instruction when it has, on its own motion, fairly and fully instructed the jury on a party's theory of the case. *Steed v. Oak Ridge Equestrian Ctr.*, 224 Neb. 792, 401 N.W.2d 495 (1987). All of the instructions given must be read together and if taken as a whole correctly state the law, are not misleading, and adequately cover the issues, there is no prejudicial error. *Bergman v. Anderson*, 226 Neb. 333, 411 N.W.2d 336 (1987); *First West Side Bank v. Hiddelston*, 225 Neb. 563, 407 N.W.2d 170 (1987). In proceedings under the FELA, where assumption of risk is not made an issue by the pleadings or the evidence, an assumption of risk instruction should not be given. *Ellis v. Union P. R. R. Co.*, 148 Neb. 515, 27 N.W.2d 921 (1947).

The jury was first instructed to decide the question of

negligence on the part of the railroad. The jury was then instructed to decide the question of contributory negligence on the part of the plaintiff as mitigation of damages. With regard to the first cause of action, the jury returned a general verdict in favor of the defendant. As stated in *Clark v. Pennsylvania Railroad Company*, 328 F.2d 591, 595 (2d Cir. 1964), where the jury is first instructed to decide the question of negligence on the part of the defendant before deciding the question of contributory negligence, and a verdict is returned for the defendant, "it is extremely improbable that the jury ever reached the only issue to which assumption of risk would have any relevancy."

With regard to the truck accident, insofar as the third assignment of error is concerned, assumption of risk was not made an issue by the pleadings, nor was it made an issue at trial. As stated in *Clark v. Burlington Northern, Inc.*, 726 F.2d 448, 452 (8th Cir. 1984), " 'where that "defense" [of assumption of risk] has been neither pleaded nor argued, [such an instruction] serves only to obscure the issues in the case.' " Plaintiff relies on *Koshorek v. Pennsylvania Railroad Company*, 318 F.2d 364 (3d Cir. 1963). In that case, the court determined that the failure to give an assumption of risk instruction constitutes reversible error where the jury might have confused contributory negligence with assumption of risk. Assumption of risk has not been raised as an issue in the present case. We do not find *Koshorek* controlling.

Plaintiff contends that assumption of risk was discussed by the jury. He attempts to establish that fact by the affidavit of juror Yvonne Wilson. That fact could not be established by a juror's affidavit. Neb. Rev. Stat. § 27-606(2) (Reissue 1985) provides as follows:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith . . . . Nor may his affidavit or evidence of any statement by

him indicating an effect of this kind be received for these purposes.

As stated in *Lambertus v. Buckley*, 206 Neb. 440, 443, 293 N.W.2d 110, 112 (1980), " 'It is a well-established rule in the federal courts and the Nebraska court that a jury verdict may not be impeached as to occurrences in the jury room which inhere in the verdict by an affidavit of a juror.' " The trial court did not err in refusing to give the assumption of risk instruction. Plaintiff's third assignment of error is without merit.

In his fourth assignment of error, the plaintiff contends that the district court erred when it failed to strike juror Steve Bowen for cause, or in the alternative, to declare a mistrial. In his brief, plaintiff contends that the plaintiff was denied a fair trial because juror Bowen "possessed and demonstrated" an obvious prejudice against the plaintiff. Brief for appellant at 33.

During the course of the trial, the court told counsel the following:

> I feel obligated to tell counsel that today, juror number one, Mr. Bowen, came into my office during the recess this morning and at that time he asked if he could speak to me and I said yes and he said that he wanted me to know that he felt that he should talk to me since the plaintiff's mother testified that she was with the Syracuse Bank. Mr. Bowen told me that as a result of some work his company did, he has had a dispute with the Syracuse Bank over the payment of what I took to be a bill for work done either directly for the bank or for a general contractor who had done some work for the bank. And I asked him if he thought that this would be a factor in his ability to decide the case on the evidence and the law that I would give the jury and he said no, but he wanted me to know.
>
> Then he said that he also wanted me to know that one of the three lawsuits that he referred to on his voir dire examination was a lawsuit that involved a union. He said at that time he didn't think that there was going to be so much union stuff in this case and he stated that his company won the case but that it was now on appeal. And I asked him if that was going to make any difference to

him in this case and he said no, but he wanted me to be aware of it.

Also this same juror contacted me on December 3rd, he came into my office at a recess in the afternoon and he asked if he could ask me a question and I said yes and he said can the jurors ask questions in court during the trial. And I said no, they cannot and he commented well, there are some things where he thought some more questions should be asked and I told him that the jurors could not ask questions.

Then he asked if he could consider observations that he made of the plaintiff in the courtroom during his deliberations and I told him that the jury must decide the case based on what they see and hear in the courtroom and the law that the judge gives the jury. He commented that he had been observing the plaintiff's range of motion of the plaintiff's head and I just told him that the jury will have to decide the case based on the instructions and the law and I thought in view of these three contacts that I should share this information with you for whatever you may think appropriate.

After informing the parties, the court permitted plaintiff's counsel to further voir dire the juror outside the presence of the jury. During that voir dire, the juror testified that he could serve as a fair juror.

At the close of that voir dire examination the plaintiff challenged juror Bowen for cause. The court determined that juror Bowen could decide the case based on the evidence presented, and denied the motion. The court also denied plaintiff's motion for a mistrial, and the trial proceeded.

During jury deliberations, juror Bowen, by note delivered to the trial judge by the bailiff, asked: "Number 1. 'Who hired Friedman? He is retained by the RR Union? When was Friedman hired?' Number 2. 'Can we see the brief filed by Friedman when the lawsuit was begun? When was the lawsuit filed?' "

In response, the court had a message delivered to juror Bowen, stating: "I can't answer your questions."

After receiving the note, the trial judge contacted the parties

that afternoon. Plaintiff's counsel requested a supplemental jury instruction to be read to the jury, as follows:

> You are further instructed that you may only decide this case on the evidence that was received during the course of the trial, either in the form of oral testimony, depositions, or documentary evidence. The question of who retained plaintiff's counsel or when the case was filed is not relevant evidence and should not be considered by you.

The court denied this additional requested jury instruction because the court determined that the jury had already been adequately instructed as to the law and what the jury could consider in reaching its verdict. Plaintiff then moved for a mistrial. The motion was denied, as was plaintiff's motion for a new trial.

Charges of juror misconduct must be substantiated by competent evidence on the motion for a new trial. The misconduct complained of must relate to a matter in dispute relevant to the issues in the case, and must have influenced the jurors in arriving at a verdict. *Ellis v. Far-Mar-Co*, 215 Neb. 736, 340 N.W.2d 423 (1983); *Schwank v. County of Platte*, 152 Neb. 273, 40 N.W.2d 863 (1950). Proof of mere indiscretion in the conduct of a juror is not sufficient to avoid a verdict unless the proof establishes that the juror's conduct was of such character that prejudice may be presumed. *Ellis, supra*. The party must show that the questioned conduct entered into a verdict prejudicial or adverse to the party alleging misconduct. *Norquay v. Union Pacific Railroad*, 225 Neb. 527, 407 N.W.2d 146 (1987). The retention or rejection of a juror is a matter of discretion with the trial court. *State v. LeBron*, 217 Neb. 452, 349 N.W.2d 918 (1984).

In the present case, the court informed the parties of the communications with juror Bowen and gave plaintiff's counsel the opportunity to further voir dire juror Bowen. After juror Bowen was questioned a second time by the court and plaintiff's counsel, the court was satisfied that juror Bowen was a fair and impartial juror.

In the present case, the initial voir dire examination of the jury at the beginning of the trial was not made a part of the record. The juror's relationship with unions was brought to the

attention of the court by the juror himself, who informed the court that one of the lawsuits the juror mentioned on his voir dire involved a union. Plaintiff does not challenge the juror's statement, at the initial voir dire, that he had mentioned the fact that he had been involved in three prior lawsuits as a litigant. The matter could have been inquired into by plaintiff's counsel during the initial voir dire examination. A party who fails to challenge prospective jurors for qualifications and passes such jurors for cause waives any objection to their selection as jurors. *Bittner v. Miller*, 226 Neb. 206, 410 N.W.2d 478 (1987); *Schroll v. Fulton*, 213 Neb. 310, 328 N.W.2d 780 (1983). The failure to make appropriate inquiry as to the qualifications of prospective jurors on voir dire waives later objections based on facts that might have been disclosed by such inquiry. *Sayer Acres, Inc. v. Middle Republican Nat. Resources Dist.*, 205 Neb. 360, 287 N.W.2d 692 (1980).

Plaintiff does not contend that juror Bowen gave untruthful responses during voir dire examination or during the subsequent questioning by the court and plaintiff's counsel. In *People v Smith*, 122 Mich. App. 202, 207, 332 N.W.2d 401, 403 (1981), the Michigan Court of Appeals stated the following: "False answers by a juror to questions on voir dire, whether intentional or unintentional, deny the defendant a fair trial if correct answers would have led the parties to challenge him."

With regard to the note which was sent to the court by juror Bowen during jury deliberations, the court instructed juror Bowen that the court could not answer any of his questions. In denying plaintiff's request for supplemental instructions, the court informed the parties that the court was satisfied that the jury had been adequately instructed as to the law and what it could consider in reaching a verdict.

Plaintiff, in his brief, relies on *Kastanos v. Ramos*, 581 S.W.2d 740 (Tex. Civ. App. 1979). In *Kastanos*, the Texas Court of Civil Appeals considered defendants' argument that the damages awarded were excessive and found that "probable injury" had occurred to the defendants, where it was possible the jury had discussed that it should award higher damages than the plaintiff in that case had suffered, in order to pay plaintiff's attorney fees. The Texas court granted defendants a new trial.

In the present case, the plaintiff is contending his damages are too low. *Kastanos* does not support any contention that consideration of plaintiff's attorney fees would lead to too low a verdict. Plaintiff has demonstrated no prejudicial misconduct specifically arising out of this incident. *Norquay v. Union Pacific Railroad, supra.*

There was substantial evidence before the jury to the effect that plaintiff's physical condition was caused by factors other than the accidents and that plaintiff's injuries were not as great as his evidence indicated. The trial court did not abuse its discretion in retaining juror Bowen. Plaintiff's fourth assignment of error is without merit.

In his fifth assignment of error, plaintiff contends that the district court erred when it overruled plaintiff's motion in limine during the course of the trial and permitted evidence to be adduced as to plaintiff's drinking and drug problems.

Prior to trial, on November 2, 1985, the plaintiff filed a motion in limine to prevent the defendant from presenting evidence on two issues: (1) evidence of plaintiff's prior drug use and (2) evidence that the plaintiff had had his driver's license suspended or served time in jail. The court sustained the motion in part, ruling that evidence of the plaintiff's drug use might be admissible and relevant on the issue of lost wages. The judge ruled, however, that the defendant could not cross-examine as to the plaintiff's urinalysis conducted by the railroad unless plaintiff's counsel "opened the door." Evidence as to the plaintiff's driving record was never introduced at trial.

At trial, the examining physician for the railroad was called as a witness by the plaintiff. The witness testified that he had been requested by the railroad to examine the plaintiff in order to determine whether or not the weight-lifting restrictions which had been placed on the plaintiff should be removed. The witness examined the plaintiff on two occasions, on March 4 and July 30, 1985. During cross-examination, he stated that he had routinely gathered a urine sample from the plaintiff, which had been sent to the defendant for testing for controlled substances. No evidence was adduced from witnesses as to the results of that test.

Roger Glawatz, rehabilitation counselor for the Nebraska

Department of Education, testified for the plaintiff. Defendant had referred the plaintiff to Glawatz with regard to plaintiff's back injury. In August 1984, Glawatz began working with the plaintiff. Glawatz obtained a medical release from the plaintiff so that he could gather past medical information from the plaintiff's physicians. The department, after consultation with its own physician, recommended that plaintiff be placed in a job which would not involve lifting more than 20 pounds. Glawatz further testified that sometime in April 1985, he referred the plaintiff to Work Net, a private organization included within the Nebraska department's operations, to provide placement services. Work Net did not accept the plaintiff into its program until June 1985.

Defendant obtained the medical reports contained in Glawatz' file. These reports contained information as to the plaintiff's participation in a 6-week outpatient drug rehabilitation program at the Independence Center in Lincoln from approximately April 1 to May 15, 1985. Defendant's counsel requested a ruling from the court during trial as to how those reports might relate to the court's earlier ruling on plaintiff's motion in limine. The court affirmed its earlier ruling regarding the urinalysis testing, but determined that the plaintiff's participation in a drug treatment program during a period of time in which he was seeking lost wages was relevant.

During cross-examination in the trial, Glawatz stated that the plaintiff's motivation in regard to employment fluctuated during their counseling sessions. The witness further testified that the plaintiff told him that he was required by the railroad to undergo treatment at the Independence Center after a physical examination conducted by the railroad indicated that he had abused drugs. Glawatz further testified on redirect the plaintiff was not immediately accepted into the Work Net program because of concerns regarding plaintiff's participation in the drug abuse program.

The plaintiff was called as a witness by the defendant. The plaintiff testified that the railroad had required him to go through the drug treatment program at the Independence Center before he could return to work. The plaintiff further testified that he had, on "[s]ome occasions in the past," taken

drugs while at work. We first note that the admission or exclusion of evidence is a matter left largely to the discretion of the trial court, whose ruling will be upheld absent an abuse of discretion. *Tank v. Peterson*, 219 Neb. 438, 363 N.W.2d 530 (1985). During the course of the trial, the court allowed the defendant to cross-examine Glawatz on the issue of plaintiff's lost wages as to his opinion concerning the employability of the plaintiff. Prior to cross-examination of Glawatz, the parties were again reminded that the court's ruling on plaintiff's motion in limine had been sustained in part and that testimony concerning the urinalysis conducted by the defendant would not be admissible. At trial Glawatz testified as to notes contained in his file concerning plaintiff's stay at the Independence Center for drug and alcohol abuse.

With regard to the motion in limine, we note that plaintiff's motion did not refer to plaintiff's alcohol abuse and referred only to plaintiff's "cocaine use." There was no direct reference during trial to the use of cocaine by the plaintiff.

There was other competent evidence at trial on the issue of defendant's drug abuse. After Glawatz had testified, the plaintiff was called as a witness by the defendant. Plaintiff testified that he was required by defendant to undergo treatment as a condition of returning to work. Plaintiff's counsel made no objection to this testimony. On cross-examination by his own counsel, plaintiff extensively discussed his treatment for drug and alcohol abuse and admitted that he had used drugs in the course of his employment with the defendant. The error, if any, in allowing Glawatz to testify concerning plaintiff's medical records was harmless, since there was other, competent evidence concerning plaintiff's drug problems. Plaintiff himself "opened the door" to further testimony. Where evidence is objected to which is substantially identical with evidence admitted and not objected to, prejudicial error will not lie because of its admission. *White v. Lovgren*, 222 Neb. 771, 387 N.W.2d 483 (1986).

There was no error in the trial proceedings. The judgment of the district court is affirmed.

AFFIRMED.

IN RE PLUMMER FREEHOLDER PETITION.
PATRICK STRUCKMAN ET AL., APPELLANTS, V. TOM J. PLUMMER, JR., ET AL., APPELLEES.
IN RE MCGINLEY-SCHILZ COMPANY FREEHOLDER PETITION.
PATRICK STRUCKMAN ET AL., APPELLANTS, V. MCGINLEY-SCHILZ COMPANY, A NEBRASKA CORPORATION, ET AL., APPELLEES.
IN RE DANA FARMS FREEHOLDER PETITION.
PATRICK STRUCKMAN ET AL., APPELLANTS, V. DANA FARMS, A GENERAL PARTNERSHIP, APPELLEE.
IN RE MCGINLEY FREEHOLDER PETITION.
PATRICK STRUCKMAN ET AL., APPELLANTS, V. DONALD F. MCGINLEY, APPELLEE.
IN RE L & W, INC., FREEHOLDER PETITION.
PATRICK STRUCKMAN ET AL., APPELLANTS, V. L & W, INC., A NEBRASKA CORPORATION, APPELLEE.

428 N.W.2d 163

Filed August 19, 1988. Nos. 86-833, 86-834, 86-835, 86-836, 86-837.

1. **Schools and School Districts: Actions: Boundaries: Standing.** It is the firmly established law of this state that a school district may not maintain an action involving a change in the boundaries of the school district.
2. **Schools and School Districts: Equity: Courts: Appeal and Error.** The action of the statutory board under Neb. Rev. Stat. § 79-403 (Reissue 1987) is an exercise of quasi-judicial power, equitable in character, and upon appeal therefrom to the district court, the cause is triable de novo as though it had been originally instituted in such court, and upon appeal from the district court to this court, it is triable de novo as in any other equitable action.
3. **Equity: Appeal and Error.** In an action in equity, we may give weight to the fact that the trial court saw the witnesses and observed their demeanor while testifying.

Appeal from the District Court for Keith County: DONALD E. ROWLANDS II, Judge. Affirmed.

Patrick R. McDermott for appellants.

R. Kevin O'Donnell, of McGinley, Lane, Mueller, O'Donnell & Williams, P.C., and C. Kenneth Spady, of McQuillan & Spady, P.C., for appellees.

HASTINGS, C.J., CAPORALE, GRANT, and FAHRNBRUCH, JJ., and JOHN MURPHY, D.J.

FAHRNBRUCH, J.

Dispositive of these five cases is whether the appellants acted as individuals or as a school board when they appealed to the Keith County District Court to set aside the transfer of appellees' lands to a different school district.

The district court held that the appellants were acting as a school board. It further held that the school board had no standing to challenge the transfer of land from its school district to another. The trial judge affirmed the transfer of appellees' lands by the Keith County freeholder board and dismissed appellants' cases. Appellants then appealed to this court. The cases were consolidated for trial in the district court and for argument in this court. We affirm the trial court's decision in dismissing the cases.

Case law establishes that a school district is a body corporate which possesses the usual powers of a corporation for public purposes, and it may sue and be sued. However, it is the firmly established law of this state that a school district may not maintain an action involving a change in the boundaries of the school district. See, *School Dist. No. 46 v. City of Bellevue*, 224 Neb. 543, 400 N.W.2d 229 (1987); *In re Hilbers Property Freehold Transfer*, 211 Neb. 268, 318 N.W.2d 265 (1982); *Board of Education v. Winne*, 177 Neb. 431, 129 N.W.2d 255 (1964).

The appellants claim they were acting as individuals rather than as a board of education when they challenged the transfer of appellees' lands. They claim, therefore, the body of case law applying to school boards should not apply to them.

Appellees' freeholder petitions to transfer their land from school district No. 17 (Brule) to school district No. 1 (Ogallala) were approved by the Keith County freeholder board. The petitions were filed pursuant to Neb. Rev. Stat. § 79-403 (Cum. Supp. 1984). The freeholder board approvals were appealed to the Keith County District Court by the appellants, who comprise the entire board of education of school district No. 17.

In answer to those appeals, each appellee raised as an affirmative defense that the appellants were maintaining the appeals not as individuals, but as the board of education of the

Brule School District.

In arriving at its decision that the appellants were acting as a board of education and not individually, the trial court found in substance:

1. The six appellants comprised the entire board of education of the Brule School District. No other taxpayer of Brule appeared as a party to oppose the transfer of land.

2. The Brule school board voted on April 24, 1986, to retain a lawyer to oppose the freeholder petitions. Although the lawyer met with the appellants on May 15, 1986, to advise them that they could not act as a board, but had to act individually, the board thereafter expended public funds to maintain the appeals.

3. The Brule board of education president testified that approximately $400 of public funds were expended to fight the freeholder petitions. As of the time of trial, these funds had been repaid to the school district by a money raising organization called "VIP 6." On cross-examination, the president admitted that on the Friday night preceding the trial, the school board had approved the payment of another $200 in legal fees in connection with the transfer issue. Those public funds had not been repaid by the time of trial. The Brule school board also paid with school district funds the bond premium for costs in each of the five cases. Since a bond is a jurisdictional requirement under Neb. Rev. Stat. § 23-135 (Reissue 1987) to maintain petitions on appeal, the appeals likely would not have been properly filed but for the use of school district funds.

4. Each member of the Brule school board testified that he or she was not billed for the lawyer's services.

On the basis of the foregoing factors, the trial court found that the real appellant in these cases was the board of education of school district No. 17. The trial court further found that the appellants "have maintained a facade for the Brule School District to file [the appeals] and that the Brule School District has no legal standing."

The trial court thereupon affirmed the decisions of the freeholder board transferring the appellees' lands from school district No. 17 to school district No. 1, and dismissed appellants' appeals.

The cases were dismissed on the basis of appellants' lack of standing to prosecute the appeals. Therefore, appellants other assignments of error and the trial court's discussion of how the court would have decided the cases on the merits if the appellants had standing are of no import. They will not be discussed further.

It was the duty of the district judge to try these cases de novo, which he did. On appeal, it is also the duty of the Supreme Court to review the cases de novo.

> The action of the statutory board under Neb. Rev. Stat. § 79-403 (Reissue 1976) is an exercise of quasi-judicial power, equitable in character, and upon appeal therefrom to the District Court the cause is triable de novo as though it had been originally instituted in such court, and upon appeal from the District Court to this court it is triable de novo as in any other equitable action.

(Syllabus of the court.) *In re Freeholder's Petition*, 210 Neb. 839, 317 N.W.2d 91 (1982).

While we review equity cases de novo and reach an independent conclusion without being influenced by the findings of the trial court, where credible evidence is in conflict, we may give weight to the fact the trial court saw the witnesses and observed their demeanor while testifying. See, *III Lounge, Inc. v. Gaines*, 227 Neb. 585, 419 N.W.2d 143 (1988); *Pallas v. Black*, 226 Neb. 728, 414 N.W.2d 805 (1987).

We have carefully reviewed the evidence on appellants' standing and have independently determined the facts of these cases to be substantially as set forth in the trial court's findings in that regard. The minutes of emergency and regular meetings of the Brule Board of Education referring to the land transfers corroborate many of the facts as found by the district court on standing.

The evidence is overwhelming that the Brule school board, during the relevant times herein, never retained the lawyer for any purpose other than to challenge the land transfers. The evidence is conclusive that the lawyer's services were never terminated and that he was paid $200 for legal services from school district funds the Friday before the trial in district court.

We fully agree with the trial court that the appellants

maintained a facade for the Brule School District to appeal the land transfers to the district court and that the Brule School District had no legal standing to litigate the issues involved.

The trial court's judgment dismissing each appeal for lack of standing is affirmed.

AFFIRMED.

JOHN MURPHY, D.J., concurs in the result.

IN RE APPLICATION OF OVERLAND ARMORED EXPRESS OF LINCOLN, INC.
OVERLAND ARMORED EXPRESS OF LINCOLN, INC., APPELLANT, V. WELLS FARGO ARMORED SERVICE CORP., APPELLEE.

428 N.W.2d 166

Filed August 19, 1988. No. 86-853.

1. **Public Service Commission: Appeal and Error.** In an appeal from an order of the Public Service Commission, this court examines the record to determine whether the commission acted within the scope of its authority and whether the evidence shows that the order in question was unreasonable or arbitrary. If there is evidence to sustain the findings and action of the commission, this court cannot intervene.
2. **Public Service Commission: Proof.** The burden of proof rests on the applicant for a certificate of public convenience and necessity to show that the applicant meets all the requirements of the statute.
3. _____: _____. The burden of proof is on the applicant to prove that the proposed service is or will be required by the present or future public convenience and necessity.

Appeal from the Nebraska Public Service Commission. Affirmed.

Robert M. Zuber, of Zuber & Ginsburg, for appellant.

Richard A. Peterson, of Peterson Nelson Johanns Morris & Holdeman, for appellee.

HASTINGS, C.J., CAPORALE, GRANT, and FAHRNBRUCH, JJ., and JOHN MURPHY, D.J.

GRANT, J.

This is an appeal from an order of the Nebraska Public Service Commission. On September 16, 1986, the commission denied the motion for rehearing and/or reconsideration filed by appellant, Overland Armored Express of Lincoln, Inc., and affirmed its earlier order denying the application filed by Overland. Overland's application sought the issuance of a certificate of public convenience and necessity granting Overland authority to transport coin, currency, and negotiable securities between points in Nebraska on irregular routes as a common carrier. Overland appeals, contending that the commission erred (1) in finding that Overland was not fit, willing, and able to perform the service; (2) in finding that there was no distinct need for the type of service offered by Overland which could not be met by common carriers; (3) in failing to find that public convenience and necessity required a grant of Overland's application; and (4) in refusing to admit supporting evidence offered by Overland, under Neb. Admin. Code tit. 291, ch. 1, § 016.015 (1985). We affirm.

The record shows that Overland filed its application on March 20, 1986. Testimony at the hearing showed that Overland desired to provide services on Tuesday and Thursday of each week between Omaha and Lincoln to financial institutions currently served by appellee, Wells Fargo Armored Service Corp., on Tuesday only. On April 9, 1986, Wells Fargo filed a protest alleging that Wells Fargo was currently providing service in the territory Overland sought to serve, that there was no public need for the service offered by Overland, and that Wells Fargo was prepared to provide additional services should there be a public demand or need for such additional services.

At the hearing on July 2, 1986, Overland presented the testimony of three witnesses. Max Rupe, the president of Overland, testified that Overland has been operating in Lincoln since 1978 and that Overland would be able to provide transportation to and from the Federal Reserve Bank in Omaha between Omaha and Lincoln on both Tuesday and Thursday of each week. None of Overland's income statements or profit and loss statements were introduced into evidence. While a balance sheet from Overland was apparently attached to Overland's

application, the balance sheet has not been made a part of the record on appeal. Overland's president did testify that the balance sheet showed one asset, described as accounts receivable, in an estimated account of $10,000, and no liabilities; that Overland had no checking account balance, no overdrafts, and no other assets such as automotive or office equipment; and that all the money it collects from its customers is endorsed over to Overland Armored Express of Omaha, which pays all of Overland's bills, including taxes and wages due. Rupe further testified that Overland is associated with Overland of Omaha, but did not testify to the particulars of that association. Rupe also testified that Overland uses one armored truck in its Lincoln operation and that Overland subleases that truck from Overland of Omaha, which leases the truck from Elliott Construction Company.

Rupe testified that Elliott Construction Company of Fremont, Nebraska, would provide "financial resources" to Overland. A letter addressed to the Public Service Commission and signed by the president of Elliott was offered in evidence. This letter advised the commission that the construction company "pledges its financial resources [to Overland] for equipment and working capital." Elliott's December 31, 1985, financial statement was also offered in evidence. Wells Fargo made hearsay objections to both of these documents. The objections were sustained by the commission's hearing examiner.

An operations officer in charge of the electronic banking department and teller operations at Gateway Bank in Lincoln testified for Overland. This witness testified that Wells Fargo was currently transporting cash for the bank from the Federal Reserve Bank in Omaha to Lincoln on Tuesday of each week. The witness testified that the bank was in need of an additional service on Thursday of each week and that the bank would "consider" using Overland for this service. The witness further testified that although she had had conversations with an employee of Wells Fargo concerning the possibility of providing the additional Thursday service, she had made no formal request to Wells Fargo for the additional Thursday service.

A vice president for First Federal Savings and Loan Association of Lincoln testified that Wells Fargo was currently providing services to First Federal on Tuesday of each week. The witness testified that First Federal had not yet determined that service on both Tuesday and Thursday was necessary, but that in the event such a determination was made, First Federal would "consider" using Overland's services for the Thursday run. The witness further testified that no formal request had been made to Wells Fargo to provide the additional Thursday service.

Larry Holmes, branch manager for Wells Fargo, was the only witness called by Wells Fargo. He testified that he was unaware of any requests by either Gateway Bank or First Federal to provide the additional Thursday service. Holmes testified that in the event such a request was made, however, Wells Fargo was prepared to provide the Thursday service for both institutions.

On August 5, 1986, the commission denied Overland's application, determining that Overland was "not fit, willing, and able properly to perform the service proposed" and that public convenience and necessity did not require that Overland's application be granted. On September 16, 1986, the commission denied Overland's motion for rehearing and/or reconsideration and affirmed its earlier decision. This appeal follows.

In its first assignment of error, appellant contends that the commission erred in finding that Overland was not fit, willing, and able to perform the service. In an appeal from an order of the Public Service Commission, this court examines the record to determine whether the commission acted within the scope of its authority and whether the evidence shows that the order in question was unreasonable or arbitrary. If there is evidence to sustain the findings and action of the commission, this court cannot intervene. *In re Application of Renzenberger, Inc.*, 225 Neb. 30, 402 N.W.2d 294 (1987).

Overland contends that there was sufficient evidence at the hearing to demonstrate that Overland is fit, willing, and able to perform the services of a common carrier. In its reply brief at 5, Overland states, "The burden of coming forward with evidence

that Overland was not fit was on Wells Fargo once Overland demonstrated fitness. It was Wells Fargo who failed in its burden of proof." We do not agree. The burden of proof rests on the applicant for a certificate of public convenience and necessity to show that the applicant meets all the requirements of the statute. *In re Application of Greyhound Lines, Inc.*, 209 Neb. 430, 308 N.W.2d 336 (1981). Neb. Rev. Stat. § 75-311 (Reissue 1986) provides, in part, that a qualified applicant must be "fit, willing, and able properly to perform the service proposed." To comply with that statute, the applicant must prove, in part, that the applicant is fit financially.

While the president of Overland testified generally to conclusions that he would be able to provide adequate insurance for Overland and that he had adequate financial resources to provide service and capitalization, Overland provided no documentary evidence to demonstrate that Overland was in sound financial condition other than the letter and balance sheet of Elliott Construction Company. The proffered evidence was not received and will be discussed below. There is nothing in the record for us to review on the issue of Overland's financial fitness, other than Rupe's testimony set out above. The commission determined Overland was not fit and able. The record before the commission supports that finding. Overland's first assignment of error is without merit.

In its second and third assignments of error, Overland contends that the commission erred in finding there was no distinct need for the type of service offered by Overland which could not be met by common carriers and in finding that public convenience and necessity did not require a grant of the application. The burden of proof is on the applicant, Overland, to prove that the proposed service is or will be required by the present or future public convenience and necessity. *In re Application of Renzenberger, Inc., supra.* The existence of adequate and satisfactory service by carriers already in the area is a complete negation of public need and demand for added service by another carrier. *In re Application of Renzenberger, Inc., supra.*

Overland's potential users testified that they had determined

that it would be "convenient" to have the additional Thursday service offered by Overland. There was no evidence to the effect that the current provider of the Tuesday run, Wells Fargo, would not be able to adequately provide the additional Thursday run if requested to do so. Furthermore, there was no testimony that the institutions would in fact use Overland for the additional Thursday run. Overland's witnesses testified that they would "consider" using Overland if Overland was granted authority to provide the Thursday service. Overland failed to demonstrate that an actual public demand existed which was not based on mere speculation, and which could not be adequately met by an existing carrier if requested to do so. Overland's second and third assignments of error are without merit.

In its fourth assignment of error, Overland contends that the commission erred in refusing to admit supporting evidence offered by Overland, under § 016.01. That rule provides:

> Evidence which is admissible in civil actions under the Revised Statutes of Nebraska will be admissible before the Commission. While the Commission will not be bound to follow the technical rules of evidence, the record will be supported by evidence which possesses probative value commonly accepted by reasonable men in the conduct of their affairs.

The evidence referred to by Overland is Elliott Construction Company's financial statement, dated December 31, 1985, and a "letter of commitment" pledging Elliott's resources to Overland. Overland's contention on appeal is that these documents, had they been admitted into evidence, would have demonstrated Overland's financial fitness.

Overland's contention is without merit. The rule referred to provides that the commission is not bound by technical rules of evidence, but that the "record will be supported by evidence which possesses probative value commonly accepted by reasonable men in the conduct of their affairs." We do not believe that evidence of the nature offered by Overland on this issue would be accepted by reasonable men. Overland offered a typewritten sheet, with a typed letterhead, called a "Financial Statement" of Elliott Construction Company. That statement

showed over $1 million in assets (including $500,604 in cash) and no liabilities. The sheet was signed by a person named as president, who certifies that the statement is true. It does not show that it was prepared by accountants from examination of Elliott's books, nor were the figures explained in any way. Overland's president testified that he had no financial interest in Elliott and that Overland did not intend to have any official of Elliott testify to the financial statement. No evidence was adduced as to the relationship, if any, between Elliott and Overland, other than the fact that Overland subleased a truck from Elliott. The financial statement was not admissible, even under the relaxed rules of the Public Service Commission. Overland has the burden of demonstrating financial fitness. There is no evidence in the record from which this court can determine the amount of financial resources which Overland has available to operate the proposed service, other than Overland's bare assertions that it has estimated accounts receivable of $10,000 from unspecified Lincoln customers and no liabilities. Overland has failed to satisfy its burden, in regard to its own showing of financial stability. Overland's fourth assignment of error is without merit.

There is sufficient evidence, or lack of evidence, to support the commission's order. The commission's denial of appellant's application is affirmed.

AFFIRMED.

GAS 'N SHOP, INC., A CORPORATION, APPELLANT, V. NEBRASKA LIQUOR CONTROL COMMISSION ET AL., APPELLEES.

427 N.W.2d 784

Filed August 19, 1988. Nos. 86-905, 86-906, 86-907, 86-908, 86-909, 86-910, 86-911.

1. **Administrative Law: Liquor Licenses: Appeal and Error.** The standard of review in the Supreme Court for appeals from the Liquor Control Commission is de novo on the record.
2. **Administrative Law: Liquor Licenses: Evidence: Appeal and Error.** The review in the district court of an order of the Liquor Control Commission denying an

application for a license is upon the record of the commission, and new evidence may not be offered and received in the district court.

3. **Alcoholic Liquors: Liquor Licenses: States.** The power of the state to absolutely prohibit the manufacture, sale, transportation, or possession of intoxicants includes the power to prescribe the conditions under which alcoholic beverages may be sold, and it may exercise large discretion as to the means employed in performing this power.
4. **Constitutional Law: Alcoholic Liquors: Liquor Licenses.** The right to engage in the sale of intoxicating liquors involves a mere privilege; and restrictive regulations or even a suppression of the traffic does not deprive persons of property without due process of law; violate the privileges, immunities, or due process clause; violate the uniformity provisions; nor, unless they contain irrational classifications or invidious discriminations, deprive one of the equal protection of the law, as prohibited by the state and federal Constitutions.
5. **Constitutional Law: Equal Protection.** Justification for classification must exist, and purely arbitrary treatment cannot be sustained.
6. **Constitutional Law: Equal Protection: Statutes: Legislature.** A legislative classification must operate uniformly on all within a class which is reasonable. Exemptions are allowed where they are made applicable to all persons of the same class similarly situated.
7. _____: _____: _____: _____. While it is competent for the Legislature to classify for purposes of legislation, the classification, to be valid, must rest on some reason of public policy, some substantial difference of situation or circumstance, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified.

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

Donald L. Dunn, of Rembolt, Ludtke, Parker & Berger, for appellant.

Dana W. Roper, Chief Assistant City Attorney, for appellee City of Lincoln.

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

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

PER CURIAM.

Each of these cases is an appeal by the plaintiff, Gas 'N Shop, Inc., from the orders of the district court, affirming the orders of the Nebraska Liquor Control Commission denying

the plaintiff's applications for class B liquor licenses (beer, off sale only) at the plaintiff's seven convenience stores located in Lincoln, Nebraska.

The plaintiff filed its first application for a class B license on October 25, 1985, for the Gas 'N Shop convenience store located at 400 West Cornhusker Highway. By a resolution dated November 25, 1985, the city council of the City of Lincoln recommended to the commission that the application be denied. The council based its recommendation of denial on the following findings: (1) The license would not comply with Lincoln Mun. Code § 6.08.100 (1981), which requires in part that all licensed premises be "separate and distinct from any other business activity"; (2) the area is already adequately served with existing licenses; (3) the applicant failed to demonstrate a need for the license, a true increase in service to the public, or an improvement to the neighborhood or a betterment to the community; (4) the present and future public convenience and necessity would not indicate that a license should be issued; (5) past liquor-related violations involving the applicant exist; (6) the existing population and the projected growth of the city would not warrant the issuance of the license; and (7) citizen opposition to the license had been received.

A formal hearing was held before the commission on January 17, 1986, at which time testimony was heard and evidence adduced, including the resolution of the city council and a copy of the pertinent ordinance. In its order dated January 23, 1986, the commission found:

> 1. That the applicant-corporation is fit, willing and able to provide the proposed services.
>
> 2. That the applicant-corporation can conform to all provisions, requirements, rules and regulations found in the Nebraska Liquor Control Act and the Rules of the Nebraska Liquor Control Commission.
>
> 3. That the applicant-corporation has demonstrated that the type of management and control exercised over the proposed licensed premises would be sufficient to ensure that the proposed licensed business would conform to all provisions, requirements, rules and regulations, found in the Nebraska Liquor Control Act.

4. That the local governing body recommended denial of said application.

5. That citizens protests were filed against said application.

6. That the issuance of this license would appear to violate Lincoln Municipal Ordinance No. 6.08.100.

7. That the issuance of this license is not required by the present or future public convenience and necessity.

8. That the application should be denied.

Subsequent to the filing of its application for a license at the 400 West Cornhusker location, the plaintiff filed six additional applications for licenses at its other six Lincoln stores, located at 951 West O Street, 3001 West O Street, 3000 Cornhusker Highway, 2142 North Cotner Boulevard, 2801 O Street, and 1545 Cornhusker Highway.

A joint hearing on these six applications was held before the city council on January 6, 1986, at which time the city council again recommended denial of the license applications for the same reasons given in its resolution on the first application.

A consolidated hearing on the six applications was held before the commission on February 27, 1986. The commission again heard testimony and received evidence regarding the applications. In each of the six orders, dated March 14, 1986, the commission again found that Gas 'N Shop was fit, willing, and able to provide the proposed services; that it could conform to all provisions, requirements, rules, and regulations found in the Nebraska Liquor Control Act, Neb. Rev. Stat. §§ 53-101 et seq. (Reissue 1984 & Cum. Supp. 1986), and the rules of the Nebraska Liquor Control Commission; and that it had demonstrated that the type of management and control exercised over the proposed licensed premises would be sufficient to ensure that Gas 'N Shop would conform to all provisions, requirements, rules, and regulations found in the Nebraska Liquor Control Act. However, the commission also found in each case:

4. That while all of the factors set forth in 53-132(3) have been considered they are not all of equal weight or significance and it is the general finding of the Commission that the issuance of this license is not

required by the present or future public convenience and necessity based upon the following specific findings of fact:

a. The local governing body recommended denial of said application.

b. The recommendation of denial was based in part upon Section 6.08.100 of the Lincoln Municipal Code which provides "(a) It shall be unlawful for any person or persons holding a license or licenses for the sale at retail of alcoholic liquor to keep, or sell the same except within duly licensed premises which are separate and distinct from any other business activity; provided, this subsection shall not apply to the retail sale of alcoholic liquor as part of a bowling alley, hotel, motel, club, or restaurant business; and provided, further, this subsection shall not apply to any nonconforming premises in existence on the effective date of this ordinance."

c. The City Council of the City of Lincoln found that the issuance of this license would violate the provisions of this ordinance.

d. Based upon the fact that the City of Lincoln found that the issuance would violate their separate and distinct ordinance, the application should be denied.

Following the commission's denials, the City of Lincoln filed with the commission a motion for rehearing and reconsideration of each of the six cases. In its motion, the city requested that the commission reconsider the wording of its order. In support of the motion, the city submitted a certified copy of ordinance No. 14345, passed by the city council on March 24, 1986, which amended § 6.08.100 to further define the separate and distinct requirements of off-sale liquor licenses, and which repealed § 6.08.100 as it existed at the time Gas 'N Shop made its applications and as it existed at the time of the commission's order. The city asked the commission to amend its order so as to reflect the current city ordinance. The commission denied each of the six motions.

In addition, the Lincoln Package Beverage Association filed a motion for rehearing and reconsideration in each of the six cases, requesting that the commission reconsider the reasons

for denial of the licenses. Each motion requested that two additional reasons be given for denying the licenses: (1) that the present and future public convenience and necessity indicate that the license should not be granted and (2) that the area is adequately served by existing licenses. The commission denied each of the six motions.

From the orders of denial entered by the commission, Gas 'N Shop filed a petition on appeal on each of the seven applications. The seven actions were consolidated for review by the district court. At the hearing on appeal the district court admitted into evidence the transcripts of each of the cases, the bills of exceptions from the two hearings before the commission, and excerpts of citizen protest testimony. In addition, the court received into evidence the city's motion for rehearing and the attached certified copy of the new city ordinance. This was received over Gas 'N Shop's objection that the motion or any attachments were irrelevant.

In *R.D.B., Inc. v. Nebraska Liquor Control Comm., ante* p. 178, 425 N.W.2d 884 (1988), we noted that the 1984 amendment to § 53-1,116 (Cum. Supp. 1986) eliminated de novo review in the district court and that the review in that court is upon "the record of the commission" and new evidence may not be received in the district court. To the extent that the district court in this case received and considered evidence other than the record before the commission, it was in error, and all such "new evidence" must be disregarded in our review of the orders of the commission.

The district court affirmed the commission's denial in each of the seven cases.

On appeal, Gas 'N Shop contends that the district court (1) erred in the interpretation and the construction of the findings and orders of the commission; (2) erred in determining that the decisions of the commission were supported by substantial evidence and were not unreasonable, arbitrary, or capricious; and (3) erred in failing to determine that Lincoln Mun. Code § 6.08.100 (1981) violates Neb. Const. art. III, § 18, by creating a discriminatory classification and thereby denying equal protection under the law.

As to the first two assignments of error, we need not consider

the merits in light of our recent decision in *R.D.B., Inc. v. Nebraska Liquor Control Comm., supra.* In that case we determined that the standard of review for appeals to this court from the Liquor Control Commission is de novo on the record under the Nebraska Administrative Procedure Act as set out in Neb. Rev. Stat. § 84-918 (Reissue 1981). This court, therefore, reaches its decision independent of all dispositions which have been made before, and we need only review the record made before the commission. *Haeffner v. State*, 220 Neb. 560, 371 N.W.2d 658 (1985).

In its third assignment of error, Gas 'N Shop alleges that § 6.08.100 is unconstitutional as a denial of equal protection under the U.S. and Nebraska Constitutions. At the time of the two hearings before the commission, and at the time of the commission's decision to deny the applications, § 6.08.100 (1981) stated:

> (a) It shall be unlawful for any person or persons holding a license or licenses for the sale at retail of alcoholic liquor to keep, or sell the same except within duly licensed premises which are separate and distinct from any other business activity; provided, this subsection shall not apply to the retail sale of alcoholic liquor as part of a bowling alley, hotel, motel, club, or restaurant business; and provided, further, this subsection shall not apply to any nonconforming premises in existence on the effective date of this ordinance.

On March 24, 1986, subsequent to the commission's denial but prior to the district court appeal, § 6.08.100 was amended. Section 6.08.100 (1986) now provides:

> (a) It shall be unlawful for any person or persons keeping or selling alcoholic liquor at retail for consumption off the premises to keep, or sell the same except within duly licensed premises which are separate and distinct from any other business activity. Premises shall be deemed separate and distinct only when located in a building which is not adjacent to any other building, or, when located within the same building, they shall be so separated by walls (floor to ceiling) that access cannot be had directly from the area of alcoholic liquor sales to any

other business activity by means of doors or other openings; provided, nothing contained herein shall prevent the construction or maintenance of doors that are used by employees only; and provided, further, any nonconforming premises in existence on the effective date of this ordinance may be continued although such premises do not conform to the provisions hereof. Three (3) years from the effective date of this ordinance, such premises must be in compliance with this section. Such nonconforming premises may not be enlarged, extended, or restored after damage during the interim. For the purposes of this section, "other business activity" shall mean the sale or display of any food, produce, mercantile product, item or service other than keeping or selling of alcoholic liquors at retail for consumption off the premises and the sale or display of ice, drink mix, tobacco, cups, or carbonated beverages.

In its brief the City of Lincoln alleges that the issue of constitutionality has been rendered moot due to the fact that § 6.08.100 (1981), as it existed at the time of the decision, no longer exists. As support for this proposition, it cites *Hall v. Beals*, 396 U.S. 45, 90 S. Ct. 200, 24 L. Ed. 2d 214 (1969), in which the U.S. Supreme Court held that the plaintiffs' action to hold unconstitutional a provision of Colorado's statute regarding voting rights of new residents was moot based in part on the fact that the statute was amended prior to the time the case reached the Supreme Court. The plaintiffs had challenged the requirement that a person must reside in the state for not less than 6 months prior to the election in order to be eligible to vote. Colorado later amended the statute so as to require only a 2-month residency for eligibility to vote. The Supreme Court stated:

> [T]he recent amendatory action of the Colorado Legislature has surely operated to render this case moot. We review the judgment below in light of the Colorado statute as it now stands, not as it once did. . . . And under the statute as currently written, the appellants could have voted in the 1968 presidential election. The case has therefore lost its character as a present, live controversy of

> the kind that must exist if we are to avoid advisory opinions on abstract propositions of law.

396 U.S. at 48.

The Court appears to have based its finding of mootness on the fact that the new statute did not prevent the plaintiffs from voting, as was the case with the prior statute. The present case, however, is factually distinguishable in that Gas 'N Shop is still prohibited from obtaining a liquor license under the ordinance as amended on March 24, 1986.

In its present posture, the issue presented in this case is the validity of § 6.08.100 prior to the March 24, 1986, amendment. Because this is a question of law, this court has an obligation to reach its conclusion independent from any conclusion reached by the trial court. *Ames v. George Victor Corp.*, 228 Neb. 675, 424 N.W.2d 106 (1988); *Communications Workers of America v. Abrahamson*, 228 Neb. 335, 422 N.W.2d 547 (1988).

The Nebraska Liquor Control Act provides that the power to regulate all phases of the manufacture, distribution, sale, and traffic in alcoholic liquors is vested exclusively with the Liquor Control Commission, except as otherwise provided in the act. § 53-116 (Reissue 1984). Section 53-147 (Reissue 1984) authorizes the governing bodies of cities and villages to regulate by ordinance the business of all retail or bottle club licensees carried on within their corporate limits provided that any ordinance not be inconsistent with the provisions of the act. In *Phelps Inc. v. City of Hastings*, 152 Neb. 651, 42 N.W.2d 300 (1950), this court held that an ordinance may impose stricter regulations than contained in the Nebraska Liquor Control Act, without violating the statutory requirement that an ordinance not be inconsistent with the act. The ordinance at issue here was, therefore, within the scope of the regulatory power of the City of Lincoln. The issue to be determined is whether the ordinance is unconstitutional as a violation of equal protection.

The power of the state to absolutely prohibit the manufacture, sale, transportation, or possession of intoxicants includes the power to prescribe the conditions under which alcoholic beverages may be sold, and it may exercise large discretion as to the means employed in performing this power.

Major Liquors, Inc. v. City of Omaha, 188 Neb. 628, 198 N.W.2d 483 (1972).

> "The right to engage in the sale of intoxicating liquors involves a mere privilege; and restrictive regulations or even a suppression of the traffic do not deprive persons of property without due process of law, violate the privileges or immunities clause, the due process clause, the uniformity provisions, nor, unless they contain irrational classifications or invidious discriminations, the equal protection of the law as prohibited by the state and federal Constitutions."

Bali Hai', Inc. v. Nebraska Liquor Control Commission, 195 Neb. 1, 8, 236 N.W.2d 614, 618 (1975). However, justification for classification must exist, and purely arbitrary treatment cannot be sustained. *Tom & Jerry, Inc. v. Nebraska Liquor Control Commission*, 183 Neb. 410, 160 N.W.2d 232 (1968).

"A legislative classification must operate uniformly on all within a class which is reasonable. Exemptions are allowed where they are made applicable to all persons of the same class similarly situated." *Casey's Gen. Stores v. Nebraska Liq. Cont. Comm.*, 220 Neb. 242, 243, 369 N.W.2d 85, 87 (1985).

> "While it is competent for the Legislature to classify for purposes of legislation, the classification, to be valid, must rest on some reason of public policy, some substantial difference of situation or circumstance, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified."

Tom & Jerry, Inc. v. Nebraska Liquor Control Commission, supra at 417, 160 N.W.2d at 237.

Gas 'N Shop argues that the ordinance fails to treat all dual business operators equally and creates two classes (those which can sell alcohol in the course of operating another business and those which cannot) where, in fact, only one exists.

The effect of the ordinance, it argues, is to prohibit the issuance of liquor licenses to some members of a class while excepting from such prohibition similarly situated members of that class (that being bowling alleys, hotels, motels, clubs, and restaurants).

This court has previously addressed this issue in *Casey's Gen. Stores, supra*. In that case, the appellant, Casey's, alleged that it was denied equal protection under §§ 53-124.02 and 53-124.03 (Reissue 1984). Section 53-124.02 prohibited a person from acquiring a beneficial interest in more than a total of two alcoholic beverage retail licenses. However, under § 53-124.03, the two-license limit was not applicable to licenses

> (1) issued to any city of the primary or metropolitan class to be used in city-owned facilities open to the public; (2) issued to a person for use in connection with the operation of a hotel containing at least twenty-five sleeping rooms; (3) issued to a person for use in connection with the operation of a bowling establishment containing at least twelve bowling lanes; (4) restricted to on premise sale of beer only in a restaurant; or (5) issued to a person for use in connection with the operation of a restaurant having food sales of at least sixty per cent of its total gross sales, except that any license issued under this subdivision shall restrict consumption of alcoholic liquors to on the premises only.

We held that the numerous exemptions rendered obsolete the original rationale for the two-license limit, which had been that a limitation on the number of licenses would protect local Nebraska operations by curbing a possible monopoly of the liquor business by chain stores.

We held that the classifications in §§ 53-124.02 and 53-124.03 treated classes similarly situated differently without substantial justification, and as such were a violation of equal protection under the U.S. and Nebraska Constitutions.

We stated:

> There is no rationale for treating a chain restaurant, such as Pizza Hut, any differently from a chain of convenience stores, such as Casey's. At either one a person may purchase food as well as alcohol, and both would require proof of legal age in order to purchase alcoholic beverages. The only distinction is that the alcoholic beverages purchased at the convenience store will be drunk off the premises. This difference, however, presents no distinctive corollary to furthering temperance, as an

> individual may drink as much in a private restaurant as he may at home or elsewhere.
>
> Further, the lifting of the two-license limit does not open wide the door to a flood of liquor licenses. Every applicant must still file an application, establish capability for handling such responsibility, and meet with liquor control approval before a license is granted.

220 Neb. at 245-46, 369 N.W.2d at 88.

The judgment of the district court was reversed and the cause remanded to the district court with directions to remand the cause to the Nebraska Liquor Control Commission for a redetermination of the license application without regard to the unconstitutional statutes.

The question here is whether § 6.08.100 also treats similarly situated classes differently without substantial justification. It would appear that by exempting bowling alleys, hotels, motels, clubs, and restaurant businesses from the "separate and distinct" requirement, the ordinance fails to treat all persons within the class of dual business operators equally, and does prohibit the issuance of liquor licenses to some members of the class while exempting others from the prohibition.

The question to be determined is whether this distinction is made without justification and, as such, is a violation of equal protection. In the statement of policy in the Nebraska Liquor Control Act, it is declared that one of the policies of the act is to "promote adequate, economical, and efficient service by licensees selling alcoholic liquor within the State of Nebraska, without unjust or undue discrimination, preference, or advantage." § 53-101.01(2) (Reissue 1984). The ordinance in question directly violates that stated policy.

Another policy is to "promote the health, safety, and welfare of the people of the State of Nebraska and encourage temperance in the consumption of alcoholic liquor . . . ." § 53-101.01(4). As in *Casey's Gen. Stores v. Nebraska Liq. Cont. Comm.*, 220 Neb. 242, 369 N.W.2d 85 (1985), the distinctions made between a convenience store and a bowling alley, hotel, motel, etc., do not bear a rational relation to the furthering of temperance.

In *Joe and Al's IGA, Inc. v. Nebraska Liquor Control*

Commission, 203 Neb. 176, 277 N.W.2d 693 (1979), where from the record we determined there was no valid reason for the commission's denying the application for a retail package liquor license for a grocery store, and its action was therefore arbitrary and unreasonable, we affirmed the judgment of the district court reversing the order of the commission and directing that the license be issued. We think the record supports a similar result in these cases.

The judgment of the district court in each case is reversed and the cause remanded with directions to enter a judgment in each case ordering the commission to issue the license applied for by the plaintiff.

REVERSED AND REMANDED WITH DIRECTIONS.

NEAL L. KELLER AND PAULINE M. KELLER, HUSBAND AND WIFE, APPELLANTS AND CROSS-APPELLEES, V. GAYLE K. NOBLE, APPELLEE AND CROSS-APPELLANT.

428 N.W.2d 170

Filed August 19, 1988. No. 86-918.

1. **Jury Instructions: Appeal and Error.** Ordinarily, the failure to object to instructions after they have been submitted for review will preclude raising an objection thereafter; however, a trial judge is nonetheless under a duty to correctly instruct on the law, and the Nebraska Supreme Court may take cognizance of plain error and thus set aside a verdict because of a plainly erroneous instruction to which no previous objection was made.
2. **Appeal and Error: Words and Phrases.** Plain error is error which was unasserted or uncomplained of at trial but is plainly evident from the record, which prejudicially affects a litigant's substantial right, and which is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.
3. **Verdicts: Appeal and Error.** A verdict which is clearly wrong will be set aside on appeal.

Appeal from the District Court for Boone County: JOHN M. BROWER, Judge. Affirmed in part, and in part reversed.

Steven O. Stumpff, of Stumpff Law Offices, and Charles E. Wright, of Cline, Williams, Wright, Johnson & Oldfather, for appellants.

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

BOSLAUGH, WHITE, CAPORALE, GRANT, and FAHRNBRUCH, JJ.

CAPORALE, J.

Plaintiffs-appellants, Neal L. and Pauline M. Keller, allege they suffered $191,640 in damages as the result of the breach by defendant-appellee and cross-appellant, Gayle K. Noble, of his written agreement to purchase certain real estate from them. Noble in turn counterclaimed for the refund of his $15,000 downpayment. The district court accepted the jury's verdict, finding against the Kellers on their petition and against Noble on his counterclaim, thereby in effect awarding the Kellers $15,000 in damages. In their appeal to this court, the Kellers assign as error certain of the district court's instructions to the jury. In his cross-appeal, Noble assigns as error the failure of the district court to sustain his motions for directed verdict on the Kellers' petition and his counterclaim. We affirm in part and in part reverse.

The Kellers' operative petition alleges that at Noble's behest they purchased the land in question for subsequent transfer to him. The petition further claims that at the time of executing the written document which is the subject of the action, the parties agreed that Noble would accept assignments of certain preexisting long-term installment contracts for sale of the land to others, and that Noble partially performed the written document by paying $15,000 and entering upon the land.

Noble's operative answer and counterclaim admits execution of the written document but alleges the Kellers contracted to convey marketable title and found themselves unable to do so, and that while the parties orally agreed that in the event of Noble's default he would forfeit his $15,000 downpayment and the Kellers' damages would be limited to that amount, the oral agreement was nonetheless void as violative of the statute of frauds. Accordingly, Noble prayed for dismissal of the Kellers'

action and return of the $15,000 he had paid.

The Kellers' answer to Noble's counterclaim asserts they were not required to deliver merchantable title, Noble knowing "at the time he signed" the written document "or very shortly thereafter" that the signatories to one of the long-term installment contracts for sale of the land "would not accept an early pay-off," and that Noble did not complain of any title defect but claimed he was abandoning the transaction because he could not obtain the requisite financing.

The land in question, consisting of approximately 2,952 acres in Brown County, was sold in 1971 by Henry and Goldie Boller to Ralph and Joanne Gracey on a long-term installment sales contract on which there remained unpaid at the time of trial approximately $100,000. In addition, the Bollers owed approximately $13,000 on a mortgage to the federal land bank which bore interest at the rate of 4 1/2 percent per annum. On May 15, 1984, the Graceys, without the written consent of the Bollers, assigned their rights under the Gracey-Boller contract to the Kellers. Neal Keller testified that Noble approached him, asking that the Kellers buy the land, as Noble was not then in a position to acquire the necessary financing, and that he would purchase it from them in approximately 6 months. Noble, on the other hand, denies such a conversation.

On June 22, 1984, the parties to this action executed a document prepared by one of Noble's attorneys, in which the Kellers agreed to sell the subject real estate to Noble for a total of $472,320 (or $160 per acre); $15,000 to be paid by Noble to the Kellers on or before June 10, 1984, and the $457,320 balance to be paid on January 15, 1985. The document provides that possession of the real estate be given to Noble upon his "making full payment," and requires that the Kellers

> furnish a merchantable abstract of title covering all of said above described real estate as soon as possible and deliver same to [Noble] so that he may have the abstract examined and approved by his attorney; upon notice of defects the [Kellers] shall have a reasonable time to perfect any defects in the title.

As part of executing the document, the parties deleted language which would have required the Kellers to convey the real estate

"by warranty deed, free and clear of all encumbrances, subject only to reservations, restrictions and easements of record." The parties also canceled language which would have made the transaction contingent upon Noble's ability to obtain financing and which had provided that if he were "unable to obtain such financing, the [Kellers agree] to cancel said contract and return the $15,000. down payment to [Noble]."

The court received conflicting evidence as to the reason the language concerning the type of conveyance was deleted. Neal Keller testified it was because if the Bollers were to refuse an early payoff of the amount due them, there would be an encumbrance; another witness testified it was because Noble was to assume the Boller-Gracey contract; and Noble testified he was told the Bollers would be "easy to get along with" and there would be "no problem" with paying off the Boller-Gracey contract. Consistent with other evidence, Noble admitted the language making the transaction contingent on his being able to obtain financing was stricken so that he would forfeit the $15,000 downpayment in the event the transaction were not completed.

Noble made the downpayment, and although the Kellers remained in possession of the real estate, he, in the fall of 1984, directed the killing of gophers on a 35-acre plot on which he then directed the planting and irrigation of alfalfa.

Although Noble discussed possible financing with a banker, he made no applications for a loan and therefore had no loan application rejected. Nonetheless, in November 1984 Noble advised Neal Keller that he "couldn't get financing on the property" and "wanted to turn it back." Later, Neal Keller asked Noble where he wanted the abstracts of title sent for review, whereupon Noble again said he was not going through with the transaction. Noble did not obtain a title opinion and at no time prior to trial made any objection that the land was subject to encumbrances. On January 9, 1985, Noble received a demand through one of the Kellers' attorneys that he accept an assignment of the Kellers' interest in the real estate and pay the balance due by January 15, 1985. Noble countered with a demand that the Kellers return the $15,000 he had paid. This action then ensued.

There is testimony that as of January 15, 1985, the real estate in question was worth up to $98 per acre, a total of $289,296. There is also evidence that when Noble met with the Bollers in late June of 1984, they, because of tax reasons, did not want an early payoff of the sums due them under the Boller-Gracey contract and did not wish to discharge their indebtedness to the federal land bank because of the favorable interest rate that debt bore. The Kellers were later able to persuade the Bollers to accept an early payoff of the amount due them under the Boller-Gracey contract for an additional consideration of $20,000 and payment of an undetermined tax liability the Bollers would incur. This additional consideration was not, however, paid to the Bollers, although Mrs. Boller testified she and her husband remained willing to accept it.

With refreshing candor, the Kellers concede the record brought to this court for review is both confusing and deficient. It is confusing because the numbers assigned to some of the instructions with which the jury was charged differ from the numbers assigned to the instructions as considered at the instruction conference, and no steps were taken on the record to correlate one set to the other. The record is deficient from the Kellers' point of view in that they failed to object to certain instructions about which they now wish to complain.

Nonetheless, there is a single instruction given to the jury which was identifiably objected to in part by the Kellers at the instruction conference, was assigned by them as error, and is discussed in their briefs, namely, the instruction numbered 8 as given to the jury. That instruction advises that in order for Noble to recover on his cross-appeal, on the theory that no contract existed between the parties, it was his burden to show, among other things, "that there was no meeting of the minds of the parties." Another instruction described the test to be used in determining whether such "meeting of the minds" occurred.

The Kellers argue, in essence, that the existence of the written document establishes as a matter of law that the minds of the parties met as expressed therein, and it was therefore error to place before the jury any issue as to whether there was any contract to enforce. Aside from the facts that such was not the nature of the objection they made at the instruction conference

and that the burden of proving a lack of mutual consent was placed on Noble, it was the Kellers themselves who pled and undertook to prove that the written document did not express the entire agreement of the parties—that Noble had agreed to accept merchantable title subject to the encumbrances arising by virtue of the preexisting installment sales contract and the Bollers' mortgage in favor of the federal land bank, notwithstanding the document's language requiring the production of "merchantable abstract of title." Under the circumstances, it cannot be said the court committed error in charging the jury as it did in instruction No. 8.

The Kellers also wish to take advantage of Noble's objection to the instruction which defines a waiver as the voluntary and intentional relinquishment of a known right and which, in effect, requires that to find Noble waived his right to a merchantable title, the jury must first find that he acted with full knowledge and with the intention to relinquish his right to such a title. Yet, as noted previously, what title was required is an issue the Kellers themselves interjected; the instruction was thus not inappropriate.

In complaining about a variety of other instructions concerning their petition, the Kellers recognize and acknowledge that, ordinarily, the failure to object to instructions after they have been submitted for review will preclude raising an objection thereafter. *McCready v. Al Eighmy Dodge*, 197 Neb. 684, 250 N.W.2d 640 (1977). They properly point out, however, that the trial judge is nonetheless under a duty to correctly instruct on the law, *Anderson v. Union Pacific RR. Co., ante* p. 321, 426 N.W.2d 518 (1988), and that this court may take cognizance of plain error and thus set aside a verdict because of a plainly erroneous instruction to which no previous objection was made. *Omaha Mining Co. v. First Nat. Bank*, 226 Neb. 743, 415 N.W.2d 111 (1987). Plain error is error which was unasserted or uncomplained of at trial but is plainly evident from the record, which prejudicially affects a litigant's substantial right, and which is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process. *In re Estate of Fischer*, 227 Neb.

722, 419 N.W.2d 860 (1988). However, our review leads us to conclude that in view of the theories on which the case was tried and the evidence, the instructions given present no plain error.

The determination that the verdict in favor of Noble on the Kellers' petition must stand mandates a conclusion that the verdict in favor of the Kellers on Noble's counterclaim must be reversed. The record is such that in order to find as it did on the Kellers' petition, the jury must have determined either that there was no contract for the sale of the land in question, in which event there is no basis on which they may retain the downpayment, or that a contract existed but the Kellers could not deliver the requisite title, in which case again there is no basis on which they may retain the $15,000. Thus, the Kellers' complaints with respect to the other instructions concerning Noble's counterclaim are equally without merit.

The corollary to the oft-stated rule that a jury verdict will not be disturbed on appeal unless it is clearly wrong, *Havlicek v. Desai*, 225 Neb. 222, 403 N.W.2d 386 (1987), and *Weiss v. Autumn Hills Inv. Co.*, 223 Neb. 885, 395 N.W.2d 481 (1986), is that a verdict which is clearly wrong will be set aside on appeal.

AFFIRMED IN PART, AND IN PART REVERSED.

HASTINGS, C.J., and SHANAHAN, J., not participating.

LONE OAK FARM CORPORATION, A NEBRASKA CORPORATION, APPELLEE, V. RIVERSIDE FERTILIZER CO., A NEBRASKA CORPORATION, APPELLANT.

428 N.W.2d 175

Filed August 19, 1988. No. 86-990.

1. **Trusts: Equity: Appeal and Error.** An action for constructive trust is one in equity and is reviewed de novo on the record in this court.
2. **Trusts: Proof.** The burden is on the party seeking to establish a constructive trust to do so by evidence which is clear, satisfactory, and convincing in character.

3. **Leases: Landlord and Tenant: Crops: Tenancy in Common.** Where land is leased and rent is to be paid by a share or specified amount of the crops to be raised, the landlord and tenant are tenants or owners in common of the growing crops until such time that the crop is harvested and divided.
4. **Leases: Landlord and Tenant: Crops: Tenancy in Common: Mortgages.** Where a landlord and tenant are tenants in common of growing crops, the tenant may mortgage or sell his interest in the crops, but his mortgagee is charged with notice of the landlord's interest. The tenant's interest is determined by the terms of the lease, and his mortgagee can take no greater interest in the crop as against the landlord than could be asserted by the tenant himself.
5. **Leases: Landlord and Tenant: Crops: Security Interests.** Where land is leased and rent is to be paid in cash rather than a share of the growing crops, the landlord's only recourse in the crops would be through an agreement with the tenant to give a security interest in the crops.
6. **Contracts.** A contract is ambiguous when, considered as a whole, it is capable of being understood in more senses than one.
7. _____. When a contract is ambiguous, courts will consider all the facts and circumstances leading up to the contract's execution, the nature and situation of the subject matter, and the apparent purpose of the contract.
8. _____. Forfeitures will be enforced only when the strict letter of the contract requires it.
9. **Uniform Commercial Code: Liens: Security Interests: Words and Phrases.** An equitable lien is an unperfected security interest under the Uniform Commercial Code.
10. **Uniform Commercial Code: Security Interests.** A perfected security interest takes priority over an unperfected security interest. Neb. U.C.C. §§ 9-301 and 9-312 (Reissue 1980).
11. _____: _____. Neb. U.C.C. § 9-312(5) (Reissue 1980) is a "pure race" type statute, and a secured party who was first to perfect or file a security interest will have priority over all unperfected security interests in the same collateral, even though such party had actual or constructive knowledge of a prior unperfected security interest.

Appeal from the District Court for Valley County: RONALD D. OLBERDING, Judge. Affirmed in part, and in part reversed and remanded with directions to dismiss.

William A. Francis, of Cunningham, Blackburn, Livingston, Francis, Cote, Brock & Cunningham, for appellant.

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

BOSLAUGH, WHITE, and SHANAHAN, JJ., and SPRAGUE and THOMPSON, D. JJ.

WHITE, J.

The plaintiff, Lone Oak Farm Corporation, brought this action to impose a constructive trust on crops, or the proceeds thereof, received by Riverside Fertilizer Co. (Riverside) allegedly in breach of a subordination agreement between the plaintiff and the defendant. The district court ruled that the subordination agreement entered into between the parties was clear and unambiguous, was controlling over the priority provisions of the Nebraska Uniform Commercial Code, and imposed a constructive trust on proceeds of crops held by the defendant in favor of the plaintiff. Riverside appeals. We affirm in part and reverse in part.

On March 19, 1984, Lone Oak Farm Corporation (landlord) leased two tracts of land to Dennis L. Land (tenant). The first tract was leased in exchange for 6,500 bushels of corn or, at the landlord's option, $20,000. The second tract was leased in exchange for 50 percent of the total crop yield. It was the tenant's responsibility to deliver the grain to the market of the landlord's choice. In addition, the landlord was to receive $3,850 from the proceeds of an insurance settlement for damage to a wheat crop. Sometime near the end of November or early December of 1984, the landlord notified the tenant that it elected to receive $20,000 for rent on tract 1. The lease further provided that the landlord was to file a security agreement covering the crops in the appropriate place and manner; however, no such security agreement was filed.

On March 21, 1984, the tenant entered into an agreement with appellant, Riverside, for the sale of goods and services necessary to produce the crops on the two tracts. On March 30 Riverside filed a financing statement and security agreement covering all crops and proceeds of crops to be grown on the subject property, and also covering crop insurance proceeds. The security agreement named the tenant and his wife as debtors. Riverside ultimately provided fuel, fertilizer, chemicals, and services to the tenant in the amount of $27,495.77.

On April 14 Riverside and the landlord entered into a subordination agreement. If the crops or crop proceeds due the tenant were not sufficient to pay the advances made by

Riverside, then the landlord was to be responsible for up to $7,000 in charges for fertilizer and chemicals used upon its ground. The subordination agreement acknowledged that the landlord had a "lien or interest" in the amount of crops or proceeds set forth in the lease. The agreement was subject to the limitation that it "shall be in effect from the period of April 1, 1984 until December 1, 1984 after which eight month period previously described, no valid claim shall be made against the [landlord]."

Riverside became involved with the harvest on tract 1, apparently at the tenant's request. No one representing the landlord was present during the harvest. A representative of Riverside testified that Riverside hauled only one of every three loads of corn from tract 1 to the elevator. Neither party was able to establish conclusively what became of the rest of the corn. The tenant filed for bankruptcy prior to the trial and was not called as a witness. The record indicates that on November 1 and 2 of 1984 approximately 8,750 bushels of corn were delivered to Boilesen Grain Company from tract 1. Several days later approximately 757 bushels of beans were delivered to another grain company from tract 2. On December 13 Riverside credited the tenant's account in the amount of $27,030.05, representing corn from tract 1 and beans and crop insurance from tract 2. At the time of this lawsuit the landlord had received no crops, proceeds, or insurance money from the two tracts.

The trial court held that the landlord was not indebted to Riverside under the subordination agreement, because by its terms it had expired. The trial court further ruled that by stating in the subordination contract "no valid claim shall be made against the [landlord]" after December 1, 1984, the parties agreed that after such date Riverside's interest became subordinate to the landlord's interest. The court awarded to the plaintiff those amounts due under the lease, that is, $20,000 of the proceeds from tract 1, half of the crop proceeds ($265.42) from tract 2, and $3,850 of insurance proceeds, or a total of $24,115.42.

Riverside contends that the trial court erred (1) in failing to grant its motion for directed verdict at the close of the

landlord's case; (2) in finding that the subordination agreement was not ambiguous; (3) in finding that its written agreement to provide materials and services to the landlord's tenant was not relevant and refusing to admit the same in evidence; and (4) in that the decision of the trial court was not sustained by sufficient evidence because the landlord had not perfected a lien in the crop as required by Neb. U.C.C. § 9-401 (Cum. Supp. 1984).

An action for constructive trust is one in equity and is reviewed de novo on the record in this court. *Knoell v. Huff*, 224 Neb. 90, 395 N.W.2d 749 (1986); Neb. Rev. Stat. § 25-1925 (Reissue 1985). The burden is on the party seeking to establish a constructive trust to do so by evidence which is clear, satisfactory, and convincing in character. *Knoell v. Huff, supra.*

The appellant's first assignment appears to be directed only at the dispute over the corn from tract 1. The appellant asserts that "[a]t the time of [the landlord's] rest, the record did not substantiate the fact that the grain delivered to Boilesen Elevator was grown on the [landlord's] land, or that [the landlord] had any interest in the same." Brief for appellant at 12. The fact that this grain came from tract 1 of the landlord's land was stipulated to before the trial began. Riverside's real argument here seems to be that the landlord failed to establish an interest in the crop because it was unable to establish how much corn was harvested from tract 1. Riverside asserts that the proceeds from 8,750 bushels of corn it received came from the tenant's share of the crop and not the landlord's share.

Riverside's assertion necessitates a discussion of the law in Nebraska relating to this subject. The rule in this state is that where land is leased and rent is to be paid by a share or specified amount of the crops to be raised, the landlord and tenant are tenants or owners in common of the growing crops until such time that the crop is harvested and divided. *Anest v. Chester B. Brown Co.*, 169 Neb. 330, 99 N.W.2d 615 (1959); *Chalupa v. Tri-State Land Co.*, 92 Neb. 477, 138 N.W. 603 (1912). The tenant may mortgage or sell his interest in the crops, but his mortgagee is charged with notice of the landlord's interest. The tenant's interest is determined by the terms of the lease, and his mortgagee can take no greater interest in the crop as against the

landlord than could be asserted by the tenant himself. *Yates v. Kinney*, 19 Neb. 275, 27 N.W. 132 (1886).

If, on the other hand, the lease is on a cash rent basis, the cotenancy relationship does not exist. In this situation the landlord's only recourse in the crops would be through an agreement with the tenant to give a security interest in the crops. See, *Todsen v. Runge*, 211 Neb. 226, 318 N.W.2d 88 (1982); *Oleson v. Pumphrey*, 125 Neb. 708, 251 N.W. 828 (1933).

The lease in this case called for rent in either corn or cash at the landlord's option on tract 1. We find no Nebraska case law which attempts to define the landlord's and tenant's relationship with respect to the growing crops in this situation. However, a judicial resolution of this issue is unnecessary on the facts of this case. When the landlord exercised its option to collect cash instead of the crop share, it gave up any ownership interest it might have had in the corn. At this point the corn belonged to the tenant. Thus, the landlord failed to prove an *ownership* interest in the corn, but not for the reason asserted by the appellant. The consequence of this determination will be discussed with the remaining assignments of error.

As to the second assignment, appellant contends that the entire subordination agreement is ambiguous and should not be understood to give the landlord's unperfected interest priority over Riverside's perfected security interest. The language limiting the effective time period of the subordination agreement, appellant argues, was only intended to affect amounts due under the agreement and was in no way intended to affect rights existing prior to and apart from the agreement.

The landlord, on the other hand, focuses on the words "no valid claim" shall be made by Riverside against the landlord and argues that the meaning of the agreement is clear; any interest the landlord had in the grain, including an unrecorded security interest, would be free from Riverside's claim after December 1, 1984.

We have held that a contract is ambiguous when, considered as a whole, it is capable of being understood in more senses than one. *Quinn v. Godfather's Investments*, 213 Neb. 665, 330 N.W.2d 921 (1983). We agree with the appellant that the subordination agreement is open to one of two interpretations.

It is unclear whether "no valid claim" refers only to rights created under the subordination agreement or also includes rights existing at the time of the agreement. In such a case it is incumbent upon this court to consider all the facts and circumstances leading up to the contract's execution, and to consider the nature and situation of the subject matter and the contract. *Lauritzen v. Davis*, 214 Neb. 547, 335 N.W.2d 520 (1983).

There was a dispute in the evidence as to which party prepared the "no valid claim" provision in the contract. Without deciding which party the language should be construed against, we make these observations.

First, the facts and circumstances leading up to the execution of the subordination agreement are that on March 19, 1984, the landlord and tenant entered into a lease agreement. The lease called for a lien against the crops to satisfy the landlord's share, but no security agreement was ever filed. On March 30, 1984, Riverside executed and filed a security agreement covering the tenant's interest in crops to be grown on the landlord's ground that year. When the subordination agreement was entered into, Riverside was entitled to believe that it had a first lien in the tenant's interest under the U.C.C.

Second, the nature and the situation of the subordination agreement's subject matter is unique in this case. At the time the subordination agreement was entered into, the landlord's interest in the corn on tract 1 was uncertain. This interest was ultimately to be either an ownership interest or a lien interest, depending upon which option was exercised under the lease. Coincidentally, the tenant's interest in the corn was an ownership interest in either the excess of 6,500 bushels or the entire harvest, depending upon the landlord's choice of rent. The extent of Riverside's lien against the corn was therefore uncertain at the time of the subordination agreement and may well have been the cause of the ambiguity.

Finally, the apparent purpose of the subordination agreement must be considered. The purpose was described in the agreement itself as follows:

> 2. Lessee desires to purchase fertilizer, fuel, and chemicals, from [Riverside], and [landlord] acknowledges

> that the supply of such goods are [sic] in its best business interest, in that it will enable Lessee to raise a crop.
>
> 3. [Riverside] is willing to advance credit to Lessee for the purchase of the above described goods if [landlord] will subordinate its present and future interests and liens against the above described property of [landlord] to the extent of goods actually supplied for the benefit of the crop grown on the above described real estate.

Clearly, Riverside sought additional security beyond that already provided by the tenant's interest in the crop. The landlord agreed to provide for up to $7,000 in charges beyond the amount that the tenant's share would ultimately satisfy.

In light of the foregoing and construing the contract as a whole, it can only be said that the "no valid claim" language limited the effective time of the subordination agreement itself. It cannot be said that the termination of the agreement affected priority rights existing prior to and apart from the contract itself. To hold otherwise would amount to a forfeiture of Riverside's rights under its perfected security agreement. The subordination agreement does not specifically address itself to lien priorities after termination, and, in the absence of direct language that such a forfeiture was intended, this court will not enforce one. *Long v. Magnolia Petroleum Co.*, 166 Neb. 410, 89 N.W.2d 245 (1958).

In the absence of an agreement to the contrary, priority of the competing interests in this case is determined by Neb. U.C.C. art. 9 (Reissue 1980 & Cum. Supp. 1984). In its fourth assignment of error appellant contends that, at best, the landlord was an unsecured creditor of the tenant and that such an interest is subordinate to Riverside's secured interest under §§ 9-301 and 9-312 (Reissue 1980). The landlord argues that it is entitled to an equitable lien under the terms of the lease, even though it did not file a financing statement, see Neb. U.C.C. § 1-103 (Reissue 1980) (unless displaced by particular provisions, equity principles supplement the U.C.C.), and that Riverside recognized this interest in the subordination agreement.

Even assuming that the landlord was entitled to an equitable lien against the tenant under the lease, it would still be an

unperfected security interest under the U.C.C. So long as the U.C.C. governs the priority question, we must agree with the appellant that its perfected security interest takes priority. The fact that Riverside may have known of the landlord's interest is of no consequence. See, *Todsen v. Runge*, 211 Neb. 226, 318 N.W.2d 88 (1982); § 9-312(5).

Appellant's third assignment was not discussed in its brief and, in any event, is not necessary to the disposition of the appeal.

The landlord's interest in the corn proceeds from tract 1 and the insurance proceeds is subordinate to Riverside's perfected security interest. The district court's order granting a constructive trust upon the corn and insurance proceeds is therefore reversed and remanded with directions to dismiss that part of the landlord's action.

The landlord's interest in the beans from tract 2 was an ownership interest on which Riverside's security interest could not attach. See *Yates v. Kinney*, 19 Neb. 275, 27 N.W. 132 (1886). The district court's order granting a constructive trust upon half of the proceeds of the beans was therefore proper and is affirmed.

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

STATE OF NEBRASKA, APPELLEE, V. SAM J. HINN, APPELLANT.
427 N.W.2d 791

Filed August 19, 1988. No. 87-499.

1. **Trial: Evidence: Appeal and Error.** It is within the trial court's discretion to admit or exclude evidence on the ground of relevancy, and such rulings will be upheld on appeal absent an abuse of discretion.
2. **Sentences: Appeal and Error.** A sentence imposed within the limits prescribed by a statute will not be disturbed on appeal unless there appears to be an abuse of discretion.
3. **Sentences: Probation and Parole: Appeal and Error.** An order denying probation and imposing a prison sentence within the statutory limits will not be overturned on appeal, absent an abuse of discretion.

Appeal from the District Court for Sheridan County: PAUL D. EMPSON, Judge. Affirmed.

Michael T. Varn for appellant.

Robert M. Spire, Attorney General, and James H. Spears for appellee.

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

HASTINGS, C.J.

This is an appeal from the district court for Sheridan County in which the defendant, Sam J. Hinn, was convicted of second degree arson and burning with intent to defraud an insurance company.

An information was filed in the district court for Sheridan County, Nebraska, on September 8, 1986, alleging that on or about the 19th day of April, 1986, the defendant did:

> Count I - then and there intentionally damage a building by starting a fire or causing an explosion, to-wit: Hinn's Ranchland at 124 South Main Street, Rushville, Nebraska; and
>
> Count II - with the intent to deceive or harm an insurer, did then and there set fire to, burn or attempt to burn; cause to be burned; or aid, counsel or procure the burning of Hinn's Ranchland located at 124 South Main Street in Rushville, Nebraska which property was at the time insured by the State Farm Insurance Company against loss or damage by fire.

A pretrial conference was held on February 24, 1987. The district court ordered each side to submit a list of witnesses intended to be called for the case in chief. This in part resulted from defendant's October 15, 1986, motion for discovery, demanding the names of all prosecution witnesses. The court, in its journal entry relating to pretrial matters, granted that motion and, additionally, allowed reciprocal discovery by the State, as provided for in Neb. Rev. Stat. § 29-1916 (Reissue 1985). Both the State and the defendant complied with the court's order.

Trial commenced on March 4, 1987, where it was established that the defendant was the owner of Hinn's Ranchland, a western wear and supply store, and that State Farm Insurance

carried the fire insurance policy on the establishment. The primary issue at trial was the cause of the fire. The State's evidence consisted in part of testimony from a deputy state fire marshal, Gerald W. Larson, who had conducted an on-site investigation of the fire. Deputy Larson concluded that there was no natural cause for the fire, as it was fed by an accelerant. This was evident from observing burn patterns on the carpet and shelving. Deputy Larson determined that there were two different and separate areas of origin. These areas of "low burning" in the basement and the boot room of the establishment were then examined for natural fire causes (electrical, gas, etc.) in the area. None was found.

Deputy Larson testified to the fact that the electrical system was in good shape. After examining all the evidence he could discover in the case, he concluded that the fire was an arson fire. Additional State's evidence included a showing of the presence of evaporated gasoline in the air, and two pieces of cloth with a distinct odor of gasoline on them. One was a shirt cuff, found in the basement, containing evaporated gasoline and evaporated heavy petroleum distillate. Oil and petroleum tests were also done and resulted in a positive showing in the boot room area.

The defendant's chief witness was Eugene O'Loughlin, a retiree from the Omaha Fire Department. He felt that the source of the fire was the heat from an electrical box, which ignited a nearby wooden beam.

During the trial, the defense attempted to call one David Hunt, whose name did not appear on the pretrial witness list submitted by defense counsel. It was the position of the defense that a rebuttal witness need not appear on the list. Defense counsel made an offer of proof that Hunt would have testified

> that the circuit breaker box was hot about a year before the fire approximately, that he was called there, because there was a problem with the air conditioner. That he checked the air conditioner, and the air conditioner, its circuit and wiring was okay, but there had to be some reason for a box being hot.

The record does not disclose the qualifications of the proposed witness or whether additional inspection or corrective actions

had been made or taken. The defense made a formal motion to the court to enlarge the court's order to allow Hunt to testify. The State objected, as the witness was not previously disclosed.

The court found that the rules regarding pretrial conferences apply to a criminal defendant and had not been complied with. The court stated that the witness was incompetent to testify, stated that Hunt was not a rebuttal witness, and refused to expand the pretrial order. In making its ruling, the court also considered the remoteness of the profferred testimony.

The jury returned verdicts of guilty on both counts on March 20, 1987. On April 27, 1987, the defendant was sentenced to a term of imprisonment of 2 to 12 years on count I and to a term of imprisonment of 5 years on count II. The sentence were ordered to run concurrently.

The defendant challenges the district court's refusal to expand the pretrial order and alleges that his sentences were excessive.

Although, as a general rule, a trial court has broad discretion in regard to amendment of a pretrial order, and its ruling with respect thereto will not be disturbed absent an abuse of that discretion, we do not agree with the court that the general rules regarding pretrial conferences apply to criminal defendants. However in this instance, by statute, the defendant, having requested a list of the State's witnesses, was bound by the reciprocal requirement of § 29-1916, and his failure to comply authorized the court to prohibit him from calling the unlisted witness. Neb. Rev. Stat. § 29-1919 (Reissue 1985).

In any event, it is within the trial court's discretion to admit or exclude evidence on the ground of relevancy, and such rulings will be upheld on appeal absent an abuse of discretion. *State v. Methe*, 228 Neb. 468, 422 N.W.2d 803 (1988). As stated in *State v. Oliva*, 228 Neb. 185, 188-89, 422 N.W.2d 53, 55 (1988):

> The argument is not that the evidence fails to address a material issue (physical ability), but that the evidence is so lacking in probative force that it should have been excluded. The modern view, however, is that evidence is probative if it tends in any degree to alter the probability of a material fact. [Citations omitted.] The view is

> codified in § 27-401: "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

In this instance, evidence that a circuit breaker box had been "hot" on a previous occasion 1 year earlier, without more, would not have any tendency to disprove the probability of a material fact; i.e., that the presence of accelerants discounted the possibility of a natural cause of the fire. The court did not err in refusing to allow the testimony of the witness Hunt.

As to the defendant's excessive sentence claim, count I, second degree arson, is a Class III felony pursuant to Neb. Rev. Stat. § 28-503(3) (Reissue 1985). The penalty upon conviction of a Class III felony is found at Neb. Rev. Stat. § 28-105(1) (Reissue 1985), and imposes a maximum penalty of 20 years' imprisonment, a $25,000 fine, or both. The minimum penalty is 1 year's imprisonment.

Count II, burning with intent to defraud an insurer, is a Class IV felony pursuant to Neb. Rev. Stat. § 28-505 (Reissue 1985). The penalty upon conviction of a Class IV felony is found at § 28-105(1), and imposes a maximum penalty of 5 years' imprisonment, a $10,000 fine, or both. There is no minimum statutory penalty.

A sentence imposed within the limits prescribed by a statute will not be disturbed on appeal unless there appears to be an abuse of discretion. *State v. Moreno*, 228 Neb. 210, 422 N.W.2d 56 (1988); *State v. Frelo*, 228 Neb. 122, 421 N.W.2d 447 (1988).

The sentences imposed upon the defendant were well within the limits prescribed by statute, yet the defendant contends that probation or a short term of imprisonment would have been more appropriate and that the district court abused its discretion in sentencing the defendant to a lengthy term of imprisonment.

Specifically, an order denying probation and imposing a prison sentence within the statutory limits will not be overturned on appeal, absent an abuse of discretion. *State v. McCoy*, 228 Neb. 178, 421 N.W.2d 780 (1988).

In imposing a sentence a trial court should consider

> inter alia the defendant's age, mentality, education, experience, and social and cultural background, as well as his past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime.

Moreno, supra at 218, 422 N.W.2d at 62. The seriousness of the offense involved is an important factor in the setting of a sentence. Also relevant to the determination of a proper sentence is evidence as to defendant's life, character, and previous conduct.

At the sentencing proceeding, the trial court was certainly aware of these relevant factors, and gave deference to the defendant as follows:

> I am extremely conscious that he is 66 years old. I am extremely conscious that it has [been] almost 30 years since he was convicted of a crime. I am extremely conscious that he has served his country well, and was honorably discharged. These things, particularly being a veteran are in my judgment big pluses for him.

The defendant's familial relationships were also fully considered prior to imposing sentence.

With regard to the seriousness of the crime, the court noted that the defendant had tried to cheat State Farm Insurance out of over a quarter of a million dollars and that his actions caused personal damage to firefighters.

The defendant's attorney sought probation for the defendant and reviewed the sentencing criteria, in Neb. Rev. Stat. § 29-2260 (Reissue 1985), which provide for probation:

> (2) Whenever a court considers sentence for an offender convicted of either a misdemeanor or a felony for which mandatory imprisonment is not specifically required, the court may withhold sentence of imprisonment unless, having regard to the nature and circumstances of the crime and the history, character and condition of the offender, the court finds that imprisonment of the offender is necessary for protection of the public because:
>
> (a) The risk is substantial that during the period of probation the offender will engage in additional criminal

conduct;

(b) The offender is in need of correctional treatment that can be provided most effectively by commitment to a correctional facility; or

(c) A lesser sentence will depreciate the seriousness of the offender's crime or promote disrespect for law.

The district court, after considering all of the factors listed above, noted one overriding concern in passing sentence:

> And there is one overriding concern in this case, and that is, that there are so many people either on the brink of, or over the edge of disaster in this country, who simply cannot stand to hear that a man made a good run at cheating somebody out of a quarter of a million dollars by burning down a building and walked away from it, and that is what they would think.

It is clear from the district court's comments that it felt very strongly that a lesser sentence would depreciate the seriousness of the offender's crime and promote disrespect for the law. § 29-2260(2)(c).

In his brief, the defendant proposes that a sentence not involving confinement is to be preferred to a sentence involving partial or total confinement, in the absence of affirmative reasons to the contrary. In doing do, the defendant cites *State v. Shonkwiler*, 187 Neb. 747, 194 N.W.2d 172 (1972), where complete restitution of $129.67 had been made for the crime of burglary. We stated that the above proposition was particularly true in the case of first offenders, and even more so when those first offenders are youthful.

In contrast, the defendant in this case was 66 years old, and had previously been convicted of the crime of branding another's livestock and sentenced to 2 years' probation. The crime at hand was most serious, as the value of Hinn's Ranchland approximated $250,000.

In addition, the defendant advances that one of the basic principles in determining the appropriate sentence is the possibility of rehabilitation, and cites *State v. Gundlach*, 192 Neb. 692, 224 N.W.2d 167 (1974). The trial judge recognized the possibility of probation and summarized his reasons for denying it as follows:

> As a general rule in an arson case of any magnitude, and this one is one of magnitude, probation is not likely, certainly not automatic. Now, I am not saying this doesn't happen, but in a case where the Defendant maintains that he didn't do it probation is more unlikely than in a case where he says, "I am guilty. I am sorry for what I did. I am willing to take the consequences." That shows the first step toward rehabilitation, and that is what probation is all about. A man cannot commit the crime of arson, serious crime of arson and maintain that he didn't do it, and then say that he wants to be rehabilitated by probation.

The trial court correctly ruled out probation.

We conclude that the trial court did not abuse its discretion. The sentences imposed were commensurate with the magnitude of the crime and the status of the defendant, and fell within the statutory range of penalties permitted. The judgment of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. REGINALD L. JORDAN, APPELLANT.

427 N.W.2d 796

Filed August 19, 1988. No. 87-587.

1. **Evidence: Hearsay: Witnesses.** As a prerequisite to the admission of hearsay statements into evidence under Neb. Rev. Stat. § 27-804 (Reissue 1985), the proponent of the statement must make a showing that the declarant is unavailable as a witness. It is within the discretion of the trial court to determine whether the unavailability of the witness has been shown.
2. **Constitutional Law: Appeal and Error.** Except in the most unusual of cases, for a question of constitutionality to be considered on appeal, it must have been properly raised in the trial court. If not so raised, it will be considered to have been waived.
3. **Criminal Law: Sentences: Evidence.** A sentencing judge has broad discretion as to the source and type of evidence or information which may be used as

assistance in determining the kind and extent of the punishment to be imposed, and the judge may consider probation officer reports, police reports, affidavits, and other information, including his own personal observations.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed.

Paul M. Conley for appellant.

Robert M. Spire, Attorney General, and Lisa D. Martin-Price for appellee.

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

WHITE, J.

Defendant-appellant, Reginald L. Jordan, was charged with six felonies: attempted second degree murder of Everett Ling, attempted first degree assault of Everett Ling, attempted first degree assault of Albert Bartek, and three counts of use of a weapon to commit these felonies. The jury found Jordan guilty of the two counts of attempted assault and two of the use of weapon counts, but not guilty of attempted murder and use of a weapon in the commission thereof.

On the evening of October 18, 1986, Ling, Bartek, and Todd Behrend went to several different bars together in Lincoln, Nebraska. At approximately 12:45 a.m., the three men left from the bar where they were and walked toward Behrend's pickup truck. Upon arriving at the parking lot where the truck was parked, they encountered Jordan. Marsha Carroll, who knew Jordan, arrived in the parking lot at about the same time. Ling testified that Jordan asked him if he wanted to buy a prostitute and that when he refused, Jordan became angry. Jordan and Carroll testified that Ling approached Carroll, told her that he wanted to buy a prostitute, and grabbed her around the shoulder. Whatever the provocation, Jordan went to his car, which was parked near Behrend's truck, and took a baseball bat out of the trunk. A fight broke out among Ling, Bartek, and Jordan, which soon escalated as patrons exiting a nearby tavern joined in. Ling and Bartek were severely beaten. Jordan testified that he had lost possession of the bat and that somebody else in the crowd used it in the fight. Jordan was

identified as the person who used the bat.

On appeal, the defendant contends that the district court erred (1) by permitting a statement to be admitted into evidence, because the *Miranda* warnings given were inadequate; (2) in excluding from consideration by the jury evidence that one other than the defendant admitted committing the offense charged; (3) in failing to dismiss all charges against the defendant because of prosecutorial misconduct in filing an excessive number of charges; (4) in giving to the jury an instruction on the essential elements of the crimes charged which was confusing and incapable of being readily understood by the jury; and (5) in sentencing the defendant after consideration of the presentence report, which violated the defendant's constitutional, procedural, and substantive due process rights and the right to face his accusers.

Jordan was given *Miranda* warnings shortly after the assault upon the victims occurred. Officer Marti of the Lincoln Police Department testified that he read the following rights to the defendant verbatim:

MIRANDA WARNINGS

1. You have the right to remain silent.

2. Anything you say can and may be used against you in court.

3. You have the right to talk to a lawyer before answering any questions, and to have the lawyer with you during questioning.

4. If you want a lawyer, and cannot afford a lawyer, one will be provided for you, free of cost, before any questioning.

5. You can stop the questioning at any time.

WAIVER

1. Do you understand your rights, as I have explained them?

2. Are you willing to talk with us without consulting a lawyer, or having a lawyer here with you?

Without citing any authority, appellant asserts that the waiver was inadequate because it did not include a question which draws all the elements of the warning together so that they may be knowingly and intelligently waived. Appellant

contends that the question, "Knowing your rights in this matter, are you willing to answer some questions or make a statement to me now?" would be adequate.

We find the appellant's contention wholly without merit. There is nothing magic about the particular words used to ensure that a suspect "knows" his or her rights. By asking the defendant whether he understood his rights, Officer Marti met the *Miranda* burden with respect to this matter.

Furthermore, we have said that

> [a]ny question involving an effective waiver of the *Miranda* rights necessarily involves consideration of two different problems—whether the waiver is the product of improper external influence on a defendant and whether a defendant possessed a certain degree of awareness or understanding regarding a right and a decision to forgo that right.

State v. Norfolk, 221 Neb. 810, 815, 381 N.W.2d 120, 125 (1986). The defendant does not claim that he was threatened, coerced, or promised anything by police to obtain his statement, nor does he assert that he was physically or mentally unable to comprehend the warnings. Absent such a claim, the defendant cannot claim error.

Appellant sought to have the testimony of Thomas Jordan and Gino Johnson admitted at trial. These individuals did not witness the fight but allegedly had information that another person had committed the crimes in question. Testimony was adduced at an in camera hearing, after which the trial judge denied admission of the hearsay statement. The court ruled, inter alia, that the defendant failed to show that the declarant was unavailable. See Neb. Rev. Stat. § 27-804 (Reissue 1985).

The party seeking to introduce hearsay evidence pursuant to the § 27-804 exception must show that diligence was used to locate the witness and that the witness is unavailable. It is within the sound discretion of the trial court to determine whether the proponent has met this burden. *State v. Bothwell*, 218 Neb. 395, 355 N.W.2d 506 (1984).

The only evidence regarding the declarant's unavailability was Johnson's testimony that the declarant was not going to testify for fear of the repercussions of confessing his own crime.

We are not persuaded that "unwillingness" is tantamount to "unavailability" under § 27-804. There was also no evidence presented that a subpoena had been issued to secure the declarant's presence in court. The appellant's contention is without merit.

Appellant's third assignment is that his constitutional right to a fair and speedy trial was violated because the prosecutor deliberately filed an excessive number of charges against him. The appellant did not object at trial in any fashion to the number of charges brought against him. Recently, in *State v. Moore*, 226 Neb. 347, 349-50, 411 N.W.2d 345, 348 (1987), we reiterated the rule that " '[e]xcept in the most unusual of cases, for a question of constitutionality to be considered on appeal, it must have been properly raised in the trial court. If not so raised, it will be considered to have been waived.' [Citations omitted.]" Because the appellant did not assert at trial that his right to a fair and speedy trial was violated by the prosecutor's actions, he is precluded from raising this issue on appeal.

Appellant's fourth assignment is that jury instruction No. 4 is confusing and misleading. A review of instruction No. 4 shows that it was taken verbatim from NJI 14.05 ("Elements of Crime Charged—Burden of Proof"), with the statutory language of the crimes, and other necessary information, inserted where appropriate. The appellant does not specifically discuss why the instruction is confusing and misleading and, upon our review, we are unable to say that it is. The giving of instruction No. 4 was proper and comported with the rule that, whenever applicable, the Nebraska Jury Instructions are to be used. See, *Tank v. Peterson*, 228 Neb. 491, 423 N.W.2d 752 (1988); Nebraska Jury Instructions at ix (1969).

In his final assignment the appellant makes numerous complaints about the manner in which the presentence investigation report was prepared. Specifically, the appellant objects to the inclusion of police reports, hearsay statements, and an edited version of only one victim's statements to a probation officer, and the exclusion of other evidence tending to show the appellant in a good light.

In *State v. Rose*, 183 Neb. 809, 811, 164 N.W.2d 646, 648-49 (1969), we said:

> It is a long accepted practice in this state that before sentencing a defendant after conviction a trial judge has a broad discretion in the sourse [sic] and type of evidence he may use to assist him in determining the kind and extent of punishment to be imposed within the limits fixed by statute. 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.) Furthermore, in *State v. Porter*, 209 Neb. 722, 723, 310 N.W.2d 926, 927 (1981), we said, "By the very nature of a presentence investigation report, it is necessary to rely to a great extent upon hearsay information." There is no merit to this assignment of error.

The judgment and sentences of the district court are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. KIRK R. MAEDER, APPELLANT.

428 N.W.2d 180

Filed August 19, 1988. No. 87-960.

1. **Pleas: Waiver: Indictments and Informations: Effectiveness of Counsel.** A voluntary guilty plea waives every defense to the charge, whether the defense is

procedural, statutory, or constitutional, except the defenses that the information is insufficient to charge an offense and that the guilty plea was the result of ineffective assistance of counsel.

2. **Lesser-Included Offenses.** To be a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time having committed the lesser.
3. **Kidnapping: Sexual Assault: Lesser-Included Offenses.** Generally speaking, neither kidnapping nor first degree sexual assault is a lesser-included offense of the other.
4. **Sentences: Appeal and Error.** Where the punishment of an offense created by statute is left to the discretion of the court to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed on appeal unless there appears to be an abuse of discretion.
5. **Sentences.** In imposing a sentence a trial court should consider inter alia the defendant's age, mentality, education, experience, and social and cultural background, as well as his past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime.

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

Robert C. Wester, Assistant Sarpy County Public Defender, for appellant.

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

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

HASTINGS, C.J.

The defendant pled guilty to kidnapping and first degree sexual assault in connection with an incident in Sarpy County. He was sentenced to 15 to 25 years' imprisonment on each count, the sentences to run consecutively. He appeals from the judgment and sentencing.

On October 4, 1986, the 16-year-old victim walked to her car from the Richman Gordman store in Sarpy County, where she had been working. As she entered her car, the defendant approached, pointed a gun at her, and told her to get in the passenger seat. He forced her head down and threw a coat over her so that she could not see. He drove her to an area on Giles Road, all the while threatening to kill her if she looked up. Her

eyes were taped shut. He told her to take off her pants and underwear and to pull up her shirt, which she did. He briefly fondled her breasts, and then put his fingers into her vagina. He unzipped his pants and forced her to rub his penis and put his penis into her mouth. He forced her to get on her hands and knees, he put a cold, creamy substance in her vaginal area, and he attempted to penetrate her with his penis. She was forced to rub his penis again until he ejaculated. He then drove her back to the parking lot, reminding her that he knew where she lived and that he would kill her if she told the police.

The defendant was subsequently charged with kidnapping, first degree sexual assault, and use of a firearm to commit a felony. Pursuant to an agreement with the State, the defendant pled guilty to kidnapping and sexual assault, and the firearm charge was dismissed. After a presentence investigation was completed, the court sentenced the defendant to 15 to 25 years' imprisonment on each count, the sentences to run consecutively.

The errors assigned are that (1) the court's acceptance of the defendant's guilty pleas to both the kidnapping and sexual assault charges, which arose out of one continuous transaction, subjected the defendant to double jeopardy, and (2) the sentences were excessive.

The defendant asserts that he was subjected to multiple punishments for the same offense. Since "there could not have been a conviction for kidnapping without proving the elements of the felony (rape) . . . these two crimes were the 'same' and the rape conviction should be vacated." Brief for appellant at 6. The defendant asserts that the present kidnapping statute clearly makes first degree sexual assault a lesser-included offense of kidnapping.

On the other hand, the defendant attempts to argue that kidnapping is a lesser-included offense of first degree sexual assault. Sexual assault, contends the defendant, "almost by definition includes restraint of the victim [and therefore] merges with kidnapping . . . ." *Id.* at 8.

Regardless of whether these arguments have merit, the defendant is precluded by a longstanding rule of this court from raising the double jeopardy issue on appeal. " 'A voluntary

guilty plea waives every defense to the charge, whether the defense is procedural, statutory, or constitutional.' " *State v. Rivers*, 226 Neb. 353, 356, 411 N.W.2d 350, 353 (1987), citing *State v. Paulson*, 211 Neb. 711, 320 N.W.2d 115 (1982). The only apparent exceptions to this rule, which are not applicable here, are the defenses that the information, indictment, or complaint is insufficient to charge an offense, *State v. Kennedy*, 224 Neb. 164, 396 N.W.2d 722 (1986), and *State v. Golgert*, 223 Neb. 950, 395 N.W.2d 520 (1986), and that the guilty plea was the result of ineffective assistance of counsel, *State v. Stranghoener*, 212 Neb. 203, 322 N.W.2d 407 (1982). "If, therefore, defendant's plea was understandingly and voluntarily made, he has waived his other alleged defenses . . . ." *State v. Mason*, 187 Neb. 675, 193 N.W.2d 576, 577 (1972).

The court carefully and exhaustively explained to the defendant his legal rights and the possible consequences of his guilty pleas. The court specifically instructed the defendant that "if I accept the pleas of guilty to these offenses, that you waive any defenses at all that you have to these two charges . . . ." Based on this discussion and the defendant's affirmative responses, the court then found that "you [the defendant] understand these charges, the penalties, your constitutional rights, consequences of entering these pleas of guilty, and that your guilty pleas are given voluntarily, freely, intelligently, with advice of counsel, and they have a factual basis." As the guilty pleas were knowingly and voluntarily made, the defendant has waived his defenses to the charges.

Even if this court were to consider the defendant's double jeopardy argument as a defense, the issue is without merit. That is, there is no merit to the argument that sexual assault is a lesser-included offense of kidnapping or that kidnapping is a lesser-included offense of sexual assault.

The rule regarding lesser-included offenses was recently stated in *State v. Pribil*, 224 Neb. 28, 395 N.W.2d 543 (1986). Quoting from *State v. Murphrey*, 220 Neb. 699, 371 N.W.2d 702 (1985), and *State v. Lovelace*, 212 Neb. 356, 322 N.W.2d 673 (1982), this court stated, " ' " 'To be a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time

having committed the lesser. . . .' " ' " *State v. Pribil, supra* at 31, 395 N.W.2d at 547.

The crime of kidnapping is set forth in Neb. Rev. Stat. § 28-313 (Reissue 1985), and provides: "(1) A person commits kidnapping if he abducts another or, having abducted another, continues to restrain him with intent to do the following: . . . (c) Terrorize him . . . or (d) Commit a felony . . . ." It is clear from the statute that it was quite possible to commit kidnapping without at the same time committing rape. The defendant points to subsection (1)(d) when he states, "Clearly, in the instant case there could not have been a conviction for kidnapping without proving the elements of the felony (rape)," brief for appellant at 6, but proof of the commission of a felony is not a necessary element of kidnapping. In the present case, the kidnapping charge was supported by evidence of subsection (1)(c); the facts reveal that the defendant terrorized the victim by pointing a gun at her and threatening to kill her.

By the same token, kidnapping is not a lesser-included offense of first degree sexual assault. Neb. Rev. Stat. § 28-319 (Reissue 1985) 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 defendant argues that kidnapping must "merge" with this offense because sexual assault cannot occur without restraint of the victim. However, it is *not* " ' " 'impossible to commit the greater [sexual assault] without at the same time having committed the lesser [kidnapping]. . . .' " ' " *State v. Pribil, supra* at 31, 395 N.W.2d at 547. Sexual assault may occur without the abduction necessary for proof of kidnapping. Abduction involves taking the victim away from her present location, while sexual assault does not necessarily involve such removal.

In *State v. Schmidt*, 213 Neb. 126, 327 N.W.2d 624 (1984), the defendant was convicted of kidnapping and attempted murder after he drove his wife to a secluded area, dragged her into the woods, and tied a rope around her neck. He assigned as error the trial court's finding that he was guilty of kidnapping, "in that the kidnapping was simply a part of another offense."

Id. at 131, 327 N.W.2d at 627. This court rejected his contention:

> This argument has been presented to this court on previous occasions and rejected. In *State v. Pankey*, 202 Neb. 595, 598, 276 N.W.2d 233, 235 (1979), quoting from *State v. Goham*, 187 Neb. 34, 187 N.W.2d 305 (1971), we said: " 'The purpose of kidnapping in every instance is to make it possible to commit some other crime. Its very nature therefore embraces other crimes as well as that of kidnapping. The penalties of kidnapping are intentionally more severe than the other crimes which may be included because of the consequences which often result from its perpetration.' " The evidence in this case established a classic kidnapping violation. That violation occurred even before anything more took place. One may not erase the commission of a crime simply because, after committing the crime, a second crime is committed.

State v. Schmidt, supra at 131, 327 N.W.2d at 627. Similarly, the defendant's assignment of error in the present case is found to be without merit.

The court sentenced the defendant to 15 to 25 years' imprisonment on each count, the sentences to run consecutively. The defendant argues that these sentences are excessive in light of his "young age, relatively clean record, mental illness, chemical dependency, and sexual problems . . . ." Brief for appellant at 9.

> This court has repeatedly held, "where the punishment of an offense created by statute is left to the discretion of the court to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed on appeal unless there appears to be an abuse of discretion."

State v. Moreno, 228 Neb. 210, 218, 422 N.W.2d 56, 62 (1988).

The defendant was convicted of first degree sexual assault, a Class II felony under § 28-319. Neb. Rev. Stat. § 28-105 (Reissue 1985) provides that a Class II felony is punishable by a minimum of 1 and a maximum of 50 years in prison. The sentence of 15 to 25 years on that count was well within the statutory range of 1 to 50 years.

The defendant was also charged and convicted under § 28-313(3), which provides that kidnapping is a Class II felony when the victim has not suffered serious bodily injury. Once again, the sentence of 15 to 25 years on this count was well within the statutory range of 1 to 50 years for a Class II felony.

> In imposing a sentence a trial court should consider inter alia the defendant's age, mentality, education, experience, and social and cultural background, as well as his past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime.

State v. Moreno, supra at 218, 422 N.W.2d at 62. Furthermore, "[t]he seriousness of the offense is an important factor in the setting of a sentence," and "[e]vidence as to a defendant's life, character, or previous conduct is highly relevant to the determination of a proper sentence." *Id.* at 218-19, 422 N.W.2d at 62.

The defendant was 27 years old at the time of the crime. He graduated from high school and attended roughly the equivalent of 2 years of college at various facilities. He apparently comes from a caring, supportive family, but nevertheless has been in trouble with the law since at least 1980. His prior convictions include theft by unlawful taking and soliciting prostitution (twice). He has a history of drug and alcohol abuse, and his discharge from the Navy stemmed from his problems with drugs. There was no evidence of mental illness or incompetency.

The offense itself was violent. The defendant repeatedly threatened and terrorized the victim with a gun. He told her several times that he would kill her. The victim, a 16-year-old, was forced at gunpoint to perform several sexual acts with the defendant. Although she did not suffer permanent physical injury, the psychological trauma will undoubtedly be with her for a very long time. She was unable to sleep alone for many weeks after the crimes, she had to sell her car because she could not bring herself to drive it again, and she needed extensive counseling. Her entire family has suffered as a result of her ordeal; even her younger brother and sister showed a marked

drop in their grades at school.

Although the defendant now professes to have turned his life around and has eliminated drugs and alcohol (which he feels were the root of his problems) from his life, the court nevertheless was correct in finding that lesser sentences would have depreciated the seriousness of the defendant's actions or promoted disrespect for the law.

Given the nature of the defendant's acts and the statutory limits for the punishment of the offenses, it cannot be said that the sentences imposed by the trial court were an abuse of discretion.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DANIEL J. START, APPELLANT.

427 N.W.2d 800

Filed August 19, 1988. No. 87-992.

1. **Postconviction.** In a proceeding under the Nebraska Postconviction Act, Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1985), the movant, in custody under sentence, must allege facts which, if proved, constitute a denial or violation of the movant's rights under the Nebraska or federal Constitution, causing the judgment against the movant to be void or voidable.
2. _____. A court is not required to grant an evidentiary hearing on a motion for postconviction relief which alleges only conclusions of law or fact.
3. _____. An evidentiary hearing is not required under the Nebraska Postconviction Act when (1) the motion for postconviction relief does not contain sufficient factual allegations concerning a denial or violation of constitutional rights affecting the judgment against the movant, or (2) notwithstanding proper pleading of facts in a motion for postconviction relief, the files and records in the movant's case do not show a denial or violation of the movant's constitutional rights causing the judgment against the movant to be void or voidable.
4. **Criminal Law: Due Process: Sentences.** When a defendant has been convicted of violating the laws of separate sovereigns, a defendant has no due process right to require that the sentence imposed by one sovereign must be served before the defendant serves the sentence from the other sovereign.
5. **Constitutional Law: Prisoners: Sentences.** Determination of priority in serving sentences imposed by different sovereigns is a matter of comity between the

sovereigns, not a constitutional right of the prisoner.

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

Daniel J. Start, pro se.

Robert M. Spire, Attorney General, and William L. Howland for appellee.

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

PER CURIAM.

In a postconviction proceeding pursuant to the Nebraska Postconviction Act, Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1985), Daniel J. Start appeals from the judgment of the district court for Douglas County, which, after reviewing the files and records in Start's case, refused to grant an evidentiary hearing on Start's motion and denied postconviction relief concerning unappealed sentences imposed in 1982. As best we can, we extract the facts from Start's pro se motion for postconviction relief.

During 1982, in Douglas County, Nebraska, Start was sentenced on two felony charges, viz, theft by receipt of stolen property and unlawful flight to avoid arrest. For the theft conviction, Start was sentenced to a term of 2 to 4 years, and for a term of 1 to 2 years on the unlawful flight conviction. Start's sentences ran consecutively for a combined term of 3 to 6 years. After Start had served approximately 2 years 4 months for those convictions, he escaped in June of 1984 while on a work release, leaving the remainder of his combined sentences unserved.

In August 1984, Start was arrested in Douglas County, Colorado, and on September 10, 1984, was sentenced in Colorado to imprisonment for 4 years as the result of his conviction for "criminal impersonation." This sentence was to be served concurrently with the Nebraska sentences in 1982 for theft and unlawful flight. However, while Start was in custody to answer another Colorado charge (auto theft), he escaped. After capture, Start was convicted and sentenced in Colorado

to 8 years on the auto theft charge. Also on March 1, 1985, Start was convicted and sentenced to 8 years for his escape after conviction for criminal impersonation and was also sentenced to 4 years on conviction of an assault charge, apparently related to his Colorado escape. The sentences for the Colorado escape and assault were concurrent and were also concurrent with the sentence for auto theft, but without any reference to the 4-year sentence for the Colorado conviction for criminal impersonation or the two Nebraska convictions in 1982. On May 1, 1985, while Start was serving his sentences at the Colorado penitentiary in Canon City, authorities from Nebraska picked up Start and returned him directly to Douglas County, Nebraska, for trial regarding the 1984 escape.

After conviction for the Nebraska escape, Start was sentenced on July 29, 1985, to imprisonment for 2 years, which ran concurrently with "any other sentences presently being served." Nothing indicates that, after his return from Colorado and before his sentence for the Nebraska escape conviction, Start resumed serving the remainder of his theft-unlawful flight sentences being served when he escaped in 1984. As the result of the sentence for escape, Start was taken to the Nebraska Penal and Correctional Complex and, about 10 days later, was delivered in Lincoln to Colorado authorities for return to Canon City to complete serving the three Colorado sentences. After resumption of Start's imprisonment in Colorado for the sentences on the auto theft, escape, and assault convictions, Nebraska placed a detainer on Start, claiming, according to Start, "that the two years from Nebraska for escape was running with the Colorado sentence but the remainder of [Start's] Nebraska sentence was on hold until the Colorado sentences were [completed] then he was to be returned to Nebraska to serve the unserved portion of his sentence." Following the Nebraska detainer, Start filed his motion in the district court for Douglas County, Nebraska, requesting that the court "vacate the remainder of [his] Nebraska sentence, since Nebraska has lost all jurisdiction over [him], and issue an order to remove the detainer placed by Nebraska with the Colorado officials . . . [i]n the interest of justice . . . ."

In a proceeding under the Nebraska Postconviction Act, the

movant, in custody under sentence, must allege facts which, if proved, constitute a denial or violation of the movant's rights under the Nebraska or federal Constitution, causing the judgment against the movant to be void or voidable. *State v. Jackson*, 226 Neb. 857, 415 N.W.2d 465 (1987); *State v. Malek*, 219 Neb. 680, 365 N.W.2d 475 (1985); *State v. Williams*, 218 Neb. 618, 358 N.W.2d 195 (1984); *State v. Turner*, 194 Neb. 252, 231 N.W.2d 345 (1975).

A court is not required to grant an evidentiary hearing on a motion for postconviction relief which alleges only conclusions of law or fact. *State v. Lytle*, 224 Neb. 486, 398 N.W.2d 705 (1987); *State v. Robinson*, 215 Neb. 449, 339 N.W.2d 76 (1983); *State v. Turner, supra*.

An evidentiary hearing is not required under the Nebraska Postconviction Act when (1) the motion for postconviction relief does not contain sufficient factual allegations concerning a denial or violation of constitutional rights affecting the judgment against the movant, or (2) notwithstanding proper pleading of facts in a motion for postconviction relief, the files and records in the movant's case do not show a denial or violation of the movant's constitutional rights causing the judgment against the movant to be void or voidable. *State v. Propst*, 228 Neb. 722, 424 N.W.2d 136 (1988); *State v. Petitte*, 228 Neb. 144, 421 N.W.2d 460 (1988); *State v. Rivers*, 226 Neb. 353, 411 N.W.2d 350 (1987); *State v. Lytle, supra*; *State v. Turner, supra*.

Start's motion, insofar as it relates to a claim for postconviction relief, does not contain allegations of fact which, if proved, constitute a denial or violation of Start's constitutional rights under the Nebraska or federal Constitution. Start contends that the State of Nebraska has waived any right "to further claim on [Start] after being the First Sovereign Authority and relinquishing [its] custody back to Colorado." Brief for appellant at 5.

Under the circumstances factually alleged by Start, we believe and hold that when a defendant has been convicted of violating the laws of separate sovereigns, a defendant has no due process right to require that the sentence imposed by one sovereign must be served before the defendant serves the

sentence from the other sovereign. See *Barber v. Cooper*, 719 P.2d 1094 (Colo. 1986). Determination of priority in serving sentences imposed by different sovereigns is a matter of comity between the sovereigns, not a constitutional right of the prisoner. See, *Alire v. People*, 171 Colo. 228, 466 P.2d 78 (1970); *Crady v. Cranfill*, 371 S.W.2d 640 (Ky. 1963); *Hayward v. Looney*, 246 F.2d 56 (10th Cir. 1957). "The law of comity is such that the two sovereigns may decide between themselves which shall have custody of a convicted prisoner; however, the sovereign having prior jurisdiction need not waive its right to custody. *Joslin v. Moseley*, 420 F.2d 1204 (10th Cir. 1970) . . . ." *Hernandez v. United States Atty. Gen.*, 689 F.2d 915, 919 (10th Cir. 1982).

When separate sovereigns have jurisdiction over a person, the doctrine of primary jurisdiction allows the tribunal and sovereign which first obtained jurisdiction to continue jurisdiction until the first sovereign's jurisdiction is exhausted. See, *Merchant v. State*, 374 N.W.2d 245 (Iowa 1985); *In re Liberatore*, 574 F.2d 78 (2d Cir. 1978). The doctrine of primary jurisdiction is merely a means to resolve jurisdictional disputes between sovereigns and does not create a right for the person affected by a jurisdictional dispute between the sovereigns. *Merchant v. State, supra*; *McDonald v. Ciccone*, 409 F.2d 28 (8th Cir. 1969).

Start's motion does not allege in what manner the sequence of his serving the Colorado and Nebraska sentences will result in prejudice or unfairness to him. There is no jurisdictional dispute between Colorado and Nebraska; therefore, the doctrine of primary jurisdiction is inapplicable in Start's case. Since Start has no constitutional right which determines the priority of serving the sentences imposed, Start's allegation of waiver does not rise to the level of a constitutional question under the circumstances.

Start also requested that the district court quash the detainer issued by the State of Nebraska and, therefore, has sought relief which is unavailable under the Nebraska Postconviction Act.

Under the circumstances, Start's motion did not factually allege grounds for relief under the Nebraska Postconviction Act. The district court properly refused to grant Start an

evidentiary hearing. The judgment of the district court is affirmed.

AFFIRMED.

J. J. SCHAEFER LIVESTOCK HAULING, INC., APPELLEE, V. GRETNA STATE BANK, A NEBRASKA BANKING CORPORATION, DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLANT, PARKS & PARKS AUCTION SALES MANAGERS, INC., A NEBRASKA CORPORATION, ET AL., THIRD-PARTY DEFENDANTS, APPELLEES.

THE WAGGONERS TRUCKING, APPELLEE, V. GRETNA STATE BANK, A NEBRASKA BANKING CORPORATION, DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLANT, PARKS & PARKS AUCTION SALES MANAGERS, INC., A NEBRASKA CORPORATION, ET AL., THIRD-PARTY DEFENDANTS, APPELLEES.

GRETNA STATE BANK, A NEBRASKA BANKING CORPORATION, APPELLANT, V. PARKS & PARKS AUCTION SALES MANAGERS, INC., A NEBRASKA CORPORATION, ET AL., APPELLEES.

428 N.W.2d 185

Filed August 26, 1988. Nos. 86-353, 86-354, 87-113.

1. **Reformation: Equity: Appeal and Error.** An action for reformation is equitable in nature. 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, this court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Appeal and Error.** The general standard of review is that dismissal by a district judge will not be reversed on appeal if it was done in the exercise of sound discretion.
3. **Trial: Appeal and Error.** A judicial abuse of discretion does not denote or imply improper motive, bad faith, or intentional wrong by a judge, but requires the reasons or rulings of a trial judge to be clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition through a judicial system.
4. **Reformation: Evidence: Appeal and Error.** On an appeal of an action for reformation, our de novo review of the record should search for the alleged fraud and/or mutual mistake, which must be shown by clear, convincing, and

satisfactory evidence.

5. **Evidence: Words and Phrases.** Clear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of the fact to be proved.
6. **Summary Judgment: Appeal and Error.** Upon reviewing the granting of a motion for summary judgment, we are obligated to view the evidence in the light most favorable to the party against whom the motion is directed and to give that party the benefit of all reasonable inferences which may be drawn therefrom.
7. **Summary Judgment.** Summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
8. **Summary Judgment: Proof.** The burden is on the party moving for summary judgment to show that no issues of material fact exist, and unless the party can conclusively do so, the motion must be overruled.
9. **Summary Judgment.** On consideration of a motion for summary judgment, the court is to examine the evidence, not to decide any issue of fact, but to discover if any real issue of fact exists.
10. **Negotiable Instruments.** As a general rule, a surrender by the holder of negotiable notes to the maker cancels the obligations.
11. **Reformation: Proof: Fraud.** Reformation may be decreed where there has been a mutual mistake or where there has been a unilateral mistake caused by the fraud or inequitable conduct of the other party. The mistake must be proven by clear and convincing evidence.
12. **Reformation: Words and Phrases.** A mutual mistake is one common to both parties in reference to the instrument to be reformed, each party laboring under the same misconception about the instrument.
13. **Subrogation: Words and Phrases.** Subrogation is defined as the substitution of one person in the place of another with reference to a lawful claim, demand, or right, so that he who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies, or securities.
14. **Subrogation: Liability.** The doctrine of subrogation includes every instance in which one person pays a debt for which another is primarily liable, and which in equity and good conscience should have been discharged by the latter, so long as the payment was made under compulsion or for the protection of some interest of the one making the payment and in discharge of an existing liability.
15. _____: _____. As a general rule, where one having an interest in property pays off an encumbrance on the property in order to protect his or her interest, such person is not entitled to be subrogated to the rights and remedies of the person paid if the debt is not one for which the payor is primarily liable.
16. **Decedents' Estates: Notice: Claims.** 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 Neb. Rev. Stat. § 30-2486 (Reissue 1985).

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

Debra R. Nickels and E. Terry Sibbernsen, of Welsh, Sibbernsen & Roach, for appellant.

James F. Fenlon and William G. Stockdale, of Harris, Feldman Law Offices, for appellees Parks & Parks Auction and Patricia Parks.

HASTINGS, C.J., SHANAHAN, and FAHRNBRUCH, JJ., and RILEY and OTTE, D. JJ.

HASTINGS, C.J.

This appeal involves three consolidated civil actions from the district court for Sarpy County for amounts allegedly due on promissory notes. The court found against Gretna State Bank on the issues of reformation, equitable subrogation, discharge of the notes, and a timely filing of a claim against an estate. The bank appeals in each case.

The first two actions, cases Nos. 86-353 and 86-354, were originally filed by plaintiffs, J. J. Schaefer Livestock Hauling, Inc., and The Waggoners Trucking (hereinafter consignors), against Gretna State Bank (hereinafter bank). The plaintiffs were auction consignors who retained an auctioneer, Parks & Parks Auction Sales Managers, Inc. (hereinafter P & P), to sell certain items, vehicles, at auction. P & P maintained several accounts at the bank, including a general operating account into which it deposited proceeds of approximately $700,000 on September 17, 1984, from the auction. Any consignors were then usually paid about 15 days after the deposits were made.

P & P was in the habit of using proceeds of a recent auction to pay off consignors of an earlier auction. Patricia Parks had discussed with her husband, Charles (Charlie) Parks, president of P & P, that this was wrong, and he agreed that P & P was in jeopardy. This condition continued until his death.

Pursuant to longstanding practice, the bank would set off debts owed to it by P & P against the account. A debt of $165,000 was evidenced by two promissory notes and personally guaranteed by Charlie Parks and his wife, Patricia, also an officer of the corporation. An amount of $115,000 was loaned to Charlie on August 6, 1984, and earlier guaranteed by him on July 13, 1978. An amount of $50,000 was guaranteed by

Patricia on May 1, 1978. Her name was then Penny A. Hancock. Each promissory note provided as follows: "SET-OFF — Lender may at any time before or after default exercise its right to set-off all or any portion of the indebtedness evidenced hereby against any liability or indebtedness of the Lender to the Borrower . . . without prior notice to the Borrower."

An understanding or verbal agreement existed between the bank's president, Ronald Suhr, and P & P as to how the accounts would be handled. It was with this authority that the setoff was taken. Moneys were deposited by P & P into its operating account, and then the bank would transfer these funds into an investment account to earn interest for a couple of weeks until the funds needed to be returned to the operating account to cover checks P & P had written. If the bank took a setoff and there were insufficient funds in the operating account to cover checks, a new loan or loan advances would be made to P & P.

On September 19, 1984, the bank took a setoff against the account in the amount of $167,131.36. The promissory notes, although not yet due, were marked "PAID" and returned to P & P. The bank also transferred $300,000 from the general operating account to the investment (money market) account.

No other indebtedness existed between the bank and P & P after September 19, 1984. However, a different corporation, in which Charlie Parks had an ownership interest, Nepco, Inc., still owed the bank.

Charlie Parks had died earlier that day, at approximately 1:30 a.m. The bank's president and cashier, Suhr, was notified of Charlie's death by a call from Mrs. Parks on the morning of the 19th, at approximately 10 a.m. He testified that the payments on the notes were done prior to the phone call, before he was aware of Charlie's death. The money was taken out right away that morning by Stephen Ingram, vice president and the second of two officers of the bank. Ingram testified that he transferred the funds before he heard about Charlie's death.

The funds in Charlie's estate were insufficient to pay the consignors the amounts owed from the auction. The consignors sued the bank for conversion of P & P's funds, alleging the

funds were held in trust for them, free and clear of any bank right of setoff. Summary judgment was granted for the consignors on the issue of liability. Ultimately, a settlement agreement was reached, with the bank paying the consignors the sum of $198,417.04.

The third-party action is essentially a claim for indemnity, wherein the bank sought to recover these amounts and filed petitions against third-party defendants, P & P and its individual guarantors, for amounts due on the promissory notes. The court dismissed the action, ruling that the bank had no right to equitable subrogation for lack of a common liability and no right to reformation of the notes for lack of mutual mistake or fraud.

Case No. 87-113 is one at law arising from the same core of operative facts in which the bank sought amounts due on the notes from P & P. Summary judgment was granted for P & P. The court found that the promissory notes and the obligations they represented were discharged by the notation of "PAID" on the notes and that the claim against the estate of Charlie Parks was not timely filed.

Claims had been filed against the estate by the bank in the amounts of $570,400 and $27,253.49 on April 22, 1985. The claims were disallowed by Mrs. Parks, the personal representative.

The bank prosecutes this appeal.

The issues on appeal are (1) whether the district court erred in dismissing the third-party action and in finding that the doctrines of equitable subrogation to avoid unjust enrichment and mutual mistake did not apply; and (2) whether the district court erred in granting summary judgment for P & P and in finding that the notes had been discharged and a claim was not properly filed against the estate.

The third-party action, seeking both reformation and equitable subrogation, was tried and dismissed. An action for reformation is equitable in nature. *Newton v. Brown*, 222 Neb. 605, 386 N.W.2d 424 (1986). 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 that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Buell, Winter, Mousel & Assoc. v. Olmsted & Perry*, 227 Neb. 770, 420 N.W.2d 280 (1988).

The general standard of review is that dismissal by a district judge will not be reversed on appeal if it was done in the exercise of sound discretion. *Estate of Tetherow v. State*, 193 Neb. 150, 226 N.W.2d 116 (1975); *Neumeyer v. Omaha Public Power Dist.*, 188 Neb. 516, 198 N.W.2d 80 (1972).

> " 'A judicial abuse of discretion does not denote or imply improper motive, bad faith, or intentional wrong by a judge, but requires the reasons or rulings of a trial judge to be clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition through a judicial system.' "

Fredericks v. Western Livestock Auction Co., 225 Neb. 211, 216, 403 N.W.2d 377, 381 (1987); *Newton, supra*; *Bump v. Firemens Ins. Co.*, 221 Neb. 678, 380 N.W.2d 268 (1986).

Our de novo review of the record should search for the alleged fraud and/or mutual mistake, which must be shown by clear, convincing, and satisfactory evidence. *Newton, supra*; *Ridenour v. Farm Bureau Ins. Co.*, 221 Neb. 353, 377 N.W.2d 101 (1985). Clear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of the fact to be proved. *Newton, supra*.

Since the matter of case No. 87-113 arises from the entering of summary judgment, we are obligated to view the evidence in the light most favorable to the party against whom the motion is directed and to give that party the benefit of all reasonable inferences which may be drawn therefrom. *Lowry v. State Farm Mut. Auto. Ins. Co.*, 228 Neb. 171, 421 N.W.2d 775 (1988); *Ford v. American Medical International*, 228 Neb. 226, 422 N.W.2d 67 (1988). Moreover, summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the

moving party is entitled to judgment as a matter of law. *Lowry, supra*; *Stodola v. Grunwald Mechanical Contractors*, 228 Neb. 301, 422 N.W.2d 341 (1988).

Summary judgment is an extreme remedy and should be awarded only when the issue is clear beyond all doubt. *Luschen Bldg. Assn. v. Fleming Cos.*, 226 Neb. 840, 415 N.W.2d 453 (1987). "The burden is on the moving party to show that no issues of material fact exist, and unless the party can conclusively do so, the motion must be overruled." *Janssen v. Trennepohl*, 228 Neb. 6, 10, 421 N.W.2d 4, 7 (1988). The court is to examine the evidence, not to decide any issue of fact, but to discover if any real issue of fact exists. *Id.*

DISCHARGE OF THE NOTES

It is undisputed that the two promissory notes were stamped "PAID" and returned to P & P. In case No. 87-113 the district court found that the marking of the words "Paid 9/19/84" on the promissory notes in the amounts of $115,000 and $50,000 and returning them to the maker constituted a discharge of the debt under the Uniform Commercial Code. The court further found that because the notes were discharged, the guaranties executed by Patricia Parks and Charles Parks were likewise discharged.

Specifically, Neb. U.C.C. § 3-605 (Reissue 1980) provides:

> (1) The holder of an instrument may even without consideration discharge any party
>
> (a) in any manner apparent on the face of the instrument or the indorsement, as by intentionally cancelling the instrument or the party's signature by destruction or mutilation, or by striking out the party's signature; or
>
> (b) by renouncing his rights by a writing signed and delivered or by surrender of the instrument to the party to be discharged.
>
> (2) Neither cancellation nor renunciation without surrender of the instrument affects the title thereto.

The plain language of § 3-605(1)(b) is controlling here and provides that an instrument may be discharged by a written renunciation "*or by surrender of the instrument to the party to be discharged.*" (Emphasis supplied.) The statute provides that

this result will occur even if such action is taken "*without consideration*." (Emphasis supplied.)

The bank points to Neb. U.C.C. § 1-103 (Reissue 1980) to note that the law of mistake should supplement § 3-605 regarding discharge. It refers us to *Guaranty Bank & Trust Co. v. Dowling*, 4 Conn. App. 376, 494 A.2d 1216 (1985), where a note was erroneously canceled and surrendered. After the mistake was pointed out to the plaintiff bank, it restored the funds to the partnership account in which the defendant had an interest. The court concluded that the marking of "paid in full" was a mistake, as the money had been taken out of the wrong account. The cancellation of the negotiable instrument thus had no effect and was unintentional, as it was made by mistake. The bank "would not have surrendered the note if it did not, in good faith, believe it had, in fact, been paid." *Id.* at 380, 494 A.2d at 1219. If the bank is somehow arguing a lack of consideration as the basis for the alleged mistake, its position is clearly untenable, as § 3-605 covers failure of consideration.

Other courts have ruled that whether a court chooses to consider the stamping of a note "paid" as a cancellation of the instrument under § 3-605(1)(a) or as a renunciation of rights under § 3-605(1)(b), the discharge must be made intentionally and not as a result of mistake. See, *Gibraltar Sav. Ass'n v. Watson*, 624 S.W.2d 650 (Tex. App. 1981) (clerical error); *First Galesburg Nat'l Bk. & Tr. v. Martin*, 58 Ill. App. 3d 113, 373 N.E.2d 1075 (1978) (note was marked "paid" and returned to defendants through a clerical error—writing off defendants' account as a bad debt as a matter of internal accounting procedure). A clerical error should be contrasted to the actions of a bank president and vice president. Further, *Dowling* may be contrasted in that the bank there immediately returned the funds to the account.

Rather, surrender of the notes canceled the obligations. Additional authority for this proposition is found in the case of *Peterson v. Crown Financial Corp.*, 661 F.2d 287 (3d Cir. 1981). At the district court level, it was resolved that an original note that was canceled and returned to Peterson was discharged although the renewal note failed to incorporate interest on the original note. The court of appeals for the third circuit agreed,

finding the reasoning of the district court persuasive, that

> parties such as Crown, which deal regularly in negotiable instruments, "ought to be held, as a matter of law, to an understanding of the implications which normal business practice assigns to 'intentionally cancelling [an] instrument' . . . ." 476 F.Supp. at 1159. The court thus held that subjective intent not to discharge was irrelevant; mere intent to cancel was sufficient.

661 F.2d at 290.

The court of appeals focused on the relationship between an instrument and the debt it represents under both common-law principles and the U.C.C.:

> "[A] negotiable instrument is regarded as the debt itself. This conception is due, in part, to the similarity, in form and function, of commercial paper to that of government currencies and bank notes. The unitary concept of a debt fused into the written evidence of it, leads readily to the further concept that destruction of the physical res itself by its owner destroys the legal relations which it induces. Consideration is thus not necessary. Cancellation then becomes a sort of constructive tearing up of the instrument."

661 F.2d at 290.

The result that the notes are discharged is consistent with the precode case decided in Nebraska of *In re Estate of Mathews*, 134 Neb. 607, 279 N.W. 301 (1938). The record showed that five notes returned to the president and owner of a corporation were marked "paid." "This indicates an intent on the part of the bank to treat the obligations represented by the notes as satisfied." *Id.* at 611, 279 N.W. at 303. The liability of all the parties to the negotiable instrument was extinguished as a matter of law. There was no claim of fraud or mistake.

The normal scenario remains that stamping the notes "paid" and delivering them to the defendant are sufficient to discharge the notes. "Statutory law makes cancellation or holding by the principal debtor after maturity a discharge of the instrument." *Bryant v. Bowles*, 108 N.H. 315, 318, 234 A.2d 534, 536 (1967). There is a strong presumption that a written instrument correctly expresses the intention of the parties to it. *Ridenour v.*

Farm Bureau Ins. Co., 221 Neb. 353, 377 N.W.2d 101 (1985). The bank's officers were experienced in the banking business and certainly must have known the effects of issuing paid notes.

Even viewing the evidence most favorably to the bank, as this matter was disposed of on summary judgment, we hold that the promissory notes have been discharged as a matter of law. The personal guaranties are also thus discharged.

REFORMATION

In its amended third-party petition against P & P, the bank sought reformation of the notes to delete the reference to the instruments being paid because it would not have intended to pay the notes had it realized that it would be required to pay moneys to the consignors. The brief in cases Nos. 86-353 and 86-354 alleges a mutual mistake on the part of the bank and P & P and/or fraud or inequitable conduct on the part of P & P. This would make any discharge ineffective.

In this jurisdiction, reformation may be decreed where there has been a mutual mistake or where there has been a unilateral mistake caused by the fraud or inequitable conduct of the other party. *Ridenour v. Farm Bureau Ins. Co., supra.* The mistake must be proven by clear and convincing evidence. *Newton v. Brown*, 222 Neb. 605, 386 N.W.2d 424 (1986).

The district court found that any mistake would have been a mistake on the part of the bank and not a mutual mistake. The bank argues that a factual issue existed as to the question of mistake by the bank when it marked the notes paid. Although this may be true, a mutual mistake is required for reformation, and there was no factual question as to a mistake by P & P.

Suhr stated in his deposition of November 5, 1984, as follows:

> Q. Okay. Let me ask you, as a matter of course, did you release or — excuse me. Was the indebtedness from Parks and Parks Auction Sales Managers, Inc. totally retired as a result of the payments transferred on September 19th? Were they paid in full?
>
> A. Yes.

The deposition continued:

> Q. As a result of the payments which you authorized on the 19th of September from 365510 to the loan accounts,

did you issue paid notes and release of security and mortgage agreements?

A. I issued paid notes.

On redirect examination, Suhr testified that even if someone had requested that the bank return the setoff funds to the P & P account, he would not have returned them. No demand to restore the funds was ever made or complied with. Cf. *Guaranty Bank & Trust Co. v. Dowling*, 4 Conn. App. 376, 494 A.2d 1216 (1985).

The above dialogue indicates that there was no mistake in taking the setoff and that the bank clearly intended to release the notes. P & P was obviously not operating under a mistaken belief.

> A mutual mistake is a belief shared by the parties, which is not in accord with the facts. See Restatement (Second) of Contracts § 151 (1981). A mutual mistake is one common to both parties in reference to the instrument to be reformed, each party laboring under the same misconception about their instrument. *Kear v. Hausmann*, 152 Neb. 512, 41 N.W.2d 850 (1950). "A mutual mistake exists where there has been a meeting of the minds of the parties and an agreement actually entered into, but the agreement in its written form does not express what was really intended by the parties." *Sierra Blanca Sales Co., Inc. v. Newco Industries, Inc.*, 84 N.M. 524, 530, 505 P.2d 867, 873 (1972).

Newton v. Brown, supra at 613, 386 N.W.2d at 430. The facts at hand are not in line with the traditional setting of mutual mistake for purposes of reformation.

In the bank's favor is the testimony of Ingram that he did not know that moneys were usually paid out within 20 days of a deposit of auction proceeds. He was not familiar with a trust account. At present, he felt that the transaction of paying the notes should not have been run through; it should have been reversed out.

If only a unilateral mistake existed, the bank must show that P & P perpetrated fraud upon it. With respect to fraud, Suhr's testimony was as follows:

Q. And do you contend that there was any fraud

practiced by Parks & Parks Auction Sales Managers, Inc. at any time in borrowing money from Gretna State Bank?

A. No.

Q. Do you contend that Charles Parks or Patricia Ann Parks practiced any fraud at any time on the bank in connection with any amounts borrowed by Parks & Parks Auction Sales Managers, Inc.?

A. No.

The district court found no inequitable conduct on the part of P & P. The record does not produce a firm belief or conviction that there was a unilateral mistake by the bank caused by the fraud or inequitable conduct of P & P.

SUBROGATION

Subrogation has been defined as follows:

> "The substitution of one person in the place of another with reference to a lawful claim, demand or right, so that he who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies, or securities. * * * The lawful substitution of a third party in place of a party having a claim against another party."

State Auto. & Cas. Underwriters v. Farmers Ins. Exchange, 204 Neb. 414, 416, 282 N.W.2d 601, 603 (1979) (quoting Black's Law Dictionary 1279 (5th ed. 1979)). Stated differently, " 'Subrogation is *the right of one, who has paid an obligation which another should have paid, to be indemnified by the other.*' " (Emphasis supplied.) 204 Neb. at 417, 282 N.W.2d at 603 (quoting *Olin Corp. v. Work. Comp. Appeal Bd.*, 14 Pa. Commw. 603, 324 A.2d 813 (1974)).

If applied to the facts, this would mean that the bank would be subrogated to the consignors' claims against P & P, especially to avoid the unjust enrichment of P & P.

More specifically, the doctrine of equitable subrogation has been explained in *Rawson v. City of Omaha*, 212 Neb. 159, 164, 322 N.W.2d 381, 384 (1982).

> " 'The doctrine of subrogation includes every instance in which one person pays a debt for which another is primarily liable, and which in equity and good conscience should have been discharged by the latter, so long as the payment was made under compulsion or for the

> protection of some interest of the one making the payment and in discharge of an existing liability.' . . ."

In *Rawson*, the plaintiff sought reimbursement of money from the defendant under the doctrine of *contribution* for amounts she had paid to settle claims arising out of an automobile accident. She contended that the negligence of the city was a proximate cause of the accident, and as a joint tort-feasor, the city should contribute to the amount she had paid in settlement. A separate indemnity claim was dismissed. We reversed the judgment of the district court and ruled that the plaintiff was entitled to seek reimbursement under the doctrine of equitable subrogation.

We prefaced that opinion, however, with the following:

> While we believe the trial court was correct in its conclusion that, generally, in order for a party to recover contribution after a settlement of a claim by one of the parties, there must be a *common liability* proved to exist between both the party settling the claim and the party from whom contribution is being sought . . . ."

(Emphasis supplied.) 212 Neb. at 163, 322 N.W.2d at 384. The district court in the present case recognized this language and dismissed the third-party petition for the reason that no common liability existed between the bank and P & P for conversion. The court found that the consignors could have shown consequential damages in connection with the bank's conversion of auction proceeds. They would not have been entitled to show these against P & P. P & P asserts that it was not a party to the bank's conversion.

Subrogation is broad enough to include every instance in which one party pays a debt for which another party is primarily answerable.

We have stated:

> "* * * [W]here one having an interest in property pays off an encumbrance on the property in order to protect his interest, he is ordinarily entitled to be subrogated to the rights and remedies of the person paid, provided the debt secured by the encumbrance is not one for which the payor is primarily liable, and the grant of such relief is equitable."

Jones v. Rhodes, 162 Neb. 169, 172, 75 N.W.2d 616, 618 (1956), quoting 83 C.J.S. *Subrogation* § 31 (1953).

Equitable subrogation should thus not be allowed, as the bank was itself "primarily liable" for the debt it paid. It may be said that the bank and the bank alone was liable for conversion of trust funds. It simply paid its own debt and is not to be subrogated to anyone's rights. See *Luikart v. Buck*, 131 Neb. 866, 270 N.W. 495 (1936). The district court found that the amount converted equaled an amount identical to the amount of the two promissory notes plus interest.

The principle of subrogation is applied to subserve the ends of justice and to do equity in the particular case under consideration. *Rawson, supra*. There is no general rule which will afford a test for its application; rather, the facts and circumstances of each case will determine whether the doctrine is applicable. *Id.* The doctrine is not applicable to the present facts.

TIMELY FILING AGAINST AN ESTATE

Claims against the estate of a decedent which are based on promissory notes executed by the deceased must be presented within the time provided by Neb. Rev. Stat. § 30-2485(a)(1) (Reissue 1985) and in the manner provided in Neb. Rev. Stat. § 30-2486 (Reissue 1985), if notice to creditors has been published. Section 30-2485(a) provides as follows:

> (a) All claims against a decedent's estate which arose before the death of the decedent, including claims of the state and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, if not barred earlier by other statute of limitations, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented as follows:
>
> (1) within two months after the date of the first publication of notice to creditors if notice is given in compliance with section 30-2483; *Provided*, claims barred by the nonclaim statute at the decedent's domicile before the first publication for claims in this state are also barred in this state. If any creditor has a claim against a decedent's

> estate which arose before the death of the decedent and which was not presented within the time allowed by this subdivision, including any creditor who did not receive notice, such creditor may apply to the court within sixty days after the expiration date provided in this subdivision for additional time and the court, upon good cause shown, may allow further time not to exceed thirty days;
>
> (2) within three years after the decedent's death, if notice to creditors has not been published.

In case No. 87-113, the district court found that the bank's claim against the estate of Charlie Parks on the promissory notes was not timely filed as required by § 30-2485. Notice to creditors was published on February 20, 1985, and the bank had failed to file a claim or suit on the promissory notes within 2 months of that time, according to the order of the district court.

The bank filed claims on April 22, 1985, totaling $597,653.49, one of which specifically described the claim as for: "Claims asserted against Gretna State Bank by The Waggoners Trucking and J. J. Schaeffer [sic] Livestock Hauling, Inc., in the District Court of Sarpy County, Nebraska for which Charles Lee Parks, deceased, may be liable to Gretna State Bank."

The question here appears to turn on when the bank's claim, if any, arose against the estate. The bank argues that its claim did not arise upon Charlie's death but, rather, on January 20, 1986, when the settlement with the consignors occurred. The bank asserts that it had 4 months from this date to present its claim, which it met by filing suit in case No. 87-113 on April 8, 1986. See § 30-2485(b)(2). This date, however, is nearly 1 year after the time limits provided in § 30-2485(a).

Section 30-2485(b)(2) provides:

> (b) All claims, other than for administration expenses, against a decedent's estate which arise at or after the death of the decedent, including claims of the state and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented as

follows:

. . . .

(2) any other claim, within four months after it arises.

The bank was sued by the consignors on October 15, 1984, approximately 1 month after Charlie's death. Although the bank did not know it would have to pay the consignors at that time, it was certainly aware of the possibility and should have taken the precaution of filing a claim against the estate of Charlie Parks. This notice was within the period for the bank to have aptly met the statutory requirement of § 30-2485(a)(1).

In *In re Estate of Feuerhelm*, 215 Neb. 872, 341 N.W.2d 342 (1983), we explained the purpose of the nonclaim statute, § 30-2485, as

> facilitation and expedition of proceedings for distribution of a decedent's estate, including an early appraisal of the respective rights of interested persons and prompt settlement of demands against the estate. As a result of the nonclaim statute, the probate court or the personal representative can readily ascertain the nature and extent of the decedent's debts, determine whether any sale of property is necessary to satisfy a decedent's debts, and project a probable time at which the decedent's estate will be ready for distribution.

215 Neb. at 874-75, 341 N.W.2d at 344.

Even assuming the district court's position, the bank argues that the purpose of the nonclaim statute has been fulfilled. It notes that motions to file third-party petitions against the estate were filed on January 29, 1985, and the petitions filed on February 22, 1985, giving the personal representative sufficient notice and time to satisfy the decedent's debts.

In the alternative, the bank sets forth § 30-2486 as allowing a claim via commencement of a proceeding against the personal representative. This section provides for presenting claims against a decedent's estate as follows:

> (2) The claimant may commence a proceeding against the personal representative in any court which has subject matter jurisdiction and the personal representative may be subjected to jurisdiction, to obtain payment of his or her claim against the estate, but the commencement of the

> proceeding must occur within the time limited for presenting the claim. No presentation of claim is required in regard to matters claimed in proceedings against the decedent which were pending at the time of his or her death.

This provision refers back to § 30-2485.

The bank is barred from pursuing a claim against the estate. *Feuerhelm* clarifies this point. In *Feuerhelm*, the issue was whether to allow a claim on a promissory note executed by the decedent. We did not accord notice the stature of a claim, in stating, "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." 215 Neb. at 875, 341 N.W.2d at 345. We affirmed the decision of the trial court disallowing the claim.

We find that the bank was "primarily liable" on the debt it paid and should not be subrogated to the rights of the consignors. No mutual mistake or fraud existed for purposes of reformation. The other theories of recovery are without merit. The judgment of the district court is affirmed.

AFFIRMED.

RANDALL HANSEN AND JO ELLEN HANSEN, APPELLEES AND CROSS-APPELLANTS, V. LIEN TERMITE AND PEST CONTROL COMPANY OF OMAHA, INC., A NEBRASKA CORPORATION, APPELLANT AND CROSS-APPELLEE.

428 N.W.2d 195

Filed August 26, 1988. No. 86-570.

1. **Judgments: Appeal and Error.** In a law action, when a jury has been waived, the findings of fact made by the trial court have the effect of a jury verdict and will not be set aside unless clearly wrong.
2. **Breach of Contract: Damages.** The proper rule for measuring damages in a case where a termite inspector has breached a contract to inspect a residence in conformance with the contract terms, and where the purchaser of the inspected residence has relied on this inspection, is the reasonable cost of repairing the termite damage, limited by the market value of the property less the fair market

value of the land and less any salvage value.

3. **Damages: Time.** The cost of repairs, if that cost properly reflects the damages, should be calculated as of the time the hidden damage is, or in the exercise of reasonable diligence could be, discovered.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Affirmed in part, and in part reversed and remanded.

Robert V. Dwyer, Jr., of Dwyer, Pohren, Wood, Heavey & Grimm, and, on brief, James R. Place and Alan M. Thelen, of Breeling, Welling & Place, for appellant.

James E. Bachman, of Bachman & Blunk, P.C., for appellees.

HASTINGS, C.J., CAPORALE, GRANT, and FAHRNBRUCH, JJ., and CHEUVRONT, D.J.

GRANT, J.

Defendant, Lien Termite and Pest Control Company of Omaha, Inc., a Nebraska corporation (hereinafter Lien), appeals from a judgment entered in favor of plaintiffs, Randall and Jo Ellen Hansen. Plaintiffs, prior to purchasing a home, contracted with defendant to inspect the home for termites. Defendant issued a certificate of termite inspection, and subsequently, termites were found in the house. Plaintiffs cross-appeal for an increase of the damages award.

On January 23, 1983, plaintiffs entered into an agreement to purchase a residence located in Omaha, Nebraska. On February 17, 1983, plaintiffs contracted with Lien to conduct a termite inspection of the house. Upon completion of the inspection, Lien issued its standard certificate of inspection, which stated in part:

> IT IS OUR OPINION there is no termite activity present at this time and termites have not impaired the strength of this building. This examination was made by inspecting exposed and accessible wood members and without opening plastered or finished parts of a building such as plastered or finished ceiling, walls and floors or by moving and removing building furnishings unless otherwise authorized.

Lien also issued a Veterans Administration wood destroying insect information report, which stated that "[t]he inspection covered the readily accessible areas of the property . . . ." This report also stated that "[v]isible evidence of previously treated infestation, which is now inactive, was observed" and that "[t]he window frame in basement bedroom at west wall has old termite damage."

About 13 months after the inspection, in early April of 1984, while Mrs. Hansen was vacuuming in the basement of the residence, she hit the mopboard with the vacuum cleaner, and the mopboard "disintegrated." This episode, in conjunction with the knowledge that the floors had been "giving real bad" since the time they moved in and that a basement archway was falling down, led plaintiffs to conclude that there was a problem. Plaintiffs then had the residence inspected by a different termite inspector, who discovered evidence of termites and termite damage.

Plaintiffs brought this action in May of 1984 against Lien in the district court for Douglas County, alleging in their petition that Lien had breached the contract because "the inspection by Lien's agent did not meet the skill and knowledge normally possessed by other termite inspectors in good standing in a similar community [in that] areas of visible evidence of prior damage was [sic] not noted in areas other than the window frame of the basement bedroom." A trial was held to the court, without a jury, and a judicial view of the premises was made. Judgment was entered in favor of plaintiffs for $16,700. Lien timely appealed.

On appeal to this court, Lien assigns six errors that may be consolidated into three: (1) "The trial court awarded the Appellees an improper measure of damages" for various reasons; (2) "[t]here was no evidence as to when the alleged damage occurred . . . therefore, the Appellant's Motion for Directed Verdict should have been sustained"; and (3) the trial court admitted, over Lien's objection, testimony and exhibits of plaintiffs which were not disclosed in plaintiffs' responses to discovery requests.

Plaintiffs' cross-appeal assigned as error that the trial court failed to accept uncontroverted evidence of damages as

controlling, thereby abusing its discretion and committing reversible error.

We first discuss Lien's assignment of error in the trial court's refusing to grant a directed verdict in favor of Lien because there was no evidence as to when the termite damage occurred.

Plaintiffs presented the evidence of a qualified longtime termite inspector from another termite control company. The witness testified that, at plaintiffs' request, he inspected plaintiffs' house on April 2, 1984. At the time of this inspection, there was a drywall ceiling in the basement. This ceiling obscured a view of some of the floor joists in the basement, but this inspector found termite damage in an area 3 to 4 inches wide by 36 to 40 inches long located between the air ducts and the furnace. This area was not covered by drywall and was visible on inspection. This damage was not reported by Lien in its examination. This witness further testified that the damage he saw on April 2, 1984, could not have occurred after February 17, 1983, which was the date of Lien's inspection. This witness further testified that the damage should have been discovered if that visible area had been inspected.

There was evidence contradicting this testimony. In a law action, when a jury has been waived, the findings of fact made by the trial court have the effect of a jury verdict and will not be set aside unless clearly wrong. *Murphy v. Stuart Fertilizer Co.*, 221 Neb. 767, 380 N.W.2d 631 (1986). Lien's assignment of error in this connection is without merit.

Lien's assignments of error concerning damages assert that the trial court used an improper measure of damages. Lien argues that the rule set forth in *Flakus v. Schug*, 213 Neb. 491, 497, 329 N.W.2d 859, 864 (1983), should be applicable in the instant case. In *Flakus*, we held that

> where there has been a misrepresentation in the sale of real estate, the measure of damages is the cost of placing the property conveyed in the condition represented, not exceeding the difference in value of the property conveyed and the value of the property if it had been as represented.

We hold that applying the measure of damages rule from *Flakus* would be incorrect in the instant case. The present case does not involve a misrepresentation in the sale of real estate

and does not involve a contract between buyer and seller. Rather, it is a contract action between a termite inspector and its customer. There is no transfer of property between the termite inspector and its customer in this case, and therefore the rationale of *Flakus* is not applicable. Lien was not making representations as a seller of property, but had contracted to perform an inspection for a fee. Lien warranted that "there is no termite activity present at this time and termites have not impaired the strength of this building."

A more appropriate rule is a modification of the rule set forth in *"L" Investments, Ltd. v. Lynch*, 212 Neb. 319, 327-28, 322 N.W.2d 651, 656 (1982), where the court stated:

> Except as otherwise hereinafter limited, where an improvement upon realty is damaged without damage to the realty itself and where the nature of the thing damaged is such that it is capable of being repaired or restored and the cost of doing so is capable of reasonable ascertainment, the measure of damages for its negligent damage is the reasonable cost of repairing or restoring the property in like kind and quality. . . .
>
> . . . If, in fact, the cost of repair or restoration exceeds the market value of the property just before the injury, then the proper measure of damages is the market value of the property just before the damages were incurred, less any salvage.

Lien argues that the instant case can be distinguished from cases such as *"L" Investments, Ltd. v. Lynch, supra*, because the damage to plaintiffs' residence was not caused by any tortious act by Lien. The damage was caused by termites. Lien further argues that plaintiffs sued for breach of contract rather than in tort. This factual situation, Lien argues, would place the present case under the *Flakus* formula for damages rather than under the *"L" Investments, Ltd.* formula.

As stated above, the rationale of *Flakus* is not present in this case. In a *Flakus* situation, the seller makes misrepresentations to the buyer which result in an overstated market value. The seller is then ordered to pay damages sufficient to bring the property up to the represented market value. If the cost of doing this is greater than the market value of the property as

represented, then the buyer would receive a windfall, more than he paid for the property.

The same factors are not present in the instant case. In this case, plaintiffs wished to purchase a residence from a seller. In order to insure against the possibility of visible termite infestation, plaintiffs (buyers) employed Lien as a termite inspector. Relying on Lien's assurances that there were no visible signs of termites and that "termites have not impaired the strength of this building," plaintiffs purchased the residence for $37,500.

This is not an action for damage to property. Lien did not damage plaintiffs' property. The termites did. Rather, this is an action for damages resulting from Lien's breach of contract in violating its warranty that there was no termite damage. Plaintiffs relied on Lien's representation that their residence had no visible signs of termite infestation. We hold that the proper rule for measuring damages in a case where a termite inspector has breached a contract to inspect a residence in conformance with the contract terms, and where the purchaser of the inspected residence has relied on this inspection, is the reasonable cost of repairing the termite damage which "impaired the strength of [their] building." This amount is limited by the market value of the property less the fair market value of the land and less any salvage value.

In the instant case, the trial court, as trier of fact, found that the cost of repairs was $16,700. Plaintiffs purchased the residence for $37,500. Plaintiffs also adduced evidence that the market value of the land was $5,000. The maximum amount of damages which plaintiffs could be awarded is $32,500 (i.e., $37,500 less $5,000). This prevents any windfall to plaintiffs, and plaintiffs did not receive a windfall in this case.

Lien also assigns as error that there was no evidence as to the cost of repairing the house on February 17, 1983, the date of its termite inspection. Lien points out that plaintiffs' witness who was testifying on cost estimates for repairs used standard cost estimates as of the time of trial, December 4, 1985, and January 3, 1986. Lien argues that plaintiffs' witness should have estimated the cost of repairs using cost estimates as of the date of Lien's inspection.

In support of this argument, Lien states at page 17 of its brief that "[i]n the trial court's Judgment Order, it was correctly inferred that the relevant cost of repairs, if any, was that cost which would have been incurred 'if the defendant had discovered the termites on February 17, 1983, and the necesary [sic] repair work were done at that time.' " The complete sentence in the trial court's order holds:

> As a direct and proximate result of defendant's breach of duty as aforesaid, plaintiffs were damaged in the amount of $16,700.00, the amount it would take to repair 6315 and make it as structurally sound as it would have been if the defendant had discovered the termites on February 17, 1983, and the necessary repair work were done at that time.

Lien contends that the trial court stated that it had determined the cost of repairs should be calculated as of the date of Lien's inspection, but did not do so. Lien contends that the court correctly determined the date of calculating the repairs, but there was no evidence of the cost of repairs on that date.

On this issue, plaintiffs contend that the proper time to measure the cost of repairs is at the time of trial, not at the time of the breach of contract or warranty. In support of their position, plaintiffs cite *Rovetti v. City and County of San Francisco*, 131 Cal. App. 3d 973, 978, 183 Cal. Rptr. 1, 2-3 (1982):

> Appellant accepts the trial court's use of "repair costs" as a measure of damages but it claims respondents benefited by their lack of diligence in repairing their property. We fail to see what benefit could come to respondents when they are given merely what it costs to repair the damage caused by appellant. Increasing an award to compensate for the effects of inflation insures that a plaintiff will not receive less than he is entitled to; such an increase merely removes the impact of inflation from the amount of the judgment awarded. Where an inflation adjustment is made the impact of delay is minimized, not exacerbated; and the defendant is denied the windfall of paying for an injury with dollars of diminished value. The plaintiff

recovers only that which time has already taken from him.

We cannot agree entirely with the *Rovetti* approach. In the case before us, there is no reason to go back to the date of Lien's breach to calculate the repairs. Lien, by its nonactions, caused damage to plaintiffs. That damage was hidden and not discovered by plaintiffs for some 13 months. If it be assumed that prices had increased due to inflation, plaintiffs should not be penalized further by requiring them to go back in time and calculate their damages at the time of the hidden injury. We hold that the cost of repairs, if that cost properly reflects the damages, should be calculated as of the time the hidden damage is, or in the exercise of reasonable diligence could be, discovered. It is at this time that the damages that Lien has caused are fixed. Lien's contention that the repairs should be calculated as of the time of its inspection is without merit.

Lien's next assignment of error contends that the trial court should not have admitted testimony on lump-sum damages figures without sufficient foundation as to the composition of the figures. Plaintiffs called an expert witness to estimate the cost of repairing the residence. The witness, Walter Rudeen, is a structural engineer with extensive engineering experience working with floor structures, roof structures, trusses, beams, joists, foundations, and foundation walls. Rudeen prepared an itemized estimate of repairs, which included the following items and their costs: roof shoring, floor demolition, electrical and ventilation, exterior and interior studs, replacement of floors, new flooring, ceiling, painting, and miscellaneous, for a total estimate of $34,900.

Lien, citing our decision in *Crowder v. Aurora Co-op Elev. Co.*, 223 Neb. 704, 393 N.W.2d 250 (1986), argues that the expert witness' estimate should not have been admitted into evidence as a summary of voluminous writings. Defendant contends that the requirements under Neb. Rev. Stat. § 27-1006 (Reissue 1985) for admission of the exhibit were not satisfied. This argument is without merit. The document is not a summary of voluminous writings, but is Rudeen's one-page estimate. Once he was questioned and qualified as an expert witness in the construction estimate field, Rudeen was competent to testify regarding the basis for his cost estimates.

Lien's final assignment of error asserts that the trial court erred when it admitted testimony and exhibits which were not disclosed in plaintiffs' responses to discovery requests. The transcript before us does not contain either Lien's interrogatories addressed to plaintiffs or plaintiffs' answers to them, but on examination of plaintiffs' witness Rudeen, reference is made to an interrogatory. Plaintiffs' counsel read into the record the answer to this interrogatory. We will consider the issue presented.

Lien apparently sent the following interrogatory to plaintiffs:

> With respect to each person identified in your answer to the preceding Interrogatory, set forth the subject matter on which he or she is expected to testify, set forth the substance of the facts and opinions to which he or she is expected to testify, and set forth a summary of the grounds for each such opinion.

The plaintiffs read their answer as follows: "Walter D. Rudeen. In order for the home to be made structurally sound, the resulting cost of repair will be $34,900."

During Rudeen's testimony, it was ascertained that Rudeen has visited the subject residence for inspection not once but twice. Lien objected to any testimony arising out of this second visit to the residence, because plaintiffs had not set forth in plaintiffs' answer to the relevant interrogatory the substance of the facts and opinions of this second visit. The trial court overruled Lien's objection. We agree.

The testimony given by Rudeen resulting from his second visit to the residence was simply foundational in nature. As stated in plaintiffs' answer to the interrogatory, the purpose for calling Rudeen as an expert witness was to provide an estimate of repair costs. The testimony objected to by Lien did not broaden the scope of Rudeen's opinion. During his second visit to the residence, Rudeen simply inspected various rooms to help refresh his memory for purposes of his repair estimate. Plaintiffs asked Rudeen foundational questions regarding his second visit to establish that he had knowledge of the residence sufficient to substantiate his estimate. Lien's assignment of error in this respect is without merit. The action of the trial

court in holding Lien liable is affirmed.

With regard to plaintiffs' cross-appeal for an increased damages award, we reverse and remand. For the reasons set out above, it is clear that the trial court used an incorrect date in calculating the cost of repairs as damages. The cause is remanded on the issue of damages only. Appellees' request for attorney fees is denied.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

AFFILIATED FOODS COOPERATIVE, INC., APPELLANT, V. COUNTY OF MADISON ET AL., APPELLEES.

428 N.W.2d 201

Filed August 26, 1988. No. 86-650.

1. **Taxation: Appeal and Error.** An appeal from the judgment of the district court concerning action by a county board of equalization is heard as in equity and reviewed de novo.
2. **Taxation: Valuation: Presumptions: Proof: Appeal and Error.** A county board of equalization is afforded the presumption that it has faithfully performed its official duties. On appeal, this presumption disappears when there is competent evidence to the contrary. From that point on, the question of unreasonableness of valuation fixed by the board of equalization becomes one of fact based upon the evidence, unaided by the presumption. The burden of showing such value to be unreasonable rests upon the applicant on appeal from the action of the board.
3. **Equity: Appeal and Error.** In an equity action, where credible evidence is in conflict, the Supreme Court may give weight to the fact the trial court saw the witnesses and observed their demeanor while testifying.
4. _____: _____. In an appeal of an equity case, we give proper consideration to the fact that the trial court inspected the property.
5. **Taxation: Valuation: Proof.** A court decree fixing the value of property under a prior assessment is not admissible to prove the value of real estate under a subsequent assessment.

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

David A. Domina, of Domina, Gerrard & Copple, P.C., for appellant.

Warren L. Reimer, Deputy Madison County Attorney, for appellees.

HASTINGS, C.J., SHANAHAN, and FAHRNBRUCH, JJ., and RILEY and OTTE, D. JJ.

FAHRNBRUCH, J.

Affiliated Foods Cooperative, Inc. (Affiliated), appeals as excessive for 1985 tax purposes the $5,298,851 value placed on its real estate and warehouse facilities by the Madison County assessor.

Both the Madison County Board of Equalization and the district court accepted the assessor's value and refused to lower that value to $3,300,000, as prayed by Affiliated. We affirm.

In appealing the district court judgment, Affiliated assigns five errors, which may be consolidated into two: (1) The trial court erred in refusing to make a proper downward adjustment in the actual value of appellant's real estate for purposes of ad valorem taxes for 1985, and (2) the trial court erred in refusing to strike the testimony of Ransom G. Roman, an appraiser hired by the Madison County assessor.

In an appeal to the district court, the judge hears the case as in equity and determines anew all questions raised before the county board of equalization which relate to the liability of the property to assessment, or to the amount thereof. Neb. Rev. Stat. § 77-1511 (Reissue 1986).

An appeal from the judgment of the district court concerning action by a county board of equalization is heard as in equity and reviewed de novo. *Fremont Plaza v. Dodge County Bd. of Equal.*, 225 Neb. 303, 405 N.W.2d 555 (1987); *Spencer Holiday House v. County Bd. of Equal.*, 220 Neb. 607, 371 N.W.2d 286 (1985). A county board of equalization is afforded the presumption that it has faithfully performed its official duties. On appeal, this presumption disappears when there is competent evidence to the contrary. From that point on, the question of unreasonableness of valuation fixed by the board of equalization becomes one of fact based upon the evidence, unaided by the presumption. The burden of showing such value to be unreasonable rests upon the applicant on appeal from the action of the board. *Richman Gordman v.*

Board of Equalization, 215 Neb. 379, 338 N.W.2d 761 (1983); *Spencer Holiday House, supra.*

The transcript of the hearing before the county board of equalization does not list the county's witnesses nor give a summary of the county's evidence. In the district court appeal, the county assessor testified she only recommended her final valuation figure to the board. There is no indication in the record that the assessor gave the board any supporting data for her recommendation. Therefore, in our de novo review of the record in this case, we shall examine the facts to determine whether the valuation fixed by the Madison County Board of Equalization and the district court was unreasonable.

While the Supreme Court reviews equity cases de novo and reaches an independent conclusion without being influenced by the findings of the trial court, where credible evidence is in conflict, we may give weight to the fact the trial court saw the witnesses and observed their demeanor while testifying. *In re Plummer Freeholder Petition, ante* p. 520, 428 N.W.2d 163 (1988); *III Lounge, Inc. v. Gaines*, 227 Neb. 585, 419 N.W.2d 143 (1988). Also, in an appeal of an equity case, we give proper consideration to the fact that the trial court inspected the property. *Lincoln East Bancshares v. Rierden*, 225 Neb. 440, 406 N.W.2d 337 (1987); *Newson Constr. Co. v. Calvary Assembly of God Church*, 193 Neb. 556, 227 N.W.2d 886 (1975). In the case at bar, the trial judge inspected the property by agreement of the parties.

The Madison County assessor hired Ransom Roman, a local licensed real estate appraiser, to appraise commercial properties within the county upon which improvements were added or removed since the property's last valuation. Roman began working in that capacity on a part-time basis in May 1984. He spent about 20 percent of his time appraising commercial property for tax purposes and 80 percent of his time on private fee appraisals. Roman became a licensed real estate appraiser when the Nebraska licensure act became effective in 1974. From 1974 to 1982, he not only appraised, but also sold, real estate in northeast Nebraska. From 1982 to time of trial, Roman confined his activities to appraisals.

In carrying out his assignment, Roman determined that

Affiliated constructed a 49,060-square-foot addition to its main building in 1984. The addition was 90 percent completed as of January 1, 1985. From blueprints, Roman calculated that the main building, in January 1985, covered 430,312 square feet. During the course of his appraisal, Roman visited the building twice, obtained floor plans and blueprints, discussed the latest addition with Affiliated's full-time architect, and reviewed prior appraisals in the Madison County assessor's office. As required by the Nebraska Department of Revenue, Roman utilized the Marshall Valuation Service as a guideline to determine replacement cost.

Roman testified that Affiliated's warehouse fit within the Marshall service's class S designation regarding replacement cost per square foot. However, he used the service's class D replacement costs, which are lower than those in class S. Roman did this because, in his experience, the class D costs were more comparable to actual local construction costs than were class S costs. On the warehouse portion of the building, the class S cost per square foot ranged from $21.96 to a low of $11.07. The cost of class D construction ranged from a low of $9.59 to a high of $21.28 per square foot. Use of the class D costs was not detrimental to Affiliated.

Roman calculated the replacement cost of Affiliated's buildings to be: office building, $509,640; refrigeration warehouse section, $2,505,886; and storage warehouse, $3,103,345; a total of $6,118,871. The total figure included a 1984 addition, which Roman found cost $1,156,187. He reduced the addition cost to $1,040,568 because the addition was only 90 percent complete as of January 1, 1985. In further valuing the property, Roman reduced the value of 129,870 square feet of the warehouse by $6.39 per square foot, for a total of $829,869 for functional depreciation. The functional depreciation was due primarily to a portion of the roof's being supported by racks. The racks are steel uprights, with steel crossmembers, that form a vertical truss. Crossmembers on which pallets are placed tie all the uprights together. Apparently, that type of roof support is not ideal.

After deducting the functional depreciation, Roman arrived at a value of $5,289,002 before deducting physical depreciation.

This figure was exactly $1,040,568 (90 percent of the appraisal cost of the addition) higher than the assessor's appraisal for 1984. From the $5,289,002 figure, Roman deducted 7 percent, or $370,230, for physical depreciation. This depreciation was $72,840 more than was deducted in the assessor's appraisal for 1984. This then reduced the $5,289,002 value to $4,918,772.

Roman added to the $4,918,772 value of the main buildings $17,922 for railroad trackage, $2,195 for fencing, $26,190 for tanks, $2,421 for pumps, $15,356 for an old, small warehouse, and $109,194 for a truck shop. Thus, Affiliated's improvements to land totaled $5,092,050. That actual value figure was increased to $5,298,851 by adding land value of $206,801.

Roman recognized that there are three approaches to determining actual or market value of property: income, market, and cost. He considered all three approaches, but ultimately used only the replacement cost approach. Roman discarded both the income and market approaches because of insufficient facts upon which to formulate an opinion. The cost approach had previously been used by the county assessor to appraise Affiliated's property.

The Madison County assessor adopted Roman's $5,298,851 appraised actual value of Affiliated's land and improvements for the tax year 1985. The Madison County Board of Equalization fixed the value of Affiliated's land and improvements at $5,298,851. After a de novo trial and inspection of the property, the district court also fixed the value of Affiliated's land and improvements at $5,298,851 for the 1985 tax year.

At trial in the district court, Affiliated called Patrick E. Morrissey of Omaha as its expert witness on values for the 1985 tax year. He was hired to appraise Affiliated's real estate for tax litigation in 1983 and again for the 1985 tax year. A full-time self-employed appraiser, Morrissey received his Nebraska real estate appraiser's license in 1978. At time of trial, he was one of 20 to 30 of the Nebraska active and nonactive members of the Appraisal Institute (MAI appraisers). Morrissey's experience included appraising real estate for financial and governmental institutions, private clients, attorneys, and syndicators.

Morrissey agreed with Roman that there were insufficient facts available to appraise Affiliated's property by an income approach. He, therefore, used the cost and market approaches.

Using the Marshall Valuation Service for class S warehouses, Morrissey calculated the replacement cost of the improvements to be $7,303,000, compared to Roman's calculated replacement cost of $6,118,871.

Roman, from his replacement cost, deducted $370,230 for physical depreciation and $829,869 for functional depreciation, for a combined depreciation of approximately 20 percent of replacement cost. Morrissey deducted 50 percent, or $3,651,500, for physical depreciation and functional obsolescence. The 50-percent figure was garnered through market extraction, using the same property Morrissey used when doing his market approach. Next, Morrissey deducted 30 percent of the $3,651,500 for locational obsolescence due to the building's Norfolk location, leaving an improvement value of $2,556,050. Morrissey's 50 percent and thereafter 30 percent reductions constitute depreciation and obsolescence deductions of 65 percent. To the resulting improvement value, Morrissey added $100,000 for the truck shop, making an improvement total value of $2,656,050. This compared to Roman's improvement value of $5,092,050. Morrissey added $220,000 land value to his $2,656,050 improvement value, making a total actual 1985 tax value of $2,876,050. Roman added his land value of $206,801 to his improvement value, thereby calculating the 1985 actual tax value of land and improvements to be $5,298,851.

Morrissey testified there was no market for the Affiliated property. In appraising the property, Morrissey also utilized what he termed the "Direct Sales Approach." Roman referred to it as the "market approach." Appraisers using this approach compare recently sold similar properties to the subject property. Adjustments are made for differences between the subject property and the "similar properties."

Morrissey discovered sales of two grocery distribution warehouses in Omaha and one in Gering, Nebraska. The United A. G. warehouse in Omaha sold in December of 1984 for $3,200,000. It was 360,717 square feet in size. After

deducting $563,600 for land value from the total sales price, Morrissey calculated the selling price per square foot to be $7.30.

The second Omaha property, a Hinky Dinky warehouse, sold in November of 1982 for $5 million. It was not a cash sale. The expert testified this warehouse was 321,793 square feet, with land value of approximately $1 million. Morrissey calculated its selling price per square foot to be $12.43. The warehouse in Gering sold for $856,500 in April of 1985, after the assessor had fixed the value of Affiliated's property. The size of the warehouse was 144,530 square feet; the land was valued at $78,872. Morrissey calculated the selling price per square foot to be $5.38.

Morrissey also considered the sales of eight Omaha warehouses ranging in size from 20,000 to 48,000 square feet. The record gives no indication of these properties' selling prices or their length of time on the market. At the time Morrissey's appraisal was conducted, four warehouses were for sale in Norfolk, ranging in size from 20,000 to 72,000 square feet. Their size alone does not make them comparable. These properties had been on the market from 1 to 3 1/2 years. It was Morrissey's opinion that this data indicated a need to adjust the Omaha sales prices for the Norfolk location.

Morrissey deducted 30 percent from the price per square foot of the Omaha warehouses because of their location. His reasons for arriving at that figure are not persuasive. After adjusting the prices, Morrissey had a range of $5.11 to $8.70 per square foot. He decided $6.50 per square foot was right for Affiliated's property. Again, the record is not persuasive why $6.50 was the appropriate figure. Morrissey indicated that the three "comparable" properties were near or adjacent to an interstate. The Gering property is 50 miles from Interstate 80; Affiliated's warehouse is within 70 to 100 miles of three different interstate highways.

Using $6.50 per square foot and 431,000 square feet, Morrissey calculated the value of Affiliated's warehouse to be $2,801,500, after the 50- and 30-percent deductions. He added to that figure $100,000 for the truck shop and $220,000 as the land value, for a total of $3,121,500 actual value.

After comparing the figures from the cost and market, or direct sales, appraisal approaches, Morrissey decided Affiliated's warehouse should be valued at $3 million. Affiliated's prayer was for a $3,300,000 value. In his appraisal, Morrissey acknowledged that his final appraised value had not changed since 1983, even though over 100,000 square feet had been added to the warehouse. It was Morrissey's opinion that the additional square footage added no value to the warehouse.

The record is not persuasive that the Omaha and Gering properties were sufficiently comparable to provide probative force to a direct sales or market approach to value. The Omaha properties were from 70,000 to 100,000 square feet smaller in size and the Gering property only about one-third the size of Affiliated's main building. In regard to the sale of one of the Omaha properties, approximately $1,400,000 to $1,500,000 in federal taxes were avoided. Morrissey, while acknowledging that fact, gave no consideration to that data, although the seller did. Morrissey did not consider the percentage of refrigerated or cooler warehouse space of the comparables to that of Affiliated's.

Affiliated argues that the factors set forth in Neb. Rev. Stat. § 77-112 (Reissue 1981) were not considered by the county "in any meaningful way." Brief for appellant at 19.

As Affiliated admits in its brief, nothing in the statute requires the county assessor or county board of equalization to use all of the factors set forth therein. Instead, those officials may use such factors or combination thereof which they determine to be applicable in determining actual value under the state Constitution. *Airport Inn v. County Bd. of Equalization*, 215 Neb. 659, 340 N.W.2d 378 (1983); *Spencer Holiday House v. County Bd. of Equal.*, 220 Neb. 607, 371 N.W.2d 286 (1985).

Roman testified that he found no properties suitable for comparison with Affiliated's warehouse. He, therefore, could not use the market approach to value. Morrissey found two properties which it is claimed Roman could have used. However, Morrissey deducted 30 percent from their sales prices to make them comparable. It is clearly a matter of opinion whether those two properties were, in fact, sufficiently

comparable to Affiliated's warehouse to make a suitable comparison. We find that the market, or direct sales, approach as used is not convincing in this case.

The remainder of appellant's argument is based upon the premise that the county has adduced "no credible evidence that withstands scrutiny," while it has presented "Morrissey's testimony, which clearly constitutes 'competent evidence.' " Brief for appellant at 26-27. Unfortunately for the taxpayer, that characterization is not borne out by the record.

Morrissey began his cost approach appraisal with a valuation of $7,303,000. Roman began with a value of $6,118,871. Roman's figure includes 90 percent of the value of the partially completed addition. Morrissey ignored this addition. The primary difference in the appraisers' final figures is the amount of depreciation and obsolescence deducted by each.

Morrissey deducted 50 percent from his $7,303,000 figure for physical and functional obsolescence. Nearly two-thirds of Affiliated's warehouse was less than 10 years old at the time Morrissey did his appraisal. Nearly one-quarter of the structure was less than 2 years old. To say these newer portions of the structure have physically or functionally depreciated by 50 percent is unreasonable. Further, Morrissey deducted 30 percent from the depreciated figure for locational obsolescence, making a total of 65 percent deducted for depreciation and obsolescence. This, coupled with his failure to include an increased value of the latest addition, casts doubt on the validity of Morrissey's appraisal. He gave no increase in value for two additions added since his 1983 appraisal. Affiliated's second assignment of error has no merit.

In its pleadings before the county board of equalization and in the district court, Affiliated contended that the tax valuation for 1984 was binding upon the board for 1985 because it was fixed by the Madison County District Court in earlier litigation. The 1984 valuation was lower than the assessor's 1984 appraisal. Neb. Rev. Stat. § 77-1502 (Cum. Supp. 1984) provides that the county board of equalization shall meet commencing April 1 of each year for not less than 3 nor more than 60 days to review and decide protests filed with it. Under the same section, the board may meet at any time for the

purpose of equalizing assessments of any omitted or undervalued property. It thus appears that the Legislature provided that the valuation for property for assessment purposes for each year could be different, according to the circumstances. In deciding *DeVore v. Board of Equalization*, 144 Neb. 351, 13 N.W.2d 451 (1944), we held in effect that a decree fixing the value of property under a prior assessment is not admissible to prove the value of real estate under a subsequent assessment. See, also, *Omaha Paxton Hotel Co. v. Board of Equalization*, 167 Neb. 231, 92 N.W.2d 537 (1958). Affiliated's contention of res judicata has no merit.

Upon de novo review, we find, as did the Madison County Board of Equalization and the district court, the actual value of Affiliated's land and improvements for the 1985 tax year to be $5,298,851.

Affiliated has not met its burden of showing such value to be unreasonable. The district court's judgment is affirmed.

AFFIRMED.

HAROLD L. HINES, APPELLANT, V. ELMER E. POLLOCK, APPELLEE.

428 N.W.2d 207

Filed August 26, 1988. No. 86-722.

1. **Summary Judgment.** In considering a motion for summary judgment, the evidence is to be viewed most favorably to the party against whom the motion is directed, giving to that party the benefit of all the reasonable inferences which may reasonably be drawn from the evidence.
2. _____. The party moving for summary judgment is entitled to summary judgment if the pleadings, depositions, and admissions on file, together with any affidavits, show that there is no genuine issue of material fact, that the ultimate inferences to be drawn from those facts are clear, and that the moving party is entitled to judgment as a matter of law.
3. **Intoxication: Negligence.** The care required of a person who has voluntarily become intoxicated is the same as that required by one who is sober.

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

O. William VonSeggern, of Grimminger & VonSeggern, for appellant.

D. Steven Leininger, of Luebs, Dowding, Beltzer, Leininger, Smith & Busick, for appellee.

BOSLAUGH, WHITE, CAPORALE, and GRANT, JJ., and NORTON, D.J.

GRANT, J.

This is an appeal from an order sustaining defendant's motion for summary judgment in the district court for Hall County. Plaintiff-appellant, Harold L. Hines, filed a petition on February 19, 1985, alleging that he had sustained personal injuries when he was struck by a truck operated by the defendant-appellee, Elmer E. Pollock. In his petition plaintiff alleged defendant was negligent in failing to keep his vehicle under reasonable control; in failing to keep a proper lookout; and in failing to yield the right of way to plaintiff, a pedestrian. The defendant answered, denying that his truck had struck the plaintiff, and alleging that the sole proximate cause of plaintiff's injuries was the negligence of plaintiff. Both the plaintiff and the defendant filed separate motions for summary judgment. Plaintiff's motion sought a summary judgment on the issue of defendant's liability "for the reason that the testimony of the Defendant clearly states that he knew the Plaintiff was an incapacitated person and the Defendant had an absolute duty to avoid injury to the Plaintiff, pursuant to Nebraska Revised Statute Section 39-644 . . . ." On August 5, 1986, the matter came on for hearing on defendant's motion for summary judgment. At the hearing, defendant offered into evidence three depositions in support of his motion. On August 12, 1986, the court sustained the defendant's motion for summary judgment and dismissed the action. Plaintiff appeals, contending that the decision of the trial court is contrary to the evidence and the law and that the trial court erred in granting defendant's motion for summary judgment and in failing to properly apply the provisions of Neb. Rev. Stat. § 39-644 (Reissue 1984).

In considering a motion for summary judgment, the

evidence is to be viewed most favorably to the party against whom the motion is directed, giving to that party the benefit of all the reasonable inferences which may reasonably be drawn from the evidence. The party moving for summary judgment is entitled to summary judgment if the pleadings, depositions, and admissions on file, together with any affidavits, show that there is no genuine issue of material fact, that the ultimate inferences to be drawn from those facts are clear, and that the moving party is entitled to judgment as a matter of law. *Hirschman v. Maddox*, 223 Neb. 302, 389 N.W.2d 297 (1986); *Remelius v. Ritter*, 222 Neb. 734, 386 N.W.2d 860 (1986); Neb. Rev. Stat. § 25-1332 (Reissue 1985).

The record, as set out in the depositions of plaintiff, defendant, and a witness, shows, without contradiction, that the plaintiff went to Our Place Bar in Grand Island, Nebraska, on January 11, 1984. Our Place Bar is on the southwest corner of Walnut and West 4th Streets, and fronts on Walnut Street. West 4th Street runs east and west, and Walnut runs north and south. Plaintiff was at the bar from 3 until approximately 11:45 p.m. During that time, the plaintiff "had a few" drinks. Plaintiff requested a ride home from a friend, who agreed to plaintiff's request. The plaintiff and two of his friends left the bar through the rear exit of the tavern. Plaintiff testified that he headed north across West 4th Street at a point about "a fourth [of a block] from the crosswalk." In his petition, plaintiff alleged that he was walking north across West 4th Street "at a point approximately 83'5" east of the intersection of Walnut Street and West 4th." This is obviously in error. Plaintiff's deposition and all the other evidence show that the plaintiff crossed this street west of the intersection, but the fact that plaintiff crossed the street between intersections is settled. Plaintiff testified that he was between parked cars when he looked to his right and to his left for traffic and saw "nothing." Plaintiff then proceeded to walk across the street. Plaintiff testified that he was "almost to the other side of the street when I noticed the pickup and I figured I had time to make it." Plaintiff further testified he was north of the center of the street when he saw the pickup truck coming.

The defendant testified that he was driving eastbound on

West 4th at 15 to 20 miles per hour when he first noticed the plaintiff and two others entering the street. At that time they were approximately 100 to 150 feet east of the defendant. The defendant observed that the plaintiff and his friends appeared to be intoxicated. Defendant then slowed his vehicle to 3 to 5 miles an hour. The defendant testified that he was approximately 50 feet west of the three people when they reached the centerline of the street. The defendant testified that when the plaintiff reached the center of the street, the plaintiff headed northeast while the others headed northwest. When the plaintiff was 4 to 6 feet north of the centerline, the defendant testified, the plaintiff quickly turned and stumbled back toward defendant's vehicle. Defendant stopped his vehicle. The deposition of one of plaintiff's friends established that she thought defendant had safely proceeded north past the centerline of West 4th Street.

In his first two assignments of error, the plaintiff contends that the decision and judgment of the trial court are contrary to the law and evidence. Plaintiff argues that the facts of the case presented an issue which should have been submitted to the jury. The gist of plaintiff's argument is that had he not been intoxicated at the time of the accident, he would have had sufficient time to safely cross the street.

With regard to plaintiff's intoxicated condition at the time of the accident, we have held that while intoxication in and of itself does not constitute contributory negligence, the care required of a person who has voluntarily become intoxicated is the same as that required of one who is sober. *Webber v. City of Omaha*, 190 Neb. 678, 211 N.W.2d 911 (1973). See, also, *Phillips v. City of Omaha*, 227 Neb. 233, 417 N.W.2d 12 (1987).

With regard to the plaintiff's duty of care, a pedestrian crossing between intersections is held to a higher standard of care than one crossing at a crosswalk, where the pedestrian is afforded the right-of-way. *Gerhardt v. McChesney*, 210 Neb. 351, 314 N.W.2d 258 (1982). A pedestrian crossing between intersections is required to keep a constant lookout for his or her own safety in all directions of anticipated danger. *Gerhardt v. McChesney, supra*. When crossing at a point not within the crosswalk, a pedestrian is required to yield the right-of-way to

all vehicles on that roadway. Neb. Rev. Stat. § 39-643(1) (Reissue 1984).

In the present case, the plaintiff testified that he observed the defendant's vehicle at a distance of approximately 100 to 150 feet, after plaintiff had crossed the centerline of the street. After that point, the plaintiff remembers nothing. At the point where the plaintiff crossed the centerline, he was in the westbound lane and in a place of safety, as he was no longer in the path of the defendant's eastbound vehicle. There is no reasonable explanation for the plaintiff's sudden backward movement toward the defendant's vehicle. It is even unclear whether or not the defendant's vehicle ever came into contact with the plaintiff. The plaintiff cannot remember whether or not he was struck by the defendant's vehicle, and the defendant testified that at the time of the accident, there was no impact with his vehicle. Plaintiff's first two assignments of error are without merit.

In his third assignment of error, the plaintiff contends that the trial court erred in granting defendant's motion and failing to properly apply the provisions of § 39-644. That statute provides as follows:

> Notwithstanding the other provisions of sections 39-601 to 39-6,122, every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway and shall give an audible signal when necessary and shall exercise proper precaution upon observing any child or obviously confused or incapacitated person upon a roadway.

Defendant's alleged violation of this statute was not set out in plaintiff's petition as a specification of negligence, but was injected into the case in plaintiff's motion for summary judgment, which was not ruled on. Nonetheless, we will consider it.

Plaintiff contends that since he was intoxicated at the time of the accident, he was an "obviously confused or incapacitated person" within the meaning of § 39-644. Brief for appellant at 9. Plaintiff further contends that § 39-644 "clearly and specifically" excepts the operation of § 39-643, which pertains to the duty of care required by a pedestrian who crosses the

street between intersections. We find nothing in § 39-644 which would lead us to such a conclusion. The statute merely sets out a higher standard of care in the situations described in the statute. The evidence does not show that defendant violated any standard of care in this case. Plaintiff's third assignment of error is without merit.

The judgment of the district court sustaining defendant's motion for summary judgment and dismissing plaintiff's case is affirmed.

AFFIRMED.

ALVIN GRUENEWALD AND BUD'S FLYING SERVICE, LTD., A NEBRASKA CORPORATION, APPELLANTS, V. WILLIAM A. WAARA AND LOUIS MINKOFF, APPELLEES.
WILLIAM A. WAARA AND LOUIS MINKOFF, APPELLEES, V. BUD'S FLYING SERVICE, LTD., A NEBRASKA CORPORATION, AND EL MARC AIR, INC., A NEBRASKA CORPORATION, APPELLANTS.
428 N.W.2d 210

Filed August 26, 1988. Nos. 86-779, 86-780.

1. **Pleadings: Final Orders: Appeal and Error.** While the granting of a plea in bar is final and appealable, denial of such a plea is not final and appealable.
2. **Summary Judgment: Final Orders: Appeal and Error.** While the granting of a summary judgment which fully disposes of a case is final and appealable, the denial of a summary judgment is not final and appealable.
3. **Jurisdiction: Final Orders: Appeal and Error.** The Nebraska Supreme Court acquires no jurisdiction in the absence of a judgment or final order in the court from which an appeal is taken.
4. **Foreign Judgments: Jurisdiction: States.** A judgment rendered by a sister state court which had jurisdiction is to be given full faith and credit and has the same validity and effect in this state as in the state rendered.
5. **Foreign Judgments: Jurisdiction: Presumptions: Collateral Attack.** While it is presumed that a foreign court rendering a judgment had jurisdiction over the parties, a foreign judgment can be collaterally attacked by evidence that the rendering court was without such jurisdiction.
6. **Statutes: Presumptions: States.** Where the law of a sister state is not presented, it is presumed to be the same as the law of Nebraska.
7. **Service of Process: Notice.** While the investigation required to determine the

address at which a copy of the process served upon a statutory agent is to be mailed to the party sued does not require the use of all possible or conceivable means of discovery, it does require such an inquiry as a reasonably prudent person would make in view of the circumstances, and must extend to those places where information is likely to be obtained and to those persons who, in the ordinary course of events, would be likely to know the address of the party sued.

8. **Due Process.** The opportunity to be heard is a fundamental aspect of due process.
9. **Notice.** Notice can be considered adequate only if it is transmitted in a manner which, at a minimum, has a reasonable certainty of resulting in actual notice.
10. **Service of Process: Notice.** Whether a statutory agent was provided with addresses at which the mailing of process was reasonably certain to result in notice to the party sued is a question of fact.
11. **Appeal and Error.** The finding of a trial judge sitting without a jury is to be treated as if it were a verdict and will not be set aside unless clearly wrong.
12. _____. In a law action tried without a jury, the Nebraska Supreme Court will not reweigh the evidence but will consider the trial judge's disposition in a light most favorable to the successful party and resolve evidentiary conflicts in favor of that party, which party is entitled to every reasonable inference deducible from the evidence.
13. **New Trial: Evidence.** Newly discovered evidence is not a ground for a new trial where exercise of due diligence before the trial court would have produced it.

Appeal from the District Court for Platte County: JOHN M. BROWER, Judge. Judgment in No. 86-779 affirmed. Appeal in No. 86-780 dismissed.

Barry L. Hemmerling, of Jeffrey, Hahn, Hemmerling & Wade, P.C., for appellants.

Noyes W. Rogers, of Leininger, Grant, Rogers & Maul, for appellees.

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

CAPORALE, J.

These consolidated appeals arise out of the unsuccessful effort in the first case, No. 86-779, to register a foreign judgment and an as yet incomplete effort in the second case, No. 86-780, to determine the ownership and status of liens claimed on certain aircraft.

More particularly, in the first case plaintiffs-appellants, Alvin Gruenewald and Bud's Flying Service, Ltd., a Nebraska

corporation, seek to register a default judgment obtained in Texas against the defendants-appellees, William A. Waara and Louis Minkoff. In their appeal to this court, Gruenewald and Bud's Flying Service assign a number of errors which combine to assert that the trial judge, sitting without a jury, initially erred by finding that the Texas judgment was not entitled to registration and further erred by refusing to grant a new trial because of newly discovered evidence. For the reasons detailed later in this opinion, we affirm the judgment of the trial judge.

In the second case the plaintiffs-appellees, Waara and Minkoff, seek a determination that the defendants-appellants, Bud's Flying Service and El Marc Air, Inc., a Nebraska corporation, have no ownership or lien interests in certain aircraft. Bud's Flying Service and the then defendant Gruenewald, who apparently is no longer a party in this case, filed a plea in bar, asserting, in essence, that the default judgment which is the subject of the first case precludes the maintenance of this suit against them. The trial judge overruled the plea and refused to grant a new trial. This appeal followed. While it is clear that an order sustaining the plea would have had the effect of precluding the maintenance of Waara and Minkoff's suit, *Schuster v. Douglas*, 156 Neb. 484, 56 N.W.2d 618 (1953), and therefore would have been final, the order overruling the plea is not final, for the presently unsuccessful parties may ultimately prevail following a trial on the merits. The matter is analogous to the granting and denial of motions for summary judgment; our cases treat the granting of a summary judgment which fully disposes of a case as final and appealable, e.g., *Hines v. Pollock, ante* p. 614, 428 N.W.2d 208 (1988), but hold that the denial of a summary judgment is not final and appealable, e.g., *Krueger v. Zarley, ante* p. 203, 425 N.W.2d 893 (1988). Since this court acquires no jurisdiction in the absence of a judgment or final order in the court from which an appeal is taken, the appeal in this second case must be, and hereby is, dismissed. *W & K Farms v. Hi-Line Farms*, 226 Neb. 895, 416 N.W.2d 10 (1987); *McCook Equity Exch. v. Cooperative Serv. Co.*, 223 Neb. 197, 388 N.W.2d 811 (1986); Neb. Rev. Stat. § 25-1911 (Reissue 1985); Neb. Ct. R. of Prac. 4A(1)b (rev. 1986).

We thus return our attention to the first case and begin by noting that the action is brought pursuant to the provisions of Nebraska's version of the Uniform Enforcement of Foreign Judgments Act, Neb. Rev. Stat. §§ 25-1587 et seq. (Reissue 1985). As such, it is a statutory proceeding at law, *Lubin v. Lubin*, 144 Cal. App. 2d 781, 302 P.2d 49 (1956), and reviewable in accordance with the rules applicable to law actions.

The judgment at issue is based upon a petition which alleges that Waara and Minkoff were believed to be residents of Michigan, that each was engaged in business in the State of Texas, that neither maintained a regular place of business in that state, and that, not being required to do so, neither had designated an agent upon whom service of process might be made. On March 22, 1983, a judgment was rendered awarding Gruenewald and Bud's Flying Service the sum of $696,774 from Waara and the sum of $150,000 from Minkoff. The judgment also declared that a certain purported sale of an aircraft to Waara was fraudulent and thus void.

A judgment rendered by a sister state court which had jurisdiction is to be given full faith and credit, U.S. Const. art. IV, § 1, and has the same validity and effect in this state as in the state rendered, *Miller v. Kingsley*, 194 Neb. 123, 230 N.W.2d 472 (1975). Thus, Texas law is to be used to determine whether the Texas court had jurisdiction of Waara and Minkoff when it entered the default judgment. While it is presumed that a foreign court rendering a judgment had jurisdiction over the parties, a foreign judgment can be collaterally attacked by evidence that the rendering court was without such jurisdiction. *Olson v. England*, 206 Neb. 256, 292 N.W.2d 48 (1980).

The Texas law as presented to the trial judge is found in Tex. Rev. Civ. Stat. Ann. art. 2031b (Vernon). The article provides in relevant part:

> Sec. 3. Any . . . non-resident natural person that engages in business in this State, irrespective of any Statute or law respecting designation or maintenance of resident agents, and does not maintain a place of regular business in this State or a designated agent upon whom service may be made upon causes of action arising out of

> such business done in this State, the act or acts of engaging in such business within this State shall be deemed equivalent to an appointment by such . . . non-resident natural person of the Secretary of State of Texas as agent upon whom service of process may be made in any action, suit or proceedings arising out of such business done in this State, wherein such . . . non-resident natural person is a party or is to be made a party.
>
> . . . .
>
> Sec. 5. Whenever process against a . . . non-resident natural person is made by delivering to the Secretary of State duplicate copies of such process, the Secretary of State shall require a statement of the name and address of the home or home office of the non-resident. Upon receipt of such process, the Secretary of State shall forthwith forward to the defendant a copy of the process by registered mail, return receipt requested.

The Texas Secretary of State certified that he was served with process on behalf of Waara and Minkoff; that he forwarded a copy of said process by certified mail, return receipt requested, to Waara at 518 Flightline Building 132, Box 9, Laredo International Airport, Laredo, Texas 78041, and to Minkoff at P.O. Box 177, Ypsilanti, Michigan; and that each copy was returned as "Unclaimed." We assume for the purpose of our analysis that, as Gruenewald and Bud's Flying Service alleged in the Texas court, Waara and Minkoff were indeed engaged in business in Texas at the relevant times, did not maintain a regular place of business therein, and were not required to appoint and had not appointed an agent for the service of process. The question thus becomes whether Gruenewald and Bud's Flying Service provided the secretary with the addresses required by article 2031b, § 5.

No presentation was made to the trial judge or to this court concerning the type of investigation Texas law requires be made in determining the address to be supplied to the secretary for use in fulfilling the requirements of the aforesaid statute. Under such a circumstance we presume the law of Texas to be the same as the law of Nebraska. Neb. Rev. Stat. §§ 25-12,101 et seq. (Reissue 1985); *Cockle v. Cockle*, 215 Neb. 329, 339 N.W.2d 63

(1983).

This court has held, in connection with a statute which permits service by publication after a reasonably diligent search fails to locate the party to be served, that while such a search does not require the use of all possible or conceivable means of discovery, it does require such an inquiry as a reasonably prudent person would make in view of the circumstances, and must extend to those places where information is likely to be obtained and to those persons who, in the ordinary course of events, would be likely to receive news of or from the absent person. *In re Interest of A. W.*, 224 Neb. 764, 401 N.W.2d 477 (1987). Since the opportunity to be heard is a fundamental aspect of due process, *McAllister v. McAllister*, 228 Neb. 314, 422 N.W.2d 345 (1988), the same requirement applies to the matter of determining the address to be provided the secretary under the provisions of the relevant Texas statute. Thus, the investigation must include inquiry of those who, in the ordinary course of events, would be likely to know the address of the party being sued. This is in keeping with the statement contained in Restatement (Second) of Judgments § 2(1)(b) at 34 (1982), which we hereby adopt, that notice can be considered adequate only if it is transmitted in a manner which, at a minimum, "has a reasonable certainty of resulting" in actual notice.

So far as the record shows, neither Gruenewald nor Bud's Flying Service made any effort to determine where Waara or Minkoff received his mail when the suit resulting in the subject judgment was instituted on or about February 18, 1983. The evidence is such, however, as to support findings that the Laredo address provided for Waara was in fact a box which Gruenewald and Bud's Flying Service controlled and to which Waara had no access at the time in question, and that there was no reasonable certainty that Waara would receive mail dispatched to that box. Indeed, it was more than reasonably certain he would not receive any notice. While it is true that Waara moved frequently, and thus had no permanent residence, the evidence supports a finding that he received mail at Minkoff's addresses and that a reasonable investigation would have revealed that fact.

Minkoff received mail at two Ypsilanti, Michigan, addresses, mail from the earlier longtime address, 1010 Pearl, being forwarded to the most recent one, 520 DeSoto, which was on file as of January 20, 1983, with a central index maintained by the Federal Aviation Administration. The record further reflects that on February 16, 1983, Gruenewald received a letter from a firm of attorneys representing one of his business interests which showed that a copy had been sent to Minkoff at 520 DeSoto, Ypsilanti, Michigan. The box number supplied the secretary was an address which Minkoff had used in connection with a claim being pursued by one of his business interests. That pursuit had ended in the spring of 1982.

Whether the secretary was provided with addresses at which the mailing of process was reasonably certain to result in notice to Minkoff and Waara is a question of fact. See *United Bank v. Dohm*, 115 Ill. App. 3d 286, 450 N.E.2d 974 (1983). In that circumstance the trial judge's finding that Gruenewald and Bud's Flying Service did not comply with the requirements of article 2031(b), § 5, is to be treated as if it were a verdict and will not be set aside unless clearly wrong. *Fisbeck v. Scherbarth, Inc., ante* p. 453, 428 N.W.2d 141 (1988); *McKinstry v. County of Cass*, 228 Neb. 733, 424 N.W.2d 322 (1988). Moreover, we will not reweigh the evidence but will consider the trial judge's disposition in a light most favorable to the successful party and resolve evidentiary conflicts in favor of that party, which party is entitled to every reasonable inference deducible from the evidence. *Kearney Centre Inv. v. Thomas, ante* p. 21, 424 N.W.2d 620 (1988); *McKinstry v. County of Cass, supra*.

In view of the evidence, the trial judge's finding that Gruenewald and Bud's Flying Service failed to provide the secretary with appropriate addresses cannot be said to be clearly wrong. Accordingly, the trial judge's legal conclusion that the judgment is void and not entitled to registration is correct, and the first assignment of error is thus without merit.

The second assignment of error rests upon the claim that certain documents provided in connection with their motion for a new trial because of newly discovered evidence establish that, in fact, the secretary was provided with appropriate addresses

and, further, that Waara and Minkoff have accepted the validity of the judgment by pleading it as a bar to another suit filed against them in Texas. Even if the documents do so establish, a matter we need not and therefore do not decide, it was not established that the documents could not, with reasonable diligence, have been discovered and produced at trial. In the absence of such, the motion for new trial was properly overruled. *Reilly v. First Nat. Bank & Trust Co.*, 220 Neb. 443, 370 N.W.2d 163 (1985); *Smith v. Erftmier*, 210 Neb. 486, 315 N.W.2d 445 (1982); Neb. Rev. Stat. § 25-1142(7) (Reissue 1985). As noted in *Erftmier, supra* at 494, 315 N.W.2d at 451 (quoting from *Jensen v. John Hancock Mutual Life Ins. Co.*, 145 Neb. 409, 16 N.W.2d 847 (1944)):

> "Applications for a new trial are entertained with reluctance and granted with caution, because of the manifest injustice in allowing a party to allege that which may be the consequence of his own neglect in order to defeat an adverse verdict, and, further, to prevent fraud and imposition which defeated parties may be tempted to practice to escape the consequences of an adverse verdict."

Thus, the second assignment of error is likewise without merit.

JUDGMENT IN NO. 86-779 AFFIRMED.
APPEAL IN NO. 86-780 DISMISSED.

IRVIN WOITALEWICZ, APPELLEE, V. WILLIAM M. WYATT, APPELLANT.
428 N.W.2d 216

Filed August 26, 1988. No. 86-896.

1. **Damages.** While it is true that there is often an economic component to disability, disability standing alone is a compensable element of damages totally separate and apart from loss of earnings or loss of earning capacity.
2. **Verdicts: Appeal and Error.** A verdict should not be set aside where the evidence is in conflict or where reasonable minds may reach different conclusions or inferences, as it is within the jury's province to decide issues of fact. A verdict by

a jury based upon conflicting evidence will not be set aside on appeal unless it is clearly wrong.

3. **Damages.** In awarding damages for physical discomfort and mental anguish, the fact finder must rely upon the totality of the circumstances surrounding the incident. The credibility of the evidence and the witnesses and the weight to be given all of these factors rest in the sound discretion of the fact finder.
4. **Verdicts: Appeal and Error.** If the verdict is not so disproportionate to the injury as to disclose prejudice and passion, it will not be disturbed on appeal.

Appeal from the District Court for Hall County: WILLIAM H. RILEY, Judge. Affirmed.

John A. Wagoner and Robert A. Wagoner for appellant.

Denzel R. Busick, of Luebs, Dowding, Beltzer, Leininger, Smith & Busick, for appellee.

HASTINGS, C.J., CAPORALE, GRANT, and FAHRNBRUCH, JJ., and JOHN MURPHY, D.J.

MURPHY, JOHN, D.J.

Irvin Woitalewicz brought an action against William M. Wyatt in the district court for Hall County, claiming that he was injured due to the negligent dental treatment provided by William M. Wyatt for a fractured jaw. The case was tried to a jury, and the jury returned a verdict for Woitalewicz and against Wyatt in the amount of $185,000. Wyatt appeals from that verdict. We affirm.

Although the appellant assigns four errors, two may be joined together for the purposes of this appeal. Appellant claims that the trial court erred in submitting as an element of damages the disability of the plaintiff, Woitalewicz; that the trial court erred in entering judgment on the verdict of the jury when it was evident that the jury ignored the issue of contributory negligence; and that the trial court erred in entering judgment on the verdict of the jury, since the verdict was excessive and the result of passion or prejudice, and in failing to grant a motion for new trial for the same reason.

Woitalewicz was injured in a motor vehicle accident on October 15, 1983. In the accident, he received a bilateral mandibular fracture of his jaw. Two days later, Woitalewicz was referred by his family physician to Wyatt and was examined by him. Woitalewicz was admitted to the hospital, and the

following day, open reduction surgery was performed. During the course of the surgery, Wyatt did not remove two teeth that were in the line of fracture on the right side. Woitalewicz was released from the hospital two days later and was given a prescription for pain medication and Keflex, an antibiotic, by Wyatt. Four days later, Woitalewicz returned to see Wyatt, and drains were installed to relieve swelling due to inflammation or infection. Wyatt did not do a culture of the bacteria involved in the infection at that time or at any time during the course of treatment, and he continued to prescribe Keflex without such a culture.

On October 26, 1983, Woitalewicz returned to his family physician because one of the drains had come out. The drain was replaced, and he continued to see Wyatt until November 28, 1983. During that time, Woitalewicz complained of pain, swelling, a foul taste in his mouth, and looseness in the area of the fracture. On December 5, 1983, Woitalewicz saw Dr. Gregg Peterson, who consulted with Wyatt, advised him that two teeth in the line of fracture might be causing the infection and should be removed, and sent Woitalewicz back to him. On December 12, 1983, Wyatt surgically removed dead bone from the jaw and cleaned out the area of the fracture site, and continued to see Woitalewicz through January 17, 1984. At that time, Woitalewicz left Wyatt's care and returned to Dr. Peterson.

Dr. Peterson performed further surgery on Woitalewicz on February 3 and April 13, 1984. These surgeries were to remove the two teeth in the line of fracture, to remove dead bone, and to graft bone from Woitalewicz' hip to the right jaw. The bone graft was necessary because osteomyelitis developed due to the infection in the area of the original fracture of the jaw on the right side.

Woitalewicz testified about the pain and discomfort he suffered, the medical bills he incurred, the disability he had due to the numbness, or anesthesia, of the lip and face, and the loss of companionship with his wife during the period of time involved.

Expert evidence was adduced that the cause of the osteomyelitis that necessitated the surgery and caused the pain

and suffering and the anesthesia of the lip and face was the negligence of Wyatt in failing to properly treat the infection and in failing to remove teeth in the line of the fracture which was the source of the infection.

Evidence was adduced by Wyatt through an expert witness that his treatment of Woitalewicz was proper and met the applicable standard of care. Further evidence was adduced concerning the alleged contributory negligence of Woitalewicz in failing to properly take the Keflex antibiotic prescribed by Wyatt. The matter was submitted to the jury, with the resultant verdict entered against Wyatt for $185,000.

DISABILITY

The appellant complains that the trial court should not have submitted the issue of disability as to the loss of future earning capacity to the jury. The simple answer to this contention is that the trial court submitted no question as to loss of earnings, present or future, to the jury. The only element of damages relating to disability was contained in instruction No. 18, adapted from NJI 4.03: "2) The disability (a) to date and (b) reasonable [sic] certain to be experienced in the future." Appellant seems to argue that since there was no economic loss attributable to the permanent injury to the lower lip and face, numbness, or anesthesia, cannot be a disability. While it is true that there is often an economic component to disability, disability standing alone is a compensable element of damages totally separate and apart from loss of earnings or loss of earning capacity.

Woitalewicz testified that he suffered from anesthesia, or numbness; that the numbness caused him not to be aware of his face at times; that he would injure the inside of his mouth by biting it without knowing it; and that when he ate or drank, the food or liquid would often run down the side of his face. There was expert testimony from a Dr. Herbert Bloom that the anesthesia was permanent. He compared the sensation to that any patient receives when dental work is being performed under a local pain block, that is, numbness, drooling, and possibility of injury due to biting the lip or inside of the mouth. There is no question that the jury could properly find that the numbness, or anesthesia, of the lip and face of Woitalewicz was a

compensable disability.

CONTRIBUTORY NEGLIGENCE

The appellant further contends that the jury ignored the issue of contributory negligence submitted to it. The argument submitted to support this contention is mere conclusion. The appellant's argument essentially is that evidence of contributory negligence was adduced, and the issue was submitted to the jury. Since the jury came in with such a large award, it must have ignored the instruction on contributory negligence. The appellant is really arguing that the verdict is not supported by the evidence. Such an argument cannot withstand scrutiny.

> A verdict should not be set aside where the evidence is in conflict or where reasonable minds may reach different conclusions or inferences, as it is within the jury's province to decide issues of fact. A verdict by a jury based upon conflicting evidence will not be set aside on appeal unless it is clearly wrong.

Schmidt v. Schmidt, 228 Neb. 758, 760, 424 N.W.2d 339, 341 (1988).

The jury is presumed to have properly considered the question of contributory negligence submitted to it. The appellant's contention in this regard is without merit.

EXCESSIVENESS OF THE VERDICT

Appellant's last contention is that the verdict is excessive.

> In awarding damages for physical discomfort and mental anguish, the fact finder must rely upon the totality of the circumstances surrounding the incident. The credibility of the evidence and the witnesses and the weight to be given all of these factors rest in the sound discretion of the fact finder.

Steinauer v. Sarpy County, 217 Neb. 830, 841, 353 N.W.2d 715, 723 (1984).

Woitalewicz testified that he was in great pain, suffered from chills and fever, had difficulty sleeping, could do very little work on his farm, and became very grouchy. He underwent two extra surgeries, including a sequestrectomy, or removal of dead bone. He was forced to wear a facial brace he found embarrassing. He underwent a third surgery for a bone graft from his hip to his jaw. Further, he was forced to sleep on the

couch, away from his wife. Woitalewicz' wife testified that due to the pain he became short-tempered and that he was in constant pain throughout the course of treatment. Woitalewicz' daughters testified that their father's disposition was much worse due to the constant pain he suffered. Expert testimony was adduced that the type of pain suffered by Woitalewicz was a deep pain.

In addition to the evidence adduced as to pain and suffering and loss of companionship, the evidence showed that the special damages approached $20,000. There was ample evidence adduced concerning disability.

> There is no formula for computing damages in a case such as this, and the final verdict is usually made up from a number of factors. As a general rule, the law gives the jury the right to determine the amount of recovery in cases such as this, and if the verdict is not so disproportionate to the injury as to disclose prejudice and passion, it will not be disturbed.

Schaefer v. McCreary, 216 Neb. 739, 742, 345 N.W.2d 821, 824 (1984).

A review of the evidence leads to the inescapable conclusion that the jury had ample evidence in order for it to determine that an award of $185,000 was appropriate. There is nothing to indicate that the award by the jury is the result of either passion or prejudice, nor does the verdict shock the conscience. The verdict is not excessive.

For the reasons set out above, the judgment of the district court is affirmed.

AFFIRMED.

NEBRASKA EQUAL OPPORTUNITY COMMISSION, APPELLEE, V. MARJORIE POSTMA, APPELLANT.

428 N.W.2d 219

Filed August 26, 1988. No. 86-1102.

1. **Actions: Dismissal and Nonsuit: Pleadings.** As a general rule, a party's right to dismiss does not affect the right of the other party to proceed on its petition or counterclaim.
2. **Actions: Dismissal and Nonsuit: Pleadings: States.** In cases in which a counterclaim against the State has been filed as authorized by Neb. Rev. Stat. § 24-325 (Reissue 1985), the dismissal by the State of its petition does not deprive the defendant of the right to proceed on the counterclaim.

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

Kevin Ruser for appellant.

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

BOSLAUGH, WHITE, and SHANAHAN, JJ., and SPRAGUE and THOMPSON, D. JJ.

PER CURIAM.

The defendant, Marjorie Postma, was formerly employed by the plaintiff, Nebraska Equal Opportunity Commission, as a field representative. Effective October 1, 1980, the plaintiff formally adopted a policy requiring its field representatives, as a condition of employment, to complete certain courses in employment discrimination law offered off-campus by the Antioch School of Law. The cost of the courses was paid by the plaintiff, but if an employee was terminated or resigned before 2 years from the date of completing a specific class, the employee was required to reimburse the State for the cost of the class.

The defendant attended Antioch training courses on March 8 through 12 and June 22 through 25, 1981. The plaintiff paid $658, which was the cost of the two courses the defendant attended.

The defendant resigned from her employment by the plaintiff effective June 10, 1982, and requested a waiver of the

tuition reimbursement. The plaintiff denied the request, and on July 13, 1984, commenced this action to recover the $658 due the plaintiff. The defendant filed an answer and counterclaim and sought to recover $487.90, the amount due her as vacation pay which was withheld by the plaintiff.

On June 18, 1986, the plaintiff dismissed its action without prejudice. On November 17, 1986, the plaintiff moved to dismiss the defendant's counterclaim with prejudice for lack of jurisdiction. On November 24, 1986, the trial court sustained the plaintiff's motion to dismiss the defendant's counterclaim.

The defendant has appealed. Her only assignment of error relates to the dismissal of her counterclaim as being a matter solely within the initial jurisdiction of the State Claims Board.

As a general rule, "A party's right to dismiss does not affect the right of the other party to proceed on its petition or counterclaim." *Dawson v. Papio Nat. Resources Dist.*, 210 Neb. 100, 103, 313 N.W.2d 242, 245 (1981); Neb. Rev. Stat. § 25-603 (Reissue 1985).

Neb. Const. art. V, § 22, provides that "[t]he state may sue and be sued, and the Legislature shall provide by law in what manner and in what courts suits shall be brought."

Neb. Rev. Stat. § 24-325 (Reissue 1985), relating to counterclaims against the State, provides:

> In any civil action instituted by the state, except in actions for the collection of revenue, or for school or other trust funds, or against defaulting officers and their bondsmen, the defendant may, as matter of defense, plead any set-off, counterclaim or cross-demand that he may have arising to him in his own right, and upon which an action could be maintained by him against the state.

The defendant's counterclaim was authorized by § 24-325, which waived the sovereignty of the State with respect to the defendant's claim for vacation pay.

The fact that the State later dismissed its petition should not deprive the defendant of her right to proceed on her counterclaim.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

BOSLAUGH, J., dissenting.

A suit against the State on a claim arising out of contract may be brought only after the claim has been presented to the Director of Administrative Services. Neb. Rev. Stat. § 24-319 (Reissue 1985). Neb. Rev. Stat. § 24-325 (Reissue 1985) creates an exception to § 24-319 by permitting the pleading of a counterclaim only as a "*matter of defense*" in suits brought by the State. (Emphasis supplied.)

Special rules govern statutes in derogation of State sovereignty. We have held that "[s]tatutes which waive a state's sovereign immunity should be strictly construed in favor of the state" and that "[t]he court will resolve an evenly balanced uncertainty of meaning in favor of sovereignty." *Wiseman v. Keller*, 218 Neb. 717, 719, 358 N.W.2d 768, 770 (1984).

Before the defendant could have maintained an action against the State on her claim, it would have to have been presented to the Director of Administrative Services. After the State dismissed its petition without prejudice, the counterclaim was no longer defensive.

Strictly construed, § 24-325 simply grants the defendant, in an action by the State, the authority to file a *defensive* counterclaim. This limited waiver of immunity is not a complete waiver of the State's immunity. The right of a private litigant to sue the State should not be expanded beyond the limits expressed in the Constitution and statutes. The Nebraska Constitution grants to the Legislature the authority to control the manner in which suits may be maintained against the State. This court should not read into § 24-325 a meaning not warranted by the clear language of the statute.

The judgment of the district court should have been affirmed.

SPRAGUE, D.J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. SCOTT PHILLIP THOMAS, ALSO KNOWN AS PHILLIP WAYNE COOK, APPELLANT.

428 N.W.2d 221

Filed August 26, 1988. No. 88-405.

1. **Sentences.** In imposing a sentence, a trial court should consider inter alia the defendant's age, mentality, education, experience, and social and cultural background, as well as his past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime.
2. _____. The seriousness of the offense is an important factor in the setting of a sentence.
3. _____. Evidence as to a defendant's life, character, and previous conduct is highly relevant to the determination of a proper sentence.
4. _____. A sentence validly imposed takes effect from the time it is pronounced, and a subsequent sentence fixing a different term is a nullity.
5. **Appeal and Error.** 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.
6. **Sentences: Appeal and Error.** A sentence imposed within the limits prescribed by statute will not be set aside as excessive absent an abuse of discretion by the sentencing judge.

Appeal from the District Court for Lincoln County: DONALD E. ROWLANDS II, Judge. Affirmed as modified.

Kent E. Florom, Lincoln County Public Defender, for appellant.

Robert M. Spire, Attorney General, and Marilyn B. Hutchinson for appellee.

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

PER CURIAM.

The defendant, Scott Phillip Thomas, also known as Phillip Wayne Cook, appeals as excessive his sentences for theft and criminal mischief. We affirm, but modify the trial court's written judgment to conform with the sentence pronounced.

At his first appearance in district court, the defendant appeared pro se and advised the court that he had previously refused to have an attorney appointed for him, that he had

waived a preliminary hearing, and that he did not want an attorney appointed to represent him or to assist him as a legal advisor. The defendant said he would hire his own attorney. When arraigned on the original charges filed against him, Thomas entered pleas of not guilty.

At the defendant's second arraignment in district court, the judge advised Thomas that if he was indigent, he was entitled to have an attorney appointed to represent him without cost. The defendant proceeded pro se. Thomas specifically waived the services and presence of both appointed and private counsel. Thomas told the judge that no one had threatened, pressured, or coerced him into waiving his right to be represented by counsel.

Pursuant to a plea agreement with the State, Thomas entered pleas of "no contest" to two violations of statutes: (1) taking or exercising control over movable property of another with the intent to deprive the owner thereof, the property being valued at over $300 but less than $1,000, contrary to Neb. Rev. Stat. §§ 28-511 and 28-518 (Reissue 1985), and (2) causing pecuniary loss of more than $300 by intentionally or recklessly damaging or intentionally tampering with the property of another so as to endanger a person or property, or intentionally or maliciously causing another to suffer pecuniary loss by deception or threat, contrary to Neb. Rev. Stat. § 28-519 (Reissue 1985).

Each charge constituted a Class IV felony. Violation of a Class IV felony is punishable by a maximum of 5 years' imprisonment, up to a $10,000 fine, or both. There is no minimum. Neb. Rev. Stat. § 28-105 (Reissue 1985).

On each of the charges, the court pronounced that Thomas serve a term of not less than 1 1/2 nor more than 3 years in the Nebraska Penal and Correctional Complex. The sentences were ordered to be served concurrently. In addition, the defendant was ordered to pay restitution of $1,101 to the victim, and Thomas was given credit for 21 days served in jail while awaiting final disposition of his case.

Before the plea agreement, Thomas had been charged with one Class III felony, a Class I misdemeanor, and a Class IV felony. Violation of a Class III felony carries a penalty of not less than 1 nor more than 20 years' imprisonment, up to a

$25,000 fine, or both. § 28-105. Violation of a Class I misdemeanor carries a penalty of not more than 1 year's imprisonment, up to a $1,000 fine, or both. Neb. Rev. Stat. § 28-106 (Reissue 1985).

Before the defendant's "no contest" pleas were accepted and before he was found guilty on each charge, the defendant was given his rights in compliance with *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986). Among the rights explained to the defendant were his rights to a jury trial, to confront and cross-examine his accusers, to subpoena witnesses, to not incriminate himself, and to be represented by a lawyer. The elements of each crime and the possible penalties were explained to the defendant. Thomas said he understood each of his constitutional rights and understood that by pleading no contest he waived them. Thomas also said he understood the range of penalties which could be imposed. He further stated that no one had threatened him, pressured him, or coerced him in any way to enter the no contest pleas. Thomas said no one had made promises as to what sentences he would receive. He said he was entering his pleas voluntarily of his own free will. The court also explained to Thomas that if he was indigent, the court would appoint an attorney for him at no cost to the defendant.

After recital of facts by the prosecutor, the trial court found that there was a factual basis for each charge and each plea. That factual basis showed that the defendant had been a live-in resident in the victim's home in North Platte, Nebraska. In mid-September 1986, the victim reported that five diamond rings, luggage, and miscellaneous items belonging to her were missing from her residence. A jeweler valued the missing rings at $2,500.

Prior to the commission of the crimes, the victim told Thomas that he must leave her home. Thereafter, Thomas telephoned the victim and told her that he would rip up her clothes and ruin them. When the victim returned to her residence the day after the telephone call, she found that approximately 50 of her dresses were damaged or destroyed. The defendant was arrested in Colorado, and, at the time of his arrest, he was in possession of the victim's luggage and diamond

rings. There was about $700 pecuniary loss as a result of the damage to or tampering with the victim's clothing.

The defendant told the judge he did not contest the factual basis as related by the prosecutor. The court found a factual basis for Thomas' pleas and that the defendant knowingly, voluntarily, and intelligently entered his plea of no contest to each of the charges against him. The court accepted the pleas of the defendant and found him guilty of both charges.

Thomas' sole assignment of error is that his sentences are excessive.

In imposing a sentence, a trial court should consider inter alia the defendant's age, mentality, education, experience, and social and cultural background, as well as his past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime. *State v. Moreno*, 228 Neb. 210, 422 N.W.2d 56 (1988); *State v. Turner*, 221 Neb. 852, 381 N.W.2d 149 (1986); *State v. Swillie*, 218 Neb. 551, 357 N.W.2d 212 (1984); *State v. Stranghoener*, 208 Neb. 598, 304 N.W.2d 679 (1981). The seriousness of the offense is an important factor in the setting of a sentence. *State v. Moreno, supra*; *State v. Schreck*, 226 Neb. 172, 409 N.W.2d 624 (1987); *State v. Swillie, supra*; *State v. Sare*, 209 Neb. 91, 306 N.W.2d 164 (1981). Evidence as to a defendant's life, character, and previous conduct is highly relevant to the determination of a proper sentence. *State v. Moreno, supra*; *State v. Schreck, supra*; *State v. Dobbins*, 221 Neb. 778, 380 N.W.2d 640 (1986).

The defendant was single and 30 years old at the time he committed the crimes. The defendant claims he attended college for 3 1/2 years. The record is unclear as to when, where, and for how long the defendant actually was in college. He had a commercial pilot's license, but it was not current at time of sentencing due to the expiration of the defendant's medical rating.

From September of 1986 to time of sentencing, the defendant had been videotaping weddings for $200 apiece. Previous employment included working for a flying club in Kentucky and running an income tax business in Colorado.

According to the victim's statement, she and the defendant

started a business together. Thomas asked the victim for money to invest in the stock market so the business account could be enlarged. He handled all the business bookwork and kept the checkbook from the victim. The checking account became overdrawn. The victim found the checkbook and discovered what was happening. She called a locksmith and had the locks to her house changed.

In her statement, the victim further states that while the locksmith was there, Thomas came to the residence, pushed the victim into a bathroom, hit her, and threatened her with a gun. The victim told the locksmith to call the police, whereupon the defendant left for a bar. The victim took Thomas' gun from his truck and went to a friend's home for the night. Thomas called and demanded his gun. When the victim responded negatively, the defendant told her that he was going to cut up all her clothes and put sugar in her gas tank.

The victim contacted the police, gave them the gun, and had an officer go to the house with her. The defendant had left for Colorado.

Thomas, when apprehended, was concerned that some of his belongings were still with the victim. He rationalized taking the victim's rings because she had his Rolex watch. He told the court that he did not steal them "just for the sake of stealing."

At the time of sentencing, the defendant had two insufficient-fund checks drawn on the business account, which he said he would resolve.

At sentencing, the court considered the recommendation of the probation officer that the defendant not be given probation. The court also considered the harm done to the victim; factors relevant to the proceedings, including defendant's failure to appear when ordered; and whether the defendant would satisfactorily complete the probation if it were granted.

The defendant's prior record includes failure to appear, in Colorado, in 1983; resistance, disturbance, and destruction of private property in 1983; and an assault and battery, which the defendant claims was only a battery, for which he was fined $60. A failure-to-appear warrant was issued for that assault and battery. The battery, or assault and battery, occurred after the

crimes at issue here.

The court concluded that the defendant would not satisfactorily complete probation because he did not appear to have stable employment or location, and on at least two occasions he failed to appear or appeared late for court proceedings in the present case. The court found that probation would depreciate the seriousness of the offenses.

The written judgment entered by the district court omits reference to restitution and gives the defendant credit for only 11 days served in the county jail.

A sentence pronounced upon a defendant is controlling over a later erroneous written sentence. We have consistently held that "[a] sentence validly imposed takes effect from the time it is pronounced, and a subsequent sentence fixing a different term is a nullity." *State v. Holmes*, 221 Neb. 629, 632, 379 N.W.2d 765, 768 (1986); *State v. Vernon*, 218 Neb. 539, 356 N.W.2d 887 (1984); *State v. Christiansen*, 217 Neb. 740, 351 N.W.2d 67 (1984). The discrepancy between the oral and written sentences creates plain error on the record. 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, *In re Estate of Fischer*, 227 Neb. 722, 419 N.W.2d 860 (1988); *Enyeart v. Swartz*, 218 Neb. 425, 355 N.W.2d 786 (1984); *State v. Beyer*, 218 Neb. 33, 352 N.W.2d 168 (1984).

The sentences pronounced upon the defendant are well within the statutory limits for Class IV felonies. A sentence imposed within the limits prescribed by statute will not be set aside as excessive absent an abuse of discretion by the sentencing judge. *State v. Ladehoff, ante* p. 111, 425 N.W.2d 352 (1988); *State v. Clark*, 228 Neb. 599, 423 N.W.2d 471 (1988). We find the trial court did not abuse its discretion. The sentences as pronounced must stand.

However, since a judgment is rendered when pronounced, there would be a substantial miscarriage of justice if the written judgment is not made to conform with the pronounced judgment. We modify the written judgment by giving the

defendant credit on his sentences for 21 rather than 11 days served in jail while awaiting final disposition of his case and by ordering the defendant to make restitution to the victim in the amount of $1,101.

AFFIRMED AS MODIFIED.

JUDY CARNES, APPELLEE, V. JAMES E. WEESNER, D.D.S., ET AL., APPELLANTS.

428 N.W.2d 493

Filed September 2, 1988. No. 86-422.

1. **Directed Verdict.** The parties against whom a verdict is directed are entitled to have every controverted fact resolved in their favor and to have the benefit of every inference which can reasonably be drawn from the evidence. If there is any evidence which will sustain a finding for the parties against whom the motion is made, the case may not be decided as a matter of law.
2. **Judgments: Verdicts: Appeal and Error.** On a motion for judgment notwithstanding the verdict, the moving party is deemed to have admitted as true all the material and relevant evidence admitted which is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences which can be deduced therefrom. A jury verdict will not be disturbed unless it is clearly wrong.
3. **Jury Instructions: Appeal and Error.** Jury instructions must be read together, and if they taken as a whole correctly state the law, are not misleading, and adequately cover the issues, there is no prejudicial error.
4. _____: _____. It is not error to refuse to give a requested instruction if the substance of the request is in the instructions actually given.

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

Alan L. Plessman for appellants.

David H. Hahn, of Hahn Law Office, and Brian C. Bennett, of Dunlap & Bennett, for appellee.

BOSLAUGH, CAPORALE, SHANAHAN, and GRANT, JJ., and BURKHARD, D.J.

GRANT, J.

Plaintiff, Judy Carnes, brought this action in the district court for Lancaster County against defendants, James E. Weesner, D.D.S., Henry Cech, D.D.S., and Weesner and Cech partnership, alleging that defendants' negligence proximately caused bodily injury to Carnes when she slipped and fell on the ice and snow in defendants' parking lot while attempting to enter her automobile after leaving defendants' office.

The record shows the following. On January 23, 1984, plaintiff took her 12-year-old daughter to the office of defendants in Lincoln, Nebraska, for a monthly orthodontic appointment with Dr. Cech. Plaintiff testified that on the day of her fall, the weather was cold and cloudy, but there was no precipitation. Plaintiff parked her car in one of the parking stalls in defendants' lot, which was adjacent to defendants' orthodontic office. As plaintiff was getting out of her car, she noticed that the lot was icy and slippery, and warned her daughter to be careful. Testimony of plaintiff and her daughter indicates that the condition of the parking lot was snowpacked and icy. As they walked across the parking lot to the office stairway, plaintiff and her daughter locked their arms with each other to provide support and stability on the slippery surface. The two entered the office, where the daughter kept her scheduled orthodontic appointment with Dr. Cech. Plaintiff remained in the waiting room during the appointment.

Following the appointment, plaintiff and her daughter left the office, descended the exterior stairs, and walked arm in arm across defendants' lot to their car by the same route they had taken on their way into the office. When they reached the back of their car, they separated, with plaintiff walking to the driver's door and the daughter walking to the passenger door. Plaintiff testified that she unlocked the door with her right hand. She then lifted up on the door handle, and, as she opened the door, her feet came out from under her and she fell to a sitting position. Immediately after falling, plaintiff experienced severe lower back pain and numbness in her left leg. The daughter and a woman who had been passing by helped plaintiff into plaintiff's car. Plaintiff drove herself to her husband's place of employment in Milford, Nebraska. Her husband drove her to

their family physician in Seward, Nebraska, and then to the emergency entrance of Seward Memorial Hospital.

Plaintiff spent the next 5 days in the hospital. After her release from the hospital, daily physical therapy sessions were required. In the following months, plaintiff suffered severe lower back pain and numbness in her left leg. This pain along with her decrease in mobility eventually forced her to change to a less physical job. On June 7, 1985, as a result of the severe back pain, plaintiff became too ill to remain at work. She had not returned to work at the time of trial, which began on December 11, 1985. On July 10, 1985, plaintiff underwent surgery on her lower back to fuse the bone of two vertebras.

At trial, the person hired by defendants to remove snow from defendants' parking lot testified that he removed the snow on November 28, 1983, and January 3, 1984. Testimony was received from a climatologist regarding snowfalls, temperatures, and other weather patterns during the winter of 1983-84. During January 1984, there were no significant snowfalls prior to January 23, 1984. The climatologist testified that the effect of the January 1984 pattern would be to transform existing snow into ice.

After the evidence was completed, the jury returned a verdict in favor of plaintiff and against defendants in the amount of $50,114.16. Defendants' motion for judgment notwithstanding the verdict or for new trial was overruled. Defendants timely appealed. They set out 12 assignments of error in their brief. Those assignments may be consolidated into three: The court erred (1) in failing to sustain defendants' motion for directed verdict made at the conclusion of all the evidence and motion for judgment notwithstanding the verdict; (2) in giving instructions Nos. 2, 3, 13, and 14; and (3) in refusing to give NJI 8.22, NJI 4.09, and NJI 3.31. We affirm.

With regard to the first assignment of error, we review defendants' appeal from the denial of motion for dismissal and directed verdict in light of the rule enunciated in *Lambelet v. Novak*, 225 Neb. 229, 231, 404 N.W.2d 28, 29-30 (1987). In *Lambelet*, we held:

> [A] directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the

> evidence. *Vice v. Darm Corp.*, 224 Neb. 1, 395 N.W.2d 524 (1986); *Greening v. School Dist. of Millard*, 223 Neb. 729, 393 N.W.2d 51 (1986). Further, the parties against whom the verdict is directed are entitled to have every controverted fact resolved in their favor and to have the benefit of every inference which can reasonably be drawn from the evidence. If there is any evidence which will sustain a finding for the parties against whom the motion is made, the case may not be decided as a matter of law. *Kahrhoff v. Kohl*, 219 Neb. 742, 366 N.W.2d 128 (1985); *Whitaker v. Burlington Northern, Inc.*, 218 Neb. 90, 352 N.W.2d 589 (1984).

Our review of the record shows controverted facts which, if resolved in favor of the plaintiff, would support a verdict in her favor. Testimony by plaintiff, her daughter, and other witnesses produced sufficient evidence for the jury to find that defendants were negligent, that their negligence was the proximate cause of plaintiff's injuries, and that no affirmative defenses were available to defendants. There was evidence that the parking lot was icy and snowpacked on the date that plaintiff slipped and fell and that this condition had developed over a period of time. There was also evidence that this ice and compacted snow could have been removed; that the application of salt, sand, or other abrasives would have improved traction in the lot; and that such abrasives were not applied. With regard to defendants' knowledge of the lot's condition, evidence was adduced to show that one of the defendants walked across the lot from his car to the building each workday and thus was on notice of the slippery conditions. Plaintiff testified that she used caution when attempting to enter her automobile.

Plaintiff presented testimony to show that her damages were caused by the fall. In addition to plaintiff's own testimony regarding her symptoms both before and after the fall, the deposition testimony of plaintiff's expert witness, a physician, indicated that the force of the impact suffered by plaintiff caused her injuries. This evidence was sufficient to submit the case to the jury for resolution of any fact questions. Therefore, a directed verdict would have been improper.

In reviewing an appeal from the denial of a motion for

judgment notwithstanding the verdict, the same rule applies. In *Havlicek v. Desai*, 225 Neb. 222, 225, 403 N.W.2d 386, 389 (1987), we said:

> On a motion for judgment notwithstanding the verdict, the moving party is deemed to have admitted as true all the material and relevant evidence admitted which is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences which can be deduced therefrom. *Farm Bureau Life Ins. Co. v. Luebbe*, 218 Neb. 694, 358 N.W.2d 754 (1984). A jury verdict will not be disturbed unless it is clearly wrong. *Id.*

The trial court did not err in denying defendants' motion for directed verdict and motion for judgment notwithstanding the verdict.

In connection with defendants' assignments of error concerning the instructions, we review the trial court's jury instructions in light of the general rule that all jury instructions must be read together, and if they taken as a whole correctly state the law, are not misleading, and adequately cover the issues, there is no prejudicial error. *Gilbert v. Archbishop Bergan Mercy Hospital*, 228 Neb. 148, 421 N.W.2d 760 (1988).

At trial, defendants objected to the giving of jury instruction No. 2. This instruction, which instructed the jury on the issues, burden of proof, and effect of findings for both plaintiff's claims and defendants' defenses, was adapted from NJI 2.01. Defendants' objections to instruction No. 2 were that (1) the instruction should not have included an act of negligence by defendants because of insufficient evidence; (2) the instruction on contributory negligence was inadequate because it did not reflect the specific negligent acts alleged in the defendants' answer; and (3) the instruction on assumption of risk was inaccurate.

With regard to the issue of defendants' negligence, the jury was instructed, in instruction No. 2, that "[p]laintiff claims in her amended petition that defendants were negligent in the following particular: (1) In failing to use reasonable care in maintaining defendant's parking lot." While general in its

terms, the instruction is not of the type criticized in *Graham v. Simplex Motor Rebuilders, Inc.*, 189 Neb. 507, 511, 203 N.W.2d 494, 497 (1973), where the trial court instructed the jury that the defendant might be found negligent " 'in otherwise failing to observe that care and caution required of reasonable, prudent persons under the circumstances.' " We held, in the *Graham* case, that such an instruction would permit the jury to speculate as to defendant's actions.

The case presented here is much different. Evidence had been presented that the lot could have been cleared, or kept clear, of ice and snow. Other evidence was to the effect abrasive materials were not applied, although such materials could have been applied. Plaintiff's contentions as to defendants' maintenance of their lot were clear. There was no error in this part of instruction No. 2.

On the issue of contributory negligence, the jury was instructed in instruction No. 2: "In defense to the plaintiff's claim, the defendants allege that . . . [a]ny injuries or damages which may have been sustained by the plaintiff were caused or contributed to by the negligence of the plaintiff herself." In their proposed jury instructions, defendants requested that the trial court give an instruction which more specifically reflects the negligent acts alleged in defendants' answer.

In *Gilbert v. Archbishop Bergan Mercy Hospital, supra* at 154, 421 N.W.2d at 764, we held that "it is not error for the trial court to refuse a request for additional instructions where it has, on its own motion, fairly and fully instructed the jury on a party's theory of the case." See, also, *First West Side Bank v. Hiddleston*, 225 Neb. 563, 407 N.W.2d 170 (1987). It is not error to refuse to give a requested instruction if the substance of the request is in the instructions actually given. *Bishop v. Farm Bureau Life Ins. Co.*, 228 Neb. 74, 421 N.W.2d 423 (1988). We hold that the jury instruction on the issue of contributory negligence sufficiently instructed the jury and therefore was not prejudicial to defendants. If anything, the broader instruction given by the trial court better served defendants' ends. Under the given instruction, possible bases for plaintiff's contributory negligence were limited only by counsel's argument and by his and the jury's imaginations. Such an instruction was not

prejudicial to defendants' position.

Defendants objected to the portion of instruction No. 2 which set out the burden of proof for the assumption of risk defense on the ground the instruction was incomplete. The instruction given was as follows:

> [T]he burden is upon the defendants to prove, by a preponderance of the evidence, each and all of the following propositions:
>
> 1. That the plaintiff knew and appreciated the danger;
>
> 2. That the plaintiff voluntarily exposed herself to that danger with knowledge of the unreasonable character of the risk.
>
> 3. That as a proximate result of that danger the injury to the plaintiff occurred.
>
> If the defendants have failed to establish any or all of the above numbered propositions by a preponderance of the evidence, you will disregard such defense.

In *Mandery v. Chronicle Broadcasting Co.*, 228 Neb. 391, 398, 423 N.W.2d 115, 120 (1988), we held: "Before the defense of assumption of risk is submissible to a jury, evidence must show that the plaintiff (1) knew of the danger, (2) understood the danger, and (3) voluntarily exposed himself or herself to the danger which proximately caused the plaintiff's damage." In the instant case, the jury was instructed on each of the assumption of risk factors, and the jury found for the plaintiff.

Defendants objected to the giving of jury instruction No. 3 on the grounds that it sets out that "[a] plaintiff does not assume a risk of harm unless he or she voluntarily accepts the risk. A plaintiff's acceptance of a risk is not voluntary if the defendant's conduct has left plaintiff no reasonable alternative course of conduct in order to avert harm to plaintiff." Defendants argue that this instruction is not a proper statement of the law and that the evidence was insufficient to warrant giving this particular instruction. Our review of the record shows that the trial court did not abuse its discretion in giving this instruction. Testimony was adduced which indicated that plaintiff had undergone substantial inconvenience and had incurred financial expense to come to defendants' orthodontic office. She reached the office safely. It was not prejudicial error

to instruct the jury to consider whether or not defendants' conduct had left plaintiff with a reasonable alternative course of conduct to return to her car.

On the assumption of risk issue, defendants also assign as error that the trial court committed reversible error by refusing to give NJI 3.31. This contention is without merit. NJI 3.31 is, in substance, embodied in part E of jury instruction No. 2, which was given. Both instructions provide the burden of proof for assumption of risk. Our general rule states that there is no prejudicial error if the instructions taken as a whole correctly state the law, are not misleading, and adequately cover the issues. *Gilbert v. Archbishop Bergan Mercy Hospital*, 228 Neb. 148, 421 N.W.2d 760 (1988).

We hold that the jury was properly instructed on the assumption of risk issue.

Defendants also assign as error that the giving of jury instruction No. 13 was reversible error and that the failure to give NJI 8.22 was reversible error. At trial, defendants objected to the giving of the instruction, stating that it was an improper statement of the law as modified from Nebraska Jury Instructions. They further objected that the instruction did not properly state the conditional duty of the defendants to use reasonable care and that the court failed to sufficiently emphasize the "unreasonable risk of harm" requirement. As the trial court pointed out, this instruction was "NJI [8.22] as modified by language from the *Corbin* case which cites the restatement." See, *Corbin v. Mann's Int'l Meat Specialties*, 214 Neb. 222, 333 N.W.2d 668 (1983); Restatement (Second) of Torts § 343 A (1965).

Instruction No. 13 provided in part:

> If you find all of the following conditions are true, the defendants had a duty to use reasonable care:
>
> (a) There was a condition on the parking lot of the defendants involving an unreasonable risk of harm to plaintiff, which defendants knew of, or, in the exercise of reasonable care, should have discovered; and
>
> (b) *Defendants should have expected that plaintiff would fail to protect herself against the danger*; and
>
> (c) *Defendants should have anticipated the harm to*

plaintiff despite the obviousness of the condition of the parking lot.

If you find all of the above conditions are true, then the defendants had a duty to use reasonable care:

(a) To make the parking lot safe for the plaintiff.

(Emphasis supplied.)

Defendants argue at page 25 of their brief that "[t]he central question before us is whether NJI 8.22 or alternatively, Restatement (Second) of Torts Section 343 A should apply to the facts of this case." This issue was before this court in *Tichenor v. Lohaus*, 212 Neb. 218, 322 N.W.2d 629 (1982), and later in *Corbin v. Mann's Int'l Meat Specialties, supra.*

In *Tichenor* and *Corbin*, this court expanded the potential for finding a duty owed by possessors to invitees in the area of known or obvious dangers. Prior to these cases, possessors normally had no duty to invitees if the dangers were known and apparent to the invitees. However, in *Tichenor*, we adopted the rationale of the Restatement, *supra*, § 343 A, and comment *f.* of this section.

Section 343 A at 218 states: "(1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, *unless the possessor should anticipate the harm despite such knowledge or obviousness.*" (Emphasis supplied.)

In *Tichenor* and in *Corbin*, we cited comment *f.* of § 343 A with approval:

> " 'There are, however, cases in which the possessor of land can and should anticipate that the dangerous condition will cause physical harm to the invitee notwithstanding its known or obvious danger. In such cases the possessor is not relieved of the duty of reasonable care which he owes to the invitee for his protection. This duty may require him to warn the invitee, or to take other reasonable steps to protect him, against the known or obvious condition or activity, if the possessor has reason to expect that the invitee will nevertheless suffer physical harm. . . .' "

Corbin v. Mann's Int'l Meat Specialties, supra at 224-25, 333 N.W.2d at 669.

Parts (b) and (c) of instruction No. 13, which was given, reflect this rationale.

It would have been incorrect to give NJI 8.22 without modifying it as set forth in *Corbin v. Mann's Int'l Meat Specialties, supra*. Thus, the trial court was correct in modifying NJI 8.22 as it did.

Defendants' final objections to the jury instructions were that the trial court erred when it gave instruction No. 14, which was NJI 4.09A, and refused to give NJI 4.09.

NJI 4.09 instructs the jury to determine whether plaintiff had a condition which was causing disability or pain prior to the fall and then whether the preexisting condition was aggravated by the fall. Plaintiff can then recover only for the *aggravation* of the preexisting condition. The jury must apportion the recovery.

NJI 4.09A, on the other hand, instructs the jury that if it determines that plaintiff had a condition which was *not* causing disability or pain and that the preexisting condition was activated or "lighted up" by the fall, then, if the verdict is for plaintiff, plaintiff is entitled to recover for the whole of the result proximately caused by the fall.

Our review of the record, including the testimony of plaintiff and her physician, reveals evidence to support the contention that plaintiff may have had a preexisting condition, but that she was not experiencing pain as a result of it prior to the fall. Therefore, we hold that the trial court was correct in giving jury instruction No. 14 (i.e., NJI 4.09A) and in refusing to give NJI 4.09.

We find that the court's jury instructions adequately and correctly submitted the case to the jury.

We further hold that the trial court did not abuse its discretion in refusing to grant a new trial. "The District Court has the power and is required to consider and determine motions for a new trial by the exercise of its sound judicial discretion." *Alliance Tractor & Implement Co. v. Lukens Tool & Die Co.*, 199 Neb. 489, 491, 260 N.W.2d 193, 195 (1977). We hold that the trial court did not abuse its discretion in refusing to grant defendants' motion for a new trial.

We find no prejudicial error, and affirm the judgment of the

district court.

AFFIRMED.

BOSLAUGH, J., dissenting.

In my opinion the failure of the trial court to instruct on the specifications of negligence as alleged and requested by the defendant was prejudicial error which requires that the judgment be reversed.

It is the uniform and proper practice in this state that where specific acts of negligence are charged and supported by the evidence, the trial court instructs as to specific acts so alleged and supported. The failure to do so, even though not requested, is error. *Enyeart v. Swartz*, 213 Neb. 732, 331 N.W.2d 513 (1983); *Pool v. Romatzke*, 177 Neb. 870, 131 N.W.2d 593 (1964).

In the *Pool* case, the defendant's answer alleged eight specific acts of negligence by the plaintiff, but the trial court instructed the jury only that the defendant claimed that the accident resulted because of the negligence of the plaintiff. We there said:

> Nowhere in the instructions was the jury told which acts of the plaintiff the defendant considered to be negligent. Nor was the jury in any way apprised of defendant's theory of defense as detailed in his answer. What we said in Ripp v. Riesland, 176 Neb. 233, 125 N.W.2d 699, is applicable herein: "It is the duty of the trial court, without request, to submit to and properly instruct the jury upon all the material issues presented by the pleadings and the evidence.
>
> "It is the uniform and proper practice in this state that where specific acts of negligence are charged and supported by the evidence, the trial court instructs as to the specific acts so alleged and supported. The failure to do so, whether or not requested to do so, is error."
>
> Evidence was adduced which, if believed by the jury, would sustain some of the defendant's specifications of negligence. These, therefore, were material issues which the defendant was entitled to have properly presented to the jury. We determine that the instructions of the trial court did not adequately present the defendant's theory of

> the case to the jury, and that the failure to do so constituted prejudical [sic] error.

Pool v. Romatzke, supra at 875-76, 131 N.W.2d at 597.

CAPORALE, J., joins in this dissent.

VIRGINIA G. RUMBAUGH, APPELLEE, V. MICHAEL J. RUMBAUGH, APPELLANT.

428 N.W.2d 500

Filed September 2, 1988. No. 86-437.

1. **Contracts.** An agreement providing for education expenses must contain an ascertainable standard by which the extent of the educational obligation can be determined.
2. _____. Words used in a contract must be given their plain and ordinary meaning as ordinary, average, or reasonable persons would understand them.
3. _____. Parties are bound by the terms of a contract even though their intent may be different from that expressed by the agreement.

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

Tim J. Kielty for appellant.

Robert M. O'Gara and Paul J. Peter, of Bruckner, O'Gara, Keating, Sievers & Hendry, P.C., for appellee.

BOSLAUGH, WHITE, and SHANAHAN, JJ., and SPRAGUE and THOMPSON, D. JJ.

SPRAGUE, D.J.

The marriage of Michael and Virginia Rumbaugh was dissolved in January of 1975. The property settlement agreement incorporated in the decree provided for the college education of the parties' minor child. Paragraph 11 of the agreement provided:

> The respondent further agrees that when said child graduates from high school, he will pay the yearly cost of the college education for said child for a maximum of 4 years beyond high school, said yearly total costs not to

> exceed the normal cost then in effect for attendance at the University of Nebraska at Lincoln, or one of the state public schools in Nebraska; that this cost will include, but not be limited to, tuition, mandatory or other special fees, book costs, [sorority costs,] and the like, but will not cover clothing or food costs . . . .

The sorority costs were specifically eliminated by the parties before final approval of the agreement.

The minor child enrolled at Kearney State College.

In January of 1985 the trial court found the appellant in contempt for willfully failing to pay the education expenses. The appellant continued to refuse to pay certain expenses, and the appellee filed a motion for contempt in December of 1985. The court ordered a consolidated hearing on the contempt motion and appellant's motion for modification of the decree, which had been filed in September of 1984. On March 13, 1986, the trial court entered an order finding that room expenses, summer school tuition, and health fees were included under the terms of the property settlement agreement.

On April 15, 1986, a hearing was had on appellant's motion for new trial and appellee's application for attorney fees. On April 21, 1986, the court overruled the motion for new trial and awarded the appellee $1,397.12 in attorney fees, to be taxed to the appellant.

At the consolidated hearing for contempt and modification, the trial court excluded the testimony of the appellant concerning his interpretation of ¶ 11. The court also refused to permit Dr. Joe Renteria, called as an expert witness, to testify to the "normal costs" of a college education.

Appellant contends the trial court erred: (1) in finding that appellant was obligated to pay all expenses set forth in ¶ 11, including the finding of obligation for "room" expense, summer school expenses, and health fees; (2) in finding that competent evidence existed in the record from which it could find that such an obligation existed; (3) in excluding testimony of appellant at the hearing concerning ¶ 11; (4) in excluding the testimony of Dr. Joe Renteria concerning the "normal" costs of a college education; and (5) in granting attorney fees and costs to the appellee.

In *Lenz v. Lenz*, 222 Neb. 85, 382 N.W.2d 323 (1986), this court held that a decree providing for education expenses must contain an ascertainable standard by which the extent of the educational obligation can be determined. We agree with the trial court's determination that the language of this agreement is sufficient to establish such a standard and limit the obligation of the appellant to a determinable amount. The provision "said yearly total costs not to exceed the normal cost then in effect for attendance at the University of Nebraska at Lincoln, or one of the state public schools in Nebraska" limits the cost imposed upon the appellant. The obligation is sufficiently definite to be ascertained.

Appellant contends that the trial court erred in excluding the testimony of an expert witness concerning the "normal cost" of a college education. If the term "normal cost" is ambiguous, then parol testimony to interpret it should have been allowed. The trial court determined that the agreement was not ambiguous. It held that the intent of the parties could be drawn from the document itself. We agree. Words used in a contract must be given their plain and ordinary meaning as ordinary, average, or reasonable persons would understand them. *Bass v. Dalton*, 213 Neb. 360, 329 N.W.2d 115 (1983). The plain and ordinary meaning of the term "normal cost" as used in this agreement is synonymous with "regular" or "usual." Room expense, summer school tuition, and health fees are such regular or usual costs of a college education.

Sufficient evidence was adduced to establish these specific expenditures.

The testimony of the appellant was also properly excluded. His proposed testimony centered on the intentions of the parties in entering into the agreement. Parties are bound by the terms of the contract even though their intent may be different from that expressed by the agreement. *Bass v. Dalton, supra.*

There was no abuse of discretion by the trial court in the awarding of attorney fees and taxing of costs. That award is approved. Additional fees and costs to the appellee are denied.

AFFIRMED.

IN RE ESTATE OF PEARL B. HANIKA, DECEASED.
DALE L. HANIKA AND VINCEL E. HANIKA, APPELLANTS, V. BYRLE HANIKA, PERSONAL REPRESENTATIVE OF THE ESTATE OF PEARL B. HANIKA, DECEASED, APPELLEE.

428 N.W.2d 502

Filed September 2, 1988. No. 86-590.

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

Wallace Becker, of Nelson & Harding, for appellants.

Richard L. Halbert and Michael R. Dunn, of Halbert & Dunn, for appellee.

BOSLAUGH, WHITE, and SHANAHAN, JJ., and GITNICK and GARDEN, D. JJ.

GARDEN, D.J.

This is an appeal from the district court for Richardson County. The district court upheld an order of the county court for Richardson County which apportioned federal estate taxes, interest thereon, and attorney fees among persons interested in the estate of Pearl B. Hanika, deceased. Before considering the assignments of error, it will be necessary to review the manner in which this case was presented to the district court and to this court.

The appellee, Byrle Hanika, personal representative of the estate of Pearl Hanika, filed a formal petition in the county court for Richardson County for a supplemental decree to determine the share of taxes and expenses to be paid by the devisees and heirs of the estate. The appellants, Dale L. Hanika and Vincel E. Hanika, filed notice of objection, and hearing was had in the county court on the issues thus joined. The county court entered an order apportioning the death taxes and expenses of probate. The appellants then filed a notice of appeal with the county court, followed by a petition in error in the district court for Richardson County. No bill of exceptions from the county court was filed in the district court. The appellee personal representative filed a responsive pleading captioned "Response to Petition in Error and Petition on

Appeal of Appellee." The matter was tried de novo in the district court without objection by the appellants or appellee. The district court affirmed the findings and order of the county court apportioning death taxes and expenses of probate. The objectors perfected their appeal to this court. The bill of exceptions from the district court contains the transcript from the county court as exhibit 1 and also contains the additional evidence received at the trial de novo in the district court.

County court apportionment orders entered pursuant to Neb. Rev. Stat. §§ 77-2108 and 77-2112 (Reissue 1986) are final, appealable orders. *In re Estate of Detlefs*, 227 Neb. 531, 418 N.W.2d 571 (1988). The standard of review of such matters is de novo on the record. *In re Estate of Detlefs, supra*. The appellants attempted to obtain relief in the district court by filing a petition in error therein. In *Andrews v. City of Fremont*, 213 Neb. 148, 152, 328 N.W.2d 194, 196-97 (1982), we said:

> New evidence is not permitted in the appellate court to determine if errors of law occurred in the tribunal giving rise to the error proceeding. [Citations omitted.]
>
> Where errors assigned require review of evidence in error proceedings, they cannot be considered in the absence of a bill of exceptions. [Citation omitted.]
>
> It is important to note, as we held by inference in *Ross v. The Governors of Knights of Ak-Sar-Ben*, 199 Neb. 513, 260 N.W.2d 202 (1977), that the transcript must contain all of the evidence relied on for reversal in the District Court or the question will be limited, as it is here limited, only to whether the transcript supports the judgment of the city council of Fremont, Nebraska.

We have reviewed the transcript of the county court for Richardson County and determine that the same does support the judgment of the county court.

In the absence of a bill of exceptions from the county court, we have nothing to review, as was the case in the district court. Therefore, the decision of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. BERNICE LABEDZ, JOHN DECAMP, AND WALTER H. RADCLIFFE, APPELLANTS, V. ALLEN J. BEERMANN, SECRETARY OF STATE, STATE OF NEBRASKA, APPELLEE.

428 N.W.2d 608

Filed September 2, 1988. No. 86-812.

1. **Initiative and Referendum: Time.** Neb. Rev. Stat. § 32-703.01 (Reissue 1984) does not invalidate initiative petitions if the time required for a judicial determination of the validity of the initiative effort extends to a date beyond that of the next ensuing general election; in such event, the election is to be held as early after the judgment of the court as can be.
2. **Initiative and Referendum: Mandamus: Limitations of Actions: Public Officers and Employees.** Under the provisions of Neb. Rev. Stat. § 32-706 (Reissue 1984), Nebraska citizens have 10 days from the day the Secretary of State formally files an order refusing to place an initiative on the ballot to bring an action for a writ of mandamus in the district court for Lancaster County.
3. **Due Process: Notice.** An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections.
4. **Due Process: Notice: Words and Phrases.** In the context of a proceeding to be accorded finality, "notice" means apprisement of the pendency of an action which is reasonably calculated in the circumstances to give interested parties an opportunity to be heard therein.
5. **Administrative Law: Initiative and Referendum: Public Officers and Employees.** The Secretary of State's determination of the sufficiency of the number of signatures collected on an initiative petition is a ministerial administrative act.
6. **Words and Phrases.** An adjudicative proceeding is one in the course of which a deliberative entity hears evidence based upon which it will determine the rights of the individuals before it.
7. **Mandamus: Public Officers and Employees.** Mandamus lies only to enforce performance of a ministerial act or duty, and not to control judicial discretion.
8. **Limitations of Actions: Public Policy: Proof.** The essential attribute of a statute of limitations is that it accords and limits a reasonable time within which a suit may be brought upon causes of action which it affects. Limitations are created by statute and derive their authority therefrom. They evidence a public policy formally declared by the legislative department of government and, as applied to each classification made by it, are based upon the similarity of the intrinsic or inherent elements which the causes of action so classified comprise, considered with reference to the nature of proof required to establish the existence of the same.
9. **Limitations of Actions: Legislature: Due Process: Appeal and Error.** Absent

some violation of due process, the Legislature may prescribe the time in which an appeal must be taken, even if the procedure, on careful reflection, is foolish or contrary to other procedures provided.

10. **Due Process: Notice.** Where inquiry notice satisfies the requirements of due process, whatever fairly puts a person on inquiry constitutes sufficient notice if the means of knowledge are at hand. If one fails to inquire, he or she is then chargeable with all the facts which, by a proper inquiry, one might have ascertained.
11. **Notice.** Notice of facts which would lead an ordinarily prudent person to make an examination which, if made, would disclose the existence of other facts is sufficient notice of such other facts.
12. **Courts: Jurisdiction: Appeal and Error.** A district court may acquire jurisdiction only if an appeal is taken in the mode and manner and within the time provided by statute; if the statutory requirements are not met, the district court acquires no jurisdiction and may not enter any order other than an order of dismissal.
13. **Constitutional Law: Initiative and Referendum: Limitations of Actions: Mandamus.** The 10-day time limit imposed by Neb. Rev. Stat. § 32-706 (Reissue 1984) within which to seek a writ of mandamus against the Secretary of State's sufficiency determination of an initiative petition violates neither the 1st nor 14th amendments to the U.S. Constitution.
14. **Constitutional Law: Statutes: Appeal and Error.** The Nebraska Supreme Court will not pass upon the constitutionality of legislation absent a need to do so in order to properly dispose of an action.

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

Timothy J. McReynolds, of Croker, Huck & McReynolds, Thomas J. Guilfoyle, of Frost, Meyers, Guilfoyle & Westover, and Alan E. Peterson, David R. Buntain, and Terry R. Wittler, of Cline, Williams, Wright, Johnson & Oldfather, for apellants.

Robert M. Spire, Attorney General, and Sharon M. Lindgren for appellee.

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

PER CURIAM.

The relators-appellants, State Senator Bernice Labedz, then State Senator John DeCamp, and one Walter H. Radcliffe, instituted this mandamus action to compel the defendant-appellee, Secretary of State Allen J. Beermann, to place on the 1986 general election ballot an initiative measure

which would amend the Constitution of this state so as to permit a state-run lottery. The district court dismissed the petition, and the relators have appealed to this court, assigning seven errors. These assignments may be summarized as asserting the district court erred in (1) finding relators did not file this action within the required period of time, (2) not declaring that the failure of Neb. Rev. Stat. § 32-706 (Reissue 1984) to require notice of the secretary's determination not to place the measure on the ballot violates the federal Constitution, and (3) not declaring other portions of the legislative scheme implementing the initiative process violative of the federal and state Constitutions. For the reasons discussed hereinafter, we affirm.

Senator Labedz, then Senator DeCamp, and another then member of the Nebraska Legislature formed a private unincorporated association, the Nebraska Taxpayers Lottery Committee—1986, for the purpose of promoting the constitutional amendment described earlier and circulating petitions to initiate its adoption, and elected Senator Labedz as chairwoman of the group. On "[t]he 3rd day of July, 1986, a few minutes before 5:00 . . . [t]he petition sponsors and organizers delivered to [the secretary's] office boxes containing signatures on petitions," and the secretary thereupon initiated the process of inventorying and sorting the proffered petition pages by county, distributing these among the various county election officials, receiving from the county officials tabulations of verified valid signatures, and from these determining whether the petition drive had been successful in gathering the requisite number of valid signatures to place the initiative measure on the November 1986 general election ballot. During this period, relators monitored the secretary's progress in verifying signatures. The secretary testified he had a number of inquiries from Radcliffe throughout the last half of July concerning the count and the reasons for rejecting certain signatures.

On August 13, 1986, having determined that the lottery initiative petition drive had failed for want of sufficient valid signatures, the secretary began drafting an order declining to place the measure on the November 1986 ballot. On August 14,

1986, he sent unsigned and undated copies of this order, marked "Not For Release," to the relators' offices. In this document the secretary stated that the lottery initiative petition drive had fallen some 13,000 signatures short and that he must therefore decline to place the measure on the November ballot. In addition, the offices of Senator Labedz, then Senator DeCamp, and 30 news media representatives were informed by telephone of a press conference to be held the following day to announce the fact that the initiative petition drive had failed.

The following day, on August 15, 1986, the secretary conducted a press conference attended by representatives of the electronic and print news media, at which he publicly announced that the lottery initiative petition drive had failed. At that time, he formally signed his order declining to place the initiative matter on the November 1986 general election ballot, and filed that order for public record. Relators commenced this suit on September 5, 1986.

Inasmuch as the general election of November 1986 is long past, it may well be suggested that this case is now moot, particularly in light of Neb. Rev. Stat. § 32-703.01 (Reissue 1984), which provides as follows:

> When a copy of the form of any initiative petition is filed with the Secretary of State prior to the obtaining of signatures, as required by section 32-704, the issue presented by such petitions shall be placed before the voters at the next ensuing general election occurring not less than four months after the date that such copy is filed, if the petitions are found to be valid and sufficient. All such petitions shall become invalid on the date of the first general election occurring not less than four months after the date on which a copy of the form is filed with the Secretary of State.

The last sentence of the foregoing statute may suggest that the petitions at issue are now invalid due to the mere passage of time. We do not so read the statute.

The first sentence of this statute provides that the "issue presented by [the] petitions shall be placed before the voters at the next ensuing general election . . . *if the petitions are found to be valid and sufficient*." (Emphasis supplied.) In this case the

validity of these petitions has yet to be finally determined. Until such disposition, the issue obviously cannot go before the voters.

Section 32-706, concerning which more will be written later, clearly provides proponents or opponents of an initiative or referendum a cause of action in the courts for mandamus or injunctive relief should they be dissatisfied with the secretary's decision regarding the validity of a petition. Thus, it must be concluded that the Legislature did not intend that the mere passage of time occasioned by judicial review of the secretary's sufficiency determination would automatically defeat an initiative effort.

In *Barkley v. Pool*, 102 Neb. 799, 169 N.W. 730 (1918), this court considered, in the context of a referendum, the very concern which now arises in the context of an initiative. In *Barkley*, the Legislature had submitted to a referendum vote of the people certain proposed legislation dealing with women's suffrage. Antisuffrage forces had sought an injunction to prevent the secretary from placing the referendum on the ballot of the next statewide election. The district court had commenced a hearing but, seeing that this could not be concluded in time, issued an order continuing the hearing until after the November 5 election date. The secretary attempted to appeal from the order, arguing that it was, in these circumstances, final because

> the constitutional provision relating to referendum petitions, which provides that "elections thereon shall be had at the first regular state election held not less than thirty days after such filing," is mandatory, and that therefore such election must be had upon the day named or not at all.

Id. at 801, 169 N.W. at 731. The *Barkley* court, noting that the Legislature had provided for injunctive suits and mandamus actions in the courts to challenge the secretary's determination, reasoned,

> if the time required for determining the validity of the petition in court extends to a date beyond that of the next ensuing election, it must be held that, by necessary implication, it was not the intent of the Constitution that

> either those who petition for a referendum or the objectors to the petition should thereby be defeated of their rights, but that the referendum vote should be had as early as it can be had, awaiting the judgment of the court.

Id. at 804, 169 N.W. at 732. Similarly, this court will not construe § 32-703.01 in a way which would defeat relators' right seasonably to present their objections for judicial review.

Having determined that this appeal is not moot, we proceed to consider whether relators' suit in the district court is barred by § 32-706, which provides in relevant part:

> If the Secretary of State shall refuse to accept and file any initiative petition presented not less than four months preceding the date of the election at which the proposed law or constitutional amendment is to be voted upon . . . any citizen may apply, within ten days after such refusal, to the district court of Lancaster County for a writ of mandamus. If it shall be decided by the court that such petition is legally sufficient, the Secretary of State shall then file it, with a certified copy of the judgment attached thereto, as of the date on which it was originally offered for filing in his office. . . . All such suits shall be advanced on the court docket and heard and decided by the court as quickly as possible. Either party may appeal to the Supreme Court within ten days after a decision is rendered. The district court of Lancaster County shall have jurisdiction of all litigation arising under the provisions of sections 32-702 to 32-713.

Under § 32-706, relators, and, we might add, all citizens of Nebraska, had 10 days from the day the secretary formally filed his order refusing to place the lottery initiative on the ballot to bring suit in the district court for Lancaster County contesting that order. Relators' suit was filed 21 days after the secretary's order was filed and was, therefore, 11 days too late under § 32-706, as the district court held.

Relators' objection to this conclusion is essentially two-pronged: on the one hand, relators argue that § 32-706 is unconstitutional, void, and therefore no bar to their suit; on the other hand, relators argue that, if constitutional, § 32-706 does not apply to this case.

Regarding the constitutionality of § 32-706, relators first argue that the statute does not require the secretary to notify persons in the relators' position of his determination of the sufficiency of an initiative petition drive and that the statute is therefore facially unconstitutional under the due process clause of the 14th amendment and the free speech clause of the 1st amendment to the U.S. Constitution. Relators aver that they may advance this argument notwithstanding the conclusion fairly to be drawn upon the present record that the relators had timely actual notice of the secretary's determination.

Relators' argument misses the mark for two principal reasons: the determination by the secretary of the sufficiency of the number of signatures collected in an initiative petition drive is not the sort of proceeding to which the due process concept of "notice" applies, and even assuming, contrary to the clear import of the record, that relators had no actual notice of the secretary's determination, they were clearly on inquiry notice of this determination. We shall explore these twin notions in turn.

As this court observed in, among other cases, *McAllister v. McAllister*, 228 Neb. 314, 422 N.W.2d 345 (1988), and *Hill v. Gerber*, 217 Neb. 670, 350 N.W.2d 545 (1984), an elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections. In this context, "notice" means apprisement *of the pendency of an action* which is reasonably calculated in the circumstances to give interested parties an opportunity to be heard therein. See, e.g., *F.P.P. Enterprises v. U.S.*, 830 F.2d 114 (8th Cir. 1987) (amended notice of appeal naming an additional party plaintiff, filed after argument of the case and interrogation by the court, was untimely); *Hroch v. City of Omaha*, 226 Neb. 589, 413 N.W.2d 287 (1987) (the requirements of the due process clause are satisfied if the citizen has reasonable notice and a reasonable opportunity to be heard and to present his claim or defense, due regard being had to the nature of the proceedings and the character of the rights which may be affected by them); *Black v. Black*, 223 Neb. 203, 388 N.W.2d 815 (1986) (constitutional due process requires notice

which advises one of the matters to be considered and which is fair in view of the circumstances and conditions existent at the time); *Benton v. Board of Ed. of Sch. Dist. No. 17*, 219 Neb. 134, 361 N.W.2d 515 (1985) (constitutional due process requires notice which relates to the matter to be presented and which is suitable and fair in view of the circumstances and conditions existent at the time).

In the present case relators cannot be without apprisement of the pendency of a determination, for there was nothing pending which the relators did not themselves initiate and of which they therefore necessarily had notice. The secretary cannot determine whether an initiative petition contains the proper number of valid signatures unless first requested to do so by persons in the position of relators, who did in fact make such a request in the present case.

Furthermore, granting that relators have a first amendment interest in the initiative petition process and in the outcome of their petition drive in particular, *Meyer v. Grant*, ____ U.S. ____, 108 S. Ct. 1886, 100 L. Ed. 2d 425 (1988), and *State v. Radcliffe*, 228 Neb. 868, 424 N.W.2d 608 (1988), it is clear that the secretary's determination of the sufficiency of the number of signatures collected on an initiative petition is administrative in nature, a ministerial act, and not judicial, and that, therefore, a statute such as § 32-706 which does not contain an explicit notice requirement is not, solely for its absence, unconstitutional.

An adjudicative proceeding is one in the course of which a deliberative entity hears evidence based upon which it will determine the rights of the individuals before it. See, e.g., *Van Fossen v. Board of Governors*, 228 Neb. 579, 423 N.W.2d 458 (1988); *Richardson v. Board of Education*, 206 Neb. 18, 290 N.W.2d 803 (1980). By contrast, the secretary's duties and responsibilities, and those of the county election officials, are ministerial in nature, insofar as these persons do not hear evidence in the course of validating petition signatures but, rather, rely upon their own records in reaching their determinations of validity. See *State ex rel. Brant v. Beermann*, 217 Neb. 632, 350 N.W.2d 18 (1984), in which this court suggested that the secretary acts in a ministerial capacity when

determining the sufficiency of the number of signatures collected on an initiative petition.

In *Barnett v. Boyle*, 197 Neb. 677, 678-79, 250 N.W.2d 635, 636-37 (1977), the facts were, briefly, as follows:

> Prior to 1975, the members of the board of education of the Omaha School District were elected at large by the electors residing in the district. . . .
>
> L.B. 423, the 1975 amendments to section 79-1003, R.R.S. 1943, provided the school district should be divided into twelve numbered districts "of compact and contiguous territory and of as nearly equal population as may be practical" by the election commissioner of the county in which the greater part of such district was situated. The defendant Boyle divided the district in accordance with the requirements of the statute. . . .
>
> The plaintiffs contend that the absence of any provision in the statute for notice and hearing prior to the division of the school district into districts for the election of board members made L.B. 423 invalid.

This court reasoned that the division of the school district into districts for the election of board members was essentially a ministerial act, legislative in nature rather than quasi-judicial, and concluded that the law was not unconstitutional.

In *Stauffer v. Weedlun*, 188 Neb. 105, 195 N.W.2d 218 (1972), after acknowledging that revocation of a license to operate a motor vehicle implicates interests subject to due process requirements, this court reaffirmed its determination that revocation of such a license for point violations is a ministerial act, as "[t]here is of course in the system no latitude for discretion nor does it require any factual determinations in the judicial, quasi-judicial, or administrative law sense. There are no inferences to be drawn." *Id.* at 111, 195 N.W.2d at 223. Furthermore, in *Stauffer*, this court quoted with approval the U.S. Supreme Court's language in *Jennings v. Mahoney*, 404 U.S. 25, 92 S. Ct. 180, 30 L. Ed. 2d 146 (1971), to the effect that

> "[t]here is plainly a substantial question whether the Utah statutory scheme on its face affords the procedural due process required by Bell v. Burson [402 U.S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971)]. This case does not however

> require that we address that question. The District Court in fact afforded this appellant such procedural due process. . . ."

Stauffer at 109, 195 N.W.2d at 222. Clearly, § 32-706 is not unconstitutional merely for the absence therein of a notice requirement.

Moreover, we note that were this court to conclude that the secretary's determination of the sufficiency of signatures on an initiative petition involves judicial rather than ministerial action, we would be forced to bar relators the recovery they seek for that very reason, for mandamus lies only to enforce performance of a ministerial act or duty, and not to control judicial discretion. *State ex rel. Wright v. Pepperl*, 221 Neb. 664, 380 N.W.2d 259 (1986).

As their next specification of unconstitutionality, relators argue that § 32-706 is a statute of limitations and, as such, sets too short a time limit, denying relators their constitutional right to due process of law.

As this court observed half a century ago, in *Markel v. Glassmeyer*, 137 Neb. 243, 245-46, 288 N.W. 821, 822-23 (1939):

> The essential attribute of a statute of limitations is that it accords and limits a reasonable time within which a suit may be brought upon causes of action which it affects. Limitations are created by statute and derive their authority therefrom. They evidence a public policy formally declared by the legislative department of government; and as applied to each classification made by it are based upon the similarity of the intrinsic or inherent elements which the causes of action so classified comprise, considered with reference to the nature of proof required to establish the existence of the same.

So considered, the adopted policy of this state has announced a limitation of "within ten days after such refusal" for an appeal to the district court for Lancaster County from the secretary's refusal "to accept and file any initiative petition presented not less than four months preceding the date of the election at which the proposed law or constitutional amendment is to be voted upon." § 32-706.

In construing Neb. Rev. Stat. § 79-403(1) (Cum. Supp. 1984), this court observed that "[a]bsent some violation of due process, the Legislature may prescribe the time in which an appeal must be taken, even if the procedure, on careful reflection, is foolish or contrary to other procedures provided." *In re Covault Freeholder Petition*, 218 Neb. 763, 767, 359 N.W.2d 349, 353 (1984). Although certainly short, the Legislature's specification of a 10-day limitation in § 32-706 seems, upon reflection, neither foolish nor contrary to other procedures provided, for, as the secretary explained, the preparation of the general election ballot is a complicated, time-consuming process involving the secretary, county election officials, the Attorney General, the Governor's office, and many printers across the state, a process for which the law must allow ample time. It is this legislative policy which the time limit set in § 32-706 appropriately serves.

Finally, in this regard, we note that relators repeatedly asserted in the court below that "the first time that the petitioner even learned that somebody had allegedly signed that [order refusing to place the initiative on the November 1986 ballot] was on September 5th, the morning that the petition [in district court] was filed." Having demonstrated that suit could be commenced within a day of the secretary's order, relators cannot seriously contend that a period of 10 days is too short a time within which to act.

For their final assertion of unconstitutionality, relators argue, in essence, that § 32-706 is unconstitutional in its application to them in the present case because they were without actual notice of the secretary's determination that their initiative petition drive had fallen some 13,000 signatures short. Assuming for purposes of this discussion, contrary to the clear import of the record, that relators were without actual notice, relators' argument must fail for the reason that knowing of the pendency of the determination which they had initiated, they were on inquiry and therefore had inquiry notice of the secretary's determination.

As this court observed in *League v. Vanice*, 221 Neb. 34, 374 N.W.2d 849 (1985), citing *Baxter v. National Mtg. Loan Co.*, 128 Neb. 537, 259 N.W. 630 (1935), whatever fairly puts a

person on inquiry is sufficient notice, where the means of knowledge are at hand; and if he or she omits to inquire, he or she is then chargeable with all the facts which, by a proper inquiry, one might have ascertained. This, in effect, means that notice of facts which would lead an ordinarily prudent person to make an examination which, if made, would disclose the existence of other facts is sufficient notice of such other facts. Clearly, the relators, and parenthetically any other Nebraska citizen so inclined, knowing that the question of the total number of valid signatures collected had been submitted to the secretary, had the responsibility to periodically apprise themselves of the secretary's progress in reaching a determination of that question. If they did in fact fail to do this, the fault was theirs, not the law's.

Having determined that § 32-706 is not unconstitutional on its face nor unconstitutional in its application to relators in the present case, we turn to relators' final argument, that the limitation provision of the statute

> applies only to situations in which the Secretary of State refuses to accept the petitions for filing because of a failure to comply with statutory requirements or a defect apparent on the face of the petition. . . . The ten day limitations [sic] has no application once the Secretary has accepted the petitions and has begun the signature verification process as was done in this case.

Brief for appellants at 13-14. Rather, relators urge the application of "the normal four year statute of limitations." Reply brief for appellants at 3.

It is clear, as relators point out, that the secretary may determine, before circulation, that a proffered initiative petition is deficient because of the lack of ancillary filings or for some reason of form, and may decline to allow circulation of the petition for that reason. *State, ex rel. Winter, v. Swanson*, 138 Neb. 597, 294 N.W. 200 (1940). In such a case § 32-706 clearly applies, as relators contend. *Swanson, supra*. It is equally clear, however, that the secretary may determine, after circulation, that a proffered initiative petition is deficient for reason of having obtained an insufficient number of valid signatures, and may decline to allow the proffered initiative

measure on the ballot for that reason. Neb. Const. art. III, § 2 ("*[W]hen thus signed* the petition shall be filed with the Secretary . . . who shall submit the measure thus proposed to the electors of the state . . ." (emphasis supplied)); Neb. Rev. Stat. § 32-704 (Reissue 1984). Section 32-704 provides in part:

> Upon the presentation of such petition for filing, the Secretary of State, with the aid and assistance of the county clerks or the election commissioners, shall determine its validity and sufficiency. To determine the validity and sufficiency of signatures on the pages of the filed petition, the Secretary of State shall have the authority to deliver the various pages of such filed petition to the county clerk or election commissioner, for the county stated on each page of the petition.

See, generally, *State ex rel. Morris v. Marsh*, 183 Neb. 502, 162 N.W.2d 262 (1968).

Relators would have this court distinguish the secretary's precirculation determinations from his postcirculation determinations, applying § 32-706 to the former but not to the latter. Section 32-706, however, contains no such distinction, granting recourse in the district court to any citizen of Nebraska "[i]f the Secretary of State shall refuse to accept and file any initiative petition" for whatever reason at whatever point in the process.

This court considered a related question, the correct statutory source of the time limitation on appeals from the district court to this court of decisions regarding sufficiency of an initiative petition, in *State, ex rel. Ayres, v. Amsberry*, 104 Neb. 279, 284, 178 N.W. 822, 824-25 (1920):

> That the legislature, by this act relating to the initiative and referendum, intended to prescribe a complete method of putting into practical effect the constitutional provision relating to the initiative and referendum, there can be no reasonable doubt. The language is clear and unambiguous. The act sets forth in detail the necessary steps to be taken to carry out its provisions. It provides that, if the secretary of state shall refuse to accept or file the petition, "any citizen may apply, within 10 days after such refusal, to the district court for a writ of mandamus;

> * * * that the district court of Lancaster county shall have jurisdiction of all litigation arising under the provisions of this act;" that such suits shall be advanced on the court docket and decided by the court as quickly as possible; and that "either party may appeal to the supreme court within 10 days after a decision is rendered." By this act ample provision is made for the protection of the citizen in every constitutional right, and if, as in this case, he has not complied with the terms of the law, the fault is his, and not of the law.

Thus, the district court may acquire jurisdiction only if an appeal is taken in the mode and manner and within the time provided by statute. If the statutory requirements are not met, the district court acquires no jurisdiction and may not enter any order other than an order of dismissal. *Gilmore v. Nebraska Crime Vict. Rep. Bd.*, 225 Neb. 640, 407 N.W.2d 736 (1987); *McCorison v. City of Lincoln*, 218 Neb. 827, 359 N.W.2d 775 (1984).

The time limit imposed by § 32-706 violates neither the 1st nor 14th amendments to the U.S. Constitution on its face nor as applied to relators in this case, and was properly applied to the facts of this case.

The foregoing analysis answers the issues presented by the first two assignments of error. The issues presented by the third assignment of error relate to various other portions of the legislative scheme implementing the initiative process and are not properly before us, for they are not germane to the question of whether this action is time-barred. This court will not pass upon the constitutionality of legislation absent a need to do so in order to properly dispose of an action. *State v. Radcliffe*, 228 Neb. 868, 424 N.W.2d 608 (1988).

The order of the district court dismissing relators' suit is correct and is therefore affirmed.

AFFIRMED.

WHITE, J., dissenting.

"The first power reserved by the people is the initiative whereby laws may be enacted and constitutional amendments adopted by the people independently of the Legislature." Neb. Const. art. III, § 2.

"The provisions with respect to the initiative and referendum shall be self-executing, but legislation may be enacted to facilitate their operation." Neb. Const. art. III, § 4.

As the majority concludes, the right of initiative once reserved in a state constitution assumes the status of a right protected by the first amendment to the Constitution of the United States.

As to the state constitutional question, does the 10-day restriction "facilitate" the operation of the initiative process? Only, I suggest, if necessary, and if one can discount the absence of any requirement of notice of the critical decision of the Secretary of State not to allow the filing of the initiative petitions and thus to deny the "electors of the state" the opportunity to vote on the issue presented. Neb. Const. art. III, § 2.

The majority suggests in circular fashion that since mandamus is the prescribed remedy to raise the propriety of the refusal to place the initiative petition on the ballot, Neb. Rev. Stat. § 32-706 (Reissue 1984), and since mandamus generally lies only to compel ministerial acts, the actions of the Secretary of State must therefore be ministerial, and thus being ministerial, no notice is constitutionally required. The simple fact is that the Legislature prescribed mandamus as the remedy, and this directive is not determinative of whether the action is ministerial or not, is simply irrelevant, and, in any event, is probably wrong.

To describe the action of the Secretary of State as ministerial and as mere counting of signatures ignores completely the actions of his surrogates, the 93 election commissioners. "The county clerk or election commissioner shall . . . compare each signature of the electors signing and the circulator . . . to determine if the signers and circulator were . . . duly qualified, registered voters." Neb. Rev. Stat. § 32-704 (Reissue 1984). The multiple judgments made by the commissioners as to similarity of signed names as against registered names and variances in addresses are obvious. The findings of the commissioners constitute the findings of the Secretary of State. The actions are at least quasi-judicial in nature. In my judgment, the failure to provide for notice of quasi-judicial acts, together with the extremely short limitation period, may impede the initiative

process and is therefore unconstitutional as violative of Neb. Const. art. III, § 2.

I agree that the mere passage of a general election date while the validity of the initiative petitions is being challenged does not void the petitions but merely postpones their consideration to the next general election date after the petitions have been determined valid. In view of this holding, what rational basis exists for the 10-day limitation to challenge the Secretary of State's refusal to file the petition? The answer is none.

Whether an artificially and unnecessarily short limitation period, coupled with a complete lack of a requirement of notice of such action, would pass the strict scrutiny standard required in first amendment cases under the U.S. Constitution is extremely doubtful. In my judgment it does not, and I therefore dissent.

RIST, D.J., joins in this dissent.

PATRICK R. DUGAN, APPELLEE, V. HOLLY JENSEN, DIRECTOR OF THE DEPARTMENT OF MOTOR VEHICLES, STATE OF NEBRASKA, APPELLANT.

428 N.W.2d 504

Filed September 2, 1988. No. 86-931.

Administrative Law: Motor Vehicles: Convictions: Licenses and Permits. To be applicable in Nebraska, a report of a traffic conviction in another jurisdiction must comply with the provisions set forth in article II of the Driver License Compact.

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

Robert M. Spire, Attorney General, and Michele M. Frost for appellant.

James Walter Crampton for appellee.

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

WHITE, J.

On March 21, 1986, the Nebraska Department of Motor Vehicles revoked Patrick R. Dugan's Nebraska motor vehicle operator's license for a period of 6 months because he had accumulated 12 traffic conviction points within a 2-year period. See Neb. Rev. Stat. § 39-669.27 (Reissue 1984). The revocation was based upon four Nebraska traffic convictions, a Kansas conviction, and an Iowa conviction.

Dugan appealed the department's order to the district court, alleging that the department's reliance on the Kansas and Iowa convictions was in violation of proper procedure. The district court ruled that these convictions had not been authenticated and therefore should not have been received into evidence. The court vacated and set aside the department's order and reinstated the plaintiff's operator's license.

In this appeal, the department contends that the convictions were in fact authenticated under Nebraska law and that the court erred in vacating the department's revocation of plaintiff's license. Although other issues are presented, we only pass on the issue of whether the reports were properly authenticated.

The trial court found that neither the Kansas nor the Iowa record of conviction was admissible, because neither was authenticated. It apparently based its conclusion on the language of *Johnston v. Department of Motor Vehicles*, 190 Neb. 606, 609, 212 N.W.2d 342, 344 (1973): "Accordingly, we hold that for a report of an out-of-state conviction to be effective in Nebraska, under the provisions of the Driver License Compact, it must be authenticated in due form for admission in evidence in the courts of this state." It would seem that the *Johnston* court based its holding on the then existing Neb. Rev. Stat. § 25-1286 (Reissue 1964), which required the attestation of the clerk, the seal of the court, and the certificate of the presiding judge that the attestation was in due form.

However, § 25-1286 was replaced by implication by the Nebraska Evidence Rules, Neb. Rev. Stat. §§ 27-101 et seq. (Reissue 1985). See *State v. Munn*, 212 Neb. 265, 322 N.W.2d 429 (1982).

Section 27-902 does not require authentication of a document bearing a seal and a signature purporting to be an

attestation, a document purporting to bear the signature in his official capacity of an officer who has no seal if a public officer having a seal certifies under seal that the previous officer signing has the official capacity to sign, or a copy of an official record certified as correct by the custodian by certificate complying with either of the previous two subdivisions. Therefore, it would seem that what is necessary is that a seal of the court appear on the document sought to be introduced in evidence. In this case, the record of conviction from Kansas did contain the seal of the court; the one from Iowa did not. Based on those facts, the Iowa document was inadmissible, and the trial court correctly found that the order of revocation issued by the department, which was based on that document, should be vacated and set aside. It is unnecessary to consider the admissibility of the Kansas conviction, and therefore we do not do so. The district court's decision is therefore affirmed.

AFFIRMED.

FRANCES MARLENE MAYS, APPELLEE, V. HAROLD C. MAYS, APPELLANT.

428 N.W.2d 618

Filed September 2, 1988. No. 86-1015.

Modification of Decree: Notice: Contempt: Pleadings. Absent an application and notice requesting modification, a trial court has no power to modify, during the course of contempt proceedings, the terms of an earlier order for support or division of property.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Affirmed in part, and in part reversed.

Robert J. Hovey, P.C., of Robinson, Hovey, P.C., and Kenney, for appellant.

James W. Knowles, Jr., of Knowles Law Office, for appellee.

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

PER CURIAM.

This is stated to be an appeal from a November 4, 1986, order of the district court which purported to deny an unidentified motion and amended motion of the respondent. The order, inter alia, made findings as to the failure of the petitioner to comply with a September 29, 1986, order of the court to deliver to respondent certain items of personal property, including some coins, and the failure of the petitioner to pay certain sums of money into court; found both parties to be in contempt of court and levied fines against each; directed the parties to pay specified sums of money to the clerk of the court with directions as to the disbursement of those funds; and overruled respondent's motion and amended motion for a new trial.

Although the transcript is woefully deficient in that none of the motions or other pleadings upon which these proceedings were had appear of record, we can address respondent's complaints by means of some interpolation.

Apparently, respondent was awarded certain coin collections in the original decree. In the order of September 29, the court found that certain enumerated coin collections shall be delivered to the respondent by the petitioner, or that petitioner shall pay what amounted to the face value of the coins to the respondent. In its order dated November 4, overruling respondent's motions for new trial, the court *apparently* let its order regarding the coins stand. Respondent's assignments of error claim that the court, by permitting payment in lieu of delivery of the coins, unauthorizedly modified its original decree of dissolution and, in the alternative, that the value of the coins should be the actual value, rather than the face value.

This case is controlled by *Neujahr v. Neujahr*, 218 Neb. 585, 357 N.W.2d 219 (1984), in which we held that absent an application and notice requesting modification, a trial court has no power to modify, during the course of contempt proceedings, the terms of an earlier order for support or division of property.

To that extent the judgment of the district court is reversed, but it is affirmed in all other respects.

AFFIRMED IN PART, AND IN PART REVERSED.

VULCRAFT, A DIVISION OF NUCOR CORPORATION, A DELAWARE CORPORATION, APPELLEE, V. DONNA KARNES, TAX COMMISSIONER OF THE STATE OF NEBRASKA, ET AL., APPELLANTS.

428 N.W.2d 505

Filed September 2, 1988. No. 86-1056.

1. **Statutes.** Where words of a statute are plain and unambiguous, no interpretation is needed to ascertain their meaning, and in the absence of anything to indicate the contrary, words will be given their ordinary meaning.
2. **Statutes: Taxation: Proof.** Statutes exempting property from taxation are to be strictly construed, and the burden of proving the right to exemption is upon the claimant.
3. **Statutes: Administrative Law.** The interpretation of a statute given by an administrative agency to which the statute is directed is entitled to weight.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed in part, and in part reversed and remanded with directions.

Robert M. Spire, Attorney General, and L. Jay Bartel for appellants.

Michael J. Ogborn and Tim O'Neill, of Nelson & Harding, for appellee.

BOSLAUGH, WHITE, and SHANAHAN, JJ., and SPRAGUE and THOMPSON, D. JJ.

THOMPSON, D.J.

This is an appeal pursuant to Neb. Rev. Stat. § 84-918 (Reissue 1987) from an order of the district court for Lancaster County, Nebraska, overruling the findings and order of the State Tax Commissioner affirming a deficiency assessment against appellee, Vulcraft, a division of Nucor Corporation, for use tax assessed on its purchase and use of argon, carbon dioxide, and oxygen in its steel welding and cutting operations for the period between April of 1981 and April of 1984.

Vulcraft is engaged in the business of manufacturing steel joists, joist girders, steel roof deck, steel floor deck, and cold finish bars at Norfolk, Nebraska. Vulcraft purchases several gases (argon, carbon dioxide, and oxygen) for use in various welding and cutting operations which are part of Vulcraft's manufacturing processes.

On November 30, 1984, the Nebraska Department of Revenue issued a notice of deficiency determination to Vulcraft based, in part, on Vulcraft's failure to pay use tax on these various gases. Vulcraft filed a petition for redetermination in response to this deficiency assessment, and a formal hearing was held on Vulcraft's petition on September 12, 1985. Vulcraft paid $21,152, under protest, which amount included tax, interest, and penalty.

On April 15, 1986, the Tax Commissioner entered her findings and order affirming the deficiency assessment against Vulcraft for use tax due as a result of Vulcraft's purchase and use of argon, carbon dioxide, and oxygen for its welding and cutting operations.

Vulcraft appealed the findings and order of the Tax Commissioner to the district court for Lancaster County.

By order dated November 7, 1986, the district court overruled the findings and order of the Tax Commissioner, finding that the gases used by Vulcraft in its manufacturing processes qualified for exemption under Neb. Rev. Stat. § 77-2704(1)(k) (Supp. 1983) and its predecessors. Appellants subsequently perfected their appeal.

The standard for review is governed by § 84-918, and is de novo on the record of the agency. *Haeffner v. State*, 220 Neb. 560, 371 N.W.2d 658 (1985).

The issue before the Tax Commissioner was whether the argon, carbon dioxide, and oxygen gases used by Vulcraft during its manufacturing processes were entitled to the exemption under § 77-2704.

Section 77-2704 provided as follows:

> (1) There are exempted from the computation of the amount of sales and use taxes imposed by sections 77-2701 to 77-27,135 the gross receipts from the sale, lease, or rental of and the storage, use, or other consumption in this state of the following:
>
> . . . .
>
> (k) Sales and purchases of electricity, coal, gas, fuel oil, diesel fuel, tractor fuel, propane, gasoline, coke, nuclear fuel, and butane for use in processing, manufacturing, mining, refining, irrigation, farming, building

> construction, telegraph, telephone and radio communication, street, and railroad transportation services and all business, commercial and industrial uses . . . .

Where words of a statute are plain and unambiguous, no interpretation is needed to ascertain their meaning, and in the absence of anything to indicate the contrary, words will be given their ordinary meaning. *Clinchard v. White*, 223 Neb. 139, 388 N.W.2d 477 (1986).

Statutes exempting property from taxation are to be strictly construed, and the burden of proving the right to exemption is upon the claimant. *United Way v. Douglas Co. Bd. of Equal.*, 215 Neb. 1, 337 N.W.2d 103 (1983). Nebraska Department of Revenue ruling No. 1-78-16 (Dec. 29, 1978), considering the above exemption, stated as follows:

> For an artificial or natural gas to qualify for the sales and use tax exemption it must be used as a power or energy source by the business or industry. Gases such as, but not limited to, freon, oxygen, carbon dioxide, anhydrous ammonia, chlorine gas, and gas used to slaughter cattle are not a power or energy source within the intent of the Act. Such gases are not exempt from sales and use tax even though purchased for business, commercial, or industrial use.

There is a general rule of statutory construction that the interpretation of a statute given by an administrative agency to which the statute is directed is entitled to weight. *ATS Mobile Tel., Inc. v. Curtin Call Communications, Inc.*, 194 Neb. 404, 232 N.W.2d 248 (1975); *McCaul v. American Savings Co.*, 213 Neb. 841, 331 N.W.2d 795 (1983).

Upon reviewing the record, there is no question that argon, carbon dioxide, and oxygen are "gases" in the generic sense of the word. The issue is whether each gas is a power or energy source as used in Vulcraft's business, since the plain meaning of the statute deals with power or energy sources.

CARBON DIOXIDE AND ARGON

The testimony presented at the hearing shows that in the welding process carbon dioxide and argon are used. A welding gun utilizes heat supplied by combustible gas, a filler consisting

of welding wire, and the gases. The wire comes out through a tube in the gun. The gases come out through a hollow tube that surrounds the wire. The combustible gas is lit, producing flame, and is applied to the area sought to be welded. The gases act as a shielding process to keep oxygen and the outside atmosphere away, thereby protecting the weld.

The weld is made by the wire's melting into the metal pieces sought to be joined. Argon and carbon dioxide do not burn and therefore are not a fuel source, nor can they be categorized as a power or energy source.

The court finds that these gases do not qualify as exempt under the above-cited statute.

OXYGEN

A more difficult determination deals with the oxygen. Oxygen is used in the metal cutting process. An "oxyfuel" cutting torch is used in this process. Two hoses run to the torch, one supplying natural gas and one supplying oxygen. The torch is lit, and, supplied by the natural gas, the area sought to be cut is heated. Once heated to a sufficient degree, the oxygen is applied, and through a chemical reaction the cut is made. Dr. William Nyle Weins, an associate professor of engineering at the University of Nebraska, testified on behalf of Vulcraft, as follows:

> The steel itself, when it's going to be cut, is preheated to 1400 to 1600 degrees Fahrenehit [sic]. At that point the hot steel, or in this case, the iron is the element that we're concerned about, is brought into contact with pure oxygen and the result is the formation of iron oxide . . . . That reaction is an exothermic [reaction] in that heat is given off in the process. The heat given off is sufficient to melt the steel at that location as well as to preheat the plate to sustain the reaction, so once the reaction starts it's a self sustaining reaction, and so the oxygen is the missing element that is added to this process and thus it is the fuel for this cutting process.

Dr. Weins also testified that the oxygen was the power source for the cutting operation.

Dr. James Carr, a professor with the chemistry department of the University of Nebraska, was called on behalf of the

appellants. He testified that oxygen does not burn and is not a fuel or a power source. On cross-examination, the following occurred:

> MR. OGBORN: When this cutting action occurs with the oxygen, is there heat released?
>
> DR. CARR: Yes.
>
> MR. OGBORN: Isn't it the heat that is the power source, the actual cut that's made through that steel?
>
> DR. CARR: I would say that the heat is the power, it's not the power source, the . . .
>
> MR. OGBORN: The heat is the power to make the cut?
>
> DR. CARR: The oxidation reaction is the power source, which generates the heat to make the cut.
>
> MR. OGBORN: Of which the oxygen is a very important component part.
>
> DR. CARR: Of which the oxygen is necessary.
>
> MR. OGBORN: In fact, it could not happen without that stream of oxygen for that cut of that steel like Vulcraft does it.
>
> DR. CARR: That's right, you cannot cut steel without high temperature and without the oxygen, if you're using a flame cutting approach, of course.

The court finds that the oxygen used in Vulcraft's business is exempt under § 77-2704.

The decision of the district court is affirmed in part and reversed in part, and the cause is remanded to the district court with instructions to remand the cause to the Nebraska Department of Revenue to enter an order in conformity with this opinion.

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

STATE OF NEBRASKA, APPELLEE, V. JAMES WAR BONNETT, APPELLANT.

428 N.W.2d 508

Filed September 2, 1988. No. 87-332.

1. **Criminal Law: Restitution: Sentences.** Restitution ordered by a court pursuant to Neb. Rev. Stat. § 29-2280 (Cum. Supp. 1988) is a criminal penalty imposed as punishment for the crime.
2. **Criminal Law: Pleas.** A guilty plea cannot be voluntary and intelligent unless the defendant is informed or is aware of the possible criminal penalties to which he may be subjected by making such a plea.

Appeal from the District Court for Box Butte County: ROBERT R. MORAN, Judge. Remanded for further proceedings.

Dean S. Forney, Box Butte County Public Defender, for appellant.

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

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

PER CURIAM.

The defendant was charged with the theft of a 1983 GMC truck belonging to United Parcel Service. The theft occurred in Alliance, Nebraska, and the truck was found rolled in a ditch 42 miles east of Alliance. Damage to the truck was totaled at $5,074.62.

The district court accepted a plea of guilty to theft, a Class IV felony, pursuant to a plea agreement which provided that the State would reduce the theft charge from a Class III felony to a Class IV felony and the defendant would enter a plea of guilty to the reduced charge. The court accepted the plea, found the defendant guilty, and ordered a presentence investigation.

The defendant was sentenced to the Box Butte County jail for a period of 1 year and ordered to pay the costs of prosecution and to make restitution of $5,074.62 within 5 years from March 10, 1988, in payments of not less than one-fifth of $5,074.62 per year.

At the arraignment the court informed the defendant that if

he entered a plea of guilty, he could be subjected to 5 years in prison and a $10,000 fine. But the court did not inform the defendant of the possibility that restitution could be ordered under Neb. Rev. Stat. § 29-2280 (Cum. Supp. 1988).

Defendant appeals, contending that the plea was not valid because it was not entered voluntarily, knowingly, and intelligently.

In the case of *State v. Duran*, 224 Neb. 774, 401 N.W.2d 482 (1987), this court held that a restitution order by a court pursuant to § 29-2280 is a criminal penalty imposed as punishment for the crime. Therefore, merely informing the defendant of the possible jail sentence and fine was not sufficient to allow the court to impose a restitution order.

In *State v. Curnyn*, 202 Neb. 135, 140, 274 N.W.2d 157, 161 (1979), this court said: "It is difficult to conceive how a guilty plea can be voluntary and intelligent unless and until the defendant is informed or is made aware of the possible penalties to which he may be subjected by making such a plea."

The court finds the plea in this case to be deficient. Accordingly, as required by *State v. Fischer*, 218 Neb. 678, 357 N.W.2d 477 (1984); *State v. Hall*, 222 Neb. 51, 381 N.W.2d 926 (1986); and *State v. Curnyn, supra*, we remand the cause to the district court for further proceedings as mandated by those cases.

REMANDED FOR FURTHER PROCEEDINGS.

CORRIGAN, D.J., dissenting.

In *State v. Holmes*, 221 Neb. 629, 379 N.W.2d 765 (1986), this court held that restitution (the retaining of drug-buy money) pursuant to Neb. Rev. Stat. § 28-427 (Reissue 1985) was in the nature of a civil or administrative penalty, not a criminal penalty imposed as punishment for the crime.

In *State v. Heaton*, 225 Neb. 702, 407 N.W.2d 780 (1987), where restitution was ordered under the probation statute, Neb. Rev. Stat. § 29-2262 (Reissue 1985), this court held that the trial court could not impose a jail sentence for a failure to pay restitution absent an evidentiary hearing clearly and convincingly showing the failure to pay was willful.

In *State v. Duran*, 224 Neb. 774, 401 N.W.2d 482 (1987), a restitution order under Neb. Rev. Stat. § 29-2280 (Cum. Supp.

1988), a statute allowing restitution to be ordered which is not part of the probation order, was held to impose a criminal penalty rather than a civil penalty.

The court seems to be putting form ahead of substance. All restitution ordered in a criminal case should be declared to be a civil penalty. Furthermore, trial judges should not be required to parrot various restitution holdings before accepting a plea of guilty.

I respectfully dissent from the majority holding.

STATE OF NEBRASKA, APPELLEE, V. RANDALL TRAHAN, APPELLANT.
428 N.W.2d 619

Filed September 2, 1988. No. 87-506.

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. **Constitutional Law: Search and Seizure.** No reasonable expectation of privacy exists in garbage which is accessible to the public and placed for collection.
3. **Constitutional Law: Police Officers and Sheriffs: Search and Seizure: Search Warrants.** A law enforcement officer making a good faith effort to execute a valid search warrant may legally seize evidence of a crime not described in the warrant.
4. **Constitutional Law: Police Officers and Sheriffs: Search and Seizure.** If evidence of contraband is discovered inadvertently while it is in plain view, it may be seized if the officer has a right to be in the place where he has such a view.
5. **Sentences: Appeal and Error.** Where the punishment of an offense created by statutes is left to the discretion of the court to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed on appeal unless there appears to be an abuse of discretion.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Affirmed.

Anthony S. Troia 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.

MULLEN, D.J.

As a result of a bench trial in the district court for Dodge County upon a stipulated set of facts, the defendant, Randall Trahan, was convicted of possession of cocaine, Neb. Rev. Stat. § 28-416(3) (Cum. Supp. 1986); promoting gambling, Neb. Rev. Stat. § 28-1102 (Reissue 1985); and possession of gambling records, Neb. Rev. Stat. § 28-1105 (Cum. Supp. 1986). The district court sentenced the defendant to a 3-year term of probation.

The defendant assigns as error: (1) The court erred in not suppressing evidence seized at the defendant's residence as fruit of an illegal search and seizure in violation of the Constitution of the State of Nebraska and the fourth amendment to the U.S. Constitution; (2) the court erred in not suppressing evidence seized at the defendant's residence which was outside the scope of the warrant issued; and (3) the court abused its discretion by its excessive sentence of the defendant.

We affirm.

On November 18, 1986, officers of the Fremont Police Department and Dodge County Sheriff's Department searched Randall Trahan's residence pursuant to a search warrant. The supporting affidavit for the warrant recited 10 occasions in which a law enforcement officer searched through the contents of garbage containers which had been placed for collection at the defendant's trailer house or at a tavern owned jointly by the defendant and his roommate. Gambling records were recovered from the trash on each occasion. In addition, the officer received information from an unspecified source that Randall Trahan and his roommate were engaged in bookmaking activities. The warrant was limited in its scope to the search for evidence of bookmaking and/or gambling materials.

While searching the defendant's bedroom, an officer discovered a vial on the defendant's dresser. Also on the dresser shelf near the vial were two straws, one of which had white powdery residue collected on and around it. The vial and white

powdery substance were in plain view as the officer conducted his search pursuant to the warrant. The officer opened the vial and found a substance which was later determined to be cocaine.

The defendant filed a motion to suppress evidence to the original one-count information containing the charge of possession of cocaine, on which motion evidence was adduced and the motion overruled. The county attorney later filed an amended information charging the two additional counts relating to the promotion of gambling and possession of gambling records. Defense counsel requested the court take judicial notice of the testimony relating to the previous motion to suppress evidence hearing, which the court did and summarily overruled defendant's motion to suppress evidence to counts II and III of the amended information.

The case was tried to the court on a stipulation of facts submitted by counsel for both parties. The stipulation recites facts which are sufficient for the trier of fact to find the defendant guilty on all three counts. The final paragraphs of the stipulation and request of the parties state as follows:

> 6. The evidence set forth in paragraphs 1 - 5 above would not be controverted by defendant, but defendant would object to the introduction of the fruits of the search warrant, and evidence derived therefrom, on the same basis as asserted in defendant's Motion to Suppress.
>
> 7. It is the intent of the parties hereto that this Stipulation resolve all elements of the offenses charged in favor of the State, while preserving the defendant's right to appeal the decision of the Court in overruling of defendant's Motion to Suppress.
>
> WHEREFORE, parties request that the Court reach a verdict in this matter on the basis of this Stipulation and testimony received at the Motion to Suppress.

In addition, defense counsel stated to the court at the time of the offer of the stipulation:

> Defendant, your Honor, pursuant to previous motions, which have already been filed in this case, argued in this case, we would reiterate and object to the basis of the evidence and ask the Court once again to suppress any

evidence based upon the unlawful search warrant in the matter.

The State argues that the defendant has waived any claim of error as to the seizure of the items in question because he stipulated to the facts constituting the offenses, which facts were sufficient to convict him.

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. *State v. Sock*, 227 Neb. 646, 419 N.W.2d 525 (1988).

This case is distinguished from *State v. Sock, supra* (failure of defendant to object at trial after motion to suppress overruled), *State v. Roggenkamp*, 224 Neb. 914, 402 N.W.2d 682 (1987) (motion to suppress overruled, but no objection made to receipt of evidence at trial on stipulated facts), and *State v. Davis*, 224 Neb. 205, 397 N.W.2d 41 (1986) (motion to suppress evidence was renewed at trial, but no objection was made to receipt of evidence at trial).

The defendant preserved his right of appeal by his objections contained in the stipulation and his objection to the receipt of the evidence at the time of trial.

Regarding defendant's first assignment of error, that the trial court erred in not suppressing evidence seized from the defendant's residence, the issue is substantially addressed in *California v. Greenwood*, ____ U.S. ____, 108 S. Ct. 1625, 100 L. Ed. 2d 30 (1988). In *Greenwood, supra*, a law enforcement officer asked the regular trash collector to pick up the plastic garbage bags that Greenwood left on the curb in front of his house and to turn the bags over to the law enforcement officer without mixing their contents with garbage from other houses. That procedure was followed, and the trash bags were subsequently searched by law enforcement officers and items were found indicative of narcotics use. Approximately a month later, a second search was completed substantially in conformity with the first, and again evidence of narcotics use was found. A search warrant was secured for the Greenwood

home; the warrant was executed; and the subsequent search found more evidence of narcotics trafficking. Justice White, delivering the opinion of the Court, stated: "An expectation of privacy does not give rise to Fourth Amendment protection, however, unless society is prepared to accept that expectation as objectively reasonable. Here, we conclude that respondents exposed their garbage to the public sufficiently to defeat their claim to Fourth Amendment protection." 108 S. Ct. at 1628.

As in *Greenwood*, the defendant placed his garbage at its normal site for collection, both at his residence and at his business. There was no evidence adduced at the hearing on the motion to suppress to suggest that the defendant would have reason to expect any greater privacy than any other member of the community would have in placing his garbage for regular collection. The Court further states in *Greenwood*:

> Accordingly, having deposited their garbage "in an area particularly suited for public inspection and, in a manner of speaking, public consumption, for the express purpose of having strangers take it," *United States v. Reicherter*, 647 F.2d 397, 399 (CA3 1981), respondents could have had no reasonable expectation of privacy in the inculpatory items that they discarded.

108 S. Ct. at 1629.

In *Greenwood*, the Court held that the fourth amendment does not prohibit the warrantless search and seizure of garbage left for collection outside the curtilage of the home. The *Greenwood* Court, in citing *United States v. Thornton*, 746 F.2d 39 (D.C. Cir. 1984), observed that " 'the overwhelming weight of authority rejects the proposition that a reasonable expectation of privacy exists with respect to trash discarded outside the home and the curtilege [*sic*] thereof.' " 108 S. Ct. at 1630. In *State v. Vicars*, 207 Neb. 325, 330, 299 N.W.2d 421, 425 (1980), the court adopted language from *State v. Kender*, 60 Haw. 301, 588 P.2d 447 (1978), and said, " 'Curtilage is usually defined as a small piece of land, not necessarily enclosed, around a dwelling house and generally includes buildings used for domestic purposes in the conduct of family affairs.' "

The defendant had the use of an area extending to 12 feet

behind the trailer house. The garbage cans at the defendant's trailer residence were placed approximately 4 feet away from the back door of the trailer.

The U.S. Court of Appeals for the Seventh Circuit addressed the issue of trespassing by law enforcement officers in *United States v. Kramer*, 711 F.2d 789 (7th Cir. 1983), *cert. denied* 464 U.S. 962, 104 S. Ct. 397, 78 L. Ed. 2d 339, wherein evidence of marijuana sales was found in the defendant's garbage by law enforcement officers. The police had to trespass several feet to obtain the trash bags. The court of appeals said:

> Every trespass, by definition, invades someone's right of possession, but not every government trespass violates the Fourth Amendment. . . . Only those that infringe a privacy interest do; preventing others from using one's land in the circumstances here is certainly not a privacy interest. Therefore the district court's denial of the motion to suppress was proper.

711 F.2d at 794.

The district court made no finding as to whether the garbage in question was within the curtilage of defendant's property, but it appears that the placement of the garbage was in a location accessible to the public and placed for collection.

Although this case is one of first impression in this state, prior case law has been consistent with the *Greenwood* rationale. In *State v. Hodge and Carpenter*, 225 Neb. 94, 102, 402 N.W.2d 867, 873-74 (1987), the court, in quoting from *State v. Havlat*, 222 Neb. 554, 385 N.W.2d 436 (1986), stated:

> "[A] person's capacity to claim the protection of Article I, § 7, of the Nebraska Constitution as to unreasonable searches and seizures, like its counterpart, the fourth amendment of the U.S. Constitution, depends upon whether the person who claims such a protection has a legitimate expectation of privacy in the invaded place."

In *State v. Havlat, supra*, the court announced the open fields doctrine and cited as authority *Oliver v. United States*, 466 U.S. 170, 179, 104 S. Ct. 1735, 80 L. Ed. 2d 214 (1984), which states:

> [O]pen fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from

> government interference or surveillance. There is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields. Moreover, as a practical matter these lands usually are accessible to the public and the police in ways that a home, an office, or commercial structure would not be. It is not generally true that fences or "No Trespassing" signs effectively bar the public from viewing open fields in rural areas. . . . For these reasons, the asserted expectation of privacy in open fields is not an expectation that "society recognizes as reasonable."

Although the facts in *Havlat* are dissimilar to the facts recited herein, the standard of a legitimate expectation of privacy in property that society deems to be reasonable is appropriately applied to this case.

Garbage left for collection at a designated location and accessible to the public shall not be accorded constitutional protection. The defendant's first assignment of error is without merit.

The defendant's second assignment of error asserts that the trial court erred in not suppressing evidence at defendant's residence which was outside the scope of the warrant issued. As earlier indicated, the officer searching the premises pursuant to a search warrant for gambling paraphernalia observed a white powdery substance in close proximity to a vial and two straws, one of which had white powdery residue collected on and around it. The items were situated on top of a dresser shelf in defendant's bedroom and were in plain view. The officer suspected the vial contained contraband.

By walking through the various areas of defendant's trailer house to look for evidence of gambling, the officer did not extend his search beyond the permissible scope of the search warrant. The officer not only had a right to seize the vial to determine its contents, but any experienced law enforcement officer in such circumstances would be dutybound to retrieve the vial and determine whether or not it contained contraband. A law enforcement officer making a good faith effort to execute a valid search warrant may legally seize evidence of a crime not described in the warrant. *State v. Vrtiska*, 225 Neb.

454, 406 N.W.2d 114 (1987); *State v. Traxler*, 210 Neb. 435, 315 N.W.2d 440 (1982). If evidence of contraband is discovered inadvertently while it is in plain view, it may be seized if the officer has a right to be in the place where he has such a view. *State v. Holman*, 221 Neb. 730, 380 N.W.2d 304 (1986). In reviewing a trial court's order on a motion to suppress evidence, this court will not overturn the trial court's findings of fact unless such findings are clearly erroneous. *State v. Vrtiska, supra.*

The trial court had sufficient facts before it to conclude that the search of defendant's residence and seizure of property within it were reasonable. The findings of the trial court are not clearly erroneous.

The defendant's third assignment of error states that the court abused its discretion by its excessive sentence of the defendant. The sentence of the defendant was an order of probation for a duration of 3 years. The terms of probation included a $1,000 fine on count II, a $1,000 fine on count III, and a jail sentence of 90 days. The court indicated that the jail sentence also was imposed in connection with counts II and III. Further, the court ordered the defendant to enter an inpatient treatment center within 7 days after finishing the jail sentence and successfully complete the program and any aftercare. The court further indicated that the defendant is subject to chemical testing at any time upon the request of any probation officer or law enforcement officer.

For the purposes of sentencing, the court had at its disposal a presentence investigation which included information that the defendant had been convicted of driving while intoxicated on two previous occasions. The court also was provided a drug and alcohol evaluation of the defendant. The information contained in the presentence investigation was sufficient for the court to impose special conditions relating to defendant's drug and alcohol usage. The fines and the imposition of imprisonment did not exceed the statutory maximums for the offenses for which the defendant was convicted. The court did not abuse its discretion by incorporating special conditions in the order of probation which addressed the lifestyle of the defendant and the unique circumstances of this case.

Defendant's assignments of error having no merit, the judgment and sentence of the trial court are affirmed.

AFFIRMED.

KENNETH SCHENK AND CORNHUSKER CASUALTY COMPANY, APPELLANTS, V. TOM YOSTEN, APPELLEE.

428 N.W.2d 510

Filed September 2, 1988. No. 88-278.

1. **Motor Vehicles: Right-of-Way.** A vehicle approaching an uncontrolled intersection is not in a favored position and entitled to proceed regardless of the circumstances merely because it is on the right of the other vehicle.
2. **Motor Vehicles: Negligence.** A driver who approaches a blind and uncontrolled intersection must do so at a speed which will afford such driver a reasonable opportunity to make effective observations for vehicles approaching on the intersecting road and give him or her a reasonable opportunity to properly react to the situation the driver then observes or could observe, and where a driver's view is completely obstructed and his or her speed is such that he or she has given himself or herself no opportunity at all to observe and react appropriately, such driver may, where the facts are undisputed, be found negligent as a matter of law.
3. **Summary Judgment.** Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from material facts, and when the moving party is entitled to judgment as a matter of law.
4. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, the Nebraska Supreme Court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.

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

Clarence E. Mock, of Johnson and Mock, for appellants.

Eugene L. Hillman, of McCormack, Cooney, Mooney, Hillman & Elder, for appellee.

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

CAPORALE, J.

Plaintiffs-appellants, Kenneth Schenk and Cornhusker Casualty Company, the workers' compensation carrier for Schenk's employer, seek damages arising from a collision between a truck operated by Schenk and an automobile driven by defendant-appellee, Tom Yosten. Yosten in turn counterclaimed for the damages he sustained. Each of the parties then moved for summary judgment. The district court sustained each motion, thereby dismissing both the action brought by Schenk and Cornhusker Casualty and the counterclaim brought by Yosten. Schenk and Cornhusker Casualty appeal, assigning as error the granting of summary judgment to Yosten. Yosten has not appealed. We affirm.

On the afternoon of August 27, 1985, Schenk and Yosten were driving along separate gravel roads in Cuming County about 1 mile east of Highway 9, north of West Point, Nebraska. Schenk was driving his employer's Chevrolet 1-ton truck westward at about 35 miles per hour in fourth gear. Yosten was driving his Datsun 280Z passenger car northward at 45 to 50 miles per hour. The speed limit in the area through which the vehicles were being operated was 50 miles per hour.

At about 2:30, both men approached the uncontrolled intersection of the two roads, which is located in a hilly area; the intersection itself lies on a hillside. Crops growing immediately to the south and east of the intersection obscured the views Schenk and Yosten had of each other. Schenk stated that a driver approaching the intersection from the east going west, as he was, had no view of northbound traffic on such driver's left until the driver entered the intersection. Yosten stated that a driver approaching the intersection from the south traveling north, as he was, might glimpse westbound traffic to such a driver's right from a point about 300 feet south of the intersection. Both men stated that they were quite familiar with the intersection, each having driven through it numerous times.

Both men also stated that at the time of the collision, it was sunny, clear, and dry. Nevertheless, neither man observed the other approach the intersection, nor did either observe any dust in the air which might have warned of the approach of another vehicle.

Both stated that they slowed as they entered the intersection. Schenk entered the intersection at about 30 miles per hour; Yosten was uncertain of his speed at that time. Neither man was able to estimate the other's speed.

Immediately after each first saw the other, the collision occurred, the front of Yosten's automobile striking the left side of the truck Schenk was driving just behind the driver's door, at a point slightly northwest of the center of the intersection.

According to Schenk, "every time [he] went through there . . . [he] most generally slowed down because [he] knew it was a dangerous corner." Yet, Yosten testified that as soon as he saw the oncoming truck, he knew a collision was imminent; in his words, "the speeds we were going there's no way we could have avoided it. I knew it was going to happen. No way you could stop that fast."

In *Hodgson v. Gladem*, 187 Neb. 736, 742-43, 193 N.W.2d 779, 783 (1972), this court stated the rule,

> A car approaching an intersection is not in a favored position and entitled to proceed regardless of the circumstances merely because he is on the right of the other car. . . .
>
> . . . [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.

As in *Hodgson, supra*, in this case

> It is evident of course the plaintiff had what is usually referred to as the directional right-of-way. . . .
>
> It is equally evident both drivers approached a blind intersection at about the same time and at such a rate of speed that neither could take any effective action to avoid the accident when he first saw or could have seen the other.

Id. at 739, 193 N.W.2d at 781. See Neb. Rev. Stat. § 39-635(1) (Reissue 1984).

Appellants recognize that summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from material facts, and when the moving party is entitled to judgment as a matter of law. *Hines v. Pollock, ante* p. 614, 428 N.W.2d 207 (1988); *J. J. Schaefer Livestock Hauling v. Gretna St. Bank, ante* p. 580, 428 N.W.2d 185 (1988); *Newman v. Hinky Dinky, ante* p. 382, 427 N.W.2d 50 (1988). Appellants argue, however, that this case is distinguishable from *Hodgson* on the law in that the vision of both *Hodgson* parties as they approached that intersection "was completely obstructed by an embankment and a shelterbelt of trees, consisting of plum brush and cedars at least 6 to 8 feet tall which could not be seen through," *Hodgson, supra* at 737, 193 N.W.2d at 780, while in this case "Yosten claimed he could see traffic traveling from east to west at least three hundred feet back from the intersection." Brief for appellants at 5. The gravamen of appellants' argument is that this intersection was not "blind" to Yosten and that therefore the *Hodgson* rule should not be applied.

The argument is unavailing. The rule in Nebraska after *Hodgson* and to this day is that one who is or should be aware that his or her own view of an uncontrolled intersection is obstructed is under a duty to approach that intersection with care reasonable in those circumstances regardless of the directional right-of-way, and quite regardless of the degree to which hindsight might indicate that another driver's view of the same intersection was or was not obstructed at the same time; further, the "care reasonable in those circumstances" is, as a matter of law, that degree of care which will permit the driver to make reasonably careful observation of the obstructed section of road and, if required, to take reasonable action to prevent a collision.

There is no dispute but that Schenk could not see northbound traffic as he approached the intersection, that he knew he could not, and that he nevertheless proceeded into the

intersection at 30 miles per hour. Under the *Hodgson* rule it was Schenk's duty, his directional right-of-way notwithstanding, as well as that of Yosten, to "approach the intersection at such speed that each may effectively exercise an option on how to proceed as may be indicated by circumstances when they reach a point where they can see." *Hodgson, supra* at 740, 193 N.W.2d at 782. Schenk's failure to do so amounts to negligence more than slight as a matter of law, and bars any recovery he might otherwise be entitled to arising out of Yosten's apparent similar breach of duty. *Hodgson, supra*. See, also, *Zeller v. County of Howard*, 227 Neb. 667, 419 N.W.2d 654 (1988); *Crink v. Northern Nat. Gas Co.*, 200 Neb. 460, 263 N.W.2d 857 (1978).

Appellants also recognize that in reviewing a summary judgment, this court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Hines v. Pollock, supra*; *J. J. Schaefer Livestock Hauling v. Gretna St. Bank, supra*; *Newman v. Hinky Dinky, supra*. Appellants thus argue that although there is no dispute of material fact, the ultimate inferences to be drawn from those facts make a summary judgment inappropriate. Specifically, appellants urge that "the comparative small size of Yosten's vehicle to Schenk's truck and the condition of the truck after impact gives rise to an inference of high speed on the part of Yosten." Brief for appellants at 6. Assuming for purposes of discussion that appellants' inference is correct, it is nonetheless clear that Yosten's speed in entering the fated intersection is irrelevant to Schenk's contributory negligence in entering the same intersection at a speed too fast to permit reasonably careful observation and, if required, reasonable action to prevent a collision.

The summary judgment dismissing the action brought by Schenk and Cornhusker Casualty against Yosten is correct and therefore is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. ERNEST W. CHAMBERS AND THE NEW ALLIANCE PARTY, RELATORS, V. ALLEN J. BEERMANN, SECRETARY OF STATE OF THE STATE OF NEBRASKA, RESPONDENT.

428 N.W.2d 883

Filed September 8, 1988. No. AP-096.

Special proceeding before William C. Hastings, Chief Justice of the Nebraska Supreme Court. Judgment entered.

Robert B. Creager, of Berry, Anderson, Creager & Wittstruck, P.C., for relators.

Robert M. Spire, Attorney General, for respondent.

HASTINGS, C.J.

This is a special proceeding relating to elections addressed to a judge of the Nebraska Supreme Court under the provisions of Neb. Rev. Stat. § 32-517 (Reissue 1984). It should be emphasized at the outset that this proceeding is not before, nor is this an opinion by, the Supreme Court. In the same manner, this is not an action in mandamus or for injunctive relief. The author of this opinion has authority only under the provisions of the previously cited statute.

The facts are not in dispute. The relator Ernest W. Chambers is currently serving in the Nebraska State Legislature representing the 11th Legislative District of the State of Nebraska. He was nominated at the May 1988 primary as a candidate for reelection to that position, and was issued and had forwarded to him by the respondent, Secretary of State Allen J. Beermann, a certificate of nomination. As of August 22, 1988, he had not returned the certificate nor had he declined or withdrawn the nomination.

The relator the New Alliance Party apparently was formed at some time before the May 1988 primary election, but the candidate certified as having been nominated at that election as its candidate for the U.S. Senate declined to serve. On July 9, 1988, the New Alliance Party met and nominated the relator Chambers as the party's candidate for the U.S. Senate. On July 11, 1988, Chambers filed with the office of the Secretary of State an acceptance of that nomination, pledging himself "to

abide by the results of the general election and qualify, if elected . . . ."

On July 22, 1988, the respondent Beermann, based on an opinion from the Nebraska Attorney General, issued an order that relator Chambers' name shall not appear on the ballot for the general election as the nominee of the New Alliance Party for the U.S. Senate. The reasons given in that order were that a person cannot run for two offices to be filled in the same general election (Neb. Rev. Stat. § 32-4,155 (Reissue 1984)) and that Chambers' nomination by the New Alliance Party was defective, because Chambers had not changed his registration to that party at least 90 days prior to filing his application for nomination (Neb. Rev. Stat. § 32-515 (Reissue 1984)). The relators then commenced these proceedings under the provisions of § 32-517.

Respondent initially raises the question of the applicability of § 32-517 to these proceedings. That section provides:

> All certificates of nomination or nomination statements, which are in apparent conformity with the provisions of sections 32-512 to 32-516, shall be deemed to be valid, unless objections thereto shall be duly made in writing within ten days after the filing of the same. In case such objection is made, notice thereof shall forthwith be mailed to all candidates who may be affected thereby . . . . The officer with whom the original certificate was filed, or who made an affidavit to the original nominating statement shall, in the first instance, pass upon the validity of such objection, and his decision shall be final, unless an order shall be made in the matter by the county court, by a judge of the district court, or by a Judge of the Supreme Court at chambers, on or before the fifty-fifth day preceding the election. Such order may be made summarily upon application of any party interested or political party committee as herein provided, and upon such notice as the court or judge may require. The decision of the Secretary of State, or the order of the county or district judge or Supreme Court Judge, shall be binding on all county, municipal or other officers with whom certificates of nomination are filed.

The respondent argues that although the entire Nebraska Supreme Court may have jurisdiction of this matter through mandamus, as provided for in Neb. Rev. Stat. § 24-204 (Reissue 1985) and Neb. Const. art. V, § 2, a single judge of this court is without jurisdiction in the present instance. His reason is that no objections were filed before the Secretary of State, and no hearing was held. Section 32-517 does speak in terms of "objections" and does provide for notice of such objections, but there is no clear requirement of a hearing. Such a reason seems to exalt form over substance. The respondent in effect raised his own objections and entered his order sustaining those objections. To say that jurisdiction would lie under this section if the Secretary of State would have sustained the objections of a third party and ordered the relator Chambers' name not to appear on the ballot, but that such jurisdiction is not available when that same officer enters the same order for the same reason on his own motion, does not make much sense. I, therefore, do assume jurisdiction of these proceedings in order to decide the remaining issues presented.

Respondent next questions relator Chambers' qualification to file as a candidate of the New Alliance Party under the political party registration provision of § 32-515. The previous section, Neb. Rev. Stat. § 32-514 (Reissue 1984), provides in substance that for a primary election, the candidate must file a statement that he affiliates with the party certifying him or her as its candidate. Section 32-515 reads in part: "*Provided*, that a change of registration to the political party named in the application less than ninety days prior to filing his application for nomination for any political office shall be deemed to be a lack of compliance with this section."

There seems to be no question that relator Chambers did not fulfill the 90-day requirement if, in fact, it did apply to him; i.e., he changed his party affiliation on June 15, 1988, and filed his acceptance of the nomination of the New Alliance Party on July 11, 1988.

However, Chambers was nominated by the New Alliance Party as its candidate by the party itself under Neb. Rev. Stat. § 32-522 (Reissue 1984). That section explains how such nomination shall be made, and concludes in subsection (3) with

the language: "The certificate, made . . . under the provisions of subsection (1) or (2) of this section, shall, upon being filed at least sixty days before the election, have the same force and effect as the original certificate of nomination or the nomination statement provided for in section 32-514." No reference is made to § 32-515, but respondent reads the requirement of that section into § 32-514. Without passing on that assumption, it is only necessary to look to Neb. Rev. Stat. § 32-526 (Cum. Supp. 1986), referring specifically to newly formed political parties. Subsection (7) of that particular provision states that "*[n]otwithstanding the provisions of section 32-515*, candidates for political office may register as members of the new political party and file for office as candidates under the party label of the new political party in accordance with the filing deadlines as established by law." (Emphasis supplied.) Chambers has otherwise fully complied "with the filing deadlines as established by law."

As his other objection to Chambers' filing, the respondent contends that § 32-4,155 prohibits a candidate for public office from filing for more than one such office. That section provides in part that "[n]o individual shall be eligible to file for two or more elected public offices to be filled at the same election, except for the position of delegate to a national or county convention." Apparently, because this section is found within article 4 of chapter 32 of the statutes, entitled "Provisions Applicable to Elections Generally," the respondent insists that it is applicable in this instance. Without explaining their position or otherwise supporting their statement, relators contend that this section applies only to a primary election. I do not agree with the relators.

Neb. Rev. Stat. § 32-425 (Reissue 1984), as amended by 1981 Neb. Laws, L.B. 446, provides in part:

> The name of a candidate shall not appear on the ballot or any series of ballots at any ~~one~~ primary election more than once except for the office of delegate to a national or county convention, and no person shall be eligible to serve in more than one elected office ~~concurrently~~ defined in section 32-421.01.

Section 32-425 as so amended clearly would seem to apply to

primary elections only. However, also in L.B. 446, § 18, § 32-4,155 was enacted as previously set out above, making no reference to primary elections. This leaves no doubt in my mind but that § 32-4,155 applies to all elections.

That then brings us to the relators' contention that if the statute does in fact prohibit Chambers from running for the U.S. Senate while at the same election he seeks the office of state legislator, it is in fact invalid as being contrary to both the Nebraska Constitution and the U.S. Constitution.

The relators point out that U.S. Const. art. I, § 3, provides for the qualifications of a Senator as follows: "No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen." Relators contend that if § 32-4,155 prohibits a person who has already filed for another office from becoming a candidate for the U.S. Senate at the same election, that section requires an additional qualification for the office of U.S. Senator, contrary to the provisions of the U.S. Constitution. In support of that position, relators cite the case of *Powell v. McCormack*, 395 U.S. 486, 89 S. Ct. 1944, 23 L. Ed. 2d 491 (1969), which held that Congress, in judging the qualifications of its members, is limited to the standing qualifications prescribed in the U.S. Constitution (art. I, §§ 2 and 3).

Relators also cite, in further support of their position, the cases of *In re Opinion of the Judges*, 79 S.D. 585, 116 N.W.2d 233 (1962), and *State ex rel. Wettengel v. Zimmerman*, 249 Wis. 237, 24 N.W.2d 504 (1946). *In re Opinion of the Judges* involved a question as to whether the governor or lieutenant governor of the State of South Dakota was eligible to receive and accept an interim appointment to the U.S. Senate. At that time, the constitution of the state, in addition to providing age and residency requirements for the office of governor and lieutenant governor, also made such officer ineligible to any other office during the term for which such officer had been elected. Based on U.S. Const. art. I, § 3, the South Dakota court stated at 586, 116 N.W.2d at 233: "We think it beyond reasonable dispute that the last phrase of this section is a

qualification which the State of South Dakota is without power to add for the office of United States Senator."

State ex rel. Wettengel v. Zimmerman involved a provision of the Wisconsin constitution which provided in part that judges should hold no office of public trust except a judicial office, and during the term for which they were elected, all votes for any other office given them by the Legislature or the people shall be void.

Joseph R. McCarthy was a duly elected, sworn, and serving judge of the State of Wisconsin, and, during that term, he filed for and was nominated for the office of U.S. Senator. The Wisconsin court, also basing its decision on U.S. Const. art. I, § 3, held that the provision of its own constitution was therefore invalid. The court stated: "Neither by constitutional provision nor legislative enactment can the state of Wisconsin prescribe qualifications of a candidate for nomination for the office of United States senator in addition to those prescribed by the constitution of the United States." 249 Wis. at 247, 24 N.W.2d at 508-09.

In *Storer v. Brown*, 415 U.S. 724, 94 S. Ct. 1274, 39 L. Ed. 2d 714 (1974), cited by respondent, the Supreme Court dealt with a provision of the California Elections Code which denied an independent candidate for elective office a position on the ballot if he or she had a registered affiliation with a qualified political party at any time within 1 year prior to the immediately preceding primary election. The unsuccessful candidate had challenged the provisions of the California law as adding qualifications for the office of U.S. Congress, contrary to U.S. Const. art. I, § 2.

The *Storer* Court recognized that "[m]oreover, as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." 415 U.S. at 730. The Court went on to state: "The requirement that the independent candidate not have been affiliated with a political party for a year before the primary is expressive of a general state policy aimed at maintaining the integrity of the various routes to the ballot. It involves no discrimination against independents." 415 U.S. at 733. Although not speaking directly

to the problem of "added qualifications" for office, the Court had no problem stating that the section of the code was not unconstitutional as alleged.

Joyner v. Mofford, 706 F.2d 1523 (9th Cir. 1983), suggested that state law which bars a state officeholder from running for federal office imposes an additional qualification on candidates and therefore violates the qualifications clause of the U.S. Constitution.

State v. Senner, 92 Ariz. 243, 375 P.2d 728 (1962), involved a statutory provision which prohibited an incumbent of an elective office from being eligible for nomination or election to any office other than the office so held. The state, in a quo warranto proceeding, sought to have the respondent's office of state corporation commissioner declared vacant because the commissioner had filed for the office of U.S. Representative. The Arizona court, although recognizing that the legislature had no authority to add qualification requirements for federal office, solved its dilemma by holding that the particular statutory provision established qualifications affecting state officers alone and did not reach out to qualify candidacy for the U.S. Congress.

In the final analysis, it appears that the Oklahoma court has come up with the most logical answer to a very similar question. In *Riley v. Cordell*, 200 Okla. 390, 194 P.2d 857 (1948), petitioner, a justice of the Supreme Court of Oklahoma, sought a writ of mandamus to compel the defendants, officers and members of the State Election Board, to place his name on the primary ballot as a candidate for the Democratic nomination for U.S. Senator. A section of the Oklahoma statutes provided that no justice of the supreme court shall become, during the term for which elected, a candidate for any office other than a judicial position. It was petitioner's contention that the statutory provision added a qualification for U.S. Senator in violation of U.S. Const. art. I, § 3. The Attorney General, as attorney for the defendants, conceded that point, and as stated by the court, "and we think properly so." 200 Okla. at 392, 194 P.2d at 859.

Petitioner argued that there was no constitutional or statutory provision expressly prohibiting him from seeking two

offices, contrary, of course, to the situation facing the relator Chambers. However, the Oklahoma court pointed to a provision of the Oklahoma statutes which required a candidate to file a notification and declaration on a form which prescribed that the candidate would accept such nomination and would "qualify for said office." That language, of course, is similar to that contained in § 32-514 and in the candidate filing form for the Legislature and the acceptance of nomination for U.S. Senator filed by the relator Chambers. The candidate filing form contains the words "I pledge myself to abide by the results of the election and *qualify if elected*" (emphasis supplied), and in the acceptance of nomination of the New Alliance Party is the language "I pledge myself to abide by the results of the general election and *qualify, if elected* . . . ." (Emphasis supplied.)

In *Riley*, the defendants argued that the necessary inference to be drawn from the statutory provisions relating to qualifying for the office is that an elector may not become a candidate for more than one office at the same election. The court went on to state:

> We agree with this contention. Where the meaning of a statute is doubtful it should be given a construction that is reasonable, sensible, and in keeping with the public policy of the state. [Citation omitted.] It is the public policy of this state that these and many other public offices shall be filled by the people under the election laws, and that some of them may be filled by appointment only when an unexpected vacancy occurs. In keeping with this expressed public policy, the voters have a right to expect one seeking their suffrage to qualify and fill the office he seeks. The construction urged by the Attorney General, that no person should be permitted at the same primary election to be a candidate for nomination for two or more offices when he may fill but one, is reasonable, sensible, and in keeping with the public policy of this state.

200 Okla. at 392, 194 P.2d at 860.

The Oklahoma court then pointed out a section of the statute which provided for the withdrawal of a candidate upon the filing of a " 'withdrawal properly verified before a notary

public.' " 200 Okla. at 393, 194 P.2d at 860. Examining the sworn notification and declaration filed by the petitioner whereby he indicated his willingness to accept the nomination and qualify for office, the court stated at 393, 194 P.2d at 860:

> It is difficult to comprehend how petitioner could more forcibly or clearly have stated his intentions on April 30, 1948, than was done in the notification and declaration then filed. The only interpretation of that instrument consistent with good faith is that petitioner then intended to and did withdraw from the race for Associate Justice of the Supreme Court. To interpret this instrument otherwise would be to attribute bad faith to petitioner which this court will not do. The withdrawal need not be couched in any particular language. It is sufficient that it be properly sworn to, timely made and show the intention of the candidate to withdraw. In the supplemental or amended petition, petitioner alleged that at the time of filing for the office of United States Senator he orally informed the Secretary of the Election Board that he did not waive his filing for the office of Associate Justice of the Supreme Court. Even if made, it is wholly inconsistent with the terms and conditions of the notification and declaration on which petitioner bases his application for the writ sought, and petitioner will not be heard to urge it.

The reasoning of the Oklahoma court is persuasive and is adopted for the purpose of this decision. A person who files for a second public office at the same election contrary to either § 32-425 or § 32-4,155, by the filing of an acceptance of nomination or a candidate filing form whereby such candidate states under oath that he or she will "qualify if elected," has by inference withdrawn the first filing.

Because the conclusion reached does not prohibit the relator Chambers from seeking the office of U.S. Senator, it is unnecessary to reach the question of the validity of § 32-4,155 under the federal Constitution.

Relators' claims under Neb. Const. art. III, §§ 8 and 9, are without merit. If anything, § 9, which states in substance that no person holding office under the authority of the United States shall be eligible to have a seat in the Legislature, supports

the conclusion reached herein.

I conclude that (1) the relator Chambers is qualified to become a candidate for the U.S. Senate at the November 8, 1988, general election; (2) that he cannot be a candidate for both that office and the office of a legislator of the Nebraska Legislature at the same election; (3) that unless he declines his nomination for the U.S. Senate by September 14, 1988, relator Chambers, by filing and allowing to stand his acceptance of nomination for U.S. Senator, will have caused the cancellation and withdrawal of his earlier nomination for the Nebraska Legislature; and (4) that, absent a withdrawal of such candidacy for the U.S. Senate, the respondent is directed to place the relator Chambers' name on the ballot of the November 8, 1988, general election as the candidate of the New Alliance Party for U.S. Senator.

JUDGMENT ENTERED.

KEARNEY STATE BANK AND TRUST COMPANY, A NEBRASKA BANKING CORPORATION, APPELLEE, V. RUSSELL SCHEER-WILLIAMS AND SCHEER-WILLIAMS CLOTHIER, INC., APPELLANTS.

428 N.W.2d 888

Filed September 9, 1988. No. 86-783.

1. **Directed Verdict: Appeal and Error.** Upon an appeal from the overruling of a motion for a directed verdict, our review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can only draw but one conclusion from the evidence, where an issue should be decided as a matter of law.
2. **Appeal and Error.** Regarding questions of law, this court has an obligation to reach conclusions independent of those reached by the trial court.
3. **Jury Instructions: Appeal and Error.** It is the trial court's duty to instruct the jury on the issues presented by the pleadings and supported by the evidence. If the instructions taken as a whole correctly state the law, are not misleading, and adequately cover the issues, there is no prejudicial error upon which a reversal on appeal may be based.
4. **Verdicts: Appeal and Error.** On an appeal from a jury verdict on the question of the sufficiency of the evidence, such verdict will not be disturbed unless it is clearly wrong.

5. **Accord and Satisfaction: Words and Phrases.** An accord and satisfaction occurs where there is a bona fide dispute between the parties, the substituted performance is tendered in full satisfaction of the claim, and the tendered performance is accepted by the other party.
6. **Uniform Commercial Code: Contracts: Liability: Words and Phrases.** Where an existing liability of a party to an agreement is completely extinguished and a new one substituted in its place according to the terms of a new written agreement, this constitutes a novation.
7. **Uniform Commercial Code: Sales.** The reasonableness of the expenses when collateral is sold is relevant in determining whether the sale was commercially reasonable.
8. **Uniform Commercial Code: Sales: Trial.** The commercial reasonableness of a sale is ordinarily a question of fact to be determined by the jury.

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

Kenneth F. George, of State, Yeagley & George, for appellants.

Thomas W. Tye, of Tye, Hopkins & Associates, for appellee.

HASTINGS, C.J., CAPORALE, GRANT, and FAHRNBRUCH, JJ., and JOHN MURPHY, D.J.

HASTINGS, C.J.

This is an appeal from a jury verdict in a contract action from the district court for Buffalo County. The jury found for the plaintiff-appellee, Kearney State Bank and Trust Company (Bank), in the amount of $10,000. The parties defendant to this action, Russell Scheer-Williams and the men's clothing store of which he is the owner and operator, Scheer-Williams Clothier, Inc., bring this appeal.

On January 15, 1985, the Bank took a security interest in the store's inventory, accounts, fixtures, etc., based on a prior security agreement and financing statement (dated October 4, 1982) in exchange for a 30-day promissory note in the amount of $230,857.17. On February 14, 1985, the note was in default.

The Bank had loaned money to the defendants in the past. The defendants usually dealt with the Bank's president, Larry Wangrud. On February 19, 1985, a 90-day renewal note was given to Wangrud. The renewal was not approved by the loan committee of the Bank.

On March 1, 1985, the Bank filed a separate action in replevin to secure the collateral under the first note. On March 11, 1985, a meeting of the parties took place in which a new "Agreement" was negotiated.

On March 28, 1985, the parties entered into a written "Agreement" whereby the defendant debtors voluntarily surrendered possession of all collateral to the creditor Bank, and the Bank agreed to sell the same in a commercially reasonable manner and apply the proceeds to the indebtedness owing by the defendants.

The agreement also forgave $15,000 of indebtedness owing on a personal guaranty from the wife of defendant Russell Scheer-Williams. In the agreement it was acknowledged that the Bank was to sell the collateral by public or private sale or by liquidation sale, and the defendants waived any and all rights to notification of the sale of the collateral. The agreement further provided that if the net proceeds of the sale did not bring $140,000, the defendants consented that a judgment might be entered against them for the difference, or $15,000, whichever was less. If the proceeds exceeded $140,000, the indebtedness would be satisfied.

The Bank did not give specific notice of the sale. It hired professional liquidators to conduct the sale. The liquidators were in the store, together with Russell Scheer-Williams, taking inventory in preparation for the sale on March 26 and 27, 2 days before the agreement was signed. Such was the testimony of Russell Scheer-Williams.

The sale was conducted from March 30 to May 11, 1985, after the Bank took possession of the collateral, but resulted in a deficient amount of proceeds. A going-out-of-business sale was utilized to dispose of inventory, and all remaining collateral was sold at various times at private sale.

The Bank filed suit and sought recovery in the amount of $15,000 under the agreement. The defendants contended that the essence of the Bank's cause of action was for a deficiency judgment and that it is precluded from such judgment as no notice of disposition was given as required under Neb. U.C.C. § 9-504(3) (Reissue 1980). At the close of the plaintiff's case in chief, the defendants made a motion for a directed verdict or to

dismiss on this basis. The trial judge ruled as a matter of law that the Uniform Commercial Code provisions did not apply, and failed to instruct the jury on the matter of notice. He treated the agreement as an accord. The jury allowed recovery under the agreement in the amount of $10,000.

The appellants challenge the trial court's ruling, as a matter of law, that the U.C.C. did not apply in this case. In so doing, the appellants are in essence challenging the trial court's overruling of its motion to dismiss at the close of all the evidence.

With regard to the overruling of a motion for a directed verdict made at the close of all the evidence, our review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can only draw but one conclusion from the evidence, where an issue should be decided as a matter of law. *Prime Inc. v. Younglove Constr. Co.*, 227 Neb. 423, 418 N.W.2d 539 (1988).

Regarding questions of law, this court has an obligation to reach conclusions independent of those reached by the trial court. *Communications Workers of America v. Abrahamson*, 228 Neb. 335, 422 N.W.2d 547 (1988).

The appellants are also critical of the court's failure to give a U.C.C. instruction. It is the trial court's duty to instruct the jury on the issues presented by the pleadings and supported by the evidence. If the instructions taken as a whole correctly state the law, are not misleading, and adequately cover the issues, there is no prejudicial error upon which a reversal on appeal may be based. *Gilbert v. Archbishop Bergan Mercy Hospital*, 228 Neb. 148, 421 N.W.2d 760 (1988).

With regard to the last assignment of error, on the sufficiency of the evidence to sustain the jury's verdict, we have stated many times that a jury verdict will not be disturbed on appeal unless it is clearly wrong. *Associated Wrecking v. Wiekhorst Bros.*, 228 Neb. 764, 424 N.W.2d 343 (1988).

The bargain of the parties in fact is found in the language of their agreement. The agreement is set out in part at paragraph No. 2:

> Scheer-Williams Clothier and Russell Scheer-Williams *immediately release possession* of all machinery,

> equipment, furniture, fixtures, inventory, accounts, and other personal property, and all proceeds therefrom, which are secured by the bank for payment of the above mentioned notes, to the bank. Scheer-Williams Clothier and Russell Scheer-Williams further recognize that the bank intends to sell said property and to apply the proceeds therefrom, after reasonable costs and expenses, to the above mentioned notes, and Scheer-Williams Clothier and Russell Scheer-Williams *renounce and waive any and all rights to notification of said sale*, all rights to redeem the collateral, and release any and all interests they have in the collateral. Upon the execution of this Agreement, Russell Scheer-Williams shall deliver to the bank the keys to the premises of the clothing store formerly known as Russell's in which the collateral is located, and such delivery of said keys shall constitute a delivery and release of possession of the collateral to the bank.

(Emphasis supplied.)

The parties have clearly chosen to remove themselves from the protections of the code. This practice is authorized by the code itself at Neb. U.C.C. § 9-501 (Reissue 1980) and § 9-504.

Section 9-501 provides as follows:

> (1) When a debtor is in default under a security agreement, a secured party has the rights and remedies provided in this Part and except as limited by subsection (3) those provided in the security agreement. . . .
>
> . . . .
>
> (3) To the extent that they give rights to the debtor and impose duties on the secured party, the rules stated in the subsections referred to below may not be waived or varied except as provided with respect to compulsory disposition of collateral (subsection (3) of section 9-504 and section 9-505) and with respect to redemption of collateral (section 9-506) but the parties may by agreement determine the standards by which the fulfillment of these rights and duties is to be measured if such standards are not manifestly unreasonable;
>
> . . . .

> (b) subsection (3) of section 9-504 and subsection (1) of section 9-505 which deal with disposition of collateral . . . .
>
> Section 9-504(3) provides:
>
> Disposition of the collateral may be by public or private proceedings . . . . [R]easonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made will be sent by the secured party to the debtor, *if he has not signed after default a statement renouncing or modifying his right to notification of sale.*

(Emphasis supplied.) More generally, Neb. U.C.C. § 1-102 (Reissue 1980) directs courts to construe and apply the U.C.C. liberally to promote its underlying purposes and policies. Section 1-102 in part provides:

> (1) This act shall be liberally construed and applied to promote its underlying purposes and policies.
>
> (2) Underlying purposes and policies of this act are
>
> (a) to simplify, clarify and modernize the law governing commercial transactions;
>
> (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;
>
> (c) to make uniform the law among the various jurisdictions.
>
> (3) The effect of provisions of this act may be varied by agreement, except as otherwise provided in this act and except that the obligations of good faith, diligence, reasonableness and care prescribed by this act may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.

The agreement forgave a great amount of indebtedness, released a personal guaranty, and limited the amount of a deficiency judgment to $15,000, or $140,000 less the net proceeds, whichever was the smaller figure. Considering the benefits received, it does not appear that the waiver of notice of the impending sale was manifestly unreasonable. The agreement itself states that "the parties are desirous of settling

and resolving all disputes between them without further litigation." The agreement contains a conspicuous waiver of notice and specifically provides for the sale as the Bank's intention as soon as possession and inventory are caused to be made.

When the code does not apply, principles of contract law and estoppel are appropriate.

> Unless displaced by the particular provisions of this act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principle [sic] and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.

Neb. U.C.C. § 1-103 (Reissue 1980).

A bill or note may be waived by subsequent agreement. 10 C.J.S. *Bills and Notes* § 264 (1938). Here, by an express agreement, the parties declared maturity of the note. The waiver of notice provision is valid and should be construed as any other contract. It is unambiguous and should be enforced. Giving the words of the contract their plain and ordinary meaning as ordinary, average, or reasonable persons would understand them, it is clear that the parties and the language used contemplated an immediate liquidation sale without the requirement of notice to the debtors. In exchange, the requirement of the amount of the debt was fixed, a substantial amount was dismissed, and a guaranty was released.

In this instance, an agreement was reached wherein the debtors released possession of the collateral, in essence to tender, in full satisfaction of the claim, an amount of $140,000 from sale proceeds. The creditor bank accepted the tender subject to certain conditions. The condition that $15,000 would be the maximum amount of liability should the proceeds be deficient was declared. Further, it was stipulated in the agreement that should the net proceeds be $140,000 or more, the debtors would "be fully and completely discharged and released from any and all liability for the payment of the balance of the indebtedness owed on the notes to the bank."

The district court held that an accord and satisfaction had

occurred; i.e., that there was a bona fide dispute between the parties, that the substituted performance was tendered in full satisfaction of the claim, and that the tendered performance was accepted. *Rees v. Huffman*, 222 Neb. 493, 384 N.W.2d 631 (1986). The facts support such a holding.

Additionally, the record fully supports the conclusion that in this instance, the existing liability of the defendants to the Bank was completely extinguished and a new one substituted in its place according to the terms of the written agreement. This clearly constitutes a novation. *Chadron Energy Corp. v. First Nat. Bank*, 221 Neb. 590, 379 N.W.2d 742 (1986).

Having determined that a waiver of notice was authorized under the code in view of the circumstances of this case, whether we decide this case on that basis, or on the basis of accord and satisfaction or novation, the trial court was correct in ruling that the failure of formal written notice was not fatal to the Bank's cause of action.

The amount sought in the petition, $15,000, was based not on the amount of indebtedness in the note but on the terms of the contract. The petition is couched in terms of the contract and is not intended as seeking a deficiency judgment. Whether the note itself technically was not yet in default, the parties nevertheless contracted to allow an acceleration of the indebtedness of the debtors, causing the note to mature.

Under the agreement, the Bank was obliged to sell the collateral in a commercially reasonable manner. The agreement provides in relevant part:

> The bank agrees to sell the collateral in a commercially reasonable manner by public or private sale, or by liquidation sale, and to exercise reasonable efforts to obtain the highest or best return on the collateral under the conditions and circumstances of such liquidation. The bank agrees to pay all costs and expenses incurred in connection with the occupancy of the premises and in conducting the sale of the collateral, including, but not necessarily limited to, the cost of promotional goods, additional inventory, rent, utilities, advertising, wages, taxes and the like. After deducting all such costs and expenses from the proceeds received by the sale of the

> collateral and the sale of any goods purchased by the bank as a means of promoting the sale of the collateral, the net proceeds shall be applied in reduction of the indebtedness owed to the bank as alleged in the Recitals above.

The defendants challenge the way in which the liquidation took place—alleging that the Bank did not proceed in a commercially reasonable manner because promotional goods were not utilized. The sale was primarily a sale of winter clothing, and it was urged that a spring line of clothing (promotional goods) would assist in advancing the winter line as the sale occurred in the spring months. It lasted from March 30 to May 11, 1985. The above agreement mentions promotional goods but certainly does not mandate use of them.

Russell Scheer-Williams also objected to the rate at which a percentage of discount was taken on the inventory. He felt that the sale progressed too quickly. With regard to the rate of markdowns, the fact that the merchandise may have yielded a higher price had alternate methods been employed does not show unreasonableness. Neb. U.C.C. § 9-507(2) (Reissue 1980) in part provides:

> The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the secured party either sells the collateral in the usual manner in any recognized market therefor or if he sells at the price current in such market at the time of his sale or if he has otherwise sold in conformity with reasonable commercial practices among dealers in the type of property sold he has sold in a commercially reasonable manner. The principles stated in the two preceding sentences with respect to sales also apply as may be appropriate to other types of disposition.

The proceeds from sales of fixtures totaled $4,308.42. The proceeds from the inventory sales were $152,085.70. Before the sale began, an inventory of the store resulted in a retail figure of at least $210,000 in the opinion of Frank Newman, a businessman involved in menswear, who had conducted over half a dozen going-out-of-business sales. With expenses of

approximately $30,000, net proceeds of $180,000 should have resulted.

Newman explained the generally accepted procedure in conducting a going-out-of-business sale. He stated that a consultant (liquidator) is almost never given a flat fee for his services but, rather, is hired on a commission basis, a certain percentage of the gross volume of the store. This provides the consultant with an incentive to increase sales and make effective markdowns. The professional liquidators hired by the Bank were given a flat fee of $15,000.

Newman continued that it is an unacceptable practice for the consultant to run the cash register. The store owner usually handles the cash register. In this case, the liquidators ran the cash registers, but one or two of the Bank officers were in the store nearly every day.

According to Newman, a store should not be closed on Sundays during a liquidation sale. There was evidence that the liquidators closed Russell's clothing store on occasional Wednesdays and Sundays. Further, Newman testified that no refunds or exchanges are acceptable or common practice in a going-out-of-business sale. Although the liquidators had a "no refund" policy, refunds and exchanges were in fact made. The sale was advertised in the Kearney Daily Hub on March 29, 1985, to provide notice to the public sufficiently in advance, and throughout the sale. It was published in a reasonable manner calculated to assure publicity for the collateral to be sold at the best possible price. It also appears that there was some advertising on television and radio as well.

Expenses incurred totaled $38,606.66. The reasonableness of the expenses when collateral is sold is relevant in determining whether the sale was commercially reasonable. *First Nat. Bank of Omaha v. Kizzier*, 202 Neb. 369, 275 N.W.2d 600 (1979).

The U.C.C. also requires the creditor to proceed in a commercially reasonable manner to liquidate accounts receivable, as the security agreement specifically encompassed accounts. *DeLay First Nat. Bank & Trust Co. v. Jacobson Appliance Co.*, 196 Neb. 398, 243 N.W.2d 745 (1976); Neb. U.C.C. § 9-502(2) (Reissue 1980). The evidence regarding accounts receivable was in conflict. Joe Novak, a loan officer

with the Bank, testified that he had not found any letters or memorandums regarding accounts receivable. Russell Scheer-Williams testified that he had given all of the accounts receivable to the liquidators for collection, but some had not yet been collected.

The issue of commercial reasonableness was submitted to the jury as to whether the Bank had shown by a preponderance of the evidence that it substantially performed the terms of the agreement, and the jury found in favor of the Bank. We cannot say that the jury's inherent determinations that the collateral was sold in a commercially reasonable manner and that the damages sustained amounted to $10,000 were clearly wrong. There was sufficient evidence to support the jury's verdict.

The Bank's claim was founded on the agreement, and the trial court did not incorrectly rule on it as a contract in itself. The jury instructions were proper, and the verdict that the Bank substantially performed the terms of the agreement was not clearly wrong. The judgment of the trial court is affirmed.

AFFIRMED.

EMMETT D. CHILDERS AND SUSANNE K. CHILDERS, APPELLANTS, V. CONSERVATIVE SAVINGS & LOAN ASSOCIATION, A NEBRASKA BUILDING AND LOAN ASSOCIATION, APPELLEE.

429 N.W.2d 325

Filed September 9, 1988. No. 86-842.

1. **Contracts: Reformation: Evidence.** To reform a written contract for mutual mistake or fraud, the evidence must be clear, convincing, and satisfactory.
2. _____: _____: _____. To decree reformation of a written instrument for a mutual mistake, equity insists that the evidence of the true intent of the parties must be clear, convincing, and satisfactory, and the evidence must establish that the mutual mistake involved is common to both parties, each laboring under the same misconception.

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

Victor J. Lich, Jr., of Lich, Herold & Mackiewicz, for appellants.

Thomas E. Johnson and Walter H. Goodwin, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for appellee.

HASTINGS, C.J., SHANAHAN, and FAHRNBRUCH, JJ., and RILEY and OTTE, D. JJ.

OTTE, D.J.

This is an equitable action for reformation of a promissory note and for a declaratory judgment.

On April 22, 1977, the plaintiffs executed and delivered to defendant their promissory note, which provided in part as follows:

> It is understood and agreed that at any time after the expiration of two years from the date of this note, the Association may increase the interest charged on this note to a rate which is 3.25% per annum greater than the highest simple interest rate the Association is then offering to pay on its regular savings accounts, or a rate which is 2.00% greater than the Association is then offering to pay on its 1 year term certificate or its 2 year term certificate. Provided, however, that the original interest rate plus any increase shall not exceed the then maximum lawful interest rate and further provided the Association will give sixty days written notice to the undersigned of any interest rate increases.
>
> The rate of interest may be reduced by said Association at any time or times and the amount of such reduction applied upon the amount due on this mortgage note, without prejudice to the right of said Association, to reinstate, without notice, the rate of interest charged before the reduction was granted.

The plaintiffs had, before executing and delivering the note, received a letter dated March 21, 1977, from the defendant, Conservative Savings & Loan Association, advising them that their loan had been approved and stating further:

> The note will provide that two years after your loan is

closed, the interest rate may be increased to 2.00% more than our Association is then offering to pay on either one or two year term certificates or to 3.25% more than our Association is then paying on regular savings, after giving you sixty days written notice.

Along with this letter, the plaintiffs received a truth in lending disclosure statement. This statement included language similar to the above letter. Effective August 1, 1979, Conservative increased that interest rate on the note from the original 8.5 percent to 8.75 percent, based upon the 5.5 percent it was paying on its regular accounts. On January 1, 1982, Conservative increased the interest rate to 10.75 percent, based upon the 12.14 percent it was paying on 1-year all-savers certificates. Finally, on August 1, 1984, Conservative increased the interest rate to 11.5 percent, based upon the fact that it was paying over 11 percent on 1-year certificates.

Plaintiffs first claim that the executed note should be reformed by deleting the paragraph "It is understood and agreed that at any time after the expiration of two years from the date of this note, the Association may increase the interest charged . . ." and by inserting substantially the paragraph from the letter of March 21, as follows: "That two years after the loan is closed, the interest rate may be increased . . .," so as to reflect the true intent of the parties. Plaintiffs further prayed for declaratory relief in two causes of action, the first seeking a declaration that the defendant could only increase the plaintiffs' interest rate one time on the note to be reformed by the court and the second seeking a declaration that an increased rate could not be based upon an all-savers certificate.

The district court, after trial upon stipulated facts, dismissed the action, and plaintiffs appealed.

To reform a written contract for mutual mistake or fraud, the evidence must be clear, convincing, and satisfactory. *Johnson v. Stover*, 218 Neb. 250, 354 N.W.2d 142 (1984); *Schweitz v. State Farm Fire & Cas. Co.*, 190 Neb. 400, 208 N.W.2d 664 (1973). There is no evidence of fraud, and consequently the plaintiffs must rest their claim upon mutual mistake. The very essence of mutual mistake is that the parties have come to a full and complete understanding of all essential

elements to the contract, and then, through error or inadvertence, some language or provision was omitted, inserted, or incorrectly worded so that the contract did not reflect the prior mutual agreement. As stated in *Farmers Coop. Assn. v. Klein*, 196 Neb. 180, 183, 241 N.W.2d 686, 688 (1976):

> To decree reformation of a written instrument for a mutual mistake, equity insists that the evidence of the true intent of the parties must be clear, convincing, and satisfactory, and the evidence must establish that the mutual mistake involved is common to both parties, each laboring under the same misconception.

The plaintiffs offered no evidence to an agreement differing in any respect from the promissory note which they signed. Plaintiffs had no recollection of the content of any oral conversations with the defendant's officers or employees in connection with the loan and did not rely upon any such conversations in connection with their action. One of the earlier declarations of this principle is *Nebraska Loan & Trust Co. v. Ignowski*, 54 Neb. 398, 403, 74 N.W. 852, 853 (1898), wherein this court stated:

> " 'The proof of mistake must be clear and certain before an instrument can be reformed, as the object of the reformation of an instrument is to make it express what the minds of the parties to it had met upon, and what they intended to express, and supposed they had expressed, in the writing. Unless this meeting of minds, and mistake in expressing it, is made quite clear and certain by evidence, the court, should it undertake to reform, might, under color of reformation, make a contract for the parties which both never assented to or intended to make.' The mistake, to be the subject of the reformation, must be not merely the oversight of one of the parties, but such that the deed fails to express what was intended and agreed upon by both parties. . . ."

The court further stated that it would not make the contract include what was intended by one of the parties unless it appears that the other party at the same time had the same intention. The plaintiff Emmett D. Childers was, at the time of the execution and delivery of the note, a practicing attorney in

the State of Nebraska; he had all of the relevant documents for review prior to closing the loan; and he admits that the executed note could imply multiple increases wherein it provides "the Association will give sixty days written notice to the undersigned of any interest rate increases."

The evidence presented by the parties falls short of the burden of proof required of the plaintiffs, and their prayer for reformation must fail.

The plaintiffs further claim error in the ruling of the trial court that interest rate increases could be based upon interest paid by defendant on its all-savers certificates. The note authorizes an interest rate increase of 2 percent greater than "the Association is then offering to pay on its 1 year term certificate," and the only question is whether the defendant's all-savers certificate was a 1-year or 2-year term certificate. The note referred to two different items upon which a rate increase could be based: the certificates or a regular savings account. At all times relevant, a certificate account was "[a] savings account evidenced by a certificate which, if held for a fixed or minimum term, will receive a rate of return greater than on regular accounts." 12 C.F.R. § 526.1(b) (1982). A regular savings account was "[a] savings account that is not a certificate account, a notice account, or a NOW account." § 526.1(d). By definition, the all-savers certificate was a 1-year term certificate. As such, the defendant was entitled to use the interest rate offered on it as the basis for a rate increase.

The final assignment of error presented by the plaintiffs is that the trial court erred in ruling that the defendant was not required to reduce its interest rate when interest it pays on applicable certificates or accounts is reduced.

The note quite clearly states, "The rate of interest *may* be reduced . . . at any time or times . . . ." (Emphasis supplied.) The use of the word "may" in this context can only mean that a reduction is permissible or discretionary with the defendant and is not, in any event, mandatory.

The judgment of the district court dismissing plaintiffs' amended petition is affirmed.

AFFIRMED.

CATTLE NATIONAL BANK OF SEWARD, NEBRASKA, APPELLANT, V. YORK STATE BANK AND TRUST COMPANY ET AL., APPELLEES.

428 N.W.2d 624

Filed September 9, 1988. No. 86-867.

1. **Summary Judgment: Appeal and Error.** In a matter arising from the entrance of summary judgment, we are obligated to view the evidence in the light most favorable to the party against whom the motion is directed and to give that party the benefit of all reasonable inferences which may be drawn therefrom.
2. **Summary Judgment.** Summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **Conversion: Words and Phrases.** Conversion is any unauthorized or wrongful act of dominion exerted over another's personal property which deprives the owner of his property permanently or for an indefinite period of time.
4. _____: _____. A conversion is any distinct act of dominion wrongfully asserted over another's property in denial of or inconsistent with that person's rights.
5. **Conversion: Pleadings.** The plaintiff in an action for conversion must allege facts showing a right to immediate possession of the property at the time of the conversion.
6. **Title: Evidence.** A scale ticket issued by a warehouse licensee shall be prima facie evidence of the holder's claim of title to the goods described in such ticket.

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

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

Vincent Valentino, of Angle, Murphy, Valentino & Campbell, P.C., for appellee York State Bank.

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

HASTINGS, C.J.

This is an action filed for conversion of proceeds of collateral by plaintiff-appellant, the Cattle National Bank, against defendants-appellees York State Bank and Trust Company and Baack Farms, Inc., in the district court for York County. Summary judgment was granted for the defendants, and the petition was dismissed.

Since the matter arises from the entering of summary

judgment, we are obligated to view the evidence in the light most favorable to the party against whom the motion is directed and to give that party the benefit of all reasonable inferences which may be drawn therefrom. *Lowry v. State Farm Mut. Auto. Ins. Co.*, 228 Neb. 171, 421 N.W.2d 775 (1988); *Ford v. American Medical International*, 228 Neb. 226, 422 N.W.2d 67 (1988). Summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Lowry, supra*; *Stodola v. Grunwald Mechanical Contractors*, 228 Neb. 301, 422 N.W.2d 341 (1988).

The Cattle Bank assigns as error that (1) the order of the district court is not supported by substantial and sufficient evidence and is contrary to law, and (2) the trial court erred in holding that there was no genuine issue as to any material fact remaining in the case and that the defendants were entitled to judgment of dismissal as a matter of law.

In February of 1982, Wayne and Leslie Zima (not parties to this action) executed security agreements and financing statements to the Cattle Bank as security for certain notes totaling $152,000 and dated February 23, 1982; April 22, 1983; May 23, 1983; February 15, 1984; April 27, 1984; May 2, 1984; and July 2, 1984. The security agreements and financing statements gave a security interest in

> [a]ll farm products or inventory, including but not limited to all livestock, crops, grain, hay, seed, feed, fertilizer, supplies, and products of crops and of livestock, together with all equipment including but not limited to all farm equipment, tractors, non-titled vehicles, machinery, implements, tools, irrigation systems, including but not limited to power units, wells, gearheads, pumps and alternators, dairying systems, all goods owned or used for preparing land or for planting, cultivating, fertilizing, irrigation, harvesting, moving, drying, storing, marketing, or processing of crops, products of crops, grain, seed or feed or for raising, feeding, handling,

> breeding, marketing or caring for livestock, all accounts and general intangibles, and debtor's interest in any minerals, including oil and gas. Such security interest shall cover warehouse receipts or other documents of title which evidence storage or possession of crops or products of crops, livestock or products of livestock, or inventory
> . . . .
> . . . .
> . . . on the following described real estate . . .
> The West Half of the NW1/4 and the SE1/4 of the NW1/4 of Section 27-12-1; York County, Nebraska;
>
> and
>
> The West Half of Section 27-12-1
> The N1/2 of the SE1/4, Section 24-12-1
> The E1/2 of the SW1/4, Section 32-11-2 [all in Seward County, Nebraska].

On April 12, 1984, Wayne Zima leased different real estate from Floyd and Elverna Baack and Baack Farms, Inc., for the purpose of farming.

A rent of $70,000 per year was agreed upon. Of this sum, $20,000 was paid per agreement in April of 1984. The balance of $50,000 was to be paid on November 5, 1984. Two rent checks of $50,000 from the Zimas drawn upon the Cattle Bank were dishonored.

In lieu of cash rent, a verbal crop-share agreement was reached wherein Wayne Zima would give enough bushels of corn from the harvest to the Baacks to pay for the $50,000 rent payment. This was according to the affidavit and deposition of Floyd Baack. This decision was made just before Zima began harvesting the crop.

The corn crop was harvested and hauled to the Utica Co-op grain elevator by Zima. Scale tickets were issued in the sum of $50,000 to Zima and Baack. Zima had informed Floyd Baack that he would have the grain receipts reflect the Baack name.

The Utica Co-op then issued a $50,000 draft to Mike Baack, Ted Baack, and York State Bank. Mike and Ted are sons of Floyd Baack, and York State Bank is a secured creditor of the Baacks. The brothers were acting as employees of Baack Farms, Inc. The check was deposited at York State Bank, and

the proceeds were applied against the Baacks' loans.

The Cattle Bank brought this action for conversion of proceeds of collateral in the amount of $50,000 against the Baacks and York State Bank. The defendants answered that the Cattle Bank did not have a valid, perfected security interest in crops grown on ground leased by the Zimas.

The defendants then moved for summary judgment. Upon a hearing on the motions, the court ruled for the defendants and dismissed the petition.

"Conversion is any unauthorized or wrongful act of dominion exerted over another's personal property which deprives the owner of his property permanently or for an indefinite period of time." *Roth v. Farmers Mut. Ins. Co.*, 220 Neb. 612, 614, 371 N.W.2d 289, 291 (1985); *B. E. Implement Co. v. Valley Farm*, 216 Neb. 269, 343 N.W.2d 892 (1984).

"A conversion is any distinct act of dominion wrongfully asserted over another's property in denial of or inconsistent with that person's rights." *PWA Farms v. North Platte State Bank*, 220 Neb. 516, 519, 371 N.W.2d 102, 105 (1985); *Prososki v. Commercial Nat. Bank*, 219 Neb. 607, 365 N.W.2d 427 (1985). "The plaintiff in an action for conversion must allege facts showing a right to immediate possession of the property at the time of the conversion." *PWA Farms, supra* at 519, 371 N.W.2d at 105.

To make out an action in conversion, the Cattle Bank must show that it was the rightful owner of the corn crop. The Cattle Bank possessed some sort of security interest in the Zimas' property, as evidenced by security agreements and financing statements.

Neb. U.C.C. § 9-402 (Reissue 1980) provides in pertinent part as follows:

> (1) A financing statement is sufficient if it gives the names of the debtor and the secured party, is signed by the debtor, gives an address of the secured party from which information concerning the security interest may be obtained, gives a mailing address of the debtor and contains a statement indicating the types, or describing the items, of collateral. A financing statement may be filed before a security agreement is made or a security interest

> otherwise attaches. *When the financing statement covers crops growing or to be grown, the statement must also contain a description of the real estate concerned.*

(Emphasis supplied.)

The commentary to this section clarifies that the description of land in reference to crops functions as part of the description of the crops concerned. "[T]he security interest in crops is a Code security interest, like the pre-Code 'crop mortgage' which was a *chattel* mortgage." § 9-402, comment 1.

In the instant case, the security agreements and financing statements between the Zima and Cattle Bank parties secured corn growing or to be grown on certain parcels of land. The real estate leased by the Zimas from the Baacks involved separate and distinct parcels from those mentioned in the security agreements and financing statements. Accordingly, no security interest in favor of the Cattle Bank existed in the corn grown on the Baacks' property.

A security interest had not been created in the corn crop allegedly converted. Neb. U.C.C. § 9-203 (Reissue 1980) further provides that such interest could not have attached.

Section 9-203 provides in pertinent part as follows:

> (1) Subject to the provisions of section 4-208 on the security interest of a collecting bank and section 9-113 on a security interest arising under the article on Sales, a security interest is not enforceable against the debtor or third parties with respect to the collateral and does not attach unless
>
> (a) the collateral is in the possession of the secured party pursuant to agreement, or *the debtor has signed a security agreement which contains a description of the collateral and in addition, when the security interest covers crops growing or to be grown or timber to be cut, a description of the land concerned*; and
>
> (b) value has been given; and
>
> (c) the debtor has rights in the collateral.

(Emphasis supplied.)

Similarly, in the case of *Landen v. PCA of Midlands*, 737 P.2d 1325 (Wyo. 1987), a security agreement covered crops growing or to be grown on land described as follows:

" 'Various [s]ections, T25N and T26N, R76W, Albany County and various sections, T23N, T24N, T25N, and T26N, R68W, Platte County, Wyoming.' " *Id.* at 1329. The Supreme Court of Wyoming held that the security agreement failed to create a security interest in any crops grown by the Morgans (debtors) as it fell short of reasonably identifying the realty concerned. In so ruling, the court stated that the description did not satisfy either of these two tests:

> " '[A] real estate description in connection with crops is sufficient *if* it contains:
>
> " '1. the name of the land owner
>
> " '2. the approximate number of acres of the farm
>
> " '3. the county of the location of the land
>
> " '4. the approximate distance and direction of the farm from the nearest town or city.' " *United States v. Collingwood Grain, Inc.*, 792 F.2d 972, 974-75 (10th Cir. 1986), quoting *United States v. McMannis*, 39 B.R. 98 (Bankr.D.Kan. 1983) (emphasis in original).
>
> It also has been said that:
>
> " '[T]he cautious creditor cannot go wrong by using a section-township legal description, so long as it is accurate.' " Id. at 975, quoting Kansas Comment to Kan.Stat.Ann. § 84-9-402, which discusses *Chanute Production Credit Association v. Weir Grain & Supply, Inc.*, 210 Kan. 181, 499 P.2d 517 (1972).

737 P.2d at 1329.

The legal description in the instant case was accurate as to the named parcels. The scope of the agreement, however, was not enlarged to cover crops on the leased tracts of land. The Cattle Bank made no security filings that listed the legal descriptions of the Baack farm properties.

The Cattle Bank seems to argue in part that the grain was "inventory" being held by the Zimas that would be encompassed within its security agreement. With regard to classification of goods, Neb. U.C.C. § 9-109 (Reissue 1980) provides:

> Goods are
>
> . . . .
>
> (3) "farm products" if they are crops or livestock or

> supplies used or produced in farming operations . . . . If goods are farm products they are neither equipment nor inventory;
>
> (4) "inventory" if they are held by a person who holds them for sale or lease . . . .

In construing what is meant by the classifications listed under § 9-109, the court in *First State Bank v. Producers Livestock Marketing Assn.*, 200 Neb. 12, 16, 261 N.W.2d 854, 858 (1978), stated the following:

> Goods which are held for sale or lease are classified as inventory. § 9-109 (4), U.C.C. The Comment to section 9-109, U.C.C., states that the classifications are mutually exclusive and that the principal test to determine whether goods are inventory is whether they are held for immediate or ultimate sale. In borderline cases the principal use to which the property is put should be considered determinative.

The corn is properly classified as a "farm product." As such, it is not inventory because the terms are mutually exclusive as to the same person at the same time. The property cannot be classified as both farm products and inventory. § 9-109, comment 2.

There is no evidence in the record that the grain was held for sale or lease by the Zimas. It is important to note that the $50,000 check issued by the Utica Co-op was in the Baacks' names as well as that of York State Bank. It is this amount which was allegedly converted, yet the Zima name does not appear as the seller or lessor of the so-called "inventory."

The fact that the scale tickets were issued in the names of both Zima and Baack does not make Zima the owner of inventory. Neb. Rev. Stat. § 88-535 (Reissue 1987) states in part that "[a] scale ticket issued by a warehouse licensee shall be prima facie evidence of the holder's claim of title to the goods described in such ticket." The scale tickets accurately reflect coownership of the grain as between a lessor (Baack) and a lessee (Zima). The 19,619 bushels of growing corn from the Baacks' real estate clearly belonged to them as rent payment.

The evidence in this case does not support the finding of a material factual issue as to the ownership of the grain involved

in this action. No perfected security interest existed in the grain on behalf of the Cattle Bank; thus, its rights are clearly subordinate to those of the Baacks. The order of the district court granting summary judgment for the defendants and dismissing the petition was correct and is affirmed.

AFFIRMED.

GLORIA SUNDEEN, APPELLANT, V. GLADYS LEHENBAUER, APPELLEE.

428 N.W.2d 629

Filed September 9, 1988. No. 86-1020.

1. **Directed Verdict.** A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom.
2. **Trial: Appeal and Error.** Conduct of final argument is within the sound discretion of the trial court, and absent abuse of that discretion, the trial court's ruling regarding final argument will not be disturbed.

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

Alan L. Plessman for appellant.

William D. Sutter, of Barlow, Johnson, DeMars & Flodman, for appellee.

BOSLAUGH, WHITE, and SHANAHAN, JJ., and SPRAGUE and THOMPSON, D. JJ.

SPRAGUE, D.J.

This action arose out of an automobile accident near the intersection of 66th and P Streets in Lincoln, Nebraska. During the course of the trial, the testimony of five medical witnesses of the plaintiff was adduced through videotape depositions.

After all the evidence was submitted, plaintiff moved for a directed verdict on the issue of liability. The motion was overruled. The defendant then moved for an order prohibiting plaintiff's counsel from presenting to the jury, as part of his

closing argument, portions of the videotape depositions of the five medical witnesses. The trial court sustained defendant's motion and ruled that the videotapes could not be shown. The court further ruled that neither party could, during closing argument, read portions of written transcripts of any deposition of witnesses.

The jury returned a verdict in favor of the plaintiff in the amount of $6,800.

The plaintiff has appealed. The plaintiff makes the following assignments of error: (1) The district court committed reversible error in overruling plaintiff's motion for a directed verdict; (2) the district court committed reversible error in ordering that plaintiff's counsel not show to the jury, during his closing argument, any portion of the videotape depositions which had been played to the jury during the trial; and (3) the district court committed reversible error in ordering that neither party's counsel could, during his closing argument, read portions of the written transcripts of any depositions of witnesses.

A review of the record confirms the decision of the trial judge to submit the question of liability. An examination of the evidence indicates a jury could have found that the plaintiff did not maintain a proper lookout, used her turn signal in a misleading manner, and was contributorily negligent. A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom. *Stephen v. City of Lincoln*, 209 Neb. 792, 311 N.W.2d 889 (1981).

To what degree the trial judge may restrict the use of videotape depositions in final argument is a matter this court has never specifically addressed. The employment of videotape in the courtroom is becoming more and more prevalent. The potential uses of videotape are limited only by the imagination of the producer. The potential abuses of videotape are limited only by the supervision of the trial judge.

This court chooses to apply the general rule that conduct of final argument is within the sound discretion of the trial court, and absent abuse of that discretion, the trial court's ruling regarding final argument will not be disturbed. *State v. Reeves*,

216 Neb. 206, 344 N.W.2d 433 (1984). There was no abuse of discretion shown in this case. To the contrary, to allow playback of the medical testimony during summation could well have been prejudicial. The proposed use would have been tantamount to calling a witness to the stand in the middle of final argument.

The above rule of law applies equally to plaintiff's third assignment of error. We find that it was within the sound discretion of the trial judge to limit the reading of portions of depositions of witnesses.

AFFIRMED.

STEVEN J. ARANT, APPELLANT, V. G. H., INC., DOING BUSINESS AS SENOR MATIAS RESTAURANT AND LOUNGE, APPELLEE.

428 N.W.2d 631

Filed September 9, 1988. No. 87-094.

Legislature: Supreme Court: Public Policy. When the Legislature has spoken on a particular issue, generally it is not up to this court to disagree with its decisions on a purely policy basis.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Affirmed.

Ronald L. Brown, of Brown Law Offices, P.C., for appellant.

Gary L. Hoffman and Michael A. Fortune, of Erickson & Sederstrom, P.C., for appellee.

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

HASTINGS, C.J.

The plaintiff has appealed the judgment of the district court which dismissed his petition after sustaining the defendant's demurrer. Plaintiff asks that we impose dramshop liability by judicial fiat.

Plaintiff's amended petition alleged that on March 13, 1986, he was involved in an automobile accident in which a Robert Wondra suddenly swerved his oncoming vehicle into the path of plaintiff's automobile, resulting in a collision and injuries to the plaintiff. It was further alleged that Wondra was intoxicated at the time of the collision and that the defendant, doing business as Senor Matias Restaurant and Lounge, caused and contributed to Wondra's intoxication by selling him alcohol when defendant knew or should have known that Wondra was intoxicated and would pose an unreasonable risk to other drivers and pedestrians.

This court considered the issue of dramshop liability in *Holmes v. Circo*, 196 Neb. 496, 244 N.W.2d 65 (1976). In that case, the court specifically declined to judicially create dramshop liability in Nebraska:

> [I]n the final analysis, the controlling considerations are public policy and whether the court or the Legislature should declare it. We believe that the decision should be left to the Legislature. The Legislature may hold hearings, debate the relevant policy considerations, weigh the testimony, and, in the event it determines a change in the law is necessary or desirable, it can then draft statutes which would most adequately meet the needs of the public in general, while balancing the interest of specific sectors.

Id. at 505, 244 N.W.2d at 70. To date, the Legislature has not adopted liability for tavern owners, nor has this court changed its position on the issue since *Holmes* was decided in 1976. See, e.g., *Strong v. K & K Investments*, 216 Neb. 370, 343 N.W.2d 912 (1984).

Plaintiff raises several important considerations and excellent policy reasons in support of dramshop liability. He further argues that for the court to impose dramshop liability would be no different from our decision to abolish governmental immunity for tort liability, which was accomplished without the intervention of the Legislature. See *Brown v. City of Omaha*, 183 Neb. 430, 160 N.W.2d 805 (1968). The same may be said for negligent entrustment, *Deck v. Sherlock*, 162 Neb. 86, 75 N.W.2d 99 (1956), and the abolishment of interspousal tort immunity, *Imig v. March*, 203

Neb. 537, 279 N.W.2d 382 (1979). However, the Legislature previously had not addressed those issues.

That is not true as to dramshop liability. A dramshop act was enacted by the Legislature in 1881 and appeared as Rev. Stat. §§ 3859 through 3863 (1913). It was repealed in 1917 and replaced with wholly new dramshop provisions. See 1917 Neb. Laws, ch. 187, § 52, p. 448. In 1935, another new act, the Nebraska Liquor Control Act, Comp. Stat. §§ 53-301 to 53-3,107 (Supp. 1935), was passed, which, among other things, repealed the provisions of the statutes relating to dramshop liability. The Legislature has not seen fit to reenact such provisions. When the Legislature has spoken, it is not up to this court to disagree with its decision on a purely policy basis.

The judgment of the district court is affirmed.

AFFIRMED.

GRANT, J., concurring.

I concur in the result reached by the majority because I believe the trial court properly sustained defendant's demurrer on the grounds the amended petition does not state a cause of action.

Plaintiff's amended petition alleges that Robert Wondra was the operator of an automobile which "suddenly swerved from the westbound traffic lanes" and struck plaintiff's car. What Wondra did is not alleged. Cf. *Bourke v. Watts*, 223 Neb. 511, 391 N.W.2d 552 (1986).

With regard to the intoxication issue, plaintiff alleges that defendant's "bartender caused and contributed to the intoxication of Wondra by selling intoxicating alcoholic beverages to Wondra" when the bartender knew or should have known that Wondra was intoxicated. Plaintiff does not allege that defendant's agent sold such beverages to Wondra and that the beverages were consumed at a time leading to the accident in question by directly causing or increasing the level of Wondra's intoxication. The sale could be of unopened containers placed unused in Wondra's car, or of sales constituting " 'pouring alcohol into [the drunken customer]. . . .' " *Nazareno v. Urie*, 638 P.2d 671, 674 (Alaska 1981).

Plaintiff recognizes this problem when he improperly sets out in his brief facts which, if alleged, might constitute a

common-law action for negligence. Without any reference to any record before us, plaintiff states, "Investigation revealed that Robert Wondra had been drinking beer and shots of tequila at the bar," and "Plaintiff alleges that the Defendant's bartender was negligent in continuing to serve an intoxicated patron . . . ." Brief for appellant at 2. No such factual allegations were set out in the petition.

Plaintiff argues that "[t]he time has come for judicial adoption of dramshop liability . . . ." Brief for appellant at 8. Plaintiff appears to want this court to readopt the provisions of Comp. Stat. § 53-147 (1929). I do not think that is our function. Viewed strictly as a petition in law, plaintiff's petition does not set out facts, as distinguished from conclusions, which, in my opinion, state a cause of action, unless one wants to apply the strictest theories of absolute liability to the question before us.

SHANAHAN, J., dissenting.

The majority quite obviously feels that legislative policy and some prior decisions of this court dispose of Arant's appeal. Actually, the inescapable conclusion embodied in today's disposition is this court's indecision in failing to carry out a judicial duty toward the common law under the Nebraska Constitution.

Before addressing the constitutional considerations contained implicitly in the majority's rejection of dramshop liability, one must first analyze the majority's thesis: "When the Legislature has spoken, it is not up to this court to disagree with its decision on a purely policy basis." As a paraphrase, the Legislature has spoken; therefore, this court must be silent. The majority's premise is predicated on the repeal of the dramshop act in 1935, when the Legislature enacted the Nebraska Liquor Control Act. Thus, the majority of this court posits that the Legislature has voiced disapproval of dramshop liability based on common-law negligence. The nature of the particular dramshop act, Comp. Stat. § 53-147 (1929), supplies an interesting insight into the consequence of the 1935 repeal of the act:

> Any person who may be or shall be injured in any manner, whether in his person, property, means of support, health, loss of companionship, care or attention,

> or in any other manner whatever, by reason of the sale or traffic in intoxicating liquors or by reason of his own or another's intoxication, or by reason of any illegal use of intoxicating liquor which directly or indirectly causes or contributes to such injury, shall have a right of action against any persons, association or corporation who by himself, his agent or servant illegally sold, supplied or in any way furnished the intoxicating liquor that caused or contributed to such injury, for all damages sustained. . . .

§ 53-147.

Nebraska's dramshop act, reflected in § 53-147 above, statutorily imposed liability irrespective of fault, such as negligence. In 1935, without any qualifying language or other explanation for the repealing statute, the Legislature repealed the dramshop act. As this court noted in *Holmes v. Circo*, 196 Neb. 496, 244 N.W.2d 65 (1976), the 1935 repeal of the dramshop act eliminated statutory strict liability for injury proximately caused by selling liquor to an intoxicated person. Consequently, in 1935 strict dramshop liability, in the form of a statutory dinosaur, became legislatively extinct. However, as this court views the scene today, anything that looks like dramshop liability and walks like dramshop liability is a dinosaur, extinct since 1935. From the premise that the Legislature has abolished strict liability which had existed under a dramshop act, the majority infers that the Legislature has precluded dramshop liability based on common-law negligence. If there is a distinction between strict liability and negligence, the majority's conclusion is an absolute legal non sequitur. The Legislature's abolition of the dramshop act, as a part of dramshop liability, does not constitute legislative denunciation of all dramshop liability, which includes liability based on common-law principles pertaining to negligence. Hence, the Legislature has not "spoken" on the question of dramshop liability for negligence. It appears, however, that the distinction between statutory strict liability and common-law liability for negligence may no longer exist in Nebraska.

On the other hand, if statutory strict liability under a dramshop act is distinguishable from liability based on common-law negligence, there is ample Nebraska precedent to

impose liability in Arant's case. As a preface to such precedent, we must bear in mind:

> For actionable negligence there must be a defendant's legal duty to protect the plaintiff from injury, a failure to discharge that duty, and damage resulting from such undischarged duty. (Citations omitted.) " '[D]uty' is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff; and in negligence cases, the duty is always the same—to conform to the legal standard of reasonable conduct in the light of the apparent risk. . . .
>
> "A duty, in negligence cases, may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another." Prosser and Keeton on the Law of Torts, *Limited Duty* § 53 at 356 (5th ed. 1984).
>
> Foreseeability is a factor in establishing a defendant's duty, or, as expressed by Justice Cardozo in *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 394, 111 N.E. 1050, 1054 (1916): "[F]oresight of the consequences involves the creation of a duty . . . ." See, also, *Lock v. Packard Flying Service, Inc.*, 185 Neb. 71, 73, 173 N.W.2d 516, 518 (1970): " 'Foresight, not retrospect, is the standard of diligence. . . .' " (Citing and quoting from *Kolar v. Divis*, 179 Neb. 756, 140 N.W.2d 658 (1966).)

Holden v. Urban, 224 Neb. 472, 474-75, 398 N.W.2d 699, 701 (1987).

Turning to Nebraska precedential authority as a foundation for dramshop liability based on common law, one finds *Deck v. Sherlock*, 162 Neb. 86, 75 N.W.2d 99 (1956), in which this court recognized the common-law liability of a motor vehicle owner who entrusted his vehicle to an intoxicated person, or one likely to become intoxicated during use of the entrusted vehicle, when a third person was injured by the intoxicated person's operation of the vehicle. The *Deck* court expressed its reason for imposing liability on the negligent owner of the vehicle:

> The law requires that an owner use care in allowing others to assume control over and operate his automobile, and holds him liable if he entrusts it to, and permits it to be

> operated by, a person whom he knows or should know to be an inexperienced, incompetent, or reckless driver, to be intoxicated or addicted to intoxication, or otherwise incapable of properly operating an automobile without endangering others. [Citation omitted.] A motor vehicle is not an inherently dangerous instrumentality and the owner is not generally liable for its negligent use by another to whom it is entrusted to be used. Liability may arise, however, if the owner permits operation of his motor vehicle by one whom he knows or should have known to be so incompetent, inexperienced, or reckless as to render the vehicle a dangerous instrumentality when operated by such person. In order to establish such a liability on the part of an owner it must be shown that he had knowledge of the driver's incompetency, inexperience, or recklessness as an operator of a motor vehicle, or that in the exercise of ordinary care he should have known thereof from facts and circumstances with which he was acquainted.

Id. at 90-91, 75 N.W.2d at 102. Cf. *Wagner v. Mines*, 203 Neb. 143, 146-47, 277 N.W.2d 672, 674 (1979): "The act of allowing a person to operate a vehicle, knowing the driver to be inexperienced or incompetent, is negligence."

The common-law principles expressed in *Holden* and *Deck* have been transposed and applied to determine duty and liability in dramshop cases maintained on the theory of common-law negligence.

> When alcoholic beverages are sold by a tavern keeper to a minor or to an intoxicated person, the unreasonable risk of harm . . . to members of the traveling public may readily be recognized and foreseen; this is particularly evident in current times when traveling by car to and from the tavern is so commonplace and accidents resulting from drinking are so frequent.

Rappaport v. Nichols, 31 N.J. 188, 202, 156 A.2d 1, 8 (1959).

As observed in *Nazareno v. Urie*, 638 P.2d 671, 674 (Alaska 1981):

> [I]t is clear that the vendor is under a duty not to sell liquor where the sale creates a risk of harm to the customer or to

> others. [Citation omitted.] This conclusion flows from general principles of negligence law; every person is under a duty to avoid creating situations which pose an unreasonable risk of harm to others. In selling liquor to an intoxicated customer, where it is evident that the customer may injure himself or others as a result of the intoxication, a vendor is not acting as a reasonable person would. "The first prime requisite . . . is to stop pouring alcohol into [the drunken customer]. This is a duty which everyone owes to society and to law entirely apart from any statute." *Jardine v. Upper Darby Lodge No. 1973, Inc.*, 413 Pa. 626, 198 A.2d 550, 553 (1964). We therefore hold that there is a general common law duty, independent of statute, requiring vendors to conduct themselves with reasonable care and prudence when dispensing alcohol.

A continually growing number of courts in other jurisdictions have adopted a dramshop doctrine as a matter of common-law negligence, namely, a commercial supplier of liquor, such as a tavern owner or other licensed seller of liquor, may be liable for injury caused by the sale of liquor to an intoxicated patron, when the licensee should have known that such conduct created an unreasonable risk of harm to others. See, *Mitchell v. Ketner*, 54 Tenn. App. 656, 393 S.W.2d 755 (1964); *Ramsey v. Anctil*, 106 N.H. 375, 211 A.2d 900 (1965); *Elder v. Fisher*, 247 Ind. 598, 217 N.E.2d 847 (1966); *Pike v. George*, 434 S.W.2d 626 (Ky. 1968); *Adamian v. Three Sons, Inc.*, 353 Mass. 498, 233 N.E.2d 18 (1968); *Majors v. Brodhead Hotel*, 416 Pa. 265, 205 A.2d 873 (1965); *Alegria v. Payonk*, 101 Idaho 617, 619 P.2d 135 (1980); *Lopez v. Maez*, 98 N.M. 625, 651 P.2d 1269 (1982); *Ontiveros v. Borak*, 136 Ariz. 500, 667 P.2d 200 (1983); *Buchanan v. Merger Enterprises, Inc.*, 463 So. 2d 121 (Ala. 1984); *Largo Corp. v. Crespin*, 727 P.2d 1098 (Colo. 1986); *Rong Yao Zhou v. Jennifer Mall Rest.*, 534 A.2d 1268 (D.C. 1987). See, also, Prosser and Keeton on the Law of Torts, *Limited Duty* § 53 (5th ed. 1984 & Supp. 1988).

Notwithstanding Nebraska precedent, logically extended to provide a common-law remedy for Arant, this court's disposition of the present appeal, that is, deferral for a possible statutory remedy, is an error of constitutional dimension.

Under Neb. Const. art. V, § 9, a district court is granted "chancery and common law jurisdiction." This court has adamantly defended subject matter jurisdiction constitutionally conferred on the courts, especially the district courts; for example, the Legislature " 'cannot limit or take from [the] courts their broad and general jurisdiction which the Constitution has conferred . . . .' " *State, ex rel. Wright, v. Barney*, 133 Neb. 676, 680-81, 276 N.W. 676, 680 (1937), quoting from *State, ex rel. Sorensen, v. Nebraska State Bank*, 124 Neb. 449, 247 N.W. 31 (1933). See, also, *State, ex rel. Sorensen, v. State Bank of Minatare*, 123 Neb. 109, 114, 242 N.W. 278, 281 (1932): "It is an imperative duty of the judicial department of government to protect its jurisdiction at the boundaries of power fixed by the Constitution." Recently, relying on Neb. Const. art. V, § 9, we righteously retrieved from the Legislature's domain those matters pertinent to enforcement of district court orders for child support, when the Legislature made enforcement of such child support orders a function of a referee operating independent of the district court. See *Drennen v. Drennen, ante* p. 204, 426 N.W.2d 252 (1988). Yet, without the least concern, we now abandon to the Legislature the judicial power to provide a remedy for common-law negligence, although Neb. Const. art. II, § 1, states: "The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted." Nowhere does the Nebraska Constitution authorize transfer of judicial power to the Legislature.

Neb. Const. art. I, § 13, provides and expressly requires: "All courts shall be open, and every person, for any injury done him in his lands, goods, person or reputation, shall have a remedy by due course of law, and justice administered without denial or delay."

The majority of this court marches in lockstep with the court in *Holmes v. Circo*, 196 Neb. 496, 244 N.W.2d 65 (1976), namely, whether there should be dramshop liability is a policy decision entirely for the Legislature. Thus, this court has

wrapped itself in a robe of stare decisis. However, one of our decisions is, nevertheless, very conspicuously exposed, namely, *Myers v. Drozda*, 180 Neb. 183, 141 N.W.2d 852 (1966), which was decided a decade before *Holmes* and is still operative precedent. Before *Myers* there was *Muller v. Nebraska Methodist Hospital*, 160 Neb. 279, 70 N.W.2d 86 (1955), in which this court held that immunity of charitable corporations from tort liability, a court-created doctrine, had become an integral part of the law affecting such corporations to the extent that any change in immunity and tort liability should come from the Legislature. With the backdrop of *Muller*, when the question of charitable immunity was presented in *Myers v. Drozda, supra*, this court renounced judge-created charitable immunity from tort liability and stated:

> Defendant hospital relies upon our prior announcement that any change ought to be made by the Legislature. See Muller v. Nebraska Methodist Hospital, supra. If we endorsed legislation by silence, we erred. See, Art. I, § 13, Constitution of Nebraska [citations omitted]. Stare decisis "was intended, not to effect a 'petrifying rigidity,' but to assure the justice that flows from certainty and stability. * * * we would be abdicating 'our own function, in a field peculiarly nonstatutory,' were we to insist on legislation and 'refuse to reconsider an old and unsatisfactory court-made rule.' " Bing v. Thunig, 2 N.Y.2d 656, 143 N.E.2d 3.
>
> "* * * judges of an earlier generation declared the immunity simply because they believed it to be a sound instrument of judicial policy which would further the moral, social and economic welfare of the people of the State. When judges of a later generation firmly reach a contrary conclusion they must be ready to discharge their own judicial responsibilities in conformance with modern concepts and needs." Collopy v. Newark Eye & Ear Infirmary, [27 N.J. 29, 141 A.2d 276 (1958)].

Myers, supra at 186-87, 141 N.W.2d at 854.

Responsive to and consistent with Neb. Const. art. I, § 13, which most assuredly is a policy expression by the people of Nebraska, the court in *Myers v. Drozda, supra*, correctly

concluded that whether common-law liability exists is a question for the judiciary, not the Legislature. Moreover, the *Myers* court unequivocally rejected the position taken by the *Holmes* court and the majority of this court—existence of a cause of action recognized at common law must be deferred to the will of the Legislature. As this court observed in *State, ex rel. Sorensen, v. State Bank of Minatare*, 123 Neb. 109, 114, 242 N.W. 278, 280-81 (1932): "[C]ourtesy does not extend to the surrendering of judicial power." Deferral to the Legislature would be a comity of errors.

A precedential principle draws strength from its validity, not just its vintage. Nothing is more detrimental to the development of common law than veneration of inveterate error. If this court continues to clutch previous decisions, without critically examining those decisions, we shall persist in error to the point of perpetuation. As previously noted, an owner who gives his automobile's keys to an intoxicated person may be liable for injury resulting from operation of that automobile by the drunk driver. The act of a tavern owner, in furnishing liquor to a drunk patron who may be expected to drive an automobile, is legally indistinguishable from the act of one who gives his car keys to an incompetent driver. Both acts have as their common consequence the placing of an incompetent driver behind the wheel of an auto, thereby transforming an automobile into a dangerous instrumentality. Is one who sells liquor to an intoxicated person, further disabling the prospective driver, liable to one injured by the drunk driver? Unfortunately, this court has provided no answer to that question but has deferred to the Legislature. From the doors of this court, looking down the Capitol hallway toward the legislative chamber is accomplished only by turning one's back on our courtroom. Perhaps unwittingly, we have today rewritten the Nebraska Constitution: "All courts shall be open, and every person, for any injury done him in his lands, goods, person or reputation, shall have a remedy by due course of law, and justice administered without denial or delay, if the Legislature has given the injured person a key to the courtroom."

This court should have answered the question raised in Arant's appeal. In view of Nebraska precedent, namely, *Deck v.*

Sherlock, 162 Neb. 86, 75 N.W.2d 99 (1956), and the well-reasoned decisions of other courts, I believe that Arant's petition states a cause of action for common-law negligence which may be prosecuted in the courts of Nebraska.

WHITE, J., joins in this dissent.

OMAHA PUBLIC POWER DISTRICT, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, ET AL., APPELLANTS, V. NUCLEAR ELECTRIC INSURANCE LIMITED, A COMPANY REGISTERED IN THE ISLANDS OF BERMUDA, ET AL., APPELLEES.

428 N.W.2d 895

Filed September 9, 1988. No. 87-888.

1. **Declaratory Judgments: Parties.** A declaratory judgment action is applicable only where all interested persons are made parties to the proceedings.
2. **Declaratory Judgments.** A requisite precedent condition for obtaining declaratory relief is that the parties seeking declaratory relief have a legally protectible interest or right in the controversy.

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

Stephen G. Olson and Amy S. Bones, of Fraser, Stryker, Veach, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., and John McPhail for appellants.

Robert M. Spire, Attorney General, and Elaine A. Catlin for appellees Robert Kerrey et al.

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

GRANT, J.

This is an appeal from the district court for Lancaster County. It is the second appearance of the matter in this court. Plaintiffs-appellants, Omaha Public Power District (OPPD), as owner and operator of the Fort Calhoun nuclear generating station, and Nebraska Public Power District (NPPD), as owner and operator of the Cooper nuclear generating station, brought

this action pursuant to Neb. Rev. Stat. §§ 25-21,149 et seq. (Reissue 1985), seeking a declaratory judgment that the plaintiffs' purchase of excess property insurance from Nuclear Electric Insurance Limited (NEIL) would not violate Neb. Const. art XI, § 1, or art. XIII, § 3. Plaintiffs commenced this action in July 1985, in light of a proposed federal Nuclear Regulatory Commission (NRC) amendment which would require the districts to increase their nuclear liability insurance. The district court dismissed plaintiffs' petition, after finding that no case or controversy existed. The district court also held that even if plaintiffs' action was properly brought as a declaratory judgment, plaintiffs' proposed purchase of insurance would violate Neb. Const. art. XI, § 1.

Plaintiffs then filed their first appeal to this court. We remanded the cause to the district court for further proceedings because the proposed NRC amendment, considered contingent at the time of the district court's first order, had been adopted by the NRC. On September 21, 1987, the parties informed the district court by stipulation that the NRC amendment had been adopted and was to take effect on October 5, 1987, and the case was resubmitted to the district court on the same evidence adduced at the first trial. On September 23, 1987, the district court dismissed plaintiffs' petition, after determining that plaintiffs' proposed purchase of excess insurance did not involve either a contested issue or a positive denial of rights and that plaintiffs' actions, if properly brought as a declaratory judgment, would violate Neb. Const. art. XI, § 1. This second appeal follows.

On appeal, plaintiffs set out five assignments of error, which may be consolidated into three for the purposes of this appeal. Plaintiffs contend that the district court erred in finding that the constitutionality of plaintiffs' proposed action was not suitable for declaratory judgment in that there was no actual controversy among the parties before the court; that the district court erred in finding that even if plaintiffs' action was proper for a declaratory judgment, the participation of the plaintiffs in NEIL, a mutual company, would violate Neb. Const. art. XI, § 1; and that the district court erred in failing to address the issue of whether plaintiffs' participation in NEIL would violate

Neb. Const. art. XIII, § 3. We affirm the lower court's holding that the plaintiffs' action was not suitable for a declaratory judgment.

The record shows that OPPD and NPPD are political subdivisions organized under Neb. Rev. Stat. ch. 70 (Reissues 1981 & 1986). As owners and operators of nuclear power plants, plaintiffs are under the supervision of the NRC. The NRC is a federal agency which creates and enforces regulations, which, for the purposes of this appeal, include requirements for the minimum amount of nuclear liability insurance required for each station.

An NRC amendment to 10 C.F.R. § 50.54(w) (1988), effective October 5, 1987, requires commercial reactor licensees to increase the minimum amount of onsite insurance to $1.06 billion. Before this amendment, each plaintiff carried $585 million of property insurance. Plaintiffs' affidavits show that the only insurance carrier which could provide the excess insurance is NEIL, a mutual company organized under the laws of Bermuda. When first organized, NEIL had one class of membership. In March 1985, NEIL amended its bylaws to include a second class of "non-voting" members. Such a member would have no voting rights and would not receive a share of any distributions made by the company. However, nonvoting members would be entitled to a "premium refund" in lieu of a distribution by NEIL of its assets. Nonvoting members are subject to an assessment of retrospective premium adjustment to 7.5 times the annual premium on call by NEIL under certain circumstances.

On May 23 and June 6, 1985, plaintiffs separately submitted applications to NEIL for excess insurance coverage in response to the proposed new amendment. On June 28, 1985, NEIL informed both plaintiffs by separate identical letters that both of the applications for insurance had been received and accepted and that

> Neil has been advised that your counsel is unable to issue an unqualified opinion certifying the legality under Nebraska law of your District's participation in Neil. Accordingly you are advised that only upon receipt of a favorable decision by the Supreme Court of the State of

> Nebraska, clarifying in Neil's view your District's legal right to participate in Neil, will Neil issue an insurance policy to your District and submit an invoice for the coverage issued.

On July 1, 1985, the plaintiffs filed their petition for a declaratory judgment in the district court for Lancaster County. In their petition plaintiffs named as defendants: NEIL; Robert Kerrey, as Governor of the State of Nebraska; Robert Spire, as Attorney General for the State of Nebraska; and Ray A.C. Johnson, as Auditor of Public Accounts for the State of Nebraska.

The record shows that on August 30, 1985, the Governor, the Attorney General, and the Auditor of Public Accounts were served with summons. The record does not show, however, that NEIL was served, nor does the record indicate any praecipe for service on NEIL. NEIL did not file an answer, or make any appearance whatsoever. The Attorney General, on behalf of all other defendants-appellees, answered and asserted that they were "without knowledge or information sufficient to form a belief" as to plaintiffs' allegations, and further contended that plaintiffs' action was not ripe for judicial review.

In their first assignment of error, plaintiffs contend that the district court erred in finding that the constitutionality of plaintiffs' proposed action was not suitable for a declaratory judgment. Plaintiffs contend that even though NEIL has chosen not to participate in the action and has not taken any position before this court, the State defendants are necessary parties to represent the interests of the State so that a final determination of the matter, binding on the State, may be had. The State defendants, on the other hand, argue that neither the State nor the named defendants have an interest in the proceedings and that they should have no responsibility to oppose the plaintiffs' application for insurance.

Section 25-21,159 provides: "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration . . . ." We have held that the statute authorizing a declaratory judgment action is applicable only where all interested persons are made parties to the proceeding. *Baker v. A. C. Nelson Co.*, 185 Neb.

128, 174 N.W.2d 197 (1970); *Marsh v. Marsh*, 173 Neb. 282, 113 N.W.2d 323 (1962).

NEIL is the party with which the plaintiffs seek to contract for excess insurance policies. Our review of the record indicates that while NEIL was named a defendant in plaintiffs' petition, NEIL was not served with process, nor did NEIL participate in the proceedings. During trial, when questioned by the court concerning NEIL's absence, plaintiffs responded as follows:

> [PLAINTIFFS' COUNSEL]: They are not going to participate. They are an off-shore company. They take the position that they don't return to the United States for fear — I don't know how to phrase this exactly. I don't understand the laws of the Islands of Bermuda. These off-shore companies don't want to voluntarily appear for fear they are going to get served or something to that effect while they are in Nebraska or Iowa. So, they don't make appearances in any of the 50 states, except New York. They have an attorney in New York who represents them. I'm a little bit in the dark as to exactly why they refuse to do this, but they simply won't do it.
>
> THE COURT: And they never have appeared in this case?
>
> [PLAINTIFFS' COUNSEL]: No.

The crux of the plaintiffs' argument is that since NEIL has chosen not to participate in the proceedings, the State should be made an interested party. We do not agree. In their brief at 7, the State defendants set out that "[t]he state appellees do not believe that it is their responsibility to oppose the appellants' application for insurance . . . or to take NEIL's position merely because they were named as defendants in the lawsuit and because NEIL has refused to become involved in this lawsuit." We agree. The State cannot be made a substitute defendant.

The rendering of a declaratory judgment would not be binding on NEIL. The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding. *Zarybnicky v. County of Gage*, 196 Neb. 210, 241 N.W.2d 834 (1976); *Arlington Oil Co. v. Hall*, 130 Neb. 674, 266 N.W. 583 (1936);

§ 25-21,154.

NEIL was not before the district court and is not before this court. The only position that NEIL has taken, insofar as the record shows, is that NEIL will issue an insurance policy, in an unknown form, to plaintiffs, only if this court clarifies, to NEIL's satisfaction, plaintiffs' right to participate in NEIL. We find it totally unnecessary to subject this court to the subjective test of a nonlitigant. We think it would violate our settled law and policy to attempt to conform with that unknown standard—NEIL's satisfaction with our clarification.

In addition, we are not persuaded by plaintiffs' contention that a contract is involved in their dispute with NEIL. Section 25-21,150 provides that "[a]ny person interested under a . . . written contract or other writings constituting a contract . . . may have determined any question of construction or validity arising under the . . . contract . . . and obtain a declaration of rights, status or other legal relations thereunder." The only evidence in the record of a contract between the plaintiffs and NEIL is the separate letters dated June 28, 1985, which were sent by defendant NEIL to the plaintiffs in response to the plaintiffs' insurance applications. In those letters, NEIL stated that NEIL would issue an insurance policy "only upon receipt of a favorable decision by the Supreme Court of the State of Nebraska, clarifying in Neil's view your District's legal right to participate in Neil . . . ." There is also in the record an unsigned insurance policy form, but we see no evidence that NEIL would adopt that policy for plaintiffs. We cannot agree with the plaintiffs' contention that these letters constituted a contract within the meaning of § 25-21,150. The record shows, without dispute, that the parties have not yet entered into any contract. "A requisite precedent condition for obtaining declaratory relief is that the parties seeking declaratory relief have a legally protectible interest or right in the controversy." *Stahmer v. Marsh*, 202 Neb. 281, 284-85, 275 N.W.2d 64, 66 (1979). See, also, *Berigan Bros. v. Growers Cattle Credit Corp.*, 182 Neb. 656, 156 N.W.2d 794 (1968). Plaintiffs have no "legally protectible interest."

The necessary parties for an appropriate determination of this controversy are not before this court. Plaintiffs' action

presents no justifiable controversy suitable for a determination. The judgment of the district court dismissing plaintiffs' petition is affirmed.

AFFIRMED.

WHITE, J., concurs in the result.

GOTTSCH FEEDING CORPORATION, A NEBRASKA CORPORATION, AND ROBERT G. GOTTSCH, SR., APPELLANTS AND CROSS-APPELLEES, V. RED CLOUD CATTLE COMPANY, A COPARTNERSHIP, ET AL., APPELLEES AND CROSS-APPELLANTS.

429 N.W.2d 328

Filed September 16, 1988. No. 86-680.

1. **Jury Trials: Pleadings.** The general rule that whether a party is entitled to a trial by jury is determinable by the nature of the case at its inception does not apply when the initial petition has been superseded by an amended petition which changes the nature of the action.
2. **Breach of Contract: Actions.** An action for breach of contract is an action at law.
3. **Appeal and Error.** 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; the 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.
4. _____. In an action at law tried without a jury, the findings and conclusions of the trial court have the effect of a verdict and will not be set aside unless clearly wrong.
5. **Costs.** Generally, one may not recover the costs of litigation and expenses incident thereto unless provided for by a statute or a uniform course of procedure.
6. **Damages: Trial.** The applicability of the doctrine of avoidable consequences is a question of law.
7. **Appeal and Error.** Regardless of the scope of its review, the Nebraska Supreme Court has an obligation to reach an independent conclusion with respect to questions of law.
8. **Breach of Contract: Damages.** Where there has been a breach of a contract by one party resulting in a loss to the other, it is the duty of the damaged party to take all reasonable steps to reduce the amount of damages; one who fails to perform such duty may not recover the damages which could have been avoided had such duty been performed.

9. **Prejudgment Interest: Claims.** Prejudgment interest is allowable only where the amount of a claim is liquidated, that is, where no reasonable controversy exists as to the right to recover or as to the amount of such recovery.

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

Robert G. Pahlke, of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, P.C., for appellants.

Robert G. Simmons, Jr., of Simmons Raymond, Olsen, Ediger, Selzer & Ballew, P.C., and Raymond B. Hunkins, of Jones, Jones, Vine & Hunkins, for appellees.

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

CAPORALE, J.

Plaintiffs-appellants, Gottsch Feeding Corporation, a Nebraska corporation, and Robert Gottsch, Sr., both hereinafter collectively referred to as the owner, allege that the defendants-appellees and counterclaimant cross-appellants, Red Cloud Cattle Company, a Wyoming partnership, Edna Carpenter, individually and as trustee of the G. Willard Carpenter Trust, and Indian River Land & Cattle Company, another partnership, all hereinafter collectively referred to as the agister, damaged the owner by breaching a written contract obligating the agister to care for the owner's cattle. In its counterclaim, the agister alleges that the owner breached the contract by failing to pay as required by its terms. Following a bench trial, the court below offset various amounts it found to be due from one party to the other and entered judgment in favor of the agister in the amount of $49,953.75. In its appeal the owner asserts five errors, which may be summarized as claiming that the trial court erred in (1) computing its damages and (2) finding that the owner failed to avoid the consequences of the agister's known breach of the contract. The agister's cross-appeal asserts seven errors, which may be summarized as claiming that the trial court erred in (1) finding the agister breached its contract with the owner, (2) calculating the amount of damages the owner suffered, if a breach occurred, (3) failing to award prejudgment interest, and (4) speculating that the

agister may have stood in contempt of court. We affirm but modify the trial court's judgment such that the owner is to recover $53,910.50 from the agister.

At some unspecified time, Robert Gottsch, a farmer, rancher, and cattleman, engaged Tom Engleman, a professional cattle buyer, to purchase bred, that is, pregnant, cattle in Sioux and Goshen Counties, and to locate land for them in the same area. The owner considered the stock in the area to be excellent and the ranches to have "as good a grass as a man could purchase for livestock." Engleman learned that the agister was interested in leasing its ranch, consisting of about 40,000 acres of land straddling the border of Sioux County, Nebraska, and Goshen County, Wyoming, to a cattle owner, and put Edna Carpenter in touch with Gottsch. As a consequence, the parties entered into a written contract dated May 17, 1985.

So far as is relevant to our review, the contract obligated the agister to keep, properly care for, and feed the owner's breeding cattle for the calendar years 1985 through 1989, subject to there being "sufficient pasture." The agister was required to perform in a manner consistent with the "bred cow and calf raising practices in" the two counties in which its ranch was located, consult with specified animal nutritionists, provide specified supplemental feeds, and otherwise maintain the owner's herd at a proper nutritional level. The agister also guaranteed a 90-percent calf crop the first year and a 95-percent calf crop during the ensuing years, promising to pay the owner for any crop shortfall at the current market price at the time of weaning. The contract obligated the owner to pay $15 per month per cow pastured, no charge to be made for calves until weaned, and to pay a like amount per month per bull except during certain months of each year, during which period the bulls were to be fed at the agister's expense. Lastly, the contract gave the owner the right to remove its cattle from the agister's possession at any time the owner became dissatisfied with the care being provided.

The owner delivered a total of 2,839 head of cows to the agister, all but 68 of which had been purchased for the owner immediately prior to delivery, some from the agister itself. In addition, the owner delivered 98 of its bulls to the agister's care.

Some of the owner's cattle had been entrusted to the agister's care before the contract was executed.

However, even before the contract was signed, the owner became concerned about the care its cattle were receiving. By June of 1985 the owner undertook a systematic inspection of its herd. While, subsequently, some conditions about which the owner was concerned were corrected, others were not. As a consequence, by July 20 the owner put a full-time employee on the agister's ranch to monitor conditions, and began to look for other pastures but could not find any. In early August, Carpenter contacted Engleman and advised him that conditions were so dry the owner's cattle would have to be moved. At the owner's instruction, Engleman negotiated a longer stay so that another location could be found. The parties then agreed that the owner's cattle would be moved the first week in September. That, however, did not come to pass, and the owner instituted the action ultimately giving rise to these appeals, seeking at that time, in addition to damages for breach of contract, a temporary injunction preventing the agister from interfering with moving the owner's increased herd elsewhere. Because by then it was not being paid in accordance with the contract, the agister caused all of the owner's cattle to be moved into Wyoming, where, on September 9, it filed a lien against them notwithstanding the fact that the owner had been granted the right by the trial court to keep possession of its cattle upon posting a bond. The owner succeeded in obtaining a release of the Wyoming lien by posting a letter of credit with the Wyoming court. The petition the owner originally filed in the trial court was then abandoned, and the owner repled its cause as described in the first paragraph of this opinion. The owner's cattle were taken from the agister's care by no later than September 28, 1985; the move took a week of 16-hour days to accomplish.

Before proceeding further, it is necessary to determine the scope of our review. The general rule that whether a party is entitled to a trial by jury is determinable by the nature of the case at its inception, *Schmidt v. Henderson*, 148 Neb. 343, 27 N.W.2d 396 (1947), does not apply when the initial petition has been superseded by an amended petition which changes the

nature of the action. See *General Elec. Credit Corp. v. Richman*, 338 N.W.2d 814 (N.D. 1983), stating that the right to a jury is determined by the real, meritorious controversy between the parties as shown by all the pleadings.

As ultimately pled and tried, this action presented competing claims for damages arising from alleged breaches of the contract between the parties. As such, it is an action at law. *Fisbeck v. Scherbarth, Inc., ante* p. 453, 428 N.W.2d 141 (1988).

Thus, our review is controlled by two fundamental rules. First, 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; in such an instance 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. *Suess v. Lee Sapp Leasing, post* p. 755, 428 N.W.2d 899 (1988); *Fisbeck v. Scherbarth, Inc., supra.* Second, in such actions the findings and conclusions of the trial court have the effect of a verdict and will not be set aside unless clearly wrong. *Lutheran Medical Center v. City of Omaha, post* p. 802, 429 N.W.2d 347 (1988); *Fisbeck v. Scherbarth, Inc., supra.*

Given the foregoing legal realities, little purpose would be served by detailing the voluminous and conflicting evidence concerning the causes of the failure of the owner's cattle to fare as well while in the agister's care as the owner would have liked. According to some witnesses, the dry conditions, and to others the condition of some of the cows themselves, were the cause; according to still other witnesses, it was the failure of the agister to use sound and accepted drought management practices. Some witnesses attributed the diminished second-year calf crop to the owner's failure to provide enough bulls to service the herd. Suffice it to say that the record adequately supports the trial court's finding that the adult cows' weight loss was not shown to be the result of the care provided by the agister. By the same token, the record adequately supports the trial court's findings that as a result of the agister's deficient care, the owner's first year calf crop was underweight by a total of 168,560 pounds and that as a consequence, the owner was

damaged at the rate of $.675 per pound, or a total of $113,778. The record supports as well the trial court's findings that the agister's deficient care produced a second-year crop shortfall of 80 calves, as the consequence of which the owner, taking into account the savings occasioned by the shortfall, was damaged in the net amount of $156 per unborn calf, for a total of $12,480.

Contrary to the finding made by the trial court, however, the pleadings do not admit that the agister failed to return 21 head of the owner's cattle. Rather, the record establishes that the owner regained possession of all or most of these cattle by self-help means. There are further suggestions in the record that a third-party landowner may have gained possession of several head of the owner's cattle from the agister after the owner's self-help repossession, but the record fails to establish the number of cattle thus lost by the owner, if any, nor their aggregate value. Thus, the trial court's finding that the owner is entitled to damages in the sum of $8,868.75 for 21 head of cattle not returned is clearly wrong.

The trial court's finding that the owner is entitled to reimbursement for the $1,045 it spent in posting the letter of credit required to release the Wyoming lien is also clearly wrong. Generally, one may not recover the costs of litigation and expenses incident thereto unless provided for by a statute or a uniform course of procedure. See, *Holt County Co-op Assn. v. Corkle's, Inc.*, 214 Neb. 762, 336 N.W.2d 312 (1983); *Nat. Bank of Commerce Trust & Savings Assn. v. Rhodes*, 207 Neb. 44, 295 N.W.2d 711 (1980). The owner does not cite us to, and our independent research fails to disclose, any statute or uniform course of procedure which permits a Nebraska court to award expenses incident to litigation instituted in a sister state.

As to the agister's counterclaim, the record supports the trial court's finding that it was owed $72,142.50 in unpaid pasture rent and $205 for trucking expenses incurred on the owner's behalf.

In complaining of the trial court's computation of damages in its first assignment of error, the owner asserts it should have been compensated for the agister's delay in selling those cows

which were not impregnated, that is open cows, and for the wages the owner paid its employees to inspect the herd and monitor conditions at the agister's ranch. The difficulty with this position is that the contract does not require the agister to sell open cows by any particular time, and the record supports the trial court's finding that the agister did not violate any direction the owner gave in that regard. Neither does the contract provide that any expenses the owner incurred in monitoring the performance of the contract or in collecting evidence of nonperformance would be paid for by the agister.

This brings us to the owner's second assignment of error, which asserts that the trial court erred in its legal conclusion that the owner should have avoided the damages resulting from the calves' weight loss. We begin our analysis of this issue by noting that the owner does not assert the trial court erred in its factual finding that the weight loss produced damages of $113,778; rather, the owner's claim is that the trial court erred in applying the doctrine of avoidable consequences. The applicability of the doctrine of avoidable consequences, being a question of law, *Welsh v. Anderson*, 228 Neb. 79, 421 N.W.2d 426 (1988), is a matter concerning which this court has an obligation to reach an independent conclusion. *Lutheran Medical Center v. City of Omaha, post* p. 802, 429 N.W.2d 347 (1988); *Kearney State Bank & Trust v. Scheer-Williams, ante* p. 705, 428 N.W.2d 888 (1988); *Fisbeck v. Scherbarth, Inc., ante* p. 453, 428 N.W.2d 141 (1988).

In *Welsh v. Anderson, supra*, this court recently noted that the "doctrine of avoidable consequences" is but another name for that which is more commonly referred to as the failure to mitigate damages. *Id.* at 82, 421 N.W.2d at 428. It is the well-established rule in this state that a wronged party will be denied recovery for such losses as could reasonably have been avoided, although such party will be allowed to recover any loss, injury, or expense incurred in reasonable efforts to minimize the injury. *Olson v. Pedersen*, 194 Neb. 159, 231 N.W.2d 310 (1975). Clearly, a plaintiff's failure to take reasonable steps to mitigate damages bars recovery, not in toto but only for the damages which might have been avoided by reasonable efforts. In approving an owner's use of an

improperly constructed grain-drying and storage complex, this court, in *Smith v. Erftmier*, 210 Neb. 486, 493, 315 N.W.2d 445, 450 (1982), stated that

> where there has been a breach of a contract by one party resulting in a loss to the other, it is the duty of such other party to take all reasonable steps to reduce the amount of his damages. It is the rule also that where one fails to perform such duty he may not recover damages which would have been avoided had such duty been performed.

(Citations omitted.) See, also, *Loomer v. Thomas*, 38 Neb. 277, 56 N.W. 973 (1893). In this case, the record clearly demonstrates that the owner took a series of reasonable, measured, and in some ways extraordinary steps to protect its investment. While it is true that the owner had the contractual right to remove its cattle from the agister's possession, it was not limited to that right. The record shows that for a period of time at least, the agister attempted to meet the owner's requests; that the owner's efforts to find new pastures were unavailing; that even after the agister told the owner to move its cattle, the parties agreed to an extension of the time within which to accomplish the task; and that the task was in fact accomplished with reasonable dispatch. Unfortunately, these measures achieved only limited success, but the blame for this lies not with the owner, but in the whims of nature or the failure of the agister to meet its contractual obligations, neither of which the owner could reasonably avoid. See, e.g., *Shurtleff v. Pick & Co.*, 103 Neb. 414, 172 N.W. 46 (1919), which holds that while parties were negotiating settlement, the purchaser was not required to avoid the consequences of the seller's failure to deliver merchandise.

Under the circumstances, the doctrine does not apply, and the owner is entitled to those damages caused by the agister's deficient care. Thus, the owner's total damages as the result of the agister's breach of the contract between the parties are $126,258; $113,778 for the calves' weight loss and $12,480 for the calf crop shortfall.

We proceed now to a consideration of the assignments of error presented by the agister's cross-appeal. The group of assignments which assert, in sum, that the agister did not breach the contract and that the trial court erred in computing

the owner's damages are resolved by the foregoing analyses of the owner's appeal. The agister did breach the contract, and the computation of the owner's damages as a result thereof is as described previously.

The assignment of error asserting that the trial court erred in failing to award the agister prejudgment interest is equally without merit. Prejudgment interest is allowable only where the amount of a claim is liquidated, that is, where no reasonable controversy exists as to the right to recover or as to the amount of such recovery. *Lutheran Medical Center v. City of Omaha, post* p. 802, 429 N.W.2d 347 (1988); *Suess v. Lee Sapp Leasing, post* p. 755, 428 N.W.2d 899 (1988); *Otto Farms v. First Nat. Bank of York*, 228 Neb. 287, 422 N.W.2d 331 (1988); *Langel Chevrolet-Cadillac v. Midwest Bridge*, 213 Neb. 283, 329 N.W.2d 97 (1983).

While it is true that the agister proved a right to recover for the services it provided under the terms of the contract, the setoff the owner proved renders the agister's claim unliquidated. *Langel Chevrolet-Cadillac v. Midwest Bridge, supra.*

In the remaining assignment of error, the agister complains that the trial court, in the course of rendering its judgment, wrote that in view of its ruling on the owner's abandoned application for a temporary injunction, it was "unknown to [the trial] court why no contempt proceedings were initiated by [the owner]." The fact remains, however, that the owner, having regained control of its cattle, abandoned its pursuit of the temporary injunction and proceeded to more fruitful endeavors. Under the circumstances, we need not concern ourselves with what might have been.

Thus, the agister's entitlement under the contract is $72,347.50; $72,142.50 for unpaid rent and $205 for trucking expenses.

Accordingly, the owner is entitled to recover $53,910.50 (its damages of $126,258 less the $72,347.50 owed under the contract) from the agister rather than the agister's being entitled to $49,953.75 from the owner, as determined by the trial court. The judgment of the trial court is affirmed as so modified.

AFFIRMED AS MODIFIED.

GERALD M. SUESS, APPELLEE, V. LEE SAPP LEASING, INC., APPELLANT.

428 N.W.2d 899

Filed September 16, 1988. No. 86-760.

1. **Appeal and Error.** In a law action, the findings of the trial court have the effect of a verdict of a jury and will not be disturbed on appeal unless clearly wrong.
2. **Wages: Words and Phrases.** An employee's share of the profits of his employer under a profit-sharing plan can be wages within the meaning of Neb. Rev. Stat. § 48-1229(3) (Reissue 1984).
3. **Prejudgment Interest: Claims.** Prejudgment interest may not be recovered on an unliquidated claim.
4. _____: _____. A claim is unliquidated where a reasonable controversy exists either as to the right to recover or as to the amount of such recovery.
5. **Appeal and Error.** In an action at law tried without a jury, 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.
6. **Evidence: Proof.** The best-evidence rule applies only when the contents of a writing are sought to be proved.
7. **Evidence: Appeal and Error.** There is a presumption that the court, trying a case without a jury, in arriving at a decision, will consider such evidence only as is competent and relevant, and the Supreme Court will not reverse a case so tried because other evidence was admitted, when there is material, competent, and relevant evidence admitted sufficient to sustain a judgment of the trial court.
8. _____: _____. Generally, the admission of incompetent or irrelevant evidence is not reversible error where the cause is tried to the court without a jury.
9. **Wages: Penalties and Forfeitures.** The provision in Neb. Rev. Stat. § 48-1232 (Reissue 1984) that authorizes the trial court to order the defendant to pay an amount equal to the judgment recovered by the employee into a fund to be distributed to the common schools of this state is in the nature of a penalty and should not be invoked where there is a reasonable dispute as to the fact that wages are owed or as to the amount of the wages.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed in part, and in part reversed and remanded with directions.

Thomas R. Wolff for appellant.

Pamela K. Black, of North & Black, P.C., for appellee.

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

BOSLAUGH, J.

This case arises out of a controversy concerning an employment contract. The plaintiff, Gerald M. Suess, was employed as manager of the defendant, Lee Sapp Leasing, Inc., from March 1, 1983, until his resignation on November 16, 1984. The plaintiff brought this action to recover amounts he claims were due him under the contract of employment but which the defendant refused to pay.

The plaintiff had been employed in the leasing industry since 1971, and was employed by Custom Leasing. Apparently, he expected to resign from Custom Leasing on January 31, 1983, but instead, was terminated on December 31, 1982.

At some point, the plaintiff was contacted by an employment agency representing the defendant and was asked about any interest he might have in working for the defendant. The plaintiff first met with Lee Sapp, the president and principal stockholder of the defendant, in October of 1982. Subsequently, he had several additional meetings with Sapp prior to accepting employment. According to the plaintiff, he and Sapp reached an agreement in November of 1982 that the plaintiff would begin employment with the defendant on March 1, 1983.

There was no written contract of employment, and the parties disagree as to what were the terms of the contract of employment.

The plaintiff describes the November 1982 employment agreement between himself and the defendant as "pretty simple." The plaintiff testified that he was to receive a 20-percent ownership share in the company, subject to purchasing the stock at its book value as of December 31, 1982. His acquisition of ownership was also subject to his ability to perform adequately for the company during the first 6 months of 1983. The plaintiff acquired his stock in August 1983, paying for it by a promissory note which remained unpaid at the time of trial.

The plaintiff claims he was to receive 10 percent of the profits generated by the business, in addition to depreciation taken on a straight line basis. According to the plaintiff, the depreciation was to be added back into the "bottom line" prior to calculating his 10-percent share of the profits.

Besides profits, the plaintiff was to receive $20,000 as a base salary, plus bonuses to be paid on a quarterly basis, based on a percentage of the leases generated by him. Apparently, however, the exact percentage was never determined by the parties.

Although his employment did not commence until March of 1983, the plaintiff did some work for the defendant in January of 1983. The plaintiff was provided with an office at the company, a company car, and credit cards. The plaintiff "brokered" approximately $600,000 in leases for the defendant in January 1983, which resulted in a $40,000 profit to the leasing company. The defendant had agreed to pay the plaintiff 30 percent of the leases that he generated in January, and the plaintiff admits that he was paid his 30-percent share on "the first couple leases," but then only a 20-percent share. However, the plaintiff acknowledged that the arrangement to broker leases in January 1983 was an independent arrangement aside from his employment to begin March 1, 1983, and he makes no claim for any additional compensation for services performed in January of 1983.

Upon beginning his employment on March 1, 1983, the plaintiff and Lee Sapp renegotiated the employment agreement. The new agreement provided for an annual salary of $40,000, 10 percent of the bottom line profits plus any depreciation generated by the plaintiff, 3 weeks' vacation, a company car, expenses, health insurance, and 20 percent ownership of the company. The plaintiff admitted that he could be fired at will and had no right to expect continued employment. In turn, he recognized that he was not committed to employment with the defendant for any specific period or term.

The plaintiff testified that he and Lee Sapp discussed tax deferment items. According to the plaintiff, the tax deferment items were to be added back into the business profits before calculating his 10-percent share of the profits. One such item was rent increases. According to the plaintiff, the parties also determined that profits would be calculated by using internal financial statements prepared by the company on a monthly basis. According to Suess, he and Sapp analyzed each statement

on a monthly basis, and at that time, the plaintiff would calculate the depreciation due him on the leases he had generated and he would then add this amount to the "bottom line" figure. In addition to adding back the depreciation, the plaintiff stated that he would add in any expenses he found to be extraordinary. However, the plaintiff admitted that he had no agreement with Lee Sapp that Sapp would defer the determination of any of the expenses to him.

The plaintiff claims that in November of 1983, Lee Sapp told him that his 10 percent of the profits was going to be paid out and that the plaintiff was to produce documents indicating the depreciation he had created, and the plaintiff and Sapp would together arrive at a figure which would compensate the plaintiff from March through October 1983. As a result, the plaintiff prepared what is described in the record as exhibit 31. This document shows depreciation generated by the plaintiff from March to October of 1983 as $25,606. The plaintiff then added this amount to $174,676.34, the profit shown on the October 31 internal financial statement, resulting in a figure of $200,282. The plaintiff testified that when these figures were shown to Lee Sapp, Sapp agreed to pay the plaintiff $20,000 and that additional matters regarding profits for November and December of 1983 would be settled on the last day of 1983. The plaintiff testified that he understood that the matters to be settled at the year's end included "the rent expense and those types of things [that] should have been added in."

Lee Sapp, on the other hand, testified that the plaintiff was in financial trouble in November of 1983 and came to Sapp for assistance. After a review of his work for the company from March to October, Sapp agreed to give the plaintiff $20,000 as a gift, which money had absolutely no relation to profits and was not based on any financial statement or depreciation generated by the plaintiff. The plaintiff denies that he asked Lee Sapp for a $20,000 bonus even though that may be reflected in the minutes of a November 1983 board meeting.

Lee Sapp testified that an employee handbook, in effect during the time of the plaintiff's employment, required an employee to work for the company for an entire fiscal year before any profits would be paid to the employee. Lee Sapp

contended that because the plaintiff had not been an employee of the leasing company for 1 fiscal year at the time he received the $20,000, the money was not to be considered profits.

When asked on cross-examination whether he was aware of the written policy regarding 1 year of employment prior to receiving a share of the profits, the plaintiff stated, "That was never discussed."

The plaintiff talked with Lee Sapp in December of 1983 about the profits due him for November and December of 1983. According to the plaintiff, Sapp told him at that time that there were no profits for those months; that in November of 1983, he had been paid a $20,000 *bonus* that was charged back against November's profits, and that, in addition, a $40,000 dividend had been declared in December 1983 as well as a $5,000 bonus to Sapp, both of which were charged back against December profits.

The plaintiff claims it was his understanding that bonuses were to be paid *after* his 10 percent of the profits had been determined. He did agree, however, that Lee Sapp had told him that he would not be paid profits for November and December because, as chief executive officer, Sapp was going to consider October 31 the year's end for 1983. According to the plaintiff, the company's fiscal year normally ran from January 1 to December 31 of each year, and from the standpoint of the board of directors, it had never formally been changed. The plaintiff claims that he would have realized an additional $5,000 in profits had the fiscal year continued through December 1983. The company's year-end statement showed the fiscal year as ending December 31, 1983. When the plaintiff complained about this matter to Lee Sapp, Sapp responded, "That's the way I do it."

The plaintiff continued to work for the defendant in 1984, and, according to him, he met monthly with Lee Sapp to go over the company's profit-and-loss statements. At this time, the plaintiff would again add in the depreciation due him as well as unauthorized expenses. The plaintiff admits there are no financial statements which relate to these claimed monthly discussions.

In the summer of 1984, Lee Sapp and the plaintiff had a

disagreement about depreciation. Sapp, at that time, according to the plaintiff, was not going to pay him any further depreciation for leases that he might generate. The plaintiff claims that he and Sapp then reached an agreement whereby the plaintiff would be paid for the leases which were in place at the end of 1983 and which continued into the future. The plaintiff claims that the defendant received $8,100 per month of depreciation benefits in 1984 as a result of leases in place in 1983. He claims that Lee Sapp agreed to the $8,100-per-month figure and also agreed that exhibits 31, 34, and 35 list the leases for which the plaintiff claims responsibility. Lee Sapp, however, denied that those exhibits were representative of exclusive accounts of the plaintiff and, instead, claimed that many of the leases were generated by Sapp himself.

According to the plaintiff, in October of 1984, he gave Lee Sapp exhibit 30, showing profits generated by the leasing company for 1984. In addition, the exhibit shows the plaintiff's claims for add-back items for the purpose of determining his 10-percent share of the profits. The plaintiff claims that Lee Sapp did not dispute the figures or add-backs, but Sapp contends that he contested *all* such items.

Due to his repeated disagreements with Lee Sapp, the plaintiff resigned from his employment after working for the defendant for approximately 20 months. The plaintiff maintained his claim for profits for November and December of 1983, as well as for the year 1984. Lee Sapp claimed that since the plaintiff was never employed, in either 1983 or 1984, for an entire fiscal year, he was not entitled to any profits. After quitting in November of 1984, the plaintiff denied ever having been told of the "fiscal year rule." Had he been aware of such a requirement, he stated, he would not have voluntarily terminated his employment in November of 1984.

The matter was tried to the court, which found generally for the plaintiff. The trial court found that the plaintiff should recover $8,238.04 plus interest as wages for 1983; $28,192.86 plus interest as wages for 1984; and attorney fees in the amount of $12,495.67, for a total amount of $57,730.39, including interest. Also, the defendant was ordered to pay $45,234.72 to the clerk for the benefit of the common schools as provided in

Neb. Rev. Stat. § 48-1232 (Reissue 1984). The defendant has appealed.

Since this was a law action, the findings of the trial court have the effect of a verdict of a jury and will not be disturbed on appeal unless clearly wrong. *Havelock Bank v. Woods*, 219 Neb. 57, 361 N.W.2d 197 (1985).

The defendant's first assignment of error is that the trial court erred in applying the provisions of Neb. Rev. Stat. §§ 48-1228 through 48-1232 (Reissue 1984), known as the Nebraska Wage Payment and Collection Act. It contends that the profits the plaintiff claims are due him are not "wages" within the meaning of the act. Section 48-1229(3) defines "wages" as "compensation for labor or services rendered by an employee, *including fringe benefits*, when previously agreed to and conditions stipulated have been met by the employee, whether the amount is determined on a time, task, fee, commission, *or other basis*." (Emphasis supplied.)

There are two ways in which a share of profits is covered by this section. First, a profit-sharing plan can be considered a fringe benefit. "Fringe benefit" has been defined as: "Side benefits which accompany or are in addition to a person's employment such as paid insurance, recreational facilities, *profit-sharing plans*, paid holidays and vacations, etc. Such benefits are in addition to regular salary or wages and are a matter of bargaining in union contracts." (Emphasis supplied.) Black's Law Dictionary 601 (5th ed. 1979).

Even absent the fringe-benefit clause, the profits claimed by the plaintiff would still be wages within the meaning of the act. Wages are compensation for labor or services rendered by an employee, whether the amount is determined on a time, task, fee, commission, or other basis. In *Ives v. Manchester Subaru, Inc.*, 126 N.H. 796, 498 A.2d 297 (1985), the plaintiff sued his former employer for a percentage of the corporation's profits he claimed were due him pursuant to his employment agreement. On appeal, the court addressed the issue of whether the agreement to pay the plaintiff a share of the profits was an agreement to pay "wages."

> [The pertinent] statute defines wages as "compensation . . . for labor or services rendered by an employee, whether

> the amount is determined on a time, task, piece, commission or other basis of calculation." *Id.* It is obvious that the parties' agreement for a share of profits was intended to provide compensation for the plaintiff's labor and services, and it clearly may fall within the statute's reference to compensation calculated on some "other basis." Standing alone these are sufficient reasons to conclude that the plaintiff's share of profits was a wage under the statute, and we so hold. This result is comparable to the holding of the California Court of Appeal applying a similar definition of "wages" in *Ware v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 24 Cal. App. 3d 35, 44, 100 Cal. Rptr. 791, 798 (1972), *aff'd* 414 U.S. 117 (1973): "The profit sharing plan is clearly an inducement to employees by a plan through which they benefit financially in proportion to their compensation. Consequently, defendant's contributions to the plan should be considered wages within the meaning of [the] Labor Code."

126 N.H. at 800, 498 A.2d at 300-01.

In *Scoa Industries, Inc. v. Bracken*, 374 A.2d 263 (Del. 1977), the plaintiff-employee had entered into an oral contract under which he was to receive, in addition to a fixed weekly salary, a year-end commission or bonus based upon an agreed percentage of sales. The defendant employer refused to pay any amount. On appeal, the court found that the plaintiff's claim was barred by the 1-year statute of limitations for recovery upon a claim for work, labor, or personal services. The court said:

> The threshold question is whether the year-end bonus constitutes "wages" under 19 *Del.C.* § 1103. The answer is found in 19 *Del.C.* § 1101(a)(2), which defines "wages" as ". . . compensation for labor or services rendered by an employee, whether the amount is fixed or determined on a time, task, piece, *commission* or other basis of calculation." (emphasis added) It follows that the statutory causes of action arose at the time of discharge, were untimely filed, and are barred by the Statute of Limitations.

374 A.2d at 264. Thus, the court relied not on the "other basis" provision, but instead found the plaintiff's share of the profits to be a commission. Since the profit-sharing agreement appeared to be tied to the plaintiff's volume of sales, reliance on the "commission" provision was appropriate. In this case, the plaintiff's claim was to 10 percent of the profits of Lee Sapp Leasing, not to 10 percent of the leases sold by the plaintiff. It would be incorrect to call the plaintiff's right to a share of the profits a commission, but it comes within the "other basis" provision.

In *Yuille v. Pester Marketing Co.*, 9 Kan. App. 2d 464, 682 P.2d 676 (1984), two former employees brought a claim for unpaid wages against their former employer, Pester Marketing Company. Under its two-part compensation plan, Pester paid, in addition to an hourly wage, a bonus to its convenience store managers in the amount of $550 per month if the manager worked 54 hours per week and $500 per month if the manager worked 60 hours per week. Slightly lower bonuses were given for managers of gas-only stores. Prior to paying these bonuses, the defendant deducted amounts for cash and inventory shortages, bad checks, and theft losses. The plaintiffs filed claims with the Kansas Department of Human Resources, arguing that the deductions from their bonuses constituted deductions from their wages, which are prohibited by Kansas statute. Wages are defined by Kan. Stat. Ann. § 44-313(c) (1986) as "compensation for labor or services rendered by an employee, whether the amount is determined on a time, task, piece, commission or other basis less authorized withholding and deductions."

Unlike Nebraska's, the Kansas statutes go on to define "other basis." Under Kansas administrative regulation 49-20-1(F), "other basis" is

> " 'all agreed compensation for services including, but not limited to, profit sharing and fringe benefits for which the conditions required for entitlement, eligibility, accrual or earning have been met by the employee. Conditions subsequent to such entitlement, eligibility, accrual or earning resulting in a forfeiture or loss of such earned wage shall be ineffective and unenforceable. . . .' "

9 Kan. App. 2d at 467, 682 P.2d at 680.

The Kansas court found that the bonus was a "wage" within the statutory language, and further found that the deductions constituted a condition subsequent which was prohibited by the statute.

We think the trial court was correct in finding that the Nebraska Wage Payment and Collection Act was applicable in this case.

The defendant's next assignment of error is that the trial court erred in awarding prejudgment interest.

As to the $8,238.04 awarded as profit-sharing compensation for 1983, the court held that the plaintiff should recover interest on that amount at the legal rate of 14 percent for a period of 30 months. As to the $28,192.86 awarded as profit-sharing compensation for 1984, the court held that the plaintiff should recover interest on that amount at the legal rate of 14 percent for a period of 18 months. The total amount of interest awarded was $8,803.82.

Prejudgment interest may not be recovered in Nebraska on an unliquidated claim. A claim is unliquidated where a reasonable controversy exists either as to the right to recover or as to the amount of such recovery. *Otto Farms v. First Nat. Bank of York*, 228 Neb. 287, 422 N.W.2d 331 (1988); *Nixon v. Harkins*, 220 Neb. 286, 369 N.W.2d 625 (1985). In the present case, the plaintiff's claim was unliquidated under both criteria.

A reasonable controversy existed as to the plaintiff's entitlement to 10 percent of the profits of the defendant. The plaintiff claimed that, pursuant to the oral employment agreement, he was to receive 10 percent of the profits derived by the defendant during his employment. He claimed that the profits were to be determined as of November 1 of each fiscal year and were to be paid to him during the month of November. The defendant, on the other hand, contended that the plaintiff was required to work an entire fiscal year (January 1 to December 31) to be eligible to share in the profits of the company. The plaintiff's employment began in March 1983 and ended in November 1984. In addition, the employment manual for Lee Sapp Enterprises, which includes the defendant, specified that an employee must start and complete a year's

employment to be eligible for a share of the profits.

A reasonable controversy also existed as to the amount of recovery. "[A] claim is liquidated where the evidence, if believed, makes it possible to compute the amount due with exactness without reliance upon opinion or discretion. In such an instance prejudgment interest is recoverable." *Nixon v. Harkins, supra* at 293, 369 N.W.2d at 631.

In this case, it was not possible to compute the share of the profits owed to the plaintiff without opinion or discretion. The plaintiff contended that the profits were to be determined by the monthly in-house financial statement, while the defendant contended that the profits were to be based upon the year-end financial statement as prepared by outside accountants.

The plaintiff claimed that depreciation generated from leases he wrote on behalf of the company was to be added to the profits as shown on the financial statement. The defendant claimed that depreciation was to be added back to determine the plaintiff's share of the profits only after October 1983. The plaintiff also claimed that the increase in rent for the space occupied by the defendant and the amount of bonuses paid to employees should be added back to determine his share of the profits. The defendant disagreed. There was also a dispute as to whether the $20,000 paid to the plaintiff in November of 1983 represented his share of the profits, as he claims, or whether the $20,000 payment was unrelated to any profit-sharing agreement, as the defendant claims. The trial court found that the $20,000 was a bonus, and thus was credited against the amount owed to the plaintiff in 1983.

There were significant disputes as to the manner in which the profits were to be calculated, and it was not possible to compute the amount of the profits without opinion or discretion. This, along with the fact that a reasonable dispute existed as to the plaintiff's right to recover, prevents an award of prejudgment interest.

The defendant further contends that the trial court erred in assessing damages against it that were not sustained by the evidence.

The plaintiff claimed that in determining his share of the profits, depreciation, rent increases, losses on the Trump

account, and bonuses were to be added to the "bottom line" profits. Much of this was disputed by Lee Sapp. Essentially, the evidence presented questions of fact and credibility which were resolved, generally, against the defendant.

> 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.

Kearney Centre Inv. v. Thomas, ante p. 21, 25, 424 N.W.2d 620, 623 (1988); *Kubista v. Jordan*, 228 Neb. 244, 422 N.W.2d 78 (1988).

With respect to the Trump account, the trial court found that no losses were attributable to that account and that the amount claimed by the plaintiff as losses for that account and depreciation attributable to that account should not be added.

The defendant's final assignment of error is that the trial court erred in admitting various items into evidence which prevented it from receiving a fair trial.

The defendant first contends that the trial court erred in receiving into evidence the deposition of Lee Sapp. The plaintiff offered the deposition for purposes of impeachment, to which the defendant objected on the grounds that it was not the best evidence. The court overruled the objection and received the deposition for purposes of impeachment.

In its brief, the defendant argues that the deposition was not the best evidence because Sapp had already been on the witness stand for an extensive period of time. This argument fails because the best-evidence rule is completely inapplicable in this context.

The best-evidence rule has nothing to do with whether a deposition may be received after lengthy testimony by a witness in court. The rule applies only when the contents of a writing are sought to be proved. In this case, the deposition was offered only for impeachment purposes. The trial court correctly overruled the defendant's objection.

Next, the defendant argues that the trial court erred in receiving a settlement agreement between the plaintiff and the

defendant pertaining to a matter separate and apart from the issues in this case.

A separate partnership known as Sarpy Limited was formed during the time in which the plaintiff was employed by the defendant. This partnership resulted in litigation, which ended with the settlement agreement. The defendant objected on the basis of relevancy, but the trial court ruled the exhibit admissible on the basis that it related to the credibility of the defendant's witness. "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Neb. Rev. Stat. § 27-401 (Reissue 1985). The fact that the parties agreed in the settlement agreement that the plaintiff was entitled to $75,000 of the proceeds from the liquidation of Sarpy Limited was not relevant to whether the plaintiff was entitled to profits under his employment contract with the defendant. However,

> it is the settled law of this state that there is a presumption that the court, trying a case without a jury, in arriving at a decision, will consider such evidence only as is competent and relevant, and the Supreme Court will not reverse a case so tried because other evidence was admitted, when there is material, competent, and relevant evidence admitted sufficient to sustain a judgment of the trial court. . . . Generally, the admission of incompetent or irrelevant evidence is not reversible error where the cause is tried to the court without a jury.

(Citations omitted.) *Schuller v. Schuller*, 191 Neb. 266, 268-69, 214 N.W.2d 617, 620 (1974).

Next, the defendant alleges that the court erred in receiving exhibits 1 and 13, which were tabulations of what the plaintiff thought the profits of the defendant should have been for 1983 and 1984, respectively. The defendant objected to each exhibit on the basis that it was irrelevant and not the best evidence. The best-evidence rule was inapplicable. As to relevancy, the exhibits illustrated how the plaintiff believed the profits of the company were to be computed in determining his share. The fact that the defendant disputed the award did not make the

exhibits irrelevant.

Finally, the defendant objected to the plaintiff's questioning regarding the amount the plaintiff paid for his stock in Lee Sapp Leasing. The defendant objected on the basis that the evidence was irrelevant. Although irrelevant to the issue of whether a share of the profits was due and owing to the plaintiff, the ruling was not reversible error.

As a part of the judgment, the trial court ordered the defendant to pay an additional $45,234.72 to the clerk of the district court, to be distributed to the common schools of the state.

Section 48-1232 provides:

> If an employee shall establish a claim and secure judgment on such claim under section 48-1231, an amount equal to the judgment shall be recovered from the employer, if ordered by the court, and shall be placed in a fund to be distributed to the common schools of this state.

Under § 48-1232, it is discretionary with the court whether to order the employer to pay to the common school fund an amount equal to the judgment. Since this provision is in the nature of a penalty, we think the discretion should be exercised only in those cases in which there is no reasonable dispute as to the fact that wages are owed or as to the amount of the wages.

Under the circumstances in this case, we think it was error to require the defendant to pay an amount equal to the judgment recovered by the plaintiff for the benefit of the common schools of this state.

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

The plaintiff is allowed $9,107.73 for the services of his attorney in this court.

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

SHIRLEE RUSHTON McCOLLISTER, APPELLANT, V. HOWARD R. McCOLLISTER, APPELLEE.

428 N.W.2d 908

Filed September 16, 1988. No. 86-843.

Jurisdiction. Jurisdiction of the subject matter is the power to hear and determine cases of the general class to which the proceedings in question belong—the power to deal with the general subject involved in the action—and means not simply jurisdiction of the particular case then occupying the attention of the court, but jurisdiction of the class of cases to which the particular case belongs and the authority to hear and determine both the classes of actions to which the action before the court belongs and the particular question which it assumes to determine.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Reversed and remanded for further proceedings.

John R. Hoffert, of Knudsen, Berkheimer, Richardson & Endacott, for appellant.

Daniel J. Duffy, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee.

HASTINGS, C.J., SHANAHAN, and FAHRNBRUCH, JJ., and RILEY and OTTE, D. JJ.

RILEY, D.J.

This is an appeal in a conversion action from the district court for Douglas County.

Shirlee Rushton McCollister and Howard R. McCollister were divorced by decree of the Douglas County District Court on December 30, 1983. Under such decree Shirlee was awarded all of her personal effects. On September 4, 1985, Shirlee filed a petition in the same court, in which she alleged Howard had converted some 81 items of her personal property which had been awarded to her under the decree. The petition alleged that Shirlee was presently a resident of Omaha and Howard a resident of Overland Park, Kansas; the personal property in question was last known to be located in Colorado Springs, Colorado.

On October 4, 1985, Howard filed an answer denying that he converted said items and filed a counterclaim seeking the return

of several items of personal property he was awarded under the decree, and seeking monetary damages for certain blinds and drapes which were awarded to him but were allegedly taken by Shirlee.

On September 9, 1986, Howard filed a demurrer on the ground that the court had no jurisdiction of subject matter in this action. A hearing was held on September 16, 1986, at which time the demurrer was sustained and the case dismissed. Shirlee appeals.

The sole assignment of error is that the district court erred in sustaining the demurrer on the ground that it did not have subject matter jurisdiction.

Jurisdiction of the subject matter is the power of a court to hear and determine cases of the general class to which the proceedings in question belong. The power to deal with the general subject involved in the action does not mean simply jurisdiction of the particular case then occupying the attention of the court. *State ex rel. Bauersachs v. Williams*, 215 Neb. 757, 340 N.W.2d 431 (1983); *Lewin v. Lewin*, 174 Neb. 596, 119 N.W.2d 96 (1962), citing 21 C.J.S. *Courts* § 23 (1940).

The duty and power of the district court to act or otherwise assume subject matter jurisdiction is conferred by Neb. Const. art. V, § 9, which provides, "The district courts shall have both chancery and common law jurisdiction . . . ."

Neb. Rev. Stat. § 24-302 (Reissue 1985) provides that the district court shall have and exercise general, original, and appellate jurisdiction in all matters, both civil and criminal, except where otherwise provided.

In the instant case, the plaintiff alleged that the defendant converted her personal property. The issue therefore presented is whether district courts in Nebraska have subject matter jurisdiction over tort actions for the conversion of personal property. The answer is clearly in the affirmative.

Howard argues and acknowledges that even though the court may have jurisdiction, it may in its discretion decline to use it, as where the doctrine of forum non conveniens is applicable, the controversy between the parties is concerned with a trifle, and an abuse of legal process is inherent in the case. He cites 20 Am. Jur. 2d *Courts* § 93 (1965).

While discretion is an integral part of the duties conferred upon the judiciary in general, it does not apply here, where the directive to the trial court is mandated.

It is clear that the district court is a court of general jurisdiction with the power to hear and determine tort actions for the conversion of personal property. The trial court erred in sustaining the demurrer of Howard and dismissing the case.

The order of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

BERNIECE O. STRATTON, APPELLANT, V. CHEVROLET MOTOR DIVISION, GENERAL MOTORS CORPORATION, APPELLEE.

428 N.W.2d 910

Filed September 16, 1988. No. 86-890.

1. **Employment Contracts: Termination of Employment.** When employment is not for a definite term, and there are no contractual or statutory restrictions upon the right of discharge, generally, an employer may lawfully discharge an employee whenever and for whatever cause it chooses without incurring liability.
2. **Employment Contracts.** The fact that an employment contract is for an indefinite duration does not preclude job security provisions of an employee handbook from becoming part of the employment contract.
3. _____. If the language of an employee handbook constitutes an offer definite in form which is communicated to the employee, and the offer is accepted and consideration furnished for its enforceability, the handbook provision becomes part of the employment contract.
4. **Employer and Employee.** Language of an employee handbook may reserve discretion to the employer in certain matters or reserve the right to amend or modify the handbook provisions.
5. **Employment Contracts: Termination of Employment.** Except in cases where an employee is deprived of constitutional or statutory rights or where contractual agreements guarantee that employees may not be fired without just cause, there is no implied covenant of good faith or fair dealing in employment termination.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Affirmed.

Mary Kay Green and Clyde A. Christian for appellant.

Soren S. Jensen and J. Russell Derr, of Erickson & Sederstrom, P.C., for appellee.

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

WARREN, D.J.

This is an action brought by the plaintiff, Berniece O. Stratton, against the defendant, Chevrolet Motor Division of General Motors Corporation, for wrongful discharge from her employment with defendant. The action was tried to the district court, which found generally for the defendant and dismissed plaintiff's petition.

Plaintiff has appealed, assigning as error the failure of the trial court to find that defendant's employee handbook and personnel policies constituted a unilateral contract of employment which defendant breached by (1) failing to give this long-term employee a mandatory second chance by transfer to a new job; (2) failing to give plaintiff equal opportunity by restricting certain privileges and benefits to males only; and (3) violating its policy of fair dealing by placing plaintiff on probation, increasing her job duties, failing to give her adequate counseling and instruction while on probation, and terminating her employment before the end of the probationary period without notice. We affirm.

Stratton was employed by the Chevrolet Motor Division of GMC at its Omaha office from September 26, 1961, through February 13, 1981, initially as a PBX operator and receptionist, and after 1978, when defendant removed its PBX board and converted to a Centrex telephone system, as a clerk-stenographer. This position involved considerably more typing than previously, operating the telex system, answering the phone, filing, and handling customer contacts. Prior to November 1978, plaintiff's performance evaluations generally indicated an efficient, cooperative, and knowledgeable handling of her work duties, but her job performance rapidly deteriorated thereafter. Problem areas included gross and repeated mistakes in her typing of letters and reports, errors in

posting and filing, and generally poor job performance. This created repeated, time-consuming work on the part of the zone manager and his assistant in checking and proofreading all of plaintiff's work. She was advised that the situation had become intolerable and that her mistakes would be documented in the future. She was regularly evaluated (22 times in all) and counseled by her zone manager and his assistant, who gave her written recommendations for additional training and improvement. She declined to enroll in training classes. On November 3, 1978, her performance dropped to a level 4 (needs slight improvement). Following its internal guidelines for dealing with problem performers, defendant prepared performance improvement plans for plaintiff in May 1979 and again in September 1980, at which time Stratton was placed on probation for 90 days.

On November 21, 1980, Stratton was advised that she had until December 23, 1980, to increase her job performance to a level 3 (good, competent performance), or she would be dropped to level 5 (needs much improvement) and be replaced. She complained at various times that her workload was excessive, that her eyes bothered her, and that her psychiatrist attributed her mistakes to excessive job pressure. In December 1980, her probation was extended, but the problems with her work continued, and on February 5, 1981, her last evaluation dropped down to level 5. Finally, on February 13, 1981, plaintiff's employment was terminated. Plaintiff claims that her superiors acted in bad faith in increasing her job responsibilities while she was on probation, that she was given no additional training, and that the repeated evaluations and recommendations concerning her job performance constituted harassment.

It is well established in Nebraska that when employment is not for a definite term, and there are no contractual or statutory restrictions upon the right of discharge, generally, an employer may lawfully discharge an employee whenever and for whatever cause it chooses without incurring liability. *Johnston v. Panhandle Co-op Assn.*, 225 Neb. 732, 408 N.W.2d 261 (1987); *Mau v. Omaha Nat. Bank*, 207 Neb. 308, 299 N.W.2d 147 (1980). Here, plaintiff does not contend that

the initial employment was for a definite term or that there are statutory restrictions upon the right of discharge, but she seeks to avoid the consequences of the general rule regarding employment at will by claiming that certain provisions of the employee handbooks and the policies of defendant for handling problem employees modified her employment contract so as to give her additional rights, which her employer violated, citing principally *Morris v. Lutheran Medical Center*, 215 Neb. 677, 340 N.W.2d 388 (1983).

In *Morris*, this court concluded that the fact that an employment contract was for an indefinite duration did not preclude job security provisions of the employer's "Policy and Procedures" handbook from becoming part of the employment contract. The court there cited *Pine River State Bank v. Mettille*, 333 N.W.2d 622 (Minn. 1983), as authority for the proposition that there is no reason why the at-will presumption needs to be construed as a limit on the parties' freedom to contract.

In *Jeffers v. Bishop Clarkson Memorial Hosp.*, 222 Neb. 829, 387 N.W.2d 692 (1986), this court held that simply because the employee does not have an employment contract for a specific term does not deprive her of the benefit of grievance procedures as set forth in an employee handbook.

In *Johnston, supra*, the court expanded on the rules regarding modification of an employment contract by virtue of an employee handbook by holding that the language of an employee handbook must constitute an offer definite in form which is communicated to the employee, and which offer is accepted and consideration furnished for its enforceability, before a handbook provision becomes part of the employment contract. The court held that in such a case there was no requirement that the handbook be furnished to the employee at the time of hiring, because the employee's retention of employment with knowledge of new or changed conditions of employment could furnish the necessary consideration.

This court has further ruled that oral representations may, standing alone, constitute a promise sufficient to create contractual terms which could modify the at-will status of an employee. *Hebard v. AT&T*, 228 Neb. 15, 421 N.W.2d 10

(1988).

The plaintiff's contention insofar as it pertains to the defendant's personnel policies can be easily disposed of. It is based upon a bulletin, issued June 26, 1980, by the Chevrolet Motor Division central office to its regional and zone managers, entitled "Salaried Personnel Administration: Managing the Problem Performer." The bulletin consisted of 21 pages of recommendations and guidelines as to how to enable managers of salaried employees to deal effectively with problem employees. The steps to be followed by management were enumerated as follows: (1) identification of the performance problem; (2) communication with both the employee and management; (3) development of the plan of action to improve performance; (4) maintenance of active followup by the supervisor; and (5) determination of the final resolution, based on the results of the action taken.

It is clear that the bulletin relied upon by plaintiff was merely a series of suggested guidelines for management to follow in dealing with employees such as plaintiff. There is no evidence that Stratton knew of or was made aware of the bulletin in question during her employment, and it follows that the bulletin did not constitute an offer definite in form which was communicated to and accepted by the employee. The bulletin clearly did not constitute a rule, procedure, or policy binding upon the employer in the manner referred to in *Morris* or *Jeffers*. Nevertheless, the evidence is overwhelming that defendant did follow the guidelines in dealing with plaintiff, including that provision for final resolution which said:

> In those cases where the necessary level of performance, after a reasonable period of time, does not reach a level of "Good Competent" or better, the following alternatives should be considered:
>
> Probationary reassignment to another salaried position — this is appropriate only when the employe has had a prior record of thoroughly successful performance on other previous jobs.
>
> Termination of Employment: Management is the sole judge of the appropriate separation classification . . . .

The evidence established that probationary reassignment to

another salaried position was not a possible alternative because there was no such position available in the Omaha office, and, further, was not appropriate under that guideline because plaintiff's prior record of employment had been far from "thoroughly successful." The record presents an overall picture of a previously competent worker who, because of her inability or unwillingness to adapt to changing conditions of employment, became incompetent in her work and then sought to place the blame for that situation on her employer. The long and burdensome efforts of her employer to help plaintiff meet minimum standards of job performance are apparent in the evidence, and there is no evidence of discrimination for any reason other than incompetence.

Another publication upon which plaintiff relies is a booklet entitled "Working with General Motors," which highlights GM's most significant personnel policies and procedures. It is qualified by the following statement in the closing: "While the policies and procedures in the booklet do not constitute a legal contract, and do not modify the month-to-month employment relationship described on page 4, GM does believe they represent a good basis for a productive relationship between you and GM." Plaintiff also relies upon a handbook entitled "Your GM Benefits: A Handbook for Salaried Employes in the United States," which was furnished to plaintiff after its publication in 1977. The foreword specifically provides: "This booklet presents general information only and is designed to give you a broad picture of some of the added values of working with General Motors. Any reference to the payment of benefits is conditioned upon your eligibility to receive them." It is significant to note that in *Pine River State Bank v. Mettille*, 333 N.W.2d 622, 627 (Minn. 1983), the Minnesota court stated: "Language in the handbook itself may reserve discretion to the employer in certain matters or reserve the right to amend or modify the handbook provisions."

Plaintiff does not claim that any oral representations were made in connection with the handbooks. She instead claims that they guarantee her equal employment opportunity, protection from unilateral disciplinary action, and annual fair appraisals based on the key elements of her job and

performance standards. There is no evidence, other than plaintiff's own conclusionary statements, that plaintiff was denied the benefit of any of the foregoing "guarantees," but, as in *Mau v. Omaha Nat. Bank*, 207 Neb. 308, 314, 299 N.W.2d 147, 151 (1980), "none of the company books or documents provided plaintiff promised any definite term of employment, but only pointed out fringe benefits to the employee *if* he remained employed . . . ." Here, there is no "offer definite in form" which could be the basis for acceptance, consideration, and modification of the contract of employment.

Plaintiff makes the further claim that she was denied fair dealing and good faith in her job termination. The trial court determined otherwise, and properly so. Additionally, except in cases where an employee is deprived of constitutional or statutory rights or where contractual agreements guarantee that employees may not be fired without just cause, there is no implied covenant of good faith or fair dealing in employment termination. *Jeffers v. Bishop Clarkson Memorial Hospital*, 222 Neb. 829, 387 N.W.2d 692 (1986).

The evidence supports the finding that Stratton was an employee at will of Chevrolet. Her employment contract was not modified by publications furnished by her employer. She received regular evaluations. She began in 1978 to be rated below an acceptable level of performance, was eventually placed on probation, failed to improve, and was terminated. The termination was not a violation of her at-will employment.

The district court was correct in finding generally for the defendant and dismissing plaintiff's petition.

AFFIRMED.

SATELLITE DEVELOPMENT COMPANY, A PARTNERSHIP, APPELLEE, V. IVAN BERNT AND EDNA BERNT, APPELLANTS.

429 N.W.2d 334

Filed September 16, 1988. No. 86-970.

1. **Contracts: Specific Performance: Proof.** Before a court may compel specific performance, there must be a showing that a valid, legally enforceable contract exists. The burden of proving a contract is on the party who seeks to compel specific performance.
2. _____: _____: _____. To establish a contract capable of specific enforcement it must be shown that there was a definite offer and an unconditional acceptance.
3. _____: _____: _____. A party attempting to enforce a contract has the burden of proving there was a definite offer and an unconditional acceptance. Furthermore, for a binding contract to result from an offer and acceptance, it is essential that the minds of the parties meet at every point. Nothing can be left open for further arrangement.
4. **Specific Performance: Equity: Appeal and Error.** On appeal, an action for specific performance is an equitable matter, triable de novo to the Supreme Court.
5. **Contracts: Specific Performance: Real Estate.** A contract for the transfer of real property is valid and enforceable if the agreement contains the essential elements of a contract with sufficient certainty and definiteness as to the parties, property, consideration, terms, and time of performance.
6. **Contracts: Specific Performance: Proof.** The party seeking specific performance must show that he has substantially complied with the terms of the contract, including proof that he is ready, able, and willing to perform his obligations under the contract.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed in part as modified, and in part reversed and remanded for further proceedings.

Warren S. Zweiback and, on brief, Scott H. Rasmussen, of Zweiback, Flaherty, Betterman & Lamberty, P.C., for appellants.

Michele M. Frost, of Nelson & Harding, for appellee.

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

FAHRNBRUCH, J.

On appeal, Edna Bernt claims that the Douglas County District Court should not have ordered her to complete the sale

of the Bernt home to the appellee. We affirm in part but modify the trial court's decision, reverse it in part, and remand the cause for further proceedings.

Through Eileen Chance, one of its partners, Satellite Development Company, by written contract, purchased Ivan and Edna Bernts' home. The Bernts refused to proceed with the sale. Ivan, Edna's husband, became ill before the scheduled closing and died on April 30, 1986.

Satellite, a partnership, by amended petition, brought an action for specific performance of contract, and Edna was ordered to complete the sale within 45 days of the entry of the judgment.

On appeal, Edna claims the district court erred in (1) holding that the purchase agreement was a completed contract; (2) holding that a land contract prepared by a proposed buyer of real estate and never accepted by the vendor is sufficient to satisfy the statute of frauds; and (3) rendering a judgment against a personal representative when the action has not been revived as to the deceased party.

The Bernts' real estate agent, her associate, and the Bernts' adult daughter assisted the Bernts in 3 hours of negotiation and sale of their home. Both the Bernts and Chance, on behalf of Satellite, signed the purchase agreement. One real estate agent witnessed the Bernts' signatures and the second agent took their acknowledgment and notarized the Bernts' signatures. The signature of Chance was also witnessed by one of the agents.

The purchase agreement was on an "Omaha Area Board of Realtors Uniform Purchase Agreement" form. The top line of the form states: "This is a legally binding contract. If not understood, seek legal advice."

The parties agreed that the purchaser was to pay $57,000 for the home. Paragraph 5 of the agreement provides:

> $3,000.00 cash at closing; balance of loan on furnace to be taken over by buyer ($3,115.00) est. Approx $50,385.00 bal to [be] paid in monthly installments of $700.00 until Dec 1, 1985. Balloon payment of $28,000.00 to be paid on December 1, 1985. Seller to carry bal of approx $22,385.00 as 2nd mtg for 20 yrs. All amts carried at 11%.

On the back of the agreement where the signatures appear, it

is stated: "The seller accepts the foregoing proposition on the terms stated and agrees to convey title of the Property, deliver possession, and perform all the terms and conditions set forth." The Bernts added, "We accept the above stated except $3,000.00 cash @ closing to be increased to add $500.00. All other figures to be adjusted accordingly. Buyer to pay all closing costs except brokerage fee." Chance accepted the Bernts' counteroffer on behalf of Satellite by printing at the bottom of the agreement, "I accept the offer as countered." Chance then executed the acceptance. Chance's acceptance of the offer as countered was witnessed by one of the Bernts' agents. Chance deposited $500 earnest money with the Bernts' real estate agent.

Closing on the house was scheduled for April 1, 1985. Due to Ivan's illness, the closing date was continued to April 21, 1985, and then to May 3. The Bernts refused to proceed with the sale. On May 3, 1985, Satellite was notified that the Bernts were "no longer interested in a closing date, that they would not be selling their property."

Sometime before April 1, 1985, a document entitled "Contract for Installment Sale of Property" was sent to Edna Bernt. The parties refer to the document as the "land contract." It was prepared by Satellite and forwarded to the Bernts through their real estate agents. Edna Bernt testified she did not read the land contract. Upon receipt of it, she forwarded it to her attorney. That document was never executed by the Bernts.

After trial, the district court found that the uniform purchase agreement contained sufficient terms and conditions so as not to be an "agreement to make an agreement." The court found the proposed land contract was in substantial compliance with the purchase agreement. It did not evidence an irreversible unwillingness on the part of the appellee to complete the purchase in accordance with the terms and conditions of the purchase agreement, the trial judge held.

Before a court may compel specific performance, there must be a showing that a valid, legally enforceable contract exists. The burden of proving a contract is on the party who seeks to compel specific performance. *Pluhacek v. Nebraska Lutheran Outdoor Ministries,* 227 Neb. 778, 420 N.W.2d 286 (1988); *Rybin Investment Co., Inc. v. Wade,* 210 Neb. 707, 316 N.W.2d

744 (1982). To establish a contract capable of specific enforcement it must be shown that there was a definite offer and an unconditional acceptance. *Horn v. Stuckey*, 146 Neb. 625, 20 N.W.2d 692 (1945).

A party attempting to enforce a contract, therefore, has the burden of proving there was a definite offer and an unconditional acceptance. Furthermore, for a binding contract to result from an offer and acceptance, it is essential that the minds of the parties meet at every point. Nothing can be left open for further arrangement. See *Farmers Union Fidelity Ins. Co. v. Farmers Union Co-op. Ins. Co.*, 147 Neb. 1093, 26 N.W.2d 122 (1947).

On appeal, an action for specific performance is an equitable matter triable de novo to the Supreme Court. See, *Pluhacek, supra*; *III Lounge, Inc. v. Gaines*, 227 Neb. 585, 419 N.W.2d 143 (1988); *III Lounge, Inc. v. Gaines*, 217 Neb. 466, 348 N.W.2d 903 (1984).

Edna Bernt first claims the purchase agreement was not a completed contract but, rather, an agreement to make an agreement. She asserts that paragraph 5 of the purchase agreement contemplates that another agreement is to be executed, that agreement being the land contract.

The Restatement (Second) of Contracts § 24 at 71 (1981) defines an offer as "the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it."

In the present case, the terms of the purchase agreement constituted a valid offer as defined by the restatement. The offer was countered by the Bernts, and the counteroffer was accepted by Chance on behalf of Satellite. Therefore, structurally, the contract is sound.

A contract for the transfer of real property is valid and enforceable if the agreement contains the essential elements of a contract with sufficient certainty and definiteness as to the parties, property, consideration, terms, and time of performance. *In re Day Estate*, 70 Mich. App. 242, 245 N.W.2d 582 (1976).

The purchase agreement before us contains all the essential

elements with sufficient definiteness and certainty. The parties are identified in the agreement, including the name "Satellite Development Co." to be used on the deed. The contract contains a legal description and the street address of the property, and the personal property (drapes, rods, fixtures) included in the sale. In the agreement, the closing was set for April 1, 1985, with the purchaser to have possession April 1.

As previously stated, specific terms of payment were included in the offer to purchase. The Bernts altered those terms to the extent of the changes made in their counteroffer. The terms provide definiteness and certainty as to financing necessary to complete the sale. Additionally, the contract provides that 1985 taxes be prorated to date of possession, the amount and receipt of earnest money, the purchase price, title insurance, risk of loss, warranty as to condition, and the date of contracting.

Appellant argues that paragraph 5 of the contract requires that a future document be made with respect to details of the second mortgage. Paragraph 5 does not suggest that an agreement will be made in the future, but merely indicates that a second mortgage is a part of the transaction.

Three cases cited in the parties' briefs which hold that real estate purchase agreements were unenforceable because they were agreements to make agreements in the future are distinguishable from the present case. In *United States v. 308.56 Acres of Land, Etc., No. Dakota*, 520 F.2d 660, 661 (8th Cir. 1975), the agreement provides:

> "The exact amount and terms are between the parties to the said agreement, and will be determined when the McCluskey Canal goes thru the said property, and which time will include other properties than that above described. The exact price for the said property will be agreed upon between the parties at that time."

The U.S. Eighth Circuit Court of Appeals held that without containing a definite and ascertainable amount of land or compensation, the contract was unenforceable as written.

In *Pomponio v. Petrillo*, 59 N.Y.S.2d 65, 67 (1945), the court found that a document stating: " 'All of the foregoing is subject to the making and delivery of a formal contract of sale,

the terms of which shall be agreeable to the purchaser and seller' " was unenforceable.

The present case is also dissimilar to *Alward v. United Mineral Products Co.*, 197 Neb. 658, 661, 250 N.W.2d 623, 625 (1977). *Alward* held:

> An agreement to make a future contract is not binding upon either party unless all terms and conditions are agreed upon and nothing is left to future negotiation. When an agreement stipulates that certain terms shall be settled later by the parties, such terms do not become binding unless and until they are settled by later agreement.

It is clear that the case before us is not an agreement to make an agreement.

In the case before us, the parties did not provide that certain terms would be settled later. The later document, the land contract, neither vitiates nor validates the original agreement. There is no evidence that the acceptance or execution of the land contract was a precondition to performance under the purchase agreement. The land contract merely restates the terms set forth in the original agreement with elaboration, but does not present materially new terms. If there is any material difference between the unexecuted land contract and the purchase agreement, the purchase agreement is controlling. The land contract does not indicate an unwillingness on the part of Satellite to proceed with the terms of the purchase agreement.

We have held that the party seeking specific performance must show that he has substantially complied with the terms of the contract, including proof that he is ready, able, and willing to perform his obligations under the contract. See *Wallroff v. Dougherty*, 212 Neb. 178, 322 N.W.2d 392 (1982). Chance testified that Satellite was ready, willing, and able to proceed with the terms and conditions of the purchase agreement. There is no evidence to the contrary. Satellite has met its burden of proof. Therefore, specific performance is the appropriate remedy.

The record before us does not indicate whether the Bernts owned their home as tenants in common or as joint tenants. If

the Bernts were joint tenants, Ivan Bernt's interest passed to Edna Bernt upon his death. Neb. Rev. Stat. § 76-2,109 (Reissue 1986) states, "There shall be no severance of an existing joint tenancy in real estate when all joint tenants execute any instrument with respect to the property held in joint tenancy, unless the intention to effect a severance expressly appears in the instrument." Here there was no such intention shown. If the property was held in joint tenancy at the time of the agreement, Edna Bernt is presently its sole owner, and she must convey the same.

If the Bernts were tenants in common, then we cannot fully determine Edna Bernt's interest in the property. However, that issue is not before us. We need only determine that Edna Bernt contracted to sell the property, and she must do so.

The appellant's second assignment of error complains that the land contract was not accepted by the Bernts and, therefore, does not satisfy the statute of frauds. As previously stated, the land contract neither vitiates nor validates the purchase agreement. There is no need for the document to be accepted by the Bernts. The second assignment of error is without merit.

The district court decree orders that specific performance take place within 45 days of the decree. It further provides that Edna Bernt and the personal representative of the estate of Ivan Bernt "shall deliver a good and adequate Warranty Deed to plaintiff to the real property" within 45 days in accordance with the terms and conditions of the uniform purchase agreement, exhibit 1. Since not all of the consideration would be due within 45 days, it is obvious that the trial court did not intend to direct that the warranty deed be delivered within 45 days of its order but, rather, that it be delivered when the terms and conditions of the uniform purchase agreement require it. We, thus, affirm but modify the trial court's decree in regard to Edna Bernt.

Finally, the appellant claims the district court erred in rendering a judgment against Ivan's personal representative when the action had not been revived. That assignment of error is valid. The record does not reflect that the action was revived. Therefore, the district court had no jurisdiction over Ivan's personal representative, and the trial court's order directing the personal representative to deliver a good and adequate

warranty deed to Satellite is void, the trial judge's order is reversed in that regard, and the cause is remanded for further proceedings as to any interest Ivan Bernt retained if the case against him is revived.

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

NORMAN SCHUSTER AND MARILYN SCHUSTER, APPELLEES, V. LELAND BAUMFALK AND BONNIE BAUMFALK, DOING BUSINESS AS BAUMFALK BINS AND EQUIPMENT, APPELLANTS.

429 N.W.2d 339

Filed September 16, 1988. No. 86-985.

1. **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.
2. **Expert Witnesses: Appeal and Error.** The determination of the qualifications of an expert witness is largely a matter within the discretion of the trial judge, whose rulings on receiving and excluding an opinion will be reversed on appeal only when an abuse of discretion is shown.
3. **Directed Verdict: Negligence: Trial.** Ordinarily, the questions of negligence, contributory negligence, and assumption of risk are for the jury, but where the facts adduced with respect to those questions are such that reasonable minds can draw but one conclusion therefrom, a directed verdict is proper.
4. **Evidence: Trial.** Where reasonable minds may differ as to the conclusions or inferences to be drawn from the evidence, or where there is a conflict in the evidence, such issues must be submitted to the jury.
5. **Evidence: Trial: Negligence.** Before the defense of assumption of risk may be submitted to the jury, the evidence must show that the plaintiff (1) knew of the danger; (2) understood the danger; and (3) voluntarily exposed himself to the danger, which proximately caused the plaintiff's damage.
6. **Negligence.** Generally, one is contributorily negligent if (1) he breaches the duty imposed upon him by the law to protect himself from injury; (2) his actions concur and cooperate with actionable negligence of the defendant; and (3) his actions contribute to his injuries as a proximate cause.

7. **Directed Verdict.** A motion for a directed verdict must, for the purpose of decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence.
8. **Contracts.** Accompanying every contract is a common-law duty to perform with care, skill, reasonable expediency, and faithfulness the thing agreed to be done.
9. **Trial: Verdicts: Appeal and Error.** Where a party has sustained the burden and expense of trial and has succeeded in securing a verdict of the jury on the facts in issue, he has the right to keep the benefit of that verdict unless there is prejudicial error in the proceeding in which it was secured.

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

Alan L. Plessman for appellants.

Paul Korslund, of Everson, Wullschleger, Sutter, Sharp, Korslund & Willet, for appellees.

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

COLWELL, D.J., Retired.

Defendants appeal a $47,000 jury verdict and judgment against them involving their alleged negligent repair of plaintiffs' farm equipment (conveyor) while using a brazing torch, causing nearby loose silage and haylage to ignite, smolder, and hours later to burst into flame, damaging plaintiffs' buildings and equipment. We affirm.

There is little dispute concerning these facts. Norman and Marilyn Schuster, plaintiffs, conduct a farming and livestock-feeding operation on their farm near Pickrell, Gage County, Nebraska. Terry, their son and employee of 10 years, lives on the farm. Plaintiffs store silage and haylage (both hereafter called silage) in an 80-foot-tall silo. Silage is removed from the silo and transported to an outside livestock feed bunk by an electric powered mechanical system that includes a conveyor housed with other equipment in a shed adjacent to the silo. The conveyor is a metal trough, open at the top, with 14-inch sides installed at an angle and with one end (the west end) resting on the concrete floor near the silo base and the

other end elevated to a height of 5 feet. While stored in the silo, the silage is about 40 percent moisture. As needed, the feed is mechanically discharged from the base of the silo into the conveyor, where paddles attached to a moving chain push the feed along the conveyer to the feed bunk. Sometimes the silage falls from the conveyor onto the shed floor. Plaintiffs remove the accumulation of the silage periodically.

After 11 years' use, the conveyor needed repairs; the chain was broken, paddles were bent, and there was a hole in the base of the trough. On May 15, 1985, Terry requested defendant Leland Baumfalk, Pickrell, Nebraska, to repair the conveyor. For about 20 years, Leland had been in the business of the sale, repair, and maintenance of similar farm equipment, including welding and brazing. Leland arrived at the farm at about 10 a.m. with his employee, Gale Rickers, who had 8 years' experience in brazing.

The hole was repaired first. A 6-foot piece of 1/8-inch metal was cut to fully cover the hole in the base plate; this patch was then sealed into place by brazing it to the base and sides of the conveyor. Simply stated, brazing is a process to unite and seal metals together by melting a bronze rod at high temperature with an acetylene torch; the molten metal and a flux seal the metal patch to the conveyor. Brazing has a distinct odor. Heat radiates from the metal surfaces being brazed.

Terry was present when Leland and Rickers arrived at the farm. All three observed that there was an accumulation of loose silage in the shed, and, around the west end of the conveyor, it was more than 2 feet high. Before Rickers started brazing he pushed some of the silage aside—to about 12 inches away from the conveyor. The brazing to cover the hole in the plate took 25 to 30 minutes, during which time Terry was nearby. Rickers then repaired the chain and straightened some of the paddles, followed by pouring water over the paddles to cool them. When this was completed, the whole conveying system was mechanically started to see if it functioned. No visible evidence of fire or smoke was noticed by either Terry or Rickers at any time; however, there is conflict in the evidence concerning the presence of burning smells/odors. Rickers left the area about 12 p.m. Norman came to the farm about 11

a.m., after the brazing repairs were completed; he entered the shed and noticed a burning odor, but saw no evidence of fire. He checked the contents of the silo for a possible fire source, but saw no evidence of fire either in the silo or the shed; he made no further investigation for fire in the shed and moved no silage. Norman momentarily returned to the shed at about 5:30 p.m. and again noticed a burning odor, but assumed it was related to the brazing. Terry was also in the shed area about 5:30 p.m. and noticed the same odor, but attributed it to the brazing repairs. At about 4 a.m. on May 16, 1985, Terry was awakened by a passerby advising that the shed was on fire. The fire destroyed parts of the conveying equipment and damaged the silo. Following the fire an official investigation and written report of the fire was made by Jim Kuticka, chief investigator, Nebraska State Fire Marshal's office.

The 14 assigned errors are consolidated: The court erred in (1) allowing expert witness Peter Sturner to testify concerning the origin and cause of the fire; (2) allowing plaintiffs' expert witnesses Larry Donnling and Eugene Schoen to testify concerning values; (3) sustaining plaintiffs' objection to the testimony of defendants' expert witness, Homer Cline, on the issue of values; (4) refusing to submit to the jury the issue of plaintiffs' assumption of risk; (5) denying defendants' motions to dismiss and for a directed verdict; and (6) denying defendants' motion for judgment notwithstanding the verdict or, in the alternative, for a new trial.

Plaintiffs' allegation of negligence as submitted to the jury was that defendants failed to clear the area of combustible material where they were doing brazing when they knew or should have known that such failure constituted an unreasonable risk of fire.

Defendants' affirmative defense of contributory negligence as submitted to the jury was that (1) plaintiffs failed to seek out the source of smoke detected at or about 5:30 p.m. on May 15, 1985, and (2) failed to clean and clear silage from the shed after detecting the smell of smoke in the evening of May 15.

" '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.' " *McKinstry v. County of Cass*, 228 Neb. 733, 739, 424 N.W.2d 322, 327 (1988).

Ordinarily, negligence is a question of fact and may be proven by circumstantial evidence. All that the law requires is that the facts and circumstances proved, together with the inferences that may be legitimately drawn from them, shall indicate, with reasonable certainty, the negligent act complained of. *Porter v. Black*, 205 Neb. 699, 289 N.W.2d 760 (1980).

EXPERT WITNESSES

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Neb. Rev. Stat. § 27-702 (Reissue 1985).

The determination of the qualifications of an expert witness is largely a matter within the discretion of the trial judge, whose rulings on receiving and excluding an opinion will be reversed on appeal only when an abuse of discretion is shown. *Herman v. Lee*, 210 Neb. 563, 316 N.W.2d 56 (1982).

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. Neb. Rev. Stat. § 27-704 (Reissue 1985). The admissibility of expert testimony is ordinarily within the discretion of the trial court, and its ruling will be upheld in the absence of an abuse of discretion. See *Shover v. General Motors Corp.*, 198 Neb. 470, 253 N.W.2d 299 (1977).

Plaintiffs' witness Peter Sturner, Lincoln, Nebraska, had been employed for 5 years by Midwestern Fire Consultants, Inc., to make fire investigations to determine cause and origin of fires. His qualifications included a B.A. degree in sociology; employment as an investigator for the Nebraska State Fire Marshal's office from 1976 to 1981, including 3 months as acting State Fire Marshal; attendance at many seminars on fire investigations and educational courses; and a certificate from the International Association of Arson Investigators. Sturner was present during a part of the in-court testimony.

In addition, he had reviewed the official report of Jim Kuticka; examined photographs of the burned conveyor and general area; and reviewed the depositions of witnesses Norman Schuster, Terry Schuster, Leland Baumfalk, and Gale Rickers, which Sturner described as normal investigative procedures that he followed. Sturner had previously investigated other similar fires. After defendant was granted voir dire, Sturner was permitted to testify that the fire originated around the west end (resting on the concrete) of the conveyor in the shed and that "the cause of the fire is from heat radiating from the brazing process coming in contact with the silage or combustible material." Sturner also testified that electrical sources and spontaneous combustion were possible sources of fire but not probable sources of causing this fire.

Over further objection, Sturner testified,

> As I understand the brazing process, you heat the metal and then you have in this particular case bronze was used to form the weld, the mechanism with which to fasten the metal plate. Bronze melts at a temperature of between 1300 and approximately 1900 degrees Fahrenheit, so you would have to heat the metal that you're going to put the bronze onto at least to that particular degree to get the bronze to melt into there. Silage or haylage, either way, would burn at approximately 350 to 450 degrees. . . . 1300 to 1900 degress [sic] that the brazing would create would be certainly enough to ignite that if it was close enough.
>
> . . . .
>
> . . . [T]he metal was heated during the brazing process with the torch. This metal is going to have some heat to it, and the heat is going to radiate out to the silage and ignite the silage.
>
> . . . .
>
> . . . It's going to radiate horizontally, and it's going to go up and down the length of the metal as well of [sic] the conveyor.
>
> . . . .
>
> . . . [T]he silage would probably have to be within two or three feet in order to ignite.
>
> . . . .

. . . It would tend to smolder first.

. . . .

. . . It can go on for several hours to more than a day or two before it breaks out.

. . . .

. . . The right combination of air, the right combination of fuel would cause it to burn.

Larry Donnling, operations manager of Huskerland Agri Systems, Geneva, Nebraska, with more than 24 years of experience in the sales, maintenance, and repair of cattle-feeding systems, installed plaintiffs' equipment, and Donnling serviced that equipment (exclusive of the silo) 1 year before the fire. Donnling was a qualified expert to testify on the cost of repairs and damages.

Eugene Schoen has been owner of Gene's Trenching and Electrical, Pickrell, Nebraska, for 9 years. He has been active in the sale and repair of farm electrical support systems, and he had repaired the electrical components of plaintiffs' feed conveyor system about six times. Schoen was qualified to give his opinion on the value of the electrical equipment before the fire. It is further noted that the objection to the question regarding Schoen's opinion was not clear, i.e., "It's already asked and answered, and no foundation to go beyond that."

There was no error in allowing witnesses Sturner, Donnling, and Schoen to testify; their credibility was for the jury.

Homer Cline was the only expert witness called by defendants on the issue of values and damages. For 7 years he had been employed as an appraiser for the Gage County assessor. A part of the foundation for Cline's proposed opinion was a description of the procedures he followed as a county tax appraiser: He personally examined the improvements, measured the buildings for square footage, established the age of the buildings, fixed a depreciation factor, and applied those factors to the Marshall-Swift manual, which is required to be used by all Nebraska county assessors. The resulting figure is taken as the fair market value of the improvement. Upon plaintiffs' voir dire, it was established that Cline's proposed opinion on value was arrived at "for purposes of arriving at an assessed value for tax purposes for Gage County, Nebraska."

The trial judge properly excluded that part of Cline's testimony. See *Lienemann v. City of Omaha*, 191 Neb. 442, 215 N.W.2d 893 (1974).

ASSUMPTION OF RISK AND CONTRIBUTORY NEGLIGENCE

"Ordinarily the questions of negligence, contributory negligence, and assumption of risk are for the jury, but where the facts adduced with respect to those questions are such that reasonable minds can draw but one conclusion therefrom, a directed verdict is proper." *Garcia v. Howard*, 200 Neb. 57, 60, 262 N.W.2d 190, 192 (1978).

Where reasonable minds may differ as to the conclusions or inferences to be drawn from the evidence, or where there is a conflict in the evidence, such issues must be submitted to the jury. *Hansen v. Hasenkamp*, 192 Neb. 530, 223 N.W.2d 44 (1974).

Defendants argue that plaintiffs knew and comprehended the danger of fire, but voluntarily left their property exposed to the danger of fire, and they allowed the fire to damage their property.

One who knows of a dangerous condition, appreciates its dangerous nature, and deliberately exposes himself to the danger assumes the risk of injury from it. *Rodgers v. Chimney Rock P.P. Dist.*, 216 Neb. 666, 345 N.W.2d 12 (1984).

The defendants had the burden to prove the issue of assumption of risk. Before the defense of assumption of risk may be submitted to the jury, the evidence must show that the plaintiff (1) knew of the danger; (2) understood the danger; and (3) voluntarily exposed himself to the danger, which proximately caused the plaintiff's damage. *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 412 N.W.2d 56 (1987).

On May 15, 1985, plaintiffs knew that the loose silage on the shed floor was combustible material creating a possible fire hazard condition unless all persons in that immediate shed area, at all times and for whatever purpose or mission, exercised caution and care to avoid igniting that material. Plaintiffs knew that defendants were experienced in brazing farm machinery and equipment. Plaintiffs did not know what procedures and precautions defendants would follow while making the repairs

to the conveyor. Rather, plaintiffs relied upon defendants to take such precautions as were necessary under the circumstances and to use due care acceptable to the trade in making the brazing repairs. Under those circumstances, plaintiffs neither had knowledge of the danger of fire that defendants might cause while making the repairs nor voluntarily exposed themselves to the risk. This was neither assumption of risk as a matter of law nor a jury fact question. At most, this evidence presented negligence and contributory negligence questions of fact which were duly submitted to the jury by the court's instructions. The trial judge properly ruled that assumption of risk was not an issue.

Generally, one is contributorily negligent if (1) he breaches the duty imposed upon him by the law to protect himself from injury; (2) his actions concur and cooperate with actionable negligence of the defendant; and (3) his actions contribute to his injuries as a proximate cause. *Lynn v. Metropolitan Utilities Dist.*, 225 Neb. 121, 403 N.W.2d 335 (1987).

There is evidence, if believed by the jury, supporting defendants' claim of contributory negligence that plaintiffs knew that silage was combustible material, that it was piled up near and around the conveyor, and that the brazing repair process involved intense heat that was a possible fire hazard which could cause ignition of the silage. Plaintiffs at no time either moved or removed the silage from the area of the conveyor. The brazing process itself has a distinctive odor. When Norman came to the shed at 11 a.m., the conveyor brazing repair was completed. Norman testified that upon entry into the shed, he said to Terry, "I can smell hay burning," and Terry said, "Well, we welded on the conveyor." Norman also testified that he "could smell some smoke or something" and he could "smell hay burning." This smell reminded Norman of a spontaneous combustion fire in the silo 2 years before, so he took the precaution of starting the silo feeding machinery to check for evidence of fire in the silo; he found none. Norman saw no evidence of fire in the shed. At about 5:30 p.m. on the same day, Norman momentarily reentered the shed again to get a wrench and noticed the same smell, which he again attributed to the brazing repairs; he saw nothing unusual;

and he made no further investigation of the odors and took no other precautions by moving or removing the loose silage.

From the record, there is conflict in the evidence on this issue. Defendants had not established plaintiffs' contributory negligence as a matter of law, and it was a fact question as later submitted to the jury.

MOTIONS

Defendants contend that the court erred in denying their motions to dismiss and for a directed verdict made at the close of plaintiffs' case in chief and at the close of all evidence—particularly (1) that plaintiffs failed to prove a prima facie case of negligence and (2) that as a matter of law plaintiffs assumed the risks and they were contributorily negligent in a manner more than slight.

A motion for a directed verdict must, for the purpose of decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence. *Hoefer v. Marinan*, 195 Neb. 477, 238 N.W.2d 900 (1976).

The issues of assumption of risk and contributory negligence having been heretofore discussed, we turn to plaintiffs' burden to prove the negligence issues of (1) defendants' duty to plaintiffs, (2) breach of duty, (3) causation, and (4) damages. *McKinstry v. County of Cass*, 228 Neb. 733, 424 N.W.2d 322 (1988).

First, defendants argue that there was no proof that they had the alleged duty to "clear the area of combustible material where they were doing brazing when they knew or should have known that such failure constituted an unreasonable risk of fire."

There is no merit to this claim. "Unless he represents that he has greater or less skill or knowledge, one who undertakes to render services in the practice of a trade is required to exercise the skill and knowledge normally possessed by members of that trade in good standing in similar communities." (Syllabus of the court.) *Doupnik v. Usher Pest Control Co.*, 217 Neb. 1, 346

N.W.2d 699 (1984). "[A]ccompanying every contract is a common-law duty to perform with care, skill, reasonable expediency, and faithfulness the thing agreed to be done." *Lincoln Grain v. Coopers & Lybrand*, 216 Neb. 433, 437, 345 N.W.2d 300, 305 (1984).

> Exceptional care and caution may be required where a party employs fire for a manufacturing, mechanical, or any other purpose under circumstances which render it especially dangerous to others or their property. However, even in such a case only reasonable and ordinary care, proportionate to the risks to be apprehended and guarded against, is required. What constitutes ordinary care depends upon those individual circumstances surrounding the particular use of fire . . . .

35 Am. Jur. 2d *Fires* § 12 at 593 (1967). See, also, Annot., 49 A.L.R.2d 368 (1956).

Whether or not defendants were independent contractors cannot be determined from the record. Clearly, defendants were highly qualified to make the agreed brazing repairs; they had knowledge of the existing circumstances, including the condition of possible fire hazards; they agreed and undertook to make the brazing repairs without exception; and they had a duty to plaintiffs to make such repairs with due care under the known existing conditions, including moving the silage from the brazing area, which defendants recognized by their own testimony and acts of Rickers as a fire precaution.

The general rule is that the court will only consider errors that are assigned and discussed. Neb. Rev. Stat. § 25-1919 (Reissue 1985); *Wellman v. Birkel*, 220 Neb. 1, 367 N.W.2d 716 (1985).

Defendants do not discuss in their brief the remaining elements of a negligence case: breach of duty, causation, and damages. We note, however, that the evidence fully supports the trial court's findings and orders that plaintiffs had proved a prima facie case of negligence and damages which was submitted to the jury with instructions, together with the issue of contributory negligence. The motions to dismiss and for directed verdict were properly denied.

Lastly, defendants claim as error the denial of their motion

for judgment notwithstanding the verdict or, in the alternative, for a new trial. See Neb. Rev. Stat. § 25-1315.02 (Reissue 1985).

> Where a party has sustained the burden and expense of trial and has succeeded in securing a verdict of the jury on the facts in issue, he has the right to keep the benefit of that verdict unless there is prejudicial error in the proceeding in which it was secured.

Schmidt v. Schmidt, 228 Neb. 758, 760, 424 N.W.2d 339, 341 (1988).

From a review of the record and all of the evidence, the trial court properly submitted to the jury all of the material issues contained in the pleadings, and there was neither prejudice nor abuse of discretion in denying defendants' motion for judgment notwithstanding the verdict or for a new trial.

AFFIRMED.

ACTION HEATING & AIR CONDITIONING, INC., APPELLANT, V. KEN PETERSEN, DOING BUSINESS AS KEN PETERSEN, BUILDER, APPELLEE; MOHAMMED H. SIDDIQ ET AL., GARNISHEES-APPELLEES.

ACTION PLUMBING, INC., APPELLANT, V. KEN PETERSEN, DOING BUSINESS AS KEN PETERSEN, BUILDER, APPELLEE; MOHAMMED H. SIDDIQ ET AL., GARNISHEES-APPELLEES.

429 N.W.2d 1

Filed September 16, 1988. Nos. 86-1031, 86-1032.

1. **Garnishment.** Garnishment is a legal, not an equitable, remedy.
2. **Appeal and Error.** The factual findings of the trial court in a law action tried without a jury have the effect of a finding by a jury and, on appeal, will not be set aside unless clearly wrong.
3. **Judgments: Debtors and Creditors: Garnishment.** The claim of a judgment creditor against a garnishee in a garnishment proceeding can rise no higher than the claim of the judgment debtor against the garnishee.

Appeal from the District Court for Lancaster County: ROBERT R. CAMP, Judge. Affirmed.

John Tavlin for appellants.

John P. Glynn, Jr., for garnishees-appellees.

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

BOSLAUGH, J.

The plaintiffs, Action Heating & Air Conditioning, Inc., and Action Plumbing, Inc. (hereafter Action), have appealed from the orders of the district court affirming judgments of the county court finding that the garnishees, Mohammed H. Siddiq and Hayat Y. Hanafi, were not indebted to the defendant, Ken Petersen, doing business as Ken Petersen, Builder (hereafter Petersen), and that the garnishees be discharged from further proceedings.

On April 10, 1984, garnishees entered into a contract with Petersen in which Petersen, as prime contractor, agreed to construct a residential duplex on real estate owned by garnishees in Lincoln, Nebraska, for $124,000. Petersen completed construction of the duplex in December 1984. On December 11, 1984, Siddiq issued a check to Petersen in the amount of $6,000.

In late December 1984, Pella Products, a subcontractor, informed Siddiq that it had not been paid by Petersen. Siddiq then contacted Petersen, who confirmed that Pella had not been paid. Siddiq contacted one or two other suppliers and discovered that they also had not been paid by Petersen. Siddiq contacted his attorney, who advised him to stop payment on the check. Siddiq issued a stop payment order, which was effective. At the time he issued the stop payment order, Siddiq had not received any notice of lien liability. There was a balance of $9,600 unpaid on the contract, including the $6,000 not paid under the stop payment order.

Garnishees then notified all subcontractors that $9,600 remained unpaid under the contract, and strongly urged each of them to contact an attorney. Thereafter, mechanics' liens in the total sum of $37,211.81 were filed against the real estate, including liens filed on February 7, 1985, by Action Heating & Air Conditioning in the amount of $3,712.58 and by Action

Plumbing in the amount of $7,072.71.

On July 24, 1985, Action filed petitions in the county court for Lancaster County asking for judgments against Petersen in the amounts of $3,712.58 and $7,072.71. On August 19, 1985, Action obtained default judgments against Petersen for these amounts.

On October 3, 1985, Action filed garnishment affidavits and interrogatories directed against garnishees, which were served on October 6, 1985. Garnishees responded that they had no liability to Petersen. Action filed petitions for determination of liability of garnishees on October 22, 1985. Garnishees filed answers admitting there was a contract between garnishees and Petersen and that $9,600 remained unpaid. The answers alleged that garnishees had discovered in mid-December 1984 that Petersen was not paying the subcontractors; that since January 4, 1985, construction liens totaling $37,311.81 had been filed against garnishees' real estate; that garnishees were protected party contracting owners within the meaning of the Nebraska Construction Lien Act, Neb. Rev. Stat. §§ 52-125 to 52-159 (Reissue 1984); and that garnishees hold the $9,600 for the benefit of the subcontractors and not for the benefit of Petersen.

After a consolidated trial, the county court found that Petersen was not entitled to the money held by garnishees and that the claim of a judgment creditor (Action) against a garnishee can rise no higher than that of the principal debtor. The county court declined to base its decisions on the Nebraska Construction Lien Act and stated that "a good deal more evidence is necessary before any court can proceed to any kind of a just resolution under the Construction Lien Act." Apparently, the court based its decisions on the fact that Petersen agreed to pay all labor and material costs and had failed to complete the structure on or before September 15, 1984, as provided in the contract.

Action appealed to the district court, where the judgments were affirmed. The district court found that garnishees were protected party contracting owners within the meaning of §§ 52-128, 52-129, and 52-136 of the Nebraska Construction Lien Act. It further found that Petersen had failed to pay the

subcontractors; that subcontractors' liens in excess of the remaining balance due Petersen from garnishees had been filed; and that under the Nebraska Construction Lien Act, Petersen could not recover the balance due from garnishees. Therefore, Action, having no greater rights than Petersen, was not entitled to garnish the funds held by garnishees.

Action has now appealed to this court, where the cases have been consolidated for briefing and argument. Garnishment is a legal, not an equitable, remedy. The factual findings of the trial court in a law action tried without a jury have the effect of a finding by a jury and, on appeal, will not be set aside unless clearly wrong. *Boren v. State Farm Mut. Auto. Ins. Co.*, 225 Neb. 503, 406 N.W.2d 640 (1987).

Action's first assignment of error relates to the sufficiency of the answers filed by garnishees. Action contends that since the answers of the garnishees did not plead any defense to a claim for damages for breach of contract by Petersen against them, the county court erred in basing its decisions on that ground.

The district court found that the Nebraska Construction Lien Act provided a defense to Action's attempted garnishments. Action also contends that the answers did not properly raise this defense.

The answers alleged that garnishees were the record owners of the real estate in question, that they entered into a contract with Petersen for construction of a residential duplex which was completed on or about December 28, 1984; that they were protected party contracting owners within the meaning of the Nebraska Construction Lien Act; that they learned in mid-December of 1984 that Petersen had not paid the subcontractors; that at that time there remained $9,600 unpaid on the general contract; that since that date garnishees had made no further payment to Petersen or any of the subcontractors; that garnishees notified all subcontractors of Petersen's default; that since January 4, 1985, construction liens totaling $37,211.81 had been filed against the real estate; that they held the sum of $9,600 for the benefit of subcontractors and not for the benefit of Petersen; and that by operation of law, the sum of $9,600 was not due Petersen.

"It is not necessary to state a defense in any particular form

so long as the facts supporting the assertion are stated." *Cass Constr. Co. v. Brennan*, 222 Neb. 69, 73, 382 N.W.2d 313, 317 (1986). Although perhaps not a model of pleading, there were sufficient facts pleaded in the answers to show that the garnishees were not indebted to Petersen.

In their second assignment of error, Action contends that the provisions of the Nebraska Construction Lien Act do not provide garnishees with a defense for nonpayment of the balance due under their contract. Specifically, Action contends that there is no provision in the act which exempts or holds in abeyance the obligation of a protected party contracting owner to pay the contractor on the prime contract.

The stated purpose of the Nebraska Construction Lien Act is to create and provide for the attachment and enforceability of a lien against real estate in favor of a person furnishing services or materials under a real estate improvement contract. § 52-126. The provisions of § 52-136 make it clear that a prime contractor is not entitled to payment from the owner until the liens of the subcontractors are satisfied. Under § 52-136(1)(a), the lien of a prime contractor is for the unpaid part of his or her contract price. Section 52-136(3) states that the lien of a claimant is reduced by the sum of the liens of claimants who claim through him or her. The comments to the Uniform Simplification of Land Transfers Act, on which the act appears to have been based, explain that

> [t]he owner's liability to a prime contractor is reduced by the amounts the owner pays to claimants claiming through that contractor. While the statute does not explicitly state that payments made by an owner to discharge liens of claimants other than the prime contractor go toward reducing the owner's contractual liability to the prime, it does state that the lien of the prime is reduced by the sum of the liens of claimants who claim through him. The clear implication of that rule is that the owner's personal liability to the prime is also discharged.

Unif. Simplification of Land Transfers Act § 5-206, comment 2, 14 U.L.A. 295 (1980).

The lien liability of a protected party contracting owner is the prime contract price minus the amount of payments properly

made. § 52-136(5). One way in which a payment is properly made on the prime contract is when it is made in good faith before the receipt by the contracting owner of a notice of lien liability. § 52-136(5)(a). The lien of a claimant (e.g., the subcontractor) other than that of the prime contractor is for the lesser of (1) the amount unpaid under the claimant's contract or (2) the amount unpaid under the prime contract at the time the contracting owner receives the claimant's notice of lien liability. § 52-136(2). If the contracting owner's lien liability under the prime contract is less than the sum of the claims of all claimants, then lien claimants whose liens attach at different times have liens in the order of attachment until the contracting owner's liability is exhausted. § 52-136(4). Therefore, the act has the effect of excusing a contracting owner's performance under the prime contract when the amount of the liens exceeds the amount of the contracting owner's lien liability.

The remaining assignments of error can be consolidated into whether there was sufficient evidence for the court to find that garnishees were not indebted to Petersen for the $9,600 unpaid on the contract.

Action's claims as a judgment creditor of Petersen against a garnishee can rise no higher than that of the principal debtor (Petersen). *Darr v. Long*, 210 Neb. 57, 313 N.W.2d 215 (1981); *Smith v. Brooks*, 154 Neb. 93, 47 N.W.2d 389 (1951). The test in determining liability of the garnishee to the garnisheeing plaintiff is whether or not the facts would support a recovery by the principal defendant against the garnishee. *Darr v. Long, supra.*

The answers denied that the garnishees were indebted to Petersen. The contract clearly provided that Petersen would "pay for all labor, material costs," etc. The evidence is abundant that Petersen failed to pay in excess of $50,000 of the labor and material costs. The evidence supports the finding that the garnishees were not indebted to Petersen.

The judgments are affirmed.

AFFIRMED.

LUTHERAN MEDICAL CENTER, APPELLANT, V. CITY OF OMAHA, APPELLEE.

429 N.W.2d 347

Filed September 16, 1988. No. 87-033.

1. **Judgments: Appeal and Error.** In a bench trial of a law action, a trial court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous. However, regarding a question of law, the Supreme Court has an obligation to reach its conclusion independent from the conclusion reached by the trial court.
2. **Due Process: Municipal Corporations: Prisoners: Medical Assistance.** A city has (1) a constitutional obligation, as a part of due process, to provide medical attention to persons in police custody and (2) the common-law liability to pay for medical treatment required by a person in police custody, such as a suspect wounded by police in the process of apprehending the suspect and such other persons needing necessary medical care while in custody.
3. **Prejudgment Interest: Claims.** Prejudgment interest is allowed where the amount of the claim is liquidated. When reasonable controversy exists concerning the claimant's right to recover or the amount of such recovery, the claim is unliquidated, and prejudgment interest is not allowed.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Reversed and remanded with direction.

William Jay Riley and Nick R. Taylor, of Fitzgerald & Brown, for appellant.

Herbert M. Fitle, Omaha City Attorney, James E. Fellows, and Richard A. Cerveny for appellee.

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

SHANAHAN, J.

Lutheran Medical Center of Omaha (LMC) appeals from a judgment for the City of Omaha, denying LMC's claims for payment of medical services rendered to persons in police custody who were brought to LMC for treatment. Previous litigation between LMC and the city supplies background for the present appeal.

Before this court decided *Lutheran Medical Center v. City of Omaha*, 204 Neb. 292, 281 N.W.2d 786 (1979) (*Lutheran I*), the city had refused to pay LMC for medical attention received by persons in police custody who were brought to LMC for

emergency treatment, namely, a prisoner with unstable angina while in the city's jail and a suspect with a gunshot wound inflicted by police at the scene of an armed robbery. The city rejected LMC's claims for payment. In affirming the judgment for LMC and in addressing the issue of the city's liability for medical treatment, this court stated in *Lutheran I*:

> The concept that an imprisoning authority has a legal obligation to supply medical services to prisoners is not of recent origin, nor was it originally based on statutes. At common law, it was stated: "The rule that where a person requests the performance of a service, and the request is complied with, and the service performed, there is an implied promise to pay for the services, does not apply where a person requests a physician to perform services for a patient, *unless the relation of that person to the patient is such as raises a legal obligation on his part to call in a physician and pay for the services*, or the circumstances are such as to show an intention on his part to pay for the services . . . ."

(Emphasis in original.) *Id.* at 295, 281 N.W.2d at 788 (quoting from *Spicer v. Williamson*, 191 N.C. 487, 132 S.E. 291 (1926)).

In *Lutheran I*, the court continued at 296, 281 N.W.2d at 789:

> The United States Supreme Court has held that intentional indifference to the medical needs of a prisoner is proscribed by the Eighth Amendment to the United States Constitution as being cruel and unusual punishment. . . . [I]t can only be concluded that under the Eighth and Fourteenth Amendments to the United States Constitution, state governmental subdivisions operating jails have the legal obligation to supply needed medical treatment.

It further stated:

> In each of the two situations at bar (the prisoner in jail and the suspect who was shot), immediate emergency medical attention was required. Defendant's employees each acted responsibly in executing their respective duties to procure needed medical services. Had they not done so under all of the circumstances, the defendant and each employee could have been liable for intentionally denying

> or delaying access to medical care or deliberate indifference to serious medical needs of prisoners. [Citations omitted.]
>
> It matters not that the suspect was not in jail when he required emergency medical attention . . . .

Id. at 297, 281 N.W.2d at 789.

Therefore, as this court ruled in *Lutheran I*, a city has (1) a constitutional obligation, as a part of due process, to provide medical attention to persons in custody and (2) the common-law liability to pay for medical treatment required by a person in police custody, such as a suspect wounded by police in the process of apprehending the suspect and such other persons needing necessary medical care while in custody.

After *Lutheran I* and during the period of May 1981 to May 1983, the city paid LMC for emergency medical care received by indigents in police custody.

In the interim, however, the Supreme Judicial Court of Massachusetts decided *Massachusetts General Hospital v. Revere*, 385 Mass. 772, 434 N.E.2d 185 (1982), which involved the hospital's claim against the city for medical services rendered to a burglary suspect named Kivlin, who was brought by the city's police to the hospital because the police had shot and wounded Kivlin as he fled the burglary scene. In its suit to recover for Kivlin's bill, the hospital based its claim on contractual and constitutional grounds, but the trial court entered summary judgment for the city. On appeal, the Supreme Judicial Court of Massachusetts held that, under existing Massachusetts law, the hospital had no basis for recovery on contract, express or implied (quantum meruit). However, the court then held that, as a result of the eighth amendment to the U.S. Constitution, "prohibition against deliberate indifference to the medical needs of prisoners . . . compels a government agency or division responsible for supplying those medical needs to pay for them." *Id.* at 776, 434 N.E.2d at 187-88. As authority for its foregoing conclusion concerning a constitutional liability for payment, the Massachusetts court cited, among other authorities, this court's decision in *Lutheran I*. The Supreme Judicial Court of Massachusetts then remanded the matter to the trial court with

direction to enter judgment against the city, requiring that the city, on the basis of the eighth amendment to the U.S. Constitution, pay for the hospital's services rendered to Kivlin in connection with the gunshot wound.

After certiorari, the U.S. Supreme Court, on June 27, 1983, decided *Revere v. Massachusetts General Hospital*, 463 U.S. 239, 103 S. Ct. 2979, 77 L. Ed. 2d 605 (1983). In recognizing Revere's constitutional duty to obtain medical care for Kivlin and others in police custody, the U.S. Supreme Court stated:

> The Due Process Clause, however, does require the responsible government or governmental agency to provide medical care to persons . . . who have been injured while being apprehended by the police. In fact, the due process rights of a person in Kivlin's situation are at least as great as the Eighth Amendment protections available to a convicted prisoner. . . . We need not define, in this case, Revere's due process obligation to pretrial detainees or to other persons in its care who require medical attention. See *Youngberg v. Romeo*, 457 U. S. 307, 312, n. 11 (1982); *Norris v. Frame*, 585 F. 2d 1183, 1187 (CA3 1978); *Loe v. Armistead*, 582 F. 2d 1291 (CA4 1978), cert. denied *sub nom. Moffitt v. Loe*, 446 U. S. 928 (1980). Whatever the standard may be, Revere fulfilled its constitutional obligation by seeing that Kivlin was taken promptly to a hospital that provided the treatment necessary for his injury. And as long as the governmental entity ensures that the medical care needed is in fact provided, the Constitution does not dictate how the cost of that care should be allocated as between the entity and the provider of the care. That is a matter of state law.
>
> If, of course, the governmental entity can obtain the medical care needed for a detainee only by paying for it, then it must pay. . . .
>
> In short, the injured detainee's constitutional right is to receive the needed medical treatment; how the city of Revere obtains such treatment is not a federal constitutional question.

463 U.S. at 244-46.

Thus, in *Revere*, the U.S. Supreme Court recognized a state

government's due process duty to provide medical care for injured persons or those otherwise needing medical treatment while such persons are in police custody. However, the *Revere* Court left to state law the determination of liability concerning payment for the medical services rendered to those in police custody, that is, "[T]he Constitution does not dictate how the cost of that care should be allocated as between the entity and the provider of the care. That is a matter of state law." 463 U.S. at 245. Therefore, the *Revere* Court, while recognizing a city's or government's due process duty to supply medical attention for those in police custody, reversed the Massachusetts court's judgment that the eighth amendment to the U.S. Constitution obligated the city to pay for that medical attention.

As the result of *Revere*, the U.S. Supreme Court has concurred with the conclusion reached by this court in *Lutheran I* concerning the due process duty of a city, as a form of state government, to provide medical attention to persons in police custody. Although antedating *Revere*, this court's decision in *Lutheran I* also contained a principle of Nebraska common law, namely, a city has common-law liability to pay for medical treatment required by a person in police custody, such as a suspect wounded by police in the process of apprehending the suspect and such as other persons needing necessary medical care while in custody.

After the *Revere* decision, Omaha police continued to bring custodial individuals to LMC for medical services, as required by the 8th and 14th amendments to the U.S. Constitution, and further required by the State of Nebraska's "Standards for Jail Facilities," which in part provided:

> It is the policy of the state of Nebraska that all jail facilities shall provide all inmates with a healthful environment and access to adequate medical care. All jail facilities shall provide access to medical services and maintain levels of sanitation and personal hygiene which are consistent with the Standards established herein.
>
> . . . .
>
> No person other than licensed physicians shall diagnose any illness or injury, give treatment, or prescribe medication, except that in emergencies a qualified person

> may administer first-aid as expeditiously as possible pending the arrival or delivery of professional health care services.

Neb. Admin. Code tit. 81, ch. 10, §§ 001 and 002.01 (1984).

Relying on the city's past payments for medical services to custodial indigents, LMC provided 242 indigent individuals with hospital and medical services while those individuals were in police custody. On August 22, 1983, and January 18, 1984, LMC filed claims with the city for payment concerning the indigent individuals brought by police to the hospital. The fair and reasonable charge for such necessary hospital and medical services was $33,765.19.

On February 22, 1984, almost 8 months after the decision in *Revere v. Massachusetts General Hospital*, 463 U.S. 239, 103 S. Ct. 2979, 77 L. Ed. 2d 605 (1983), and some 6 months after LMC's first claim had been filed, the city's attorney notified LMC that, based on *Revere*, the city "is no longer obliged" to pay medical expenses of persons in police custody inasmuch as "the issue of responsibility for payments of medical expenses was resolved in favor of the City of Revere" and that the city, therefore, denied LMC's claims. Subsequently, LMC's claims were presented to the Omaha city council, which denied the claims on May 15, 1984. On appeal to the district court, LMC sought a money judgment, interest, both before and after judgment, and any other relief and costs to which LMC was entitled. In its answer, the city maintained it had no constitutional, statutory, or common-law duty to pay for LMC's services. After a trial with facts as previously stated in this opinion, the district court found for the city and dismissed LMC's petition.

LMC assigns numerous errors. However, this appeal is resolved by our answer to the question: Does the city have a common-law obligation to pay LMC under the circumstances?

In a bench trial of a law action, a trial court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous. However, regarding a question of law, the Supreme Court has an obligation to reach its conclusion independent from the conclusion reached by the trial court. *Wibbels v. Unick, ante* p. 184, 426 N.W.2d 244 (1988); *McKinstry v.*

County of Cass, 228 Neb. 733, 424 N.W.2d 322 (1988).

The city believes that *Revere* somehow alters this court's conclusions reached in *Lutheran I*. According to the city,

> Our Supreme Court correctly applied the Fourteenth Amendment as the constitutional provision imposing a legal responsibility upon the City to provide medical care when required, but erroneously applied the Eighth Amendment as the basis for requiring the City to provide such care.
>
> Neither Amendment, as stated in *Revere*, dictates how the cost of that care should be paid. Our Supreme Court, clearly in error, concluded that the Amendments placed an obligation upon the City of Omaha to pay for the medical care rendered.

Brief for appellee at 10-11.

The city then states: "The Appellee does not disagree now nor has it ever disagreed in this lawsuit that it is obliged to obtain medical attention for a person whether that person is in custody due to an adjudication of guilt or a detainee . . . ." Brief for appellee at 18.

The city then concludes:

> [W]hen Lutheran I was decided by our Supreme Court, it was a case of first impression and it did not have the holding of the *Revere* case to guide it in making its decision. Now that the *Revere* case has been decided, it appears that our Supreme Court erroneously applied the Eighth and Fourteenth Amendments to the U.S. Constitution to impose a duty to pay upon the City of Omaha in that case. The *Revere* case clearly holds that the U.S. Constitution does not dictate how the cost of the medical care should be allocated as between the governmental entity and the provider of the care, but that that should be determined as a matter of state law.

Brief for appellee at 19.

From the foregoing excerpts from the city's brief, we gather that the city is somewhat dissatisfied with *Lutheran I* and, relying on *Revere v. Massachusetts General Hospital*, 463 U.S. 239, 103 S. Ct. 2979, 77 L. Ed. 2d 605 (1983), wants this court to overrule *Lutheran I*, which the city believes is inconsistent with

and diametrically opposed to *Revere*.

However, *Revere* is consistent with the principles which this court applied in *Lutheran I* under the 14th amendment and the common law of Nebraska. Specifically, in *Lutheran I*, we determined that allocation for the payment of medical expenses for custodial individuals is the city's liability as the result of the common-law implied contractual duty to pay such expenses. Thus, in *Lutheran I*, this court determined that the city was liable for payment to LMC on the basis of common law, not constitutional law. *Revere* in no wise affected the city's common-law liability, which was determined in and by *Lutheran I*; rather, *Revere* merely buttresses the conclusion reached in *Lutheran I*, that is, the city's liability for payment to LMC is a "matter of state law." *Revere*, 463 U.S. at 245. Quite obviously, our interpretation of *Revere* differs from that expressed by the city attorney in his letter to LMC. Again, according to *Revere*, a government, including a city, has the constitutional obligation, as part of due process, to provide or supply medical attention to those in police custody, but liability to pay for that medical attention is determined by state law, which, as far as the present appeal is concerned, was enunciated in *Lutheran I*. The constitutional obligation to provide medical attention is markedly distinct from the common-law liability to pay for medical attention, a distinction and conclusion made and clearly expressed in *Lutheran I*. Our interpretation of *Revere* is in accord with other state jurisdictions construing *Revere*; for example, see, *Harrison Mem. Hosp. v. Kitsap County*, 103 Wash. 2d 887, 700 P.2d 732 (1985); *Smith v. Linn County*, 342 N.W.2d 861 (Iowa 1984). Consequently, we reject the city's contention that *Revere* alters, overrules, or necessitates overruling the conclusions and principles expressed in *Lutheran I*. Lest the city remain in doubt, we conclude and reaffirm that the following is still the law in Nebraska: A city has (1) a constitutional obligation, as a part of due process, to provide medical attention to persons in police custody and (2) the common-law liability to pay for medical treatment required by a person in police custody, such as a suspect wounded by police in the process of apprehending the suspect and such other persons needing necessary medical care while in custody.

Under the circumstances, the district court's judgment for the city is clearly erroneous and is, therefore, reversed. This matter is remanded to the district court with direction to enter judgment in favor of LMC for $33,765.19, the amount stipulated as the fair and reasonable charge for the services rendered by LMC.

Prejudgment interest is allowed where the amount of the claim is liquidated. When reasonable controversy exists concerning the claimant's right to recover or the amount of such recovery, the claim is unliquidated, and prejudgment interest is not allowed. *Graff v. Burnett*, 226 Neb. 710, 414 N.W.2d 271 (1987); *Fee v. Fee*, 223 Neb. 128, 388 N.W.2d 122 (1986). The factual basis and amount of LMC's combined claims were stipulated and, therefore, are undisputed. In view of *Lutheran I*, a reasonable controversy did not exist concerning the right of LMC to recover on its claims for medical services rendered to those in custody of the city's police. Hence, the claim was liquidated. Prejudgment interest is allowable. On remand, the district court, as part of its judgment, shall award prejudgment interest to LMC from the date on which the Omaha city council denied LMC's claims for services rendered, namely, prejudgment interest from May 15, 1984, until entry of judgment on remand, with interest thereafter as provided by law concerning a money judgment.

LMC has requested an attorney fee for the services of its lawyers. Neb. Rev. Stat. § 25-824(2) (Cum. Supp. 1988), which became effective on August 30, 1987, during pendency of this appeal, authorizes and requires that the court in which an action is commenced or an appellate court

> shall award as part of its judgment and in addition to any other costs otherwise assessed reasonable attorney's fees and court costs against any attorney or party who has brought or defended a civil action that alleges a claim or defense which a court determines is frivolous or made in bad faith.

Section 25-824(5) states that "[n]o attorney's fees or costs shall be assessed if a claim or defense was asserted by an attorney or party in a good faith attempt to establish a new theory of law in this state . . . ."

Neb. Rev. Stat. § 25-824.01 (Cum. Supp. 1988) provides:

> In determining the amount of a cost or an attorney's fee award pursuant to subsection (2) of section 25-824, the court shall exercise its sound discretion. When granting an award of costs and attorney's fees, the court shall specifically set forth the reasons for such award and shall, in determining whether to assess attorney's fees and costs and the amount to be assessed against offending attorneys and parties, consider the following factors, including, but not limited to: [here the statute sets out certain factors to be considered in determining whether to assess an attorney fee].

In *Shanks v. Johnson Abstract & Title*, 225 Neb. 649, 407 N.W.2d 743 (1987), we considered the application of § 25-824 (Reissue 1985), the immediate predecessor of § 25-824 (Cum. Supp. 1988), which allowed an attorney fee in a situation where a litigant's allegation or denial was frivolous. In her amended petition in an action to recover a commission which Shanks, as seller, had paid to her real estate broker, Shanks reiterated the previous allegations of her petition, to which a demurrer had been sustained, but added an allegation that the purchasers did not complete the real estate transaction by " 'closing title in accordance with the provisions of the contract.' " 225 Neb. at 655, 407 N.W.2d at 746. At the time Shanks amended her petition, Nebraska law was undecided concerning the precise point or time at which a real estate "closing" took place. Summary judgment was granted to the broker; the district court awarded an attorney fee to the broker because Shanks' amended petition was made in bad faith; and Shanks appealed. We affirmed the summary judgment for the broker on the issue concerning the commission, but reversed the judgment awarding an attorney fee to the broker under § 25-824 (Reissue 1985), concluding that Shanks' allegation about the "closing," a previously undetermined question in Nebraska, removed Shanks' pleading from the characterization as "frivolous" or "bad faith." We noted that the word "frivolous" connotes an improper motive or a legal position wholly without merit.

The Supreme Court of Colorado, in *Western United Realty, Inc. v. Isaacs*, 679 P.2d 1063 (Colo. 1984), construed the

following Colorado statute: " 'The court shall not award attorney fees among the parties unless it finds that the bringing, maintaining, or defense of the action against the party entitled to such award was frivolous or groundless. . . .' " (Emphasis omitted.) *Id.* at 1066. Another Colorado statute supplied factors which a court must consider in awarding an attorney fee, much the same as the factors contained in the Nebraska statute, § 25-824.01. In *Western United Realty, supra*, under Colorado law existing when Isaacs brought suit against their realtor, there was no cause of action for negligent misrepresentation. Nevertheless, for their cause of action against the realtor, Isaacs alleged the realtor's negligent misrepresentation. The trial court informed Isaacs that no such cause of action existed under Colorado law and that, if evidence at trial coincided with the evidence discussed at a pretrial conference, the court would be disposed to dismiss Isaacs' action. At trial, the court granted the realtor's motion for a directed verdict and awarded the realtor an attorney fee when Isaacs' evidence failed to establish deceit or negligent misrepresentation by the realtor.

On appeal, in *Western United Realty, supra*, Isaacs contended that "they were attempting to explore at trial the 'gray areas' of a relatively new theory of liability, negligent misrepresentation." 679 P.2d at 1069. In concluding that a court-assessed attorney fee was not warranted under the circumstances, the court considered various cases characterizing *frivolous* as " 'of little weight or importance having no basis in law or fact,' " *id.* at 1067; without "rational argument based on the evidence or law in support of a proponent's claim or defense," *id.* at 1067-68; " 'trifling or silly,' " *id.* at 1068; and "no realistic chance of success on merits," *id.* The Colorado court then stated at 1069:

> A claim or defense is frivolous if the proponent can present no rational argument based on the evidence or law in support of that claim or defense . . . but does not apply to meritorious actions that prove unsuccessful, legitimate attempts to establish a new theory of law, or good-faith efforts to extend, modify, or reverse existing law.

It concluded:

> Under the circumstances, we are satisfied that the Isaacs' decision to maintain the action beyond the pretrial conference was not frivolous, groundless, or indicative of bad faith. Their claim became weaker as the litigation continued and ultimately proved unsuccessful, but, given the factual setting and the newly recognized theory of liability, we conclude that the conduct at issue here does not call for the award of attorney fees . . . .

Id. at 1070.

The court in *Western United Realty, supra*, then affirmed the decision of the intermediate court of appeals, which had held that Isaacs' claim had presented a justiciable issue and that the trial court had abused its discretion in assessing an attorney fee against Isaacs.

In the present case, the city, throughout the proceedings, has maintained that *Revere v. Massachusetts General Hospital*, 463 U.S. 239, 103 S. Ct. 2979, 77 L. Ed. 2d 605 (1983), controls the issue of the city's liability to pay for medical attention rendered by LMC, notwithstanding our decision in *Lutheran I*. As we have pointed out and emphasized, *Revere* did not in any respect alter or necessitate further consideration of our holding in *Lutheran I*. In *Revere*, the U.S. Supreme Court simply concurred with this court in recognizing a city's due process duty for medical attention to those in police custody.

The city has failed to point out any decision from this court, after *Lutheran I*, which indicates a departure from the principles enunciated in *Lutheran I*, or a precedential inconsistency between *Lutheran I* and any other case which may be controlling in Nebraska. The city does not defend against LMC's action by attempting to establish a new theory of law as a defense inasmuch as *Revere*, on which the city doggedly relies, affords no new basis or theory as a defense to LMC's claims. The excerpts from the city's brief, previously quoted in this opinion, graphically and unambiguously demonstrate that the city's defense is nothing more than a misinterpretation of *Revere* and evasion of our statement of the common law concerning the city's heretofore determined liability for payment of LMC's charges under the circumstances.

In relation to *Lutheran I*, the parties are the same. The facts

involved in the present appeal are legally indistinguishable from the facts presented in *Lutheran I* and are undisputed. The law existing as the result of *Lutheran I* is still the law, both constitutional and common. The issue, whether the city is liable for payment, is the same. The city does not question the validity of the common law enunciated by this court in *Lutheran I* or seek to modify or reverse *Lutheran I* as an expression of Nebraska law governing the city's liability for payment. Thus, the city's defense demonstrates disdain for common law and common sense, notwithstanding the constancy of governing law since *Lutheran I*. The only newness injected into this appeal is the city's misinterpretation of *Revere* and the city's corresponding defense which finds no rational support in *Revere* or cogent argument founded on *Revere*.

Both *Shanks v. Johnson Abstract & Title*, 225 Neb. 649, 407 N.W.2d 743 (1987), and *Western United Realty, Inc. v. Isaacs*, 679 P.2d 1063 (Colo. 1984), characterize as "frivolous" a legal position wholly without merit, that is, without rational argument based on law and evidence to support a litigant's position in the lawsuit. Consequently, the city's defense is without rational argument based on law or fact. The city's defense to LMC's action was, in a word, frivolous. As authorized by § 25-824 (Cum. Supp. 1988) and after consideration of the factors set forth in § 25-824.01, we, therefore, as a part of the costs of this appeal, tax to the City of Omaha an attorney fee in the amount of $3,000 for the services of LMC's lawyers in this court.

Also, in view of our determination and the provision for an attorney fee authorized by § 25-824, on remand the district court shall proceed to determine an attorney fee for the services of LMC's attorney in the district court. Such attorney fee, when determined, shall be included in the costs taxed to the City of Omaha in the proceedings before the district court.

REVERSED AND REMANDED WITH DIRECTION.

CONSTANCE WILSON, APPELLANT, V. F & H CONSTRUCTION COMPANY ET AL., APPELLEES.

428 N.W.2d 914

Filed September 16, 1988. Nos. 87-047, 87-263.

1. **Summary Judgment.** A summary judgment is properly granted when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue concerning any material fact or the ultimate inferences deducible from such fact or facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law if the evidence presented for summary judgment remains uncontroverted.
4. _____: _____. After the movant for a summary judgment has shown facts entitling the movant to judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents a judgment as a matter of law for the moving party.
5. **Negligence.** For actionable negligence, there must be a defendant's legal duty to protect the plaintiff from injury, a failure to discharge that duty, and plaintiff's damage proximately caused by such undischarged duty.
6. **Negligence: Words and Phrases.** "Duty" is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff.
7. **Negligence: Liability.** One cannot be held responsible on the theory of negligence for an injury caused by an act or omission unless the negligent tort-feasor had knowledge or was reasonably charged with knowledge that the act or omission involved danger to another.
8. **Negligence: Liability: Notice.** One under a duty to use care for which knowledge is necessary cannot avoid liability as the result of voluntary ignorance; constructive notice is as effective as actual notice.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed.

Richard J. Schicker for appellant.

Thomas J. Walsh, Jr., of Walsh, Fullenkamp & Doyle, for appellee F & H Construction Company.

William E. Naviaux for appellee Taylor Plumbing, Inc.

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

SHANAHAN, J.

In consolidated cases, Constance Wilson appeals from summary judgments granted to F & H Construction Company and Taylor Plumbing, Inc., in negligence actions brought by Wilson to recover for bodily injury sustained when she fell into a hole. Wilson also included the city of Omaha as a defendant, but the action against the city is not involved in Wilson's appeal.

On February 9, 1982, F & H Construction, as general contractor, entered a contract with the housing authority of the city of Omaha for the construction of 42 units of scattered-site housing, which included construction of a six-plex. Wilson's home is located immediately north of the six-plex site.

F & H subcontracted demolition of a brick house and earthwork for construction of the six-plex. During demolition of the brick house on the six-plex site, the subcontractor struck an underground waterline. Taylor Plumbing, another subcontractor of F & H Construction, capped that broken waterline. Taylor also capped the sewerline that had serviced the demolished brick house, but was not involved with any demolition or removal of structures from the site.

As part of its subcontract with F & H Construction, Taylor Plumbing connected the sewer and water services for the six-plex by tying into the city's mains. Taylor Plumbing installed the six-plex waterline about 6 feet below ground, and then backfilled the area above the newly installed line by using a "hydraulic tamping tractor" and two other pieces of heavy equipment.

The Omaha housing authority approved and accepted the housing project in January 1983.

On February 13, 1983, Wilson stepped onto the strip of land between the sidewalk and 24th Street in front of her home adjacent to the six-plex site, and was injured when the ground caved in and she fell into a waist-deep hole. According to Wilson's husband, the ground in the area where Constance fell had never settled or sunk before the accident.

The City of Omaha was called and the depression was filled,

but the hole had to be filled two or three additional times because the ground kept sinking. Finally, on April 5, 1983, the accident site was excavated to ascertain the cause of the settling ground and accident in which Constance Wilson was injured. Representatives of F & H Construction, Taylor Plumbing, and the City of Omaha were present at the time of this investigatory excavation. Robert Taylor, president of Taylor Plumbing, described what he saw as the investigatory excavation reached the 6-foot level where Taylor Plumbing had installed the waterline from the six-plex to the city's main at 24th Street: "[W]e went down lower and found a sewer stub that was open and the water was finding its way into this new excavation here down the hole into the sewer stub . . . a stub not plugged up . . . ."

The broken and uncapped sewer stub allowed water and earth to pass from above into the main sewerline, thereby causing subterranean erosion and resulting in the overlying ground's sinking to fill the gap left by the earth which had moved through the open stub into the sewer. As a city employee related, the stub was part of "an old abandoned sewer line that came from a house that was sitting on a lot that had been torn down. We found that house line that was not plugged off, and dirt was going into that from that spot there." Before the investigatory excavation, existence of the stub was unknown to F & H Construction and its subcontractors. The stub in question was buried 2 feet beneath the waterline installed by Taylor Plumbing. A plat or "job site quarter section," prepared by the city and obtained by F & H Construction before its work at the six-plex site, showed the location of all known utility stubs, but did not show the stub where the earth caved in. Robert Taylor stated that there was no reason to suspect the stub was buried beneath the waterline installed by Taylor Plumbing, because the stub was not shown on the city's plat or quarter section. Seepage did not indicate a problem, because the ground was dry at the 6-foot level when Taylor Plumbing installed the waterline.

The stub apparently serviced an old building, a structure torn down anywhere from 5 to 50 years before F & H's construction work concerning the six-plex. No one knows who tore down the

old building, and the only indication that a structure once sat on the project site was some debris uncovered near the surface during grading of the site. In postaccident investigation, an excavatory crew traced the stub by starting at the street and digging back toward the six-plex, but the sewer pipe that had run from the stub to the old building had been removed and no additional pipe was discovered. The investigatory excavation did not disclose any waterlines or sewerlines which connected the old building to the uncapped stub. The exact distance from the discovered broken stub to the six-plex site is not definite and may range from 20 to 30 feet.

In her summary judgment affidavit, Wilson states that "[w]hile the bulldozer was digging up the foundation of the old, previously demolished house on the site, I observed that it unearthed old brick and mortar and pieces of tile pipe which were hauled off the job site."

In her second amended petition, Wilson alleged that F & H Construction and Taylor Plumbing caused her injuries by failing to properly tamp the ground after they completed the construction project, by failing to properly cap the broken sewerline, and by operating heavy machinery in the area in which the broken stub was found.

F & H Construction and Taylor Plumbing moved for summary judgment, claiming that no genuine issue of fact existed regarding their alleged liability for Wilson's injuries. The district court sustained both motions and dismissed F & H Construction and Taylor Plumbing from the case.

Wilson contends that the stub was broken by Taylor Plumbing when it installed the waterline above the stub and used three pieces of heavy equipment to backfill the installation area. Wilson argues that F & H Construction and Taylor Plumbing knew or should have known that they were excavating above an old sewerline and that they should have discovered and capped the previously broken stub, thereby preventing the cave-in which caused Wilson's injuries.

> A summary judgment is properly granted when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue concerning any material fact or the ultimate

> inferences deducible from such fact or facts and that the moving party is entitled to judgment as a matter of law. [Citations omitted.] In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. [Citation omitted.]

Union Pacific RR. Co. v. Kaiser Ag. Chem. Co., ante p. 160, 162-63, 425 N.W.2d 872, 875 (1988). See, also, Neb. Rev. Stat. § 25-1332 (Reissue 1985).

The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law if the evidence presented for summary judgment remains uncontroverted. *Naidoo v. Union Pacific Railroad*, 224 Neb. 853, 402 N.W.2d 653 (1987); *Carlson v. Waddle*, 223 Neb. 671, 392 N.W.2d 777 (1986); *Gall v. Great Western Sugar Co.*, 219 Neb. 354, 363 N.W.2d 373 (1985). After the movant for a summary judgment has shown facts entitling the movant to judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents a judgment as a matter of law for the moving party. *Marshall v. Radiology Assoc.*, 225 Neb. 75, 402 N.W.2d 855 (1987); *Smith v. Weaver*, 225 Neb. 569, 407 N.W.2d 174 (1987).

For actionable negligence, there must be a defendant's legal duty to protect the plaintiff from injury, a failure to discharge that duty, and plaintiff's damage proximately caused by such undischarged duty. *Holden v. Urban*, 224 Neb. 472, 398 N.W.2d 699 (1987). See, also, *Zeller v. County of Howard*, 227 Neb. 667, 419 N.W.2d 654 (1988). " ' "Duty" is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff . . . .' " *Holden v. Urban, supra* at 474, 398 N.W.2d at 701 (quoting Prosser and Keeton on the Law of Torts, *Limited Duty* § 53 (5th ed. 1984)).

One cannot be held responsible on the theory of negligence for an injury caused by an act or omission unless the negligent tort-feasor had knowledge or was reasonably charged with

knowledge that the act or omission involved danger to another. *Hoover's Dairy, Inc. v. Mid-America Dairymen*, 700 S.W.2d 426 (Mo. 1985); *LaFaso v. LaFaso*, 126 Vt. 90, 223 A.2d 814 (1966); *Wire v. Williams*, 270 Minn. 390, 133 N.W.2d 840 (1965); *Alires v. Southern Pacific Company*, 93 Ariz. 97, 378 P.2d 913 (1963).

As we observed in *Center State Bank v. Dana, Larson, Roubal & Assoc.*, 226 Neb. 408, 415, 411 N.W.2d 635, 639 (1987): " 'Knowledge is fundamental to liability for negligence. The very concept of negligence presupposes that the party charged therewith either fails to foresee an unreasonable risk of injury to another, or could have foreseen it had he conducted himself as a reasonably prudent person.' " (Quoting from *Farmer v. S.M.S. Trucking Co.*, 180 Neb. 779, 145 N.W.2d 922 (1966).)

> The foundation of liability for negligence is knowledge—or what is deemed in law to be the same thing: opportunity by the exercise of reasonable diligence to acquire knowledge—of the peril which subsequently results in injury. One cannot be held responsible on the theory of negligence for an injury from an act or omission on his part unless it appears that he had knowledge or reasonably was chargeable with knowledge that the act or omission involved danger to another. Concisely stated, negligence presupposes a duty of taking care, and this in turn presupposes knowledge or its equivalent.

57 Am. Jur. 2d *Negligence* § 54 at 402-03 (1971).

However, one under a duty to use care for which knowledge is necessary cannot avoid liability as the result of voluntary ignorance; constructive notice is as effective as actual notice. *Whittington v. Nebraska Nat. Gas Co.*, 177 Neb. 264, 128 N.W.2d 795 (1964); *Daugherty v. Nebraska Nat. Gas Co.*, 173 Neb. 30, 112 N.W.2d 790 (1961).

Wilbur v. Schweitzer Excavating Co., 181 Neb. 317, 148 N.W.2d 192 (1967), involved a homeowners' suit against a contractor which inadvertently broke a gasline adjacent to the plaintiffs' home, almost immediately resulting in a fire caused by gas escaping from the broken line, which damaged plaintiffs' property. In affirming a directed verdict for the

contractor, this court held that, under the circumstances of the case, there was no evidence of the contractor's actual or constructive knowledge of the existence and location of the gasline. Consequently, as a matter of law, the contractor had no duty to protect against the particular hazard which damaged the plaintiffs. In *Wilbur*, factors which negated the contractor's duty to the plaintiffs included absence of the contractor's actual knowledge of the gasline, no indication concerning the gasline's presence before the contractor's work was commenced, and no public record of the gasline's existence or location.

When evidence from F & H Construction and Taylor Plumbing negated knowledge concerning a broken and uncapped stub, Wilson had the burden to present evidence demonstrating a genuine factual question about the knowledge of F & H Construction and Taylor Plumbing concerning existence of the stub in question. However, Wilson's evidence fails to establish a factual question whether the defendants actually or constructively knew about the stub, which was buried 2 feet below the waterline installed by Taylor Plumbing. The city's plat or jobsite quarter section, a public record which normally would have provided constructive notice and, therefore, knowledge concerning the stub, did not show the existence of the stub which caused the cave-in. Although there was debris near the surface of the six-plex project and remnants of an old building, previously on the site, which had fallen into ruin years before the six-plex project began, Wilson did not establish a relation between the debris and the broken stub involved in the cave-in. Postaccident excavation revealed that no pipe ran from the stub to any location for the six-plex project. The evidence provides no basis for an inference that F & H Construction or Taylor Plumbing knew about the stub or that circumstances should have alerted F & H Construction or Taylor Plumbing to the stub's presence. In the absence of knowledge or the reasonable opportunity to acquire knowledge about the broken stub, F & H Construction and Taylor Plumbing had no duty to protect against the particular hazard which resulted in Wilson's injury. Without knowledge imposing a protective duty on F & H Construction and Taylor Plumbing, the defendants were entitled to judgment as a matter of law,

that is, alleged negligence did not exist in the absence of the defendants' duty to protect Wilson and breach of that duty.

The summary judgments of the district court in favor of F & H Construction and Taylor Plumbing are, therefore, affirmed.

AFFIRMED.

CHIEF INDUSTRIES, INC., APPELLEE, V. HALL COUNTY BOARD OF EQUALIZATION, APPELLANT.

428 N.W.2d 919

Filed September 16, 1988. No. 87-137.

1. **Constitutional Law: Taxation: Valuation.** Neb. Const. art. VIII, § 1, provides in relevant part that except for motor vehicles, taxes shall be levied by valuation uniformly and proportionately upon all tangible property.
2. **Taxation: Valuation.** A taxpayer is entitled to have its property in a county assessed uniformly and proportionately with other property in the county even though the result may be that it is assessed at less than actual value.

Appeal from the District Court for Hall County: WILLIAM H. RILEY, Judge. Affirmed.

Jerom E. Janulewicz, Deputy Hall County Attorney, for appellant.

Norman H. Wright, of Fraser, Stryker, Veach, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellee.

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

WHITE, J.

The district court for Hall County reduced the 1984 assessed value of two parcels of real estate owned by appellee, Chief Industries, Inc., to 50 percent of actual value, to equalize the assessed value with the assessments of agricultural land in the county. The Hall County Board of Equalization appeals.

The evidence discloses that appellee's property was assessed at 100 percent of actual value. The evidence as to assessed value of agricultural land largely duplicates the evidence presented in

Equitable Life v. Lincoln Cty. Bd. of Equal., ante p. 60, 425 N.W.2d 320 (1988).

The Department of Revenue study, see Neb. Rev. Stat. § 77-508.01 (Reissue 1986), reveals that assessed agricultural values in the county represented approximately 40 to 50 percent of actual value. Other studies prepared by appraisers for Chief Industries indicated a ratio of from 43 to 53 percent of assessed value of agricultural lands to actual value. All such studies were screened to consider only arm's-length transactions.

As in *Equitable Life, supra*, the county questioned the statistical methods of both the Department of Revenue and the private appraisers. The experts relied on by the appellant to establish the unreliability testified in both cases. Again the board introduced no sales-assessment ratios of its own to justify the valuation of agricultural land.

The presumption that attaches to the valuation of the board of equalization having been overcome, and the taxpayer having established that the valuation violated the uniformity provision of Neb. Const. art. VIII, § 1, the decision of the district court is correct and is hereby affirmed.

AFFIRMED.

ALBERT WAYNE ELLIOTT, APPELLANT, V. MIDLANDS ANIMAL PRODUCTS, APPELLEE.

428 N.W.2d 920

Filed September 16, 1988. No. 87-867.

1. **Workers' Compensation: Appeal and Error.** 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: Proof.** The plaintiff has the burden of establishing a causal connection between the accident and any disability resulting therefrom.
3. _____: _____. The burden of proof is upon the plaintiff to show by a preponderance of the evidence that the disability sustained was caused by or related to the accident in question and was not the result of the normal progression of plaintiff's preexisting condition.

Appeal from the Nebraska Workers' Compensation Court. Affirmed as modified.

David J. Cullan and Virginia L. Cullan, of Cullan & Cullan, for appellant.

Melvin C. Hansen and Allen J. Potts, of Hansen, Engles & Locher, P.C., for appellee.

BOSLAUGH, WHITE, CAPORALE, and GRANT, JJ., and NORTON, D.J.

GRANT, J.

This is an appeal from a decision of a three-judge panel of the Workers' Compensation Court. The panel modified the judgment rendered by a single judge of the court. In his petition, filed June 16, 1986, plaintiff-appellant, Albert Wayne Elliott, alleged that "on or about the 23 day of April, 1982, the plaintiff sustained personal injury in an accident arising out of and in the course of the plaintiff's employment by the defendant [Midlands Animal Products]." Plaintiff further alleged that the injury sustained was a "[r]ight hand injury" and that the "accident and injury occurred in the following manner: Strain to right hand while boning meat." Defendant filed an answer in the compensation court admitting that plaintiff was its employee on the date in question and generally denying plaintiff's other allegations.

After rehearing on February 6, 1987, the panel found that plaintiff was entitled to payments for 166 1/7 weeks for temporary total disability and "in addition thereto the sum of $180.00 per week for 140 weeks for 80 per cent permanent partial disability to his right hand." The court also found that defendant was entitled to credits for payments it had made to the date of the rehearing.

The panel further found that defendant should pay Saint Joseph Center for Mental Health, $12,914; Mercy Hospital, $897; Saint Joseph Hospital, $896; and two doctors. The panel specifically found, "The bill of Eppley Chemical Dependency Unit is disallowed along with the bills of Dr. Subhash Bhatia; the mileage for visits to Dr. Bhatia is likewise disallowed." The panel ordered that the plaintiff was entitled to vocational

rehabilitation benefits, but did not make any permanent disability award to plaintiff for damages resulting from any "emotional disorder or depression."

Plaintiff appeals to this court, setting out four assignments of error, in that the panel erred (1) in allowing hospital bills but disallowing doctor bills and mileage for the same treatment; (2) in allowing one hospital bill but disallowing a later hospital bill for treatment of the same condition; (3) "in failing to determine Plaintiff's degree of impairment (disability) from his work related psychological problems and alcohol abuse where uncontradicted medical and vocational rehabilitation expert testimony established Plaintiff to be 80 to 90 percent disabled"; and (4) in making no allowance of benefits for loss of plaintiff's earning capacity.

Neb. Rev. Stat. § 48-185 (Cum. Supp. 1986) sets forth this court's standard of review for workers' compensation cases:

> The findings of fact made by the compensation court after rehearing shall have the same force and effect as a jury verdict in a civil case. A judgment, order, or award of the compensation court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers, (2) the judgment, order, or award was procured by fraud, (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award, or (4) the findings of fact by the compensation court do not support the order or award.

In *Clifford v. Harchelroad Chevrolet, ante* p. 78, 425 N.W.2d 331 (1988), we held that 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.

The record shows the following. Plaintiff first went to work for defendant in January 1979. His job at that time was "boning shanks." Approximately 3 weeks after he began his employment, plaintiff was injured. Plaintiff testified that Dr. Cegielski "did surgery on my wrist and something down on my elbow here." The wrist surgery was apparently a carpal tunnel operation on plaintiff's right hand. Plaintiff further testified

that a few weeks later, the same doctor performed elbow surgery and that plaintiff eventually returned to work at a different job. He was still in pain at that time.

Plaintiff continued to work. His hand continued to hurt, and he was sent to another doctor whose name plaintiff could not remember. This doctor ordered plaintiff off his job for 2 or 3 weeks, and then plaintiff returned to work. In March of 1980, plaintiff saw a Dr. Somsky, who took plaintiff off work for a short time, but performed no surgery. Plaintiff went back to work, but "the fingers started coming down on me, oh, about another three or four months or later." Plaintiff described that his hand was "closing down, like making a fist."

Plaintiff was then referred to Dr. Richard Murphy, who performed "an ulnar nerve reconstruction with microscopic surgery" in October 1981. Plaintiff was off work "a few months" and was in occupational therapy for much of that time. Plaintiff testified that he was off work from April 23 to June 23, 1982, and returned to work for a "couple of months" and then returned to Dr. Murphy's care. It is difficult to determine, from plaintiff's testimony alone, just what medical services were rendered to him and what time he was off work.

The panel determined that defendant suffered injuries to his right hand on April 22, 1982; that plaintiff was temporarily totally disabled from April 23 to June 23, 1982, and from May 20, 1983, to May 26, 1986; and that plaintiff "thereafter sustained 80 per cent loss of use of his right hand." No party challenges those facts, and they are accepted as correct.

Dr. Murphy reported that prior to his treatment of plaintiff in October 1981, plaintiff had undergone three surgeries: "1) Right carpal tunnel release. 2) Right ulnar nerve transfer at the elbow. 3) Right ulnar nerve laceration at the wrist (age unknown)." Dr. Murphy described plaintiff's operations under his care as: "4) Ulnar nerve reconstruction with microscopic nerve reconstruction. 5) Tendon transfer for ulnar nerve paralysis. 6) Index ray resection. 7) Palmer fasciectomy." Dr. Murphy concluded that plaintiff had suffered an 80-percent impairment of his right hand. There is not any dispute as to that conclusion. Dr. Murphy also concluded that the pain that plaintiff suffered was a part of his disability.

There is no specific evidence in the record as to the incident and resulting treatment of plaintiff's injuries to his right hand in January of 1979. Those injuries were suffered at a time when plaintiff was employed by defendant, but there is nothing in the record to show whether the injury at that time was treated as a workers' compensation injury. There is no dispute that plaintiff suffered a compensable injury in April of 1982.

The dispute arises out of the complications that plaintiff suffered. Plaintiff testified that "they wouldn't give me any kind of pain medicine for pain, and I knew I could drink three or four beers and get it down to where I wouldn't, you know, hurt too bad."

The record shows that plaintiff testified that before he injured his hand in 1979, he would drink socially, but that after the injury in 1979, his use of alcohol changed and got "pretty bad."

Plaintiff testified that on December 31, 1983, he was depressed and went to a bar, where he drank until he became intoxicated. He then drove himself to Saint Joseph Hospital's emergency room and told the people there that he needed help. He was taken to the Saint Joseph Center for Mental Health. Dr. Subhash Bhatia admitted plaintiff and treated him up to the date of the rehearing in this case. Dr. Bhatia kept plaintiff in that hospital until February 6, 1984. Plaintiff was rehospitalized in the same hospital from May 18 to June 1, 1984. The hospital bills for these two periods of time were $9,500.12 and $3,414.10, respectively. The panel ordered these bills to be paid by defendant. There is no dispute as to these hospital bills.

Dr. Bhatia was the admitting and attending doctor in each of these hospitalizations. The details of plaintiff's various hospitalizations are in exhibit 6, to which frequent reference is made by both parties. Exhibit 6 is a pile of copies of hospital and physician records totaling 1 3/4 inches in height. Some pages are numbered and some are not. There does not appear to be any chronological or other order to the documents. Accordingly, references to exhibit 6 in the briefs are useless in directing this court's attention to factors that should be specifically noted. Cf. *Coyle v. Janssen*, 212 Neb. 785, 326

N.W.2d 44 (1982). Nonetheless, we have discovered that Dr. Bhatia was the admitting and attending physician during each hospitalization. The hospital bills have been ordered to be paid. We are not able to determine why Dr. Bhatia's bill for those periods is not also paid.

Plaintiff's first assignment of error has merit, in part, and Dr. Bhatia's bill, in the amount of $1,694.50 for services from December 31, 1983, to October 16, 1984, is ordered to be paid by defendant. Insofar as Dr. Bhatia's bill for $480 for services from January 24, 1986, to February 6, 1987, is concerned, we are unable, as was the panel, to connect that bill with any particular service. The panel did not find that plaintiff was temporarily totally disabled during most of this period. The bill itself shows that part of the payment was made from some source. The panel's order disallowing that bill is affirmed, as is the $45.60 mileage charge for visits to Dr. Bhatia.

Plaintiff's second assignment of error is that the panel did not direct the payment of the hospitalization bill of $4,474.12 at Methodist Hospital's Eppley chemical dependency unit for services rendered to plaintiff from January 17 to February 15, 1985. The only information before us is the bill itself. We find nothing else in the record before us, nor are we directed to any evidence, that would support a finding that this bill is connected with the award in question. Plaintiff's second assignment of error is without merit.

Plaintiff's third and fourth assignments of error may be considered together. As set out above, plaintiff contends that the panel erred in failing to determine plaintiff's "degree of impairment (disability)" and in failing to award "benefits for loss of earning capacity."

At the initial hearing the one-judge court awarded "the sum of $180.00 per week for so long in the future as the plaintiff shall remain totally disabled as a result of said accident." On rehearing, the three-judge panel found that the plaintiff's emotional disorder or depression was aggravated by said accident and injury, but that the evidence did not establish the extent or degree of impairment resulting from the aggravation.

Plaintiff contends that the testimony of his vocational rehabilitation expert determined the degree of plaintiff's

disability resulting from physical injury, aggravation of his psychological condition, and aggravation of his alcohol problem. This expert witness testified at length regarding plaintiff's medical impairment and educational ability. It was the opinion of plaintiff's expert witness that plaintiff has lost the ability to procure, retain, or perform 80 to 90 percent of the jobs which would have been available to him before his injury and associated problems.

The panel, in its award on rehearing, found as follows on this specific issue:

> The Court finds that the plaintiff's alcohol abuse or dependency predated the accident and injury of April 22, 1982, and did not result therefrom. We further find that the plaintiff's emotional disorder or depression was aggravated by said accident and injury, but the evidence fails to establish the extent or degree of impairment resulting from the aggravation.

In reviewing the initial award, the panel had the benefit of the deposition of Dr. Bhatia, plaintiff's treating physician in the areas of depression and alcoholism. That testimony was apparently not available at the time of the initial hearing.

Dr. Bhatia testified at length concerning the difference in plaintiff's attitudes and approach to drinking alcohol before and after plaintiff's 1979 carpal tunnel surgery. He did not, in any degree, differentiate plaintiff's condition in these areas before and after the April 22, 1982, injury which is the subject of this case.

Plaintiff's vocational rehabilitation expert testified generally to the same effect. There is no doubt that plaintiff has been damaged, but there is no proof that damages were the result of the injury in this case.

There was substantial evidence before the panel that plaintiff's alcoholism had predated his April 1982 injury. In our review of a workers' compensation case, the factual findings of the compensation court on rehearing will not be set aside unless clearly wrong. *Rodriquez v. Prime Meat Processors*, 228 Neb. 55, 421 N.W.2d 32 (1988).

Further, it is established that the plaintiff bears the burden of establishing a causal relationship between the accident and

disability. *Nordby v. Gould, Inc.*, 213 Neb. 372, 329 N.W.2d 118 (1983). Plaintiff in this case has not carried that burden.

The panel did find that the accident of April 22, 1982, aggravated plaintiff's "emotional disorder or depression," but that "the evidence fails to establish the extent or degree of impairment." Even if it be concluded the evidence did support a finding that an aggravation resulted from the April 22, 1982, accident, we are in full accord with the panel's conclusion. Plaintiff, his doctor, and his rehabilitation expert set out a great deal of evidence concerning the effect of the 1979 injury. No specific evidence was adduced as to the effect of the 1982 injury on plaintiff's condition resulting from the 1979 accident. In *Kingslan v. Jensen Tire Co.*, 227 Neb. 294, 297, 417 N.W.2d 164, 167 (1987), we held, "The burden of proof is upon the plaintiff to show by a preponderance of the evidence that the disability sustained was caused by or related to the accident and was not the result of the normal progression of plaintiff's preexisting condition." Plaintiff did not show the effect of the 1982 accident on his long-lasting condition.

Plaintiff's third and fourth assignments of error are without merit.

The award on rehearing is affirmed as modified herein with regard to the payment of a portion of Dr. Bhatia's bill. Plaintiff is awarded the sum of $750 for attorney services in this court.

AFFIRMED AS MODIFIED.

DAVID LEE JOYCE, APPELLANT, V. TEENA JOYCE, APPELLEE.

429 N.W.2d 355

Filed September 23, 1988. No. 86-309.

1. **Foreign Judgments: Child Support.** Under the Revised Uniform Reciprocal Enforcement of Support Act, Neb. Rev. Stat. §§ 42-762 et seq. (Reissue 1984), the court in the responding state may fix the support payment at a different amount than that specified by the judgment in the initiating state.
2. **Foreign Judgments: Service of Process: Notice.** Where a party in an action under the Revised Uniform Reciprocal Enforcement of Support Act, Neb. Rev. Stat. §§ 42-762 et seq. (Reissue 1984), is served personally with a summons and a copy of the petition in the case, and that party chooses not to file any pleading nor to enter an appearance in the case, and has not otherwise requested notice of hearing, notice of default hearing need not be given to such party. It would be an abuse of the trial court's discretion under such circumstances to set aside a decree, properly entered, on the sole basis that notice of hearing was not sent to the party in default of filing any pleading or entering an appearance in the case.
3. **Judgments: Equity.** Neb. Rev. Stat. § 25-2001 (Reissue 1985) is not the exclusive remedy for vacating a judgment after the term has expired. That statute is concurrent with an independent equity jurisdiction. To proceed in equity the litigant must show that he was without a remedy at law; more specifically, that § 25-2001 could not serve him.
4. **Equity.** Equity will not afford relief if the complainant has a remedy by statutory proceeding in the original action, and to be entitled to equitable relief a party must not have neglected to avail himself of the statutory remedy.

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

Timothy J. Doyle for appellant.

Janice Lipovsky, Deputy Lancaster County Attorney, for appellee.

BOSLAUGH, CAPORALE, SHANAHAN, and GRANT, JJ., and BURKHARD, D.J.

BURKHARD, D.J.

Plaintiff, David Lee Joyce, filed suit in the district court for Lancaster County, Nebraska, against his former wife, defendant, Teena Joyce, seeking a new trial of issues decided by a default judgment in a case brought by Teena under the Nebraska Revised Uniform Reciprocal Enforcement of Support Act, Neb. Rev. Stat. §§ 42-762 et seq. (Reissue 1984) (URESA). David also sought relief from enforcement of the

judgment, which was entered therein on December 31, 1979, and also asked for the vacating of said order.

Trial was held on September 12, 1985, and all issues were resolved against David in the district court's order of March 5, 1986, dismissing his petition. David has appealed the district court's ruling of March 5.

David is the father of Jayson Joyce, born in July 1977. On June 16, 1978, David and Teena, the mother of Jayson, were divorced by decree of the district court of Union County, Iowa. David was ordered to pay $75 per month for the support of Jayson.

David subsequently moved to Nebraska. On September 14, 1979, the aforementioned URESA petition was filed against him, seeking an order directing David to provide support for Jayson. Although summons and, apparently, a copy of the petition were personally served upon him on September 30, 1979, David filed no answer or any other pleading and made no appearance in the case. According to the findings in the March 5, 1986, order, notice of hearing to be held on December 26, 1979, at 8:50 a.m. on the URESA petition was served upon David by certified mail on November 28, 1979. However, both parties, in their briefs, state that notice of the December 26, 1979, hearing was mailed to David on December 21, 1979, a Friday, and received by him on December 26, 1979, but after the hearing had taken place. December 22, 23, and 25, 1979, were apparently not working days. David had been working in Utah for 5 weeks and had returned to Nebraska on Christmas Eve or Christmas Day.

David states that on December 26, 1979, after receiving the notice, he telephoned the Lancaster County courthouse (apparently the county attorney's office) and was told that the hearing had taken place, and there was nothing he could do about it. David says he was not told of the outcome of the hearing, and he made no inquiries at that time regarding the outcome of the hearing. On that same day, David called someone in Union County, Iowa, that had to do with sending notices about child support, and this person told David that she was not aware of any change in his child support obligation.

At the hearing on September 12, 1985, the court took judicial

notice of the proceedings in the URESA hearing held on December 26, 1979. The evidence presented at the default hearing on December 26, 1979, before Judge Samuel Van Pelt indicated that Teena and Jayson required $221 per month for rent, food, clothing, utilities, transportation, and telephone. There were no monetary figures set forth for child care, medical expenses, and incidentals. Teena was receiving $275 per month in assistance from the welfare department. On December 31, 1979, Judge Van Pelt entered an order directing David to pay $275 per month for the support of Jayson. David states that he found out about December 26, 1979, that an order for child support had been entered in Lancaster County, but he did not know the amount. David states he first heard of the modification to $275 per month on August 1, 1983, when he appeared in court for failure to pay child support and spoke with Deputy County Attorney Joe Kelly. David had, however, appeared in the district court for Lancaster County on June 1, 1983, and agreed to pay $150 per month on child support starting June 10, 1983, with $75 of that to be on current support and $25 on arrearage. Obviously, there was some confusion at that hearing.

David filed this action on October 27, 1983. His first assignment of error is that the trial court erred by failing to find that the Nebraska court was without jurisdiction to increase the amount of support previously ordered by the Iowa court. This issue is not one of first impression with this court. *Chisholm v. Chisholm*, 197 Neb. 828, 251 N.W.2d 171 (1977), involved a California divorce and a subsequent proceeding under the Nebraska URESA. The court in *Chisholm*, in reference to the URESA, stated at 830, 251 N.W.2d at 173: "Under the statute the court in the responding state may fix the support payment at a different amount than that specified by the judgment in the initiating state. Moore v. Moore, 252 Iowa 404, 107 N.W.2d 97; Swan v. Shelton (Mo. App.), 469 S.W.2d 943." See, also, *State of Iowa ex rel. Petersen v. Miner*, 226 Neb. 551, 412 N.W.2d 832 (1987).

David's first assignment of error is therefore without merit.

David's second assignment of error is that the trial court erred in finding that due process was observed when it entered

judgment requiring him to pay $275 per month for the support of his minor child.

As previously noted, David did not receive actual notice of the December 26, 1979, hearing until that date, after the hearing had taken place. He filed no appearance or pleadings in the URESA case, nor did he file any request for notice of hearing, even though he was aware that the action was pending. He did not ask what order had been entered on December 26, 1979. He did not go to the clerk of the district court for Lancaster County to obtain a copy of the order, nor did he make inquiry of the county attorney's office as to what order had been entered.

The failure of David to receive notice prior to the taking of a default judgment in the URESA case is not determinative, since notice is not required, David having filed no appearance or pleading in the URESA case. This court held in *Tejral v. Tejral*, 220 Neb. 264, 267, 369 N.W.2d 359, 361 (1985) that

> where a party in a dissolution of marriage case is served personally with a summons and a copy of the petition in the case, and that party chooses not to file any pleading nor to enter an appearance in the case, and has not otherwise requested notice of hearing, notice of default hearing need not be given to such party. We further hold that it is an abuse of the trial court's discretion under § 42-372 to set aside a dissolution decree, properly entered, on the sole basis that notice of hearing was not sent to the party in default of filing any pleading or entering an appearance in the case.

The same rule is applicable in a URESA case.

Due process was duly observed. David's second assignment of error is without merit.

David's third assignment of error is that the trial court erred by finding that David was not equitably entitled to a new trial on the issue of how much child support he should be required to pay.

It is clear from the history of this case that the trial court's action was appropriate and that David is not entitled to any relief, either by statute or through the court's general equity powers.

The Nebraska statutes set out the time limits for requesting a

new trial.

> The application for a new trial must be made, within ten days, either within or without the term, after the verdict, report or decision was rendered, except (1) where unavoidably prevented, or (2) for the cause of newly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial.

Neb. Rev. Stat. § 25-1143 (Reissue 1985).

The grounds for vacation of judgment after term are also addressed by statute.

> A district court shall have power to vacate or modify its own judgments or orders after the term at which such judgments or orders were made (1) by granting a new trial of the cause within the time and in the manner prescribed in sections 25-1143 and 25-1145; (2) by a new trial granted in proceedings against defendants constructively summoned as provided in section 25-517; (3) for mistake, neglect, or omission of the clerk, or irregularity in obtaining a judgment or order; (4) for fraud practiced by the successful party in obtaining the judgment or order; (5) for erroneous proceedings against an infant or person of unsound mind, where the condition of such defendant does not appear in the record, nor the error in the proceedings; (6) for the death of one of the parties before the judgment in the action; (7) for unavoidable casualty or misfortune, preventing the party from prosecuting or defending; (8) for errors in a judgment shown by an infant in twelve months after arriving at full age, as prescribed in section 25-1317; and (9) for taking judgments upon warrants of attorney for more than was due to the plaintiff, when the defendant was not summoned or otherwise legally notified of the time and place of taking such judgment.

Neb. Rev. Stat. § 25-2001 (Reissue 1985).

Neb. Rev. Stat. § 25-2008 (Reissue 1985) determines time limitations on proceedings to vacate after term:

> Proceedings to vacate or modify a judgment or order, for the causes mentioned in section 25-2001, subdivisions

> (4), (5) and (7), must be commenced within two years after the judgment was rendered or order made, unless the party entitled thereto be an infant or person of unsound mind, and then within two years after removal of such disability. Proceedings for causes mentioned in subdivisions (3) and (6) of the same section shall be within three years, and in subdivision (9) within one year, after the defendant has notice of the judgment.

The order of support was entered in Lancaster County on December 31, 1979. David failed to request a new trial or vacation of judgment until October 27, 1983, almost 4 years later. Clearly, he has waited too long to avail himself of any statutorily created relief from judgment.

David also contends he is entitled to relief under the court's general equity powers. An examination of those powers and David's actions shows that such relief must be denied.

The question of when one is entitled to relief from judgment through the court's equity power was addressed by this court in *Emry v. American Honda Motor Co.*, 214 Neb. 435, 447-48, 334 N.W.2d 786, 794 (1983), when the court stated:

> It is true that 25-2001 is not the exclusive remedy for vacating a judgment after the term has expired. That statute is concurrent with an independent equity jurisdiction. *Shinn v. Shinn*, 148 Neb. 832, 29 N.W.2d 629 (1947); *Norfolk Packing Co. v. American Ins. Co.*, 116 Neb. 118, 216 N.W. 309 (1927); *Kulhanek v. Kulhanek*, 106 Neb. 595, 184 N.W. 139 (1921).
>
> We note at the outset that to proceed in equity the litigant must show that he was without a remedy at law; more specifically, that § 25-2001 could not serve him. *Shipley v. McNeel*, 149 Neb. 793, 32 N.W.2d 636 (1948); *Lindstrom v. Nilsson*, 133 Neb. 184, 274 N.W. 485 (1937). We believe that the language of the court in *Lindstrom* is particularly pertinent in this regard: "This court is committed to the rule that equity will not afford relief if the complainant has a remedy by statutory proceeding in the original action, and that to be entitled to equitable relief a party must not have neglected to avail himself of the statutory remedy. See *Brandeen v. Beale*, 117 Neb.

291, 220 N.W. 298; *Krause v. Long*, 109 Neb. 846, 192 N.W. 729. . . ."

David knew that a lawsuit had been filed against him in Lancaster County, Nebraska. He was personally served with the summons. He also knew that a hearing had been held in Lancaster County District Court on December 26, 1979. He was advised of that fact on December 26, 1979, via a telephone conversation with the county attorney's office. He was aware, at all times, of the URESA action. He did not go to the clerk of the district court for a copy of the order, nor did he ask the county attorney's office about the order.

Until October 27, 1983, David took no action to vacate the judgment or request a new trial. It is clear that David knew of the lawsuit and the hearing. He consciously chose to disregard any order entered by the Lancaster County District Court.

If David did have grounds for vacating the judgment or requesting a new trial, he should have proceeded in a timely manner, within term or under the statutorily prescribed time guidelines. Because of his actions, David's request for relief through the court's general equity powers must be denied.

David's third assignment is also without merit.

The judgment of the district court is affirmed.

AFFIRMED.

CORNHUSKER CHRISTIAN CHILDREN'S HOME, INC., A NEBRASKA NONPROFIT CORPORATION, ET AL., APPELLEES, V. DEPARTMENT OF SOCIAL SERVICES OF THE STATE OF NEBRASKA ET AL., APPELLANTS.
429 N.W.2d 359

Filed September 23, 1988. No. 86-691.

1. **Declaratory Judgments: Appeal and Error.** In an appeal from a declaratory judgment regarding questions of law, this court has an obligation to reach its conclusion independent from the conclusion reached by the trial court.
2. **Statutes: Appeal and Error.** 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.

3. _____: _____. It is not within the province of this court to read a meaning into a statute which is not warranted by the legislative language; neither is it within the province of this court to read anything plain, direct, and unambiguous out of a statute.
4. **Administrative Law: Minors: Words and Phrases.** A sending agency within the meaning of the Interstate Compact on Placement of Children, Neb. Rev. Stat. § 43-1101 (Reissue 1984), is defined to include "a person," which by logical extension would also apply to "a parent."
5. **Statutes: Presumptions: Legislature: Intent.** In construing a statute it is presumed that the Legislature intended a sensible rather than an absurd result.

Appeal from the District Court for Lancaster County: DALE E. FAHRNBRUCH, Judge. Reversed and remanded for further proceedings.

Robert M. Spire, Attorney General, and Royce N. Harper for appellants.

Steven G. Seglin, of Crosby, Guenzel, Davis, Kessner & Kuester, for appellees.

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

HASTINGS, C.J.

Cornhusker Christian Children's Home, Inc. (the Home), plaintiff-appellee, sought and received declaratory and injunctive relief in the district court for Lancaster County. The court declared that the Interstate Compact on Placement of Children (the Compact), Neb. Rev. Stat. § 43-1101 (Reissue 1984), did not apply to the placement of children with a Nebraska child-caring agency by parents residing in other Compact states, and enjoined the enforcement of the regulation against the Home. The defendant Department of Social Services (DSS) appeals from that decree.

The Home is a state-licensed 24-hour residential child-care facility in Nebraska. The Home is licensed to care for 19 children. At the time of trial, about half of the current residents had been placed by parents residing in other states which are parties to the Compact.

The Compact, followed except in New Jersey, Washington, D.C., and Puerto Rico, was adopted in Nebraska in 1974. Since

that time, the Home has received children placed by parents residing in other Compact states without regard to the Compact. However, during the Home's annual license review in November 1985, DSS informed the Home that its license would not be renewed until it complied with the Compact. DSS interpreted the Compact as requiring parents residing in Compact states outside Nebraska to notify DSS before placing their children with a state-licensed agency in Nebraska. DSS would then have the authority to approve the placement, and the State would be notified of the child's presence in the state.

In its second amended petition, the Home requested a declaration, in part, that DSS was in error in applying the terms of the Compact to the placement by a nonresident parent of a child in a licensed institution of this state; that in the event that such interpretation by DSS was proper, article II(b) of the Compact is unconstitutional as it violates the 5th and 14th amendments to the U.S. Constitution and Neb. Const. art. I, § 3, and offends the privileges and immunities clause found in U.S. Const. art. IV, § 2; and that DSS' interpretation of the Compact was arbitrary and capricious and without any rational basis, and therefore was invalid.

Although making an oblique reference to the due process clause of the 14th amendment, the trial court did not rule on that issue, and singularly held and ordered that the Compact did not apply to the placement of children by parents residing in other Compact states and enjoined DSS from enforcing that rule against the Home. Although the assignments of error interposed by DSS are four in number, they address only the holding by the district court that the provisions of the Compact do not apply to the placement of children by parents residing in other Compact states, and the entering of the injunction against DSS. Accordingly, we limit our review to the issues here presented, which eliminates any necessity of our dealing with the constitutional issues.

In an appeal from a declaratory judgment, the Supreme Court, regarding questions of law, has an obligation to reach its conclusion independent from the conclusion reached by the trial court. *Cornhusker Christian Ch. Home v. Dept. of Soc. Servs.*, 227 Neb. 94, 416 N.W.2d 551 (1987). There are no

questions of fact with which we are concerned.

The Compact was created for the purpose of facilitating the placement of children in the most suitable environment available for their needs. Art. I(a). Additionally, the "purpose and policy of the party states" is:

> (b) The appropriate authorities in a state where a child is to be placed may have full opportunity to ascertain the circumstances of the proposed placement, thereby promoting full compliance with applicable requirements for the protection of the child [and]
>
> (c) The proper authorities of the state from which the placement is made may obtain the most complete information on the basis of which to evaluate a projected placement before it is made.

Art. I(b) and (c).

The Compact then provides conditions for such placements. Art. III. It is the applicability of these conditions which is at issue. The Compact provides in part:

> (a) No *sending agency* shall send . . . into any other party state any child for placement . . . unless the sending agency shall comply with each and every requirement set forth in this article . . . .
>
> (b) Prior to [such placement], the sending agency shall furnish *the appropriate public authorities* in the *receiving state* written notice of the intention to send, bring, or place the child in the receiving state. . . .
>
> . . . .
>
> (d) The child shall not be sent . . . into the receiving state until the appropriate public authorities in the receiving state shall notify the sending agency, in writing, to the effect that the proposed placement does not appear to be contrary to the interest of the child.

(Emphasis supplied.) Art. III(a), (b), and (d). The "receiving state" in this case is, of course, Nebraska. See Art. II(c). "Sending agency" is defined as:

> a party state, officer or employee thereof; a subdivision of a party state, or officer or employee thereof; a court of a party state; *a person*, corporation, association, charitable agency or other entity *which sends, brings, or causes to be*

sent or brought any child to another party state.
(Emphasis supplied.) Art. II(b). "The appropriate public authorities" discussed in article III "shall, with reference to this state, mean the Department of Social Services, and said Department shall receive and act with reference to notices required by Article III." Art. X(c).

The trial court based its ruling in the Home's favor on its determination that the Compact's notification requirements were not applicable to placements made by nonresident parents. The court recognized the parents' right to raise (and place) their child without State interference, and found that the Legislature clearly intended not to abridge that right.

DSS argues that, logically, a parent is a "person," and therefore falls within the definition of "sending agency." The Home, however, insists that the Compact language is ambiguous as "it is not clear whether the term 'parent' is included in the term 'person' as referred to in the definition of a 'sending agency'." Brief for appellees at 11.

Our analysis is guided by the following principles: "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 G.B., M.B., and T.B.*, 227 Neb. 512, 514, 418 N.W.2d 258, 260 (1988); *Niedbalski v. Board of Ed. of Sch. Dist. No. 24*, 227 Neb. 516, 418 N.W.2d 565 (1988); *Dieter v. State*, 228 Neb. 368, 422 N.W.2d 560 (1988); *State v. Carlson*, 223 Neb. 874, 394 N.W.2d 669 (1986). Furthermore, "it is not within the province of this court to read a meaning into a statute which is not warranted by the legislative language; neither is it within the province of this court to read anything plain, direct, and unambiguous out of a statute." *Lawson v. Ford Motor Co.*, 225 Neb. 725, 728, 408 N.W.2d 256, 258 (1987).

The plain and ordinary meaning of "person" certainly includes "parent." See *State ex rel. O'Sullivan v. Heart Ministries, Inc.*, 227 Kan. 244, 247, 607 P.2d 1102, 1105 (1980), in which the Supreme Court of Kansas noted that "sending agency" as used in the Compact "includes private persons." See, also, *People v Keane*, 144 Mich. App. 12, 373 N.W.2d 228

(1985), in which the Michigan Court of Appeals suggested in dicta that the Compact would cover out-of-state placements by parents. There is nothing within the Compact to indicate that, for the purposes of this statute, parents are not persons, and in the absence of such an indication, we should not construe the language to eliminate parents from the class of persons. "In construing a statute it is presumed that the Legislature intended a sensible rather than an absurd result." *Rodriquez v. Prime Meat Processors*, 228 Neb. 55, 65, 421 N.W.2d 32, 39 (1988); *Dugdale of Nebraska v. First State Bank*, 227 Neb. 729, 420 N.W.2d 273 (1988). To now say that a parent is not a "person," without some indication in the statute to the contrary, would indeed lead to such a result.

As the Compact is applicable to placements made within Nebraska by a parent residing outside of Nebraska, the order of the district court declaring to the contrary and enjoining the State from enforcing the Compact is reversed, and the cause is remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

HAROLD A. GESELL, APPELLEE AND CROSS-APPELLANT, V. RICHARD E. REEVES, APPELLANT AND CROSS-APPELLEE.

429 N.W.2d 363

Filed September 23, 1988. No. 86-825.

1. **Accounting: Equity.** An action for an accounting may under one set of circumstances find its remedy in an action at law and under another find it within the jurisdiction of equity. Where the intimate relationships of the parties are involved, an adequate remedy is available only within the equitable jurisdiction of the court.
2. **Equity: Appeal and Error.** In an action in equity, this court must review the record de novo and reach an independent conclusion without being influenced by the findings of the trial court; however, where credible evidence is in conflict, we may give weight to the fact that the trial court saw the witnesses and observed their demeanor while testifying.
3. **Contracts: Waiver.** A party to a contract may waive the provisions made for his

benefit.

4. **Prejudgment Interest: Claims.** Where a reasonable controversy exists as to the plaintiff's right to recover or as to the amount of recovery, the claim is generally considered to be unliquidated, and prejudgment interest is not allowed.

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

James M. Kelley for appellant.

Steven D. Burns and Beverly Evans Grenier, of Steven D. Burns, P.C., for appellee.

BOSLAUGH, WHITE, and SHANAHAN, JJ., and SPRAGUE and THOMPSON, D. JJ.

THOMPSON, D.J.

Defendant-appellant, Richard E. Reeves, together with his wife, purchased 320 acres of undeveloped land in Maricopa County, Arizona, in February of 1980 for $200 per acre, or a total of $64,000. Reeves paid $13,000, financed the balance with a loan, and executed a deed of trust to the Bank of California for $51,000, with principal and interest due yearly for 6 years commencing on April 2, 1981.

On February 25, 1980, Reeves entered into a written purchase agreement with plaintiff-appellee, Harold A. Gesell, whereby Reeves agreed to sell to Gesell 60 acres of the land for $30,000, with a payment of $12,500 and the balance of $17,500 to be carried on a land contract with six annual installments plus 11 percent interest.

Sometime after the purchase agreement was signed and prior to May 16, 1980, Reeves advised Gesell that he had a chance to sell the land for approximately $450 per acre. At this price Gesell would take a loss.

On May 17, 1980, the parties entered into another written agreement, incorporating the terms of the February 25, 1980, agreement. Under this agreement Gesell paid an additional $2,500 and obtained a 20-percent ownership interest in the land. In the event of sale of the land, the parties agreed that Reeves would receive his base investment of $66,000 ($2,000 for previously incurred expenses was added by Reeves), plus 80 percent of the profit above this. Gesell would receive 20 percent

of the profit above $66,000, plus Reeves would pay Gesell $15,000 and any reduction in principal made on a promissory note to be executed by Gesell for $17,500 payable in six yearly installments at 11 percent interest commencing February 25, 1981, and each year thereafter through 1986. Gesell also agreed to pay 20 percent of all taxes, insurance, and other expenses as agreed attributed to the maintenance, upkeep, and future development of the property.

Two weeks later, Reeves and Gesell flew to Phoenix, Arizona, to conduct negotiations with a prospective purchaser, Betty Boo, Inc. Betty Boo was represented by Hugh Johnson, president of Betty Boo. A purchase agreement was reached and a written purchase agreement executed in June of 1980. The agreement called for a purchase price of $144,000 on the following terms: (1) $1,000 in cash payable on the execution of the agreement; (2) $1,000 due on or before July 10, 1980; (3) $19,600 at time of closing; (4) $51,000 by purchaser paying Reeves' note with the Bank of California; and (5) Two promissory notes, each for $35,700, with 10 percent interest payable on a 10-year amortization schedule.

The agreement was signed by Betty Boo, Reeves, and his wife. Reeves and his wife, on June 25, 1980, executed two deeds covering the land under the terms of the agreement, which were placed in escrow.

Gesell executed a quitclaim deed to Betty Boo.

Betty Boo actually paid Reeves $6,000 prior to closing and $17,699.01 on January 2, 1981. Reeves' closing costs were $898.72.

Betty Boo's first annual payment on the two notes, including principal of $10,001.20 and interest of $1,619.16, or a total of $11,620.36, was due on March 22, 1981. Betty Boo was given credit for interest paid at closing of $2,809.15, with a balance due of $8,811.21. This payment was made by Betty Boo in 1981. Betty Boo also remitted Reeves' 1981 payment to the Bank of California in the amount of $14,100.

In September 1982, Johnson gave Reeves $5,000 as consideration for an extension for Betty Boo's already overdue payment. Betty Boo later defaulted and deeded the land back to Reeves. Thereafter, Johnson and Reeves entered negotiations,

this time with Johnson representing Southwest Jojoba Company. On October 1, 1982, Jojoba gave Reeves $5,000 earnest money. An agreement was reached on the property for a purchase price of $176,000, and a closing took place on November 19, 1982. Reeves' closing costs were $9,254.77. Payment was made by Jojoba's paying $39,000 in cash at closing, and executing a note and deed of trust for $132,000. By September of 1983, Jojoba had paid all that was due on the note, as admitted by Reeves at trial. Jojoba paid $110,500 to an escrow agent, and the escrow agent paid the balance due to the Bank of California of $36,409 and remitted a check to Reeves of $74,091. The difference between $132,000 and $110,500 is $21,500. Reeves, by his admission of receiving all the amounts due, would also have received the $21,500 between the November 19, 1982, closing and September of 1983.

Gesell filed his petition in the district court on December 21, 1984, praying for "an accounting, judgment in an uncertain amount but in excess of $34,702.00, together with interest as allowed by law and costs . . . ." Reeves filed an answer admitting portions of the petition and denying portions.

Reeves filed a counterclaim alleging a breach of the contract by Gesell with Reeves, and alleging the following:

> 9. As the direct, sole and proximate result of plaintiff's failure and refusal to live up to the burdens imposed upon him by the Agreement, defendant was forced to find a buyer for the property under a distress situation and he was able to negotiate a contract with Betty Boo, Inc., an Arizona corporation, for the purchase of the property at approximately One Hundred Forty-Four Thousand ($144,000.00) Dollars. With the concurrence of the Bank of California the Betty Boo, Inc.,— defendant transaction was approved and foreclosure proceedings against defendant's interest in the property were dropped;
>
> . . . .
>
> 13. As the direct, sole and proximate result of plaintiff's failure and refusal to abide the terms of his agreement with defendant, and his consequent breach thereof, defendant was unable to continue to finance the property to the Bank of California nor was he able to maintain

taxes, insurance, and other expenses directly attributable to said property. Consequently, a second foreclosure was instituted by the Bank of California against defendant's interest in the property. With the concurrence of the Bank of California, defendant negotiated a sale of the property in November of 1982 to the Southwest Jojoba Company, an Arizona corporation, for the sum of One Hundred Ten Thousand Five Hundred ($110,500.00) Dollars. From said proceeds defendant paid the Bank of California Thirty-six Thousand Four Hundred Nine ($36,409.00) Dollars and paid taxes, insurance, and other expenses attributable to defendant's and plaintiff's interests in the property. Plaintiff failed and refused to make any contribution to the expenses related to the property in direct breach of his agreement with defendant.

Cross-petitioner prayed for an accounting and judgment of $113,500, plus 20 percent of expenses.

Jury trial was waived, and the matter was tried before the court. The evidence consisted of the testimony of the two parties and exhibits that were received.

The trial court made the following findings:

4. During a trip to the State of Arizona by plaintiff and defendant during which they traveled together, plaintiff stated to defendant that plaintiff wanted nothing further to do with the land transaction and that plaintiff would not sign a promissory note as required by Exhibit No. 4.

5. Plaintiff contends that plaintiff's obligation to pay $17,500.00 by a promissory note to the defendant was discharged upon the sale of the property to Betty Boo, Inc., in December, 1980. The Court does not agree with plaintiff's contention. It appears to the Court that defendant had the right under the agreement, Exhibit No. 4, to insist that plaintiff make the full investment of $32,500.00 as set forth in the terms of Exhibit No. 4.

6. Plaintiff's failure to perform under the terms of Exhibit No. 4 and plaintiff's communication to defendant in June, 1980, prior to the sale of the subject property to Betty Boo, Inc., that plaintiff would not contribute further cash constituted a repudiation of said agreement

by the plaintiff. Plaintiff is entitled only to a return of his original investment in the sum of $15,000.00 plus prejudgment interest on said sum at the rate of 12 percent from and after January 1, 1981, to the date of this judgment. Plaintiff is entitled to judgment in the sum of $15,000.00 plus prejudgment interest in the sum of $9,926.84 for a total judgment in the sum of $24,926.84.

7. Defendant has failed to sustain his burden of proving the allegations contained in defendant's counterclaim and plaintiff is entitled to judgment on defendant's counterclaim.

The court entered judgment in favor of Gesell for $15,000, plus prejudgment interest from January 1, 1981, to date of judgment entry of $9,926.84, for a total of $24,926.84, and dismissed Reeves' counterclaim, with costs taxed to Reeves.

Reeves appealed, and Gesell cross-appealed.

An action for an accounting may under one set of circumstances find its remedy in an action at law and under another find it within the jurisdiction of equity. *Schmidt v. Henderson*, 148 Neb. 343, 27 N.W.2d 396 (1947).

Where the intimate relationships of the parties are involved, an adequate remedy is available only within the equitable jurisdiction of the court. *Philip G. Johnson & Co. v. Salmen*, 211 Neb. 123, 317 N.W.2d 900 (1982).

In an action in equity, this court must review the record de novo and reach an independent conclusion without being influenced by the findings of the trial court; however, where credible evidence is in conflict, we may give weight to the fact that the trial court saw the witnesses and observed their demeanor while testifying. *J. J. Schaefer Livestock Hauling v. Gretna St. Bank, ante* p. 580, 428 N.W.2d 185 (1988); *Allen v. AT&T Technologies*, 228 Neb. 503, 423 N.W.2d 424 (1988); *Philip G. Johnson & Co. v. Salmen, supra*.

We find that the trial court erred in finding that Gesell repudiated the contract. The testimony of Reeves and Gesell was in direct conflict as to whether Gesell repudiated the contract during the trip to Arizona in June of 1980. However, documents received into evidence clearly support the testimony of Gesell. In a letter from Reeves to Gesell dated February 5,

1981, Reeves wrote:

> As I previously explained to you, you and I mutually agreed to sell the land under the terms of the escrow agreement, that agreement included the following:
>
> a. The Buyer would agree to make my mortgage payments and pay the interest on the balance in accordance with my original purchase agreement of the property. The sale to Hugh does not relieve me of my obligation to pay the $51,000.00 note I signed with the Bank of California, it merely says Hugh Johnson agrees to make the payments for me, however, in the event Hugh Johnson fails to make those payments, that does not relieve me of my obligation to make the payments, in such an event I would take whatever legal means necessary to recover clear and full title to the property.
>
> b. Nor does it relieve you of your obligation to pay me the $17,500.00 plus interest you agreed to pay me. As long as Hugh makes his payments, the only thing I will hold you responsible for is the difference in the interest rate.
>
> I hope this illustrates my position to you concerning the agreement. I am more than willing to pay you your 20% of the profit less expenses, however, I will have to pay you on the same basis I get paid.

In a letter from Gesell's attorney dated March 17, 1981, to Reeves, the attorney demanded $29,722.98 from Reeves.

In Reeves' response to the attorney by letter dated April 3, 1981, he wrote:

> I am not disputing the fact that I did make an agreement with Mr. Gesell on the dates indicated in your letter. I will also owe Mr. Gesell an amount very close to the amount you indicated, in fact, if the land escrow closes at maturity, the amount Mr. Gesell would receive would be slightly more than the amount you indicated.

Reeves further indicated in the letter:

> I have agreed to pay Mr. Gesell his 20% of the profits after deducting the expenses on an annual basis as I am paid in accordance with the terms of the escrow agreement. I would also not require Mr. Gesell to pay the balance of the $17,500.00 note at 11% interest that he

agreed to pay me as long as Mr. Johnson continues to make his annual escrow payments.

It is highly unlikely that Reeves would acknowledge the validity of the contract some 10 months after the alleged repudiation of Gesell, if indeed the repudiation had actually occurred. Hence, we find that Gesell did not repudiate the contract.

This court has held that a party to a contract may waive the provisions made for his benefit. *Carter v. Root*, 84 Neb. 723, 121 N.W. 952 (1909). The February 5 and April 3 letters constitute a waiver by Reeves of Gesell's annual payments due under the contract as long as Betty Boo made its payments. The facts show that Johnson, on behalf of Betty Boo, made the payments on the notes and the payment due the Bank of California in 1981.

There is no evidence that Reeves demanded further payment in 1982. Gesell testified:

> Q. Were you ever informed by Mr. Reeves that Betty Boo had failed to make the payments?
>
> A. In about the fall of '82. Mr. Reeves — we were in conversation. I kept calling him every so often to try to find out how the property is going and payments and he mentioned that it's possible that Hugh Johnson may default on that and then he may have to take it over.
>
> Q. This is fall of '82?
>
> A. That's the fall of '82 and I asked him at that time if he had the money to make the payments because I was concerned about it being sold out from under us. So, I then would get nothing and at that time he stated that he did have another source of funds and that it was taken care of.
>
> Q. Did you offer to give him money at that point?
>
> A. Yes.
>
> Q. And he said he did not need it, is that correct?
>
> A. That is correct.

It appears from the record that by the fall of 1982, especially after the purchase agreement was made between Reeves and Jojoba, Reeves was primarily interested in avoiding Gesell and their contract.

A summary of the money paid to Reeves or on Reeves' behalf follows:

Received by Reeves:	
From Betty Boo:	
Received through closing	$ 23,699.01
March 1981 payment	8,811.21
1981 payment to Bank of California	14,100.00
For extension	5,000.00
From Jojoba:	
Earnest money	$ 5,000.00
Cash at closing	39,000.00
Payment after closing	21,500.00
Final payment 1983	110,500.00
Total	$227,610.22
The following are the sellers' sales expenses:	
Betty Boo sale	$ 898.72
Jojoba sale	9,254.77
Total	$ 10,153.49
Gesell's 20 percent of expenses =	$ 2,030.70

The interest due from Gesell to Reeves pursuant to their agreement is as follows:

1981: Waived by Reeves	
1982: $17,500 × 11 percent =	$ 1,925.00
1983: 267 days (Feb. 25 to Nov. 19, 1982) × $5.27 per day ($1,925 ÷ 365) =	1,407.09
Total	$ 3,332.09

Pursuant to the parties' agreement, the amount due Gesell is computed as follows:

Total sales proceeds		$227,610.22
Less Reeves' base investment		66,000.00
Total profit		$161,610.22
20 percent of $161,610.22 =		32,322.04
Plus Gesell's equity		15,000.00
Subtotal amount due		$ 47,322.04
Less 20 percent expenses	$2,030.70	
Less interest	3,332.09	
	5,362.79	5,362.79
Total amount due to Gesell		$ 41,959.25

Prejudgment interest is allowable only when the amount claimed is liquidated. Where a reasonable controversy exists as to the plaintiff's right to recover or as to the amount of recovery, the claim is generally considered to be unliquidated, and prejudgment interest is not allowed. *Lutheran Medical Center v. City of Omaha, ante* p. 802, 429 N.W.2d 347 (1988); *Otto Farms v. First Nat. Bank of York*, 228 Neb. 287, 422 N.W.2d 331 (1988); *Philip G. Johnson & Co. v. Salmen*, 211 Neb. 123, 317 N.W.2d 900 (1982).

We determine that there is due from Reeves to Gesell the sum of $41,959.25 and that the district court's judgment is modified accordingly. Costs are hereby taxed to Reeves.

AFFIRMED AS MODIFIED.

DORIS J. DAMOUDE, APPELLEE, V. GENE E. DAMOUDE, APPELLANT.

429 N.W.2d 368

Filed September 23, 1988. No. 86-897.

Property Division. When awarding property in a dissolution of marriage, property acquired by one of the parties through gift or inheritance ordinarily is set off to the party receiving the gift or inheritance and is not considered a part of the marital estate. An exception to the rule is where both of the spouses have contributed to the improvement or operation of the property after receiving it by way of inheritance or gift, or the spouse not receiving the inheritance or gift has significantly cared for the property during the marriage.

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

Douglas Pauley, of Conway, Connolly and Pauley, P.C., for appellant.

O. William VonSeggern, of Grimminger & VonSeggern, for appellee.

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

BUCKLEY, D.J.

This is a dissolution of marriage appeal. The only error assigned by appellant, Gene E. DaMoude, is the trial court's division of the marital property and assignment of the debts.

The parties were married in 1977. No children were born as a result of the marriage. Gene has been in the well-drilling business since before the marriage.

The trial court dissolved the marriage and divided the parties' assets. Gene was awarded the family home in Grand Island, a certificate of deposit at Cairo State Bank in the face amount of $10,000, all personal property in the family home except certain items, and his well-drilling business, including all business equipment. Appellee, Doris J. DaMoude, was awarded a 143-acre farm in Howard County, together with all personal property located thereon, including irrigation equipment and a 1980 Oldsmobile. The court also awarded Doris, "as a further equitable division of the parties' marital assets," a judgment in the sum of $27,500.

The decree did not address any debts of the parties, did not determine whether the assets were marital or nonmarital, and did not make findings as to any valuations of the assets awarded.

In dissolution of marriage appeals, we review the case de novo on the record and reach independent conclusions without reference to the conclusions or judgment of the trial court. Neb. Rev. Stat. § 25-1925 (Reissue 1985); *Bryan v. Bryan*, 222 Neb. 180, 382 N.W.2d 603 (1986).

The parties' disputes center on (1) whether the farm awarded to Doris is a marital asset, (2) the value of Gene's well-drilling business equipment, and (3) whether rental income from the farm was used to reduce Gene's bank loans for his business equipment.

There is no question that the family home and the CD at the Cairo State Bank, both awarded to Gene, are nonmarital assets. Gene owned and occupied the house before the marriage. During the marriage Gene inherited from his father the CD and the proceeds from the sale of a property on Lake Maloney. He used those proceeds to pay off the mortgage loan on the house. Doris claims no interest in the house or the CD.

When awarding property in a dissolution of marriage, property acquired by one of the parties through gift or inheritance ordinarily is set off to the individual receiving the inheritance or gift and is not considered a part of the marital estate. *Sullivan v. Sullivan*, 223 Neb. 273, 388 N.W.2d 516 (1986).

The farm, however, brings into play an exception to the foregoing general rule, namely, that where both spouses have contributed to improvements or operation of the property received by inheritance or gift during the term of the marriage, or where a spouse, not owning the property prior to the marriage or receiving the inheritance or gift, has significantly cared for such property during the marriage. *Sullivan v. Sullivan, supra.*

During the marriage, in 1979, Doris and her two sisters each inherited a one-third interest in their parents' family farm at Dannebrog. Doris then purchased the other two-thirds interest from her sisters for approximately $120,000. Payment was made with cash Doris inherited, cash from the sale of a home that she owned prior to the marriage, and money borrowed from the Metropolitan Life Insurance Company. Both Gene and Doris executed the note to Metropolitan Life. The farm was titled to both parties.

Doris admitted that Gene performed services and put equipment in the farm that enhanced its value "[s]ome" and that some of the loans Gene took out at the Overland National Bank went into the operation of the farm. She offered no evidence of the value of the services or equipment.

Gene testified:

> [W]e dug in a reuse line from a reuse pit back, installed the inlet and outlet tubes to reuse pit. Put in electric control panel, completely automatic, tail water pump to bring it back up and across the bench and stuff. We rebuilt irrigation pipe, built all the offsets and special fittings for rebuilt irrigation pipe. Bought a lot of irrigation pipe, additional over what she has stated. . . .
>
> . . . .
>
> . . . We also drilled several wells and traded like for the reuse pit and leveling four or five acres of land and

> floating all the benches and stuff. I drilled an irrigation well and set a pump . . . .

He valued his services and the equipment installed at approximately $30,000. The only evidence of the value of the entire farm at the time of trial was $60,000.

We conclude that Gene made significant contributions to the improvements on the farm and therefore it should be included in the marital estate.

Doris contends that the farm rental income was used by Gene to pay his loans with Overland National Bank which were used to buy his well-drilling equipment. She produced four checks drawn on the parties' checking account, payable to Overland National Bank, totaling approximately $42,000. Gene testified that the money went "[i]n living, food, clothing for her children and me and my child, and operating the business, heating the home, electricity, the farm, payments on the farm." Doris had no records to indicate how the loan proceeds were used, but admitted that some of the proceeds were used for the farm.

Gene submitted a property statement listing business equipment owned prior to the marriage at $15,000 and equipment acquired after the marriage at $14,600. Doris offered a financial statement Gene gave to the Overland National Bank in March 1986, which, he said in answer to an interrogatory two months before trial, contained a list of assets of his well-drilling business. The values stated there total $64,100, of which $30,500 relates to equipment owned prior to the marriage. We place a value of Gene's business equipment acquired during the marriage at $33,600.

At the time of trial, the farm mortgage had a balance of $30,800, and Gene's loans with Overland National Bank totaled $20,369. He also had a loan on a Peterbilt truck at Five Points Bank for $3,000.

We agree in part with the trial court's distribution of the parties' property. Setting aside the nonmarital assets, Doris received the farm with a gross value of $60,000, less the mortgage loan, which she should assume and pay, leaving a net value of $29,200. She also received household goods at $2,500, the 1980 Oldsmobile valued at $1,100, and equipment at the farm valued at $5,600. The net value of property awarded to

her is $38,400. Gene received his well-drilling business, including equipment valued at $33,600, accounts receivable of $5,000, cash on hand of $500, and inventory at $7,500, less accounts payable of $1,000, for a net value of $45,600. He also should be awarded a 1979 Chevrolet Monza valued at $400, and should assume and pay the loans to Overland National Bank, totaling $20,369, and the debt to Five Points Bank of $3,000. The net value of property awarded to him is $22,631.

Counsel for appellant, in his brief and in oral argument, asks only that the $27,500 judgment awarded appellee as further equitable division of the parties' marital assets be eliminated. The judgment clearly is intended as a property settlement, not as alimony. Considering our determination as to the division of property, it cannot be justified, and we conclude that the trial court abused its discretion in awarding it and that it should be deleted.

The decree of the district court, as modified, is affirmed.

AFFIRMED AS MODIFIED.

ALICE J. ENO, APPELLEE, V. BRIAN R. WATKINS AND RICHARD SCOTT, APPELLANTS.

429 N.W.2d 371

Filed September 23, 1988. No. 86-993.

1. **Attorney and Client: Malpractice: Damages.** In a legal malpractice action, the general measure of damages is the amount of loss actually sustained as a proximate result of the conduct of the attorney.
2. **Attorney and Client: Malpractice: Damages: Proof.** In a legal malpractice action, when the loss arises from negligently prosecuting a prior case, the client has the burden of proving not only the amount of the judgment he would have obtained but for the negligence, but also what he would have collected.
3. **Trial: Expert Witnesses: Evidence.** Where the claimed injuries are of such a character as to require skilled and professional persons to determine the cause and extent thereof, the question is one of science. Such a question must necessarily be determined from the testimony of skilled professional persons and cannot be determined from the testimony of unskilled witnesses having no scientific knowledge of such injuries.

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

Paula J. Metcalf, of Knudsen, Berkheimer, Richardson & Endacott, for appellants.

Robert R. Gibson, of Professional Legal Associates of Nebraska, P.C., for appellee.

BOSLAUGH, WHITE, and SHANAHAN, JJ., and HOWARD, D.J., and COLWELL, D.J., Retired.

BOSLAUGH, J.

This was an action for legal malpractice brought by the plaintiff, Alice J. Eno, against Brian R. Watkins individually and Watkins, Richard Osborne, Richard Scott, and Steven D. Keist, doing business as Watkins, Osborne, Scott & Keist. A summary judgment in favor of Keist was entered on May 5, 1986, and the plaintiff dismissed the action as to Osborne on September 8, 1986.

The matter was tried to a jury, which returned a verdict in favor of the plaintiff in the amount of $65,000 "plus attorney fees." The defendants, Watkins and Scott, have appealed.

The plaintiff was involved in an automobile accident on June 25, 1976, when an automobile operated by Wyonna J. Neff collided with the rear of the automobile which the plaintiff was driving. As a result of the accident, the plaintiff claimed, she was injured and sustained multiple contusions, a strain to her cervical spine, and traumatic arthritis in her cervical spine. She also claimed that she suffered "great, intense and severe physical pain, intense mental shock, agony and anguish." She claimed special damages in the amounts of $739.22 for medical services and $250 for repairs to her automobile.

Apparently, Neff was insured, and the plaintiff negotiated with an adjuster but was unable to complete a settlement. On about June 1, 1980, the plaintiff hired the defendant Watkins to file a petition in the district court and obtain service upon Neff so that the court would obtain jurisdiction and the statute of limitations would not bar the plaintiff's action. It is undisputed that the defendant Watkins was hired only to prepare and file a

petition and obtain service on Neff. A petition was filed on June 6, 1980, and a summons was issued and personally served on Neff on June 11, 1980.

On July 1, 1980, Neff filed a special appearance. Watkins then had the special appearance set for hearing, and it was overruled on August 1, 1980. Watkins made no further appearance in the district court.

Neff answered on August 4, 1980. On September 30, 1981, the plaintiff was ordered to show cause on or before November 4 why the case should not be dismissed for want of prosecution. Apparently, no cause was shown, and the action was dismissed on November 5, 1981.

Watkins received postcard notices concerning the show-cause order and the dismissal and testified that he mailed both of them to the plaintiff. The plaintiff claims that she did not receive either postcard.

This action was commenced on October 3, 1984, to recover damages the plaintiff alleged she sustained as a result of her action against Neff's being dismissed.

In an action such as this, the plaintiff has the burden of proving that she would have been successful in obtaining and collecting a judgment against Neff and that she was prevented from doing so by the negligence of the defendants. Since the plaintiff's damages depend upon proof of the amount that she would have recovered and collected from Neff, the practical result is that the plaintiff must try both her lawsuit against Neff and her case against the defendants.

> In a legal malpractice action, the general measure of damages is "the amount of loss actually sustained as a proximate result of the conduct of the attorney." . . .
>
> . . . .
>
> . . . As the general measure is the loss "actually sustained," when the loss arises from negligently prosecuting a prior case the client has the burden of proving not only the amount of the judgment he would have obtained but for the negligence, but also what he would have collected. If the solvency of the prior defendant is known beyond question—for example, a tort claim against the state or an insurance claim within policy

> limits—a court may hold without other proof that the entire judgment would have been collectible. But if the prior defendant was an individual or other entity whose solvency is not known beyond question, the client must introduce substantial evidence from which a jury could reasonably find that a prior judgment would have been collectible in full, or could reasonably find the portion of the judgment which would have been collectible. In malpractice cases of this sort the client is limited in any event to the amount which could have been collectible.

(Emphasis omitted.) (Citations omitted.) *Pickens, Barnes & Abernathy v. Heasley*, 328 N.W.2d 524, 525-26 (Iowa 1983). See, also, *Stansbery v. Schroeder*, 226 Neb. 492, 412 N.W.2d 447 (1987).

One of the defendants' principal assignments of error is that the plaintiff failed to prove that she sustained any injuries as a proximate result of the automobile collision on June 25, 1976. The only evidence offered by the plaintiff in regard to her alleged injuries was her testimony that she suffered from headaches and backaches after the accident. The plaintiff offered no expert medical testimony.

The plaintiff's alleged injuries were subjective in nature. Before a plaintiff can recover damages for such injuries, there must be expert medical testimony to establish causation and the extent and nature of the injuries.

As we stated in *Eiting v. Godding*, 191 Neb. 88, 91-92, 214 N.W.2d 241, 244 (1974):

> Where the claimed injuries are of such a character as to require skilled and professional persons to determine the cause and extent thereof, the question is one of science. Such a question must necessarily be determined from the testimony of skilled professional persons and cannot be determined from the testimony of unskilled witnesses having no scientific knowledge of such injuries. . . . When symptoms from which personal injury may be inferred are subjective only, medical testimony is required. . . . There was no medical evidence to support the required causal connection here. The evidence is therefore insufficient to establish that the personal injuries alleged to have been

suffered by the plaintiff were caused by the accident. . . . (Citations omitted.)

The absence of any medical testimony to establish the extent and nature of the plaintiff's alleged injuries and that they were proximately caused by the accident of June 25, 1976, prevents the plaintiff from making any recovery in this case.

It is unnecessary to consider the other assignments of error.

The judgment is reversed and the cause remanded with directions to dismiss the petition of the plaintiff.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

LINDA L. RITZ, APPELLANT, V. RICHARD G. RITZ, APPELLEE.
429 N.W.2d 707

Filed September 23, 1988. No. 86-1044.

1. **Property Division: Alimony: Appeal and Error.** The division of property and the awarding of alimony in dissolution cases are matters initially entrusted to the discretion of the trial judge. On appeal, such matters will be reviewed de novo on the record and affirmed in the absence of an abuse of discretion.
2. **Alimony.** The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances and the other criteria enumerated in Neb. Rev. Stat. § 42-365 (Reissue 1984) make it appropriate.
3. _____. The earning capacity of a spouse operating a business is an element to be considered in determining alimony.

Appeal from the District Court for Sherman County: DEWAYNE WOLF, Judge. Affirmed as modified.

John O. Sennett, of Sennett & Roth, for appellant.

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

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

GRANT, J.

Petitioner-appellant, Linda L. Ritz, and respondent-

appellee, Richard G. Ritz, were married in Tennessee on December 19, 1959. Petitioner sought dissolution of the marriage by petition filed in December 1985, in Sherman County, Nebraska. A decree of dissolution was entered, after trial, on August 29, 1986. The decree dissolved the marriage of the parties, awarded alimony, divided property, and awarded attorney fees to petitioner. After a motion for new trial was overruled, petitioner timely appealed to this court. In this court, petitioner assigns as error the division of the assets and liabilities of the parties and the amount of award of alimony to her. We affirm the decree of dissolution, but modify it in the particulars hereinafter stated.

The record shows that at the time of the marriage of the parties, petitioner was 18 years old and respondent was 25. At the time of the marriage, petitioner was a senior in high school. She did not graduate, but later obtained a GED certificate. Respondent graduated from high school.

Two children were born of the marriage, and both were emancipated at the time of the decree of dissolution. Both parties were in good health, and both worked throughout the marriage. At one time, respondent was a "certified welder" and worked for several years on pipeline construction in Texas. Petitioner has no specialized training other than on-the-job training as a secretary and bookkeeper.

Neither party had substantial assets at the time of the marriage. After working in Texas, the parties moved to Nebraska in 1962. The parties had purchased land in Nebraska beginning in 1961 and bought "the home place" in 1962 or 1963. In connection with these purchases, we note respondent's testimony that

> I bought the half section that I live on or the quarter and the quarter adjoining to the west, I bought them the last year that I was pipelining. I bought them in — well, in fact I bought them in '61. I've got some dates if I may use some dates. I'll give you some dates on it if you need it. I bought the home place in '63 — spring of '62.

The deeds to the lands in question are not before us, but we will treat such land purchases, and other operations, as the property and operations of the parties and not those of

respondent alone, at least up to the time of their separation in December 1985.

Respondent began working in a grain elevator when he returned to Nebraska, and also engaged in farming and other business. Respondent testified he bought the grain elevator at Ashton, Nebraska, in about 1967, and, at that time, "we had the fertilizer plant and the elevator, bought and sold grain, sold fertilizer, had applicators, you know, to spread it with. Also had a big amount — had this grinder/mixer delivery truck kind of an all around operation."

Respondent testified that he could not keep up under the pace, so he finally cut down on the farming, sold the grain elevator, and got into the operation of a sale barn, with others, in Loup City, Nebraska. The sale barn did not turn out to be a good investment and, at time of trial, was treated as being of no value.

Respondent testified that petitioner was engaged in all the enterprises and that petitioner did the books and helped do whatever needed to be done. In addition, petitioner bore and raised two children. At the time of their separation in December of 1985, respondent was employed at the sale barn in Loup City at a salary of $1,750 per month. In 1984, respondent earned $21,000 in wages from the sale barn, and petitioner earned $6,294 at the same place. In January 1986, petitioner had moved from the family home in Ashton, Nebraska, to Grand Island, Nebraska, where she was able to get a job at $3.35 per hour for 12 hours per week at a motel. She testified that if she had been offered the job of running the motel, she could not handle that because the job required 24-hour-a-day work.

After trial, the court's decree was entered. In the decree, petitioner was awarded certain personal property, consisting primarily of furniture, a 1971 Thunderbird automobile, and certain small bank accounts and insurance policies. Respondent was awarded certain furniture, guns, a 1983 Lincoln automobile, his checking and savings accounts, farm machinery and trucks, and livestock. Respondent was also awarded real property, totaling 2 1/2 sections of land, and was ordered to "assume and pay" certain debts, totaling approximately $440,000. In addition, respondent was ordered

to pay petitioner $15,000 as part of the property settlement, plus $5,000 per year alimony for a period not to exceed 5 years or until the death or remarriage of petitioner.

In connection with the division of property, there is little controversy concerning valuations. At the trial in July 1986, the financial situation of the parties as of July 16, 1986, was set out in an exhibit, jointly offered by the parties. This exhibit reflected the valuations set by each of the parties on various segments of the property owned by the parties.

In the valuation attributed to the various items, we specifically note that we are not affected in our judgments herein by respondent's statement at page 10 of his brief, as follows:

> An examination of the Property Statement . . . shows that either the Petitioner's or the Respondent's value of each asset and liability has been highlighted. There are also some handwritten notes and values appearing on the Property Statement . . . . When the Property Statement was received into evidence, there were no highlighted values nor handwritten notes appearing on the exhibit. Therefore, it can be concluded that it was the trial judge who highlighted certain values and wrote notes on the exhibit. It can further be concluded that the highlighted and the handwritten values are those values that the trial court used as a basis for the property division.

We make no conclusions at all in the areas suggested by respondent. Had respondent desired the trial court to make specific findings, he could have requested such findings. Respondent's remarks in this area will be ignored. See, *D & J Hatchery, Inc. v. Feeders Elevator, Inc.*, 202 Neb. 69, 274 N.W.2d 138 (1979); *Chalupa v. Chalupa*, 220 Neb. 704, 371 N.W.2d 706 (1985).

The division of property and the awarding of alimony in marriage dissolution cases are matters initially entrusted to the discretion of the trial judge. On appeal, such matters will be reviewed de novo on the record and affirmed in the absence of an abuse of discretion. *Busekist v. Busekist*, 224 Neb. 510, 398 N.W.2d 722 (1987); *Taylor v. Taylor*, 222 Neb. 721, 386 N.W.2d 851 (1986). We have reviewed the record herein de novo, and we

conclude that the trial court abused its discretion in the property award and in the granting of alimony, and accordingly modify the judgment of the trial court.

In order to analyze the division of property, we will follow the method suggested by petitioner in valuing the property awarded to petitioner. We accept the higher valuation offered by the two parties as to that property. In valuing similar property awarded to respondent, we will generally accept the lower valuation offered by the parties.

We agree with the trial court's determination of the personal property items to be awarded to petitioner, as set out in the court's decree. We value that property at $28,075.

Respondent alleges in his brief that the assets awarded to him total $588,797.19. We do not accept that figure. We value the assets awarded to respondent, as follows:

Household goods	$ 2,750 (set out above)
Cash in accounts	2,900 (agreed)
1983 Lincoln	13,700 (set by respondent)
Pickup, stock trailer, tractor, misc.	19,250 (agreed)
Farm machinery	69,050 (agreed)
3 horses	750 (agreed)
Government payments	5,900
Livestock	
65 cows with calves	34,125
300 steers	124,800
60 heifers	20,520
Elevator contract	27,500 (agreed)
Insurance policies and IRA	14,867 (agreed)
Real estate	295,030 (agreed)
	$631,142

With regard to the only items disputed in the foregoing list, first, as to the government payments, respondent testified he had received such amount and indeed had the checks on his person at the time of trial. Such amount should be treated as cash in respondent's hands.

The only other figure that needs explanation is the amount for livestock. In exhibit 1, submitted jointly at the time of trial, the livestock had an agreed valuation of $144,387. At trial, it

was stipulated by counsel that that value was the value as of February or March of 1986 and that it was not the value as of the date of trial. Respondent testified that at the time of trial the parties owned 65 cows with calves, rather than the 70 cows owned in the early spring. Petitioner testified the value was $450 to $600 per pair. We adopt a valuation of $525 per pair and therefore find the value of the cows with calves at $34,125.

Respondent testified the parties owned 300 steers. At trial, respondent testified the steers averaged 650 pounds and had a value of $64 per hundredweight. The steers, therefore, had a value of $124,800 at time of trial.

With regard to the heifers, respondent testified that the agreed number of heifers weighed approximately 600 pounds each and that heifers had a value of $57 per hundredweight. We find the value of the heifers to be $20,520.

In his brief at page 20, respondent lists the liabilities which he must assume under the dissolution decree as a total of $481,539.42. In that amount he includes a credit of $1,300 for "Credit for Assets of Respondent on date of marriage"—some 27 years before the trial. We specifically reject that amount, and we determine the debts to be paid by respondent are accurate as set out in the trial court's decree: St. Paul National Bank, $322,177.98 (various notes); Equitable Life Insurance, $61,500; Ray Boncynski, $47,760 (remaining amount due on land contract for real estate); and Norwest Leasing Co., $8,595.68 (for center pivots); or a total debt assignment of $440,033.66. These debts are to be paid by respondent, and respondent is ordered to hold petitioner harmless from any obligation on her part arising out of those debts. Subtracting that amount from the property awarded to respondent, the figures show a net value of property to respondent of approximately $191,110.

In making the property award, the court awarded respondent a certificate of deposit in the amount of $100,000. This amount was either loaned or given to respondent by a friend in Texas. The court did not specifically determine the nature of this transaction, but the evidence would suggest it was a gift to respondent, and that amount is not herein considered because it does not constitute marital property, but is the

property of respondent.

We agree with the trial court and do not include additional moneys allegedly made by respondent in hay, milo, and rental proceeds. The hay and milo figures apparently have been incorporated in the livestock-feeding expense figures, and the rental proceeds were too speculative to be considered.

In the particular circumstances of this case, we feel that the property should be divided evenly. The parties had been married for 26 years. Each has worked hard in his or her lifetime. After the dissolution, however, respondent's life goes on much the same. He lives in the same house he has lived in for many years. He has the burden of a large debt, but he has very substantial assets to cope with that debt. He is 51 years old, with many working years ahead of him.

Petitioner, on the other hand, is living in a $140-per-month apartment, driving an older car, working at minimum wages, and starting a new life at age 44, with relatively few assets. Dividing the property in the fashion the trial court did appears to be the only way the situation should be handled. The difference in assets must be handled by awarding an appropriate amount of money to petitioner.

Respondent has net assets totaling $191,110. Petitioner has assets totaling $28,075. The difference is $163,035. Respondent is ordered to pay to petitioner the sum of $81,500. This results in an approximately even split, which, under the particular circumstances of this case, is fair to each party. Such amount should be paid by a $16,300 payment by October 1, 1988, with additional payments of $16,300 to be paid by October 1, 1989, 1990, 1991, and 1992. Respondent shall not pay interest on the unpaid balance except as to any payments which are not timely paid, and on such payments he will pay interest at the rate of 10 percent per year after any payments are overdue.

In connection with the alimony to be awarded to petitioner, we are governed by the provisions of Neb. Rev. Stat. § 42-365 (Reissue 1984), which provides:

> When dissolution of marriage is decreed, the court may order payment of such alimony by one party to the other . . . as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a

> history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in custody of such party. . . .
>
> While the criteria for reaching a reasonable division of property and a reasonable award of alimony may overlap, the two serve different purposes and are to be considered separately. . . . The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances and the other criteria enumerated in this section make it appropriate.

We consider first the wage income of respondent, which is approximately $21,000 per year. The parties' income tax return shows that in 1985, the parties also had $18,105 in interest income; $4,084 in business income (resulting from gross trucking income of $32,698 and expenses of $28,614, including $4,628 in depreciation); and $9,272 in capital gain income.

The parties' return showed $52,890 as farm loss. This figure was based on $118,336 of gross income, based on $68,570 net sales of purchased livestock and $41,532 sales of grain and other livestock. This gross income figure was reduced by expenses of $171,226, including $24,216 depreciation. The resulting loss plus a $20,045 loss carried forward required no income tax payment in 1985.

The parties' 1984 and 1983 income tax returns showed similar figures. The only purpose of listing these figures is to show that respondent has been awarded practically all of the income producing assets accumulated by the parties.

As stated in *Gleason v. Gleason*, 218 Neb. 629, 634, 357 N.W.2d 465, 468 (1984):

> While the condition of a business is an important consideration in determining the propriety of alimony to be paid, the condition of a spouse's business is not the sole factor in determining proper alimony. Rather, the earning capacity of a spouse operating a business is an element

which is to be considered in determining alimony. In addition, respondent has $100,000 of his own not to be considered marital assets. The substantial expenses he is incurring are ultimately going to redound to his benefit. Petitioner has nothing awarded on which to earn money, except her insurance policies and the property award hereunder.

Equitable consideration requires that petitioner not have to live like the proverbial church mouse while her ex-partner daily drives around his extensive holdings and observes his assets grow.

Accordingly, respondent is to pay petitioner the sum of $750 per month alimony for a period of 4 years from the date of the decree herein on August 29, 1986. Credits will be allowed on such sums for any maintenance payments made to petitioner by respondent since August 29, 1986. In addition, respondent shall pay to petitioner the sum of $2,400 per year beginning at the conclusion of the 4-year period set out above. The payments are subject to termination when petitioner reaches age 62, is married, or dies.

Respondent shall also pay the sum of $1,000 on the amount owing for services rendered to petitioner by her attorney.

As so modified, the order of the district court is affirmed.

AFFIRMED AS MODIFIED.

JAMES KLIEWER, APPELLANT, V. WALL CONSTRUCTION COMPANY ET AL., APPELLEES.

429 N.W.2d 373

Filed September 23, 1988. No. 87-004.

1. **Summary Judgment.** In considering a motion for summary judgment, the evidence is to be viewed most favorably to the party against whom the motion is directed, giving him or her the benefit of all favorable inferences which may reasonably be drawn from the evidence. Summary judgment is proper when pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from material facts, and when the moving party is entitled to judgment as a matter of law.

2. **Negligence: Presumptions.** The occurrence of an accident which causes injury and does damage does not create a presumption or authorize an inference of negligence.
3. **Negligence.** For actionable negligence to exist, there must be a legal duty on the part of the defendant to protect the plaintiff from injury, a failure to discharge that duty, and damage proximately resulting from such undischarged duty.
4. **Negligence: Proof.** It is axiomatic that the burden of proving negligence is on the party alleging it and that merely establishing that an accident happened does not prove negligence.
5. **Invitor-Invitee: Words and Phrases.** In law, an "invitee" is a person who enters on the premises of another in answer to the express or implied invitation of the *owner* or *occupant* on the business of the owner or occupant for their mutual benefit.
6. **Negligence: Liability: Proof.** Under a premises liability theory, it is indispensable to any recovery that the plaintiff show by evidence that the defendant was at the time of the accident in control of the premises upon which the plaintiff was injured.
7. **Invitor-Invitee: Negligence.** If conditions and circumstances are such that the invitee has knowledge of the condition in advance, or should have knowledge comparable to that of the invitor, then it may not be said that the invitor is guilty of actionable negligence.
8. **Invitor-Invitee: Liability.** The superior knowledge of the invitor is the foundation of liability, and absent such superior knowledge, no liability exists.
9. **Fraud.** To constitute a false representation, a statement must be made as a statement of fact, not merely the expression of an opinion.
10. **Negligence.** One who knows of a dangerous condition, appreciates its dangerous nature, and deliberately exposes himself or herself to the danger assumes the risk of injury from it.

Appeal from the District Court for Fillmore County: ORVILLE L. COADY, Judge. Affirmed.

Rex R. Schultze, of Perry, Perry, Witthoff, Guthery, Haase & Gessford, P.C., for appellant.

David A. Barron, of Cline, Williams, Wright, Johnson & Oldfather, for appellee Wall Construction Company.

BOSLAUGH, WHITE, CAPORALE, GRANT, and FAHRNBRUCH, JJ.

FAHRNBRUCH, J.

James Kliewer appeals the summary judgment dismissal of his personal injury claim against the appellee Wall Construction Company. We affirm dismissal of the claim.

While on site to gather data to bid on repairing an explosion-damaged elevator belonging to Shickley Grain

Company, Kliewer was injured by falling timber. At the time of the injury, Kliewer was accompanied by Dale Wall, president of Wall Construction, who had asked the appellant to view the damaged elevator and make a subcontract bid.

Kliewer claims his injuries were proximately caused by the negligence of Shickley Grain Company, Sherbarth, Inc., and/or by Wall Construction Company. This appeal does not involve Shickley Grain Company or Sherbarth. At the hearing on the motion for summary judgment, the court considered the depositions of Wall; Kliewer; Gerald Grote, an owner and manager of the elevator; and Jeffrey B. Asch, Sherbarth's superintendent foreman in charge of removing postexplosion debris. The following account is gathered from the record.

On May 15, 1985, the Shickley Grain Company's elevator in Shickley, Nebraska, exploded. The explosion damaged a structure called "Facility B." Damage included the headhouse's being blown off Facility B and the loosening of that elevator's legs.

After the explosion, Grote contacted Sherbarth, Inc., to clean up the debris in the headhouse. Sherbarth claims it cleaned up the debris in accordance with Grote's directions. Wall, on behalf of Wall Construction, either contacted Grote or was contacted by Grote with respect to submitting a bid for reconstruction work on the elevator.

Grote gave Wall permission to look at the premises and make a bid. Wall visited the elevator about a week after the explosion. During that visit, Wall did not go into the damaged facility, but climbed an adjacent grain bin to view the damaged headhouse. Thereafter, Wall told Grote that he would consider making a bid on the reconstruction work. No bid was made at that time.

Within 2 days after his initial visit, Wall and his foreman returned to the elevator to again view the damage. Wall climbed a ladder inside the damaged elevator. He assumed the ladder was dangerous because he knew there had been structural damage due to the explosion. As he climbed, he looked for loose debris but did not observe any.

On May 29, 1985, at Wall's request, Kliewer accompanied Wall to the Shickley Grain elevator. Wall suggested Kliewer make a bid on carpentry repair work on the elevator. On the

40-mile trip to Shickley from Henderson, Nebraska, the two men discussed the condition of the elevator. Kliewer was told that the headhouse was damaged and needed to be rebuilt and that the debris had been removed. Wall also told Kliewer that he had been to the elevator site on two previous occasions and that he had climbed the ladder to the top of the elevator on one occasion.

Kliewer testified that as they approached the elevator, he could see that the roof of the structure was missing. The two men went into the elevator and approached the ladder. Prior to climbing it, Kliewer asked Wall if the ladder was safe. According to Kliewer, Wall's response was, "Well, we've been up that ladder before and a lot of other people have been up and down that ladder, so I guess it's safe." Kliewer testified that Wall implied that the ladder was solid up to the top. Kliewer testified that he was under the impression that the loose debris was cleaned up and that there would not be any trouble with debris, as far as getting to the top of the elevator. Yet Kliewer hesitated climbing the ladder because of the possibility of falling debris.

Wall climbed the ladder. Kliewer considered waiting to climb the ladder just in case something would fall and hit him. Kliewer did not see anything above him, so he decided to follow Wall up the ladder. While climbing, Wall did not see any loose debris. When Wall reached the top of the ladder, Kliewer was approximately 20 feet below him.

Kliewer heard a commotion above him. Looking up, he saw timber coming toward him. He covered his head with his right arm to protect himself. A piece of wood fell and struck Kliewer on his right arm. Kliewer suffered a fractured arm and neck injuries. The injured man described the wood as two 2 by 6 boards nailed together, approximately 6 feet long, with another piece of lumber attached to them perpendicularly.

Upon analysis, in his second amended petition, Kliewer claims that Wall Construction was negligent under two theories: (1) premises liability; and (2) negligent misrepresentation. On appeal, Kliewer claims that the district court erred in failing to find liability under those two theories. Kliewer also claims that the district court erred in failing to view the evidence presented to it in a light most favorable to the party against whom the

motion was directed, and in failing to give the plaintiff the benefit of all favorable inferences which may be reasonably drawn from the evidence.

> "In considering a motion for summary judgment, the evidence is to be viewed most favorably to the party against whom the motion is directed, giving him or her the benefit of all favorable inferences which may reasonably be drawn from the evidence. Summary judgment is proper when pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from material facts, and when the moving party is entitled to judgment as a matter of law. . . ."

Wells Fargo Ag Credit Corp. v. Batterman, ante p. 15, 15-16, 424 N.W.2d 870, 871 (1988).

With respect to premises liability, Kliewer alleges that the timber was a condition upon the premises which Wall knew of, or in the exercise of reasonable care should have discovered, and which involved an unreasonable risk of harm to the appellant. Kliewer alleges Wall had a duty to use reasonable care to make the premises safe for him or to give him adequate warning to allow him to avoid harm. Additionally, Kliewer claims that the appellee Wall Construction failed to inspect the ladder and leg shaft to determine if there was loose debris which might fall onto persons using the ladder.

The occurrence of an accident which causes injury and does damage does not create a presumption or authorize an inference of negligence. *Wilson v. North Central Gas Co.*, 163 Neb. 664, 80 N.W.2d 685 (1957).

For actionable negligence to exist, there must be a legal duty on the part of the defendant to protect the plaintiff from injury, a failure to discharge that duty, and damage proximately resulting from such undischarged duty. *Tiede v. Loup Power Dist.*, 226 Neb. 295, 411 N.W.2d 312 (1987); *Holden v. Urban*, 224 Neb. 472, 398 N.W.2d 699 (1987). It is axiomatic that the burden of proving negligence is on the party alleging it and that merely establishing that an accident happened does not prove negligence. *Himes v. Carter*, 219 Neb. 734, 365 N.W.2d 840

(1985); *Porter v. Black*, 205 Neb. 699, 289 N.W.2d 760 (1980).

Kliewer claims he was an invitee or subinvitee of Wall Construction on the premises at the time he was injured. In law, an "invitee" is a person who enters on the premises of another in answer to the express or implied invitation of the *owner* or *occupant* on the business of the owner or occupant for their mutual benefit. See, *Roan v. Bruckner*, 180 Neb. 399, 143 N.W.2d 108 (1966); *Lindelow v. Peter Kiewit Sons', Inc.*, 174 Neb. 1, 115 N.W.2d 776 (1962). If Kliewer was an invitee of Wall Construction, and if Wall Construction was the owner or occupant and in control of the premises, then Wall Construction owed Kliewer the duty to use reasonable care to keep the premises safe for his use. See, *Tiede v. Loup Power District, supra*; *Neff v. Clark*, 219 Neb. 521, 363 N.W.2d 925 (1985). The appellant had substantially the same knowledge concerning the condition of the elevator as Wall. Kliewer also had experience with elevators that had exploded. Wall had no reason to expect that Kliewer would fail to protect himself from any obvious danger. Thus, this case does not fall within the rules of *Carnes v. Weesner, ante* p. 641, 428 N.W.2d 493 (1988), or *Corbin v. Mann's Int'l Meat Specialties*, 214 Neb. 222, 333 N.W.2d 668 (1983). "Ordinarily a person who is not the owner and is not in control of property is not liable for negligence with respect to such property." 65 C.J.S. *Negligence* § 94 at 1051 (1966). See, also, *Wilson, supra*. "[T]he person in possession of property ordinarily is in the best position to discover and control its dangers, and often is responsible for creating them in the first place." Prosser and Keeton on the Law of Torts, *Owners and Occupiers of Land* § 57 at 386 (5th ed. 1984). We look to the record to determine whether Wall Construction was in possession and control of the elevator at the time Kliewer was injured.

In *Wilson, supra* at 667-68, 80 N.W.2d at 687, this court held:

> It was indispensable to any recovery . . . that appellant show by evidence that appellee was at the time of the accident in control of the premises upon which appellant was injured. . . . "The burden was upon the plaintiff to establish that the contractor was yet in charge and control of the work at the time of the accident."

Quoting *Haynes v. Norfolk Bridge & Construction Co.*, 126 Neb. 281, 253 N.W. 344 (1934).

In *Wilson, supra* at 668, 80 N.W.2d at 688, the court also held:

> There is no proof in this case that appellee was in the occupancy or control or that it had any relationship, duty, or right whatever at the time of the accident in reference to the premises upon which appellant fell and was injured or in reference to any instrumentality thereon.

As in *Wilson*, there is no evidence that Wall Construction was in control of or had any right over the premises where and when Kliewer was injured. Wall Construction was not the possessor, owner, or occupier of the elevator. It had no contractual relationship with the elevator's owners. Dale Wall was there merely to evaluate the property in preparation of submitting a bid for repair work. As a matter of law, Kliewer cannot be said to be an invitee of Wall Construction on the premises.

The appellant argues that the case of *Isler v. Burman*, 305 Minn. 288, 232 N.W.2d 818 (1975), supports his position regarding premises liability. *Isler* is also cited in support of Kliewer's claim regarding negligent inspection. The duty to inspect premises is not a separate tort, but is one of the elements of premises liability. *Isler's* facts do not sufficiently parallel the facts of Kliewer's case to be controlling.

Isler involved a negligence action brought to recover damages for personal injuries resulting from a snowmobile accident. One of the defendants was Constance Evangelical Free Church, sponsor of the snowmobiling party the plaintiff was attending as a guest when she was injured. After trial, the jury returned a verdict finding the church negligent. The verdict was affirmed by the Minnesota Supreme Court. In *Isler*, the church obtained permission to use a farm for the snowmobile party. The church youth director was responsible for organizing and supervising the event. On the day of the party, the youth director inspected trails to determine whether there were any hazards or dangers in the area where the snowmobiling would take place. That night at the party, Isler was injured when the snowmobile on which she was riding crossed a ditch on an established trail. Apparently, several other snowmobiles had

crossed the same ditch without incident that night.

The *Isler* court held that the church was a *possessor* of the property. The court relied on Restatement (Second) of Torts § 328 E (1965), which defines a possessor of land as

> (a) a person who is in occupation of the land with intent to control it or
>
> (b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or
>
> (c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b).

There is no evidence that Wall Construction falls within any of those three categories.

Factual differences between *Isler* and the present case rule out its applicability. In *Isler*, the youth director specifically made a safety inspection of the property in anticipation of later use of that property by the church youth and guests. The director knew at the time of the inspection that the church, through him, would be in possession of that particular property during that evening's party.

In the present case, Wall visited the elevator on two occasions to determine the amount of damage, so he could submit a bid for reconstruction work. Wall's purpose in visiting the elevator was not to occupy it, nor did he have any intent to control it or assume any responsibility to inspect the property for the safety of others before Kliewer went onto the property.

Moreover, by the time Wall and Kliewer arrived at the elevator, Wall had shared with the appellant the information he had regarding the damaged facility. Kliewer had substantially the same knowledge about the condition of the property as did Wall. Kliewer testified he also knew about the explosion from watching pictures on television. In *Isler*, the youth director did not convey the results of his inspection of the property to the youths who were to use the property that evening. They relied on his inspection and determination of safety. The youth director assumed the specific duty of inspecting the property for the safety of Isler and other youths in the party. Wall Construction did not assume the responsibility of inspecting the

elevator for Kliewer's safety. Under the facts, Wall Construction had no duty to do so.

Also distinguishable from the present case is *Merritt v Nickelson*, 407 Mich. 544, 287 N.W.2d 178 (1980), which appellant cites as supportive of his position. In *Merritt*, the plaintiff was injured while attending automobile races at a track operated by one of the defendants. *Merritt* held that it is unity of premises possession and control that is dispositive for purposes of determining premises liability. The court found that the defendants in *Merritt* owned the land in question as tenants in common, but that one of the owners did not occupy the land at all and did not exercise her right to possession. The court held, "Insofar as [the track operator] became the sole 'possessor' of the land within the meaning of the Restatement . . . he alone owed a duty of care to the invitees who entered the premises." *Id.* at 554, 287 N.W.2d at 181. Clearly, *Merritt* is distinguishable from the case at bar, as the racetrack operator in *Merritt* was in possession and control of the property as an owner.

Assuming, arguendo, that Wall Construction was in possession and control of the property and that Kliewer was on site as Wall Construction's invitee, he still would not be entitled to recover from Wall Construction.

This court has held, " 'If . . . conditions and circumstances are such that the invitee has knowledge of the condition in advance, or should have knowledge comparable to that of the inviter, then it may not be said that the inviter is guilty of actionable negligence.' " *Brandert v. Scottsbluff Nat. Bank & Trust Co.*, 194 Neb. 777, 779, 235 N.W.2d 864, 866 (1975) (quoting *Nance v. Ames Plaza, Inc.*, 177 Neb. 88, 128 N.W.2d 564 (1964)). *Brandert* held that the superior knowledge of the invitor is the foundation of liability, and absent such superior knowledge, no liability exists. See, also, *Collins v. Herman Nut & Supply Co.*, 195 Neb. 665, 669, 240 N.W.2d 32, 35 (1976), where this court held that defendant's liability " 'is predicated on proof of [defendant's] superior knowledge, actual or constructive, of dangers to which invitee is subjected and of which invitee is unaware.' "

On the trip to the elevator, Kliewer and Wall discussed the

condition of the elevator, including the nature of the damage and the cleanup effort that had taken place. Damage from the explosion was evident to Kliewer upon his arrival at the elevator. He testified that he was aware of the powerful force of grain elevator explosions. Based upon that, he recognized the possibility of loose debris or "something on the top that I hadn't seen yet." Kliewer testified that he had even considered waiting until Wall had climbed up the ladder before climbing himself to avoid "anything falling and hitting me from above." Kliewer nevertheless "decided to climb the ladder behind Dale." It is obvious that Kliewer was conscious of the possibility that something he did not know about could cause him harm on the way up the ladder. Kliewer was fully aware that the elevator was damaged and that there was risk involved in going into the elevator to obtain data to submit a bid.

There is no evidence in the record that Wall possessed superior knowledge, actual or constructive, of which Kliewer was unaware. Because both Kliewer and Wall were on the premises for the same purpose, there is no basis for finding that Wall was under a greater duty than Kliewer to know or ascertain the true condition of the damaged elevator. See *Nance, supra*. In light of his testimony, Kliewer had a duty to observe and take precautions in the interest of his own safety.

The assignments of error regarding premises liability and inspection of the premises are without merit. Wall Construction, as a matter of law, cannot be held liable for Kliewer's injury on the theories discussed.

In his second amended petition, appellant claims that Wall Construction was negligent in representing to Kliewer that "the ladder and leg shaft were safe and that there was no danger in using said ladder to climb to the top . . . ." The actual language used by Wall to Kliewer states, "Well, we've been up that ladder before and a lot of other people have been up and down that ladder, so I guess it's safe."

To constitute a false representation, a statement must be made as a statement of fact, not merely the expression of an opinion. *Circle 76 Fertilizer v. Nelsen*, 219 Neb. 661, 365 N.W.2d 460 (1985); *Maser v. Lind*, 181 Neb. 365, 148 N.W.2d 831 (1967); *Beveridge v. Miller-Binder, Inc.*, 177 Neb. 734, 131

N.W.2d 155 (1964).

Wall's statement was nothing more than his opinion that it was safe to climb the ladder. Wall's utterance was not a statement of fact and, therefore, cannot be a false representation. The appellant's assignment of error regarding misrepresentation and untruthfulness of the statement is without merit.

Finally, we conclude that in any event, the appellant cannot recover from Wall Construction as a matter of law because the appellant assumed the risk of injury. Wall Construction advanced that defense in its answer.

" ' " 'One who knows of a dangerous condition, appreciates its dangerous nature, and deliberately exposes himself to the danger assumes the risk of injury from it.' " ' " *Utsumi v. City of Grand Island*, 221 Neb. 783, 787-88, 381 N.W.2d 102, 105 (1986); *Rodgers v. Chimney Rock P.P. Dist.*, 216 Neb. 666, 345 N.W.2d 12 (1984). In *Utsumi*, the court found that while assumption of the risk is normally a question for the jury, where the facts are such that reasonable minds can draw but one conclusion, a directed verdict is proper. The same standard governs a motion for summary judgment.

From the evidence, reasonable minds can draw but one conclusion: Kliewer had prior knowledge of the potential danger of injury in climbing the elevator ladder. He assumed the risk of injury. Thus, Kliewer is barred from recovering from Wall Construction as a matter of law.

We have considered all appellant's assignments of error and have concluded that there is no genuine issue as to any material fact and no merit to the assignments. Summary judgment in favor of Wall Construction was appropriately granted.

AFFIRMED.

REYNA FINANCIAL CORPORATION, APPELLANT, V. LEWIS SERVICE CENTER, INC., ET AL., DEFENDANTS AND THIRD-PARTY PLAINTIFFS, AND REYNOLDS AND REYNOLDS COMPANY, THIRD-PARTY DEFENDANT, APPELLEES.

429 N.W.2d 380

Filed September 23, 1988. No. 87-006.

1. **Trial: Pretrial Procedure.** The issues specified at the pretrial conference control the course of the action and, unless altered by the trial court, constitute the issues upon which the case is tried.
2. **Uniform Commercial Code: Leases: Security Interests.** An agreement that upon compliance with the terms of the lease the lessee shall become or has the option to become the owner of the property for no additional consideration or for a nominal consideration does make the lease one intended for security.
3. **Uniform Commercial Code: Security Interests: Notice.** Compliance with the Uniform Commercial Code for notification as to the disposition of collateral is a condition precedent to a secured creditor's right to recover a deficiency.
4. **Uniform Commercial Code: Security Interests: Notice: Proof: Pleadings.** In a suit to recover a deficiency judgment, a secured creditor has the burden to prove compliance with the notice requirements for the sale of collateral without regard to whether the debtor has alleged lack of notice as a defense.

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

Gary F. Wence and Mark F. Enenbach, of McGrath, North, O'Malley & Kratz, P.C., for appellant.

T.J. Hallinan, of Law Offices of Cobb & Hallinan, P.C., for appellees Lewis Service Center et al.

BOSLAUGH, WHITE, and SHANAHAN, JJ., and HOWARD, D.J., and COLWELL, D.J., Retired.

PER CURIAM.

This case arises out of a lease agreement between Reynolds and Reynolds Company and the defendant Lewis Service Center, Inc., dated March 17, 1982. The agreement provided for the lease of computer equipment and programming to the defendant for a term of 7 years, with the defendant obligated to pay 84 monthly installments of $1,724.77. The agreement further provided an option to the defendant Lewis Service Center to purchase the equipment for $1 at the expiration of the

lease term. The obligation of Lewis Service Center under the agreement was personally guaranteed by defendant Gerald B. Lewis, the president of the defendant corporation. On July 16, 1982, the agreement and guaranty were assigned by Reynolds to the plaintiff, Reyna Financial Corporation.

A dispute developed between the parties with respect to the performance of the equipment, and none of the payments due under the agreement were paid. This action was commenced on November 17, 1983, to replevin the equipment and recover the amounts due under the agreement "less any amounts realized on resale of the equipment."

The equipment was voluntarily returned to the plaintiff, so the action proceeded as one to recover only the amounts alleged to be due the plaintiff. Reynolds was joined as a third-party defendant.

The case was submitted to the jury on issues of performance and substantial performance. The evidence was conflicting and presented a jury question on those issues. The jury returned a verdict in favor of the plaintiff in the amount of $52,529.04 and a verdict in favor of Reynolds.

The defendants filed a motion for judgment notwithstanding the verdict, which the trial court sustained on December 1, 1986. The trial court found that the Uniform Commercial Code applied to the transaction between the parties; that the notices of sale of the equipment were not sufficient; and that the defendants were entitled to judgment. The plaintiff has appealed.

The plaintiff's principal assignment of error is that the trial court erred in sustaining the motion for judgment notwithstanding the verdict because there was no issue as to whether the lease agreement was intended as a security interest. The review in this court is complicated by the fact that although a pretrial hearing was held and, apparently, a pretrial order entered, the pretrial order does not appear in the record. The issues specified at the pretrial conference control the course of the action and, unless altered by the trial court, constitute the issues upon which the case is tried. *Malerbi v. Central Reserve Life*, 225 Neb. 543, 407 N.W.2d 157 (1987).

None of the pleadings which are in the record referred to the

Uniform Commercial Code other than the defendants allegation that the contract was "unconscionable within the meaning of § 2-302 U.C.C." The defendants' pretrial conference memorandum described the action as "a suit for collection of a debt created by execution of a master lease . . . ." None of the defenses asserted referred to a failure of the plaintiff to give adequate notice of the sale of the property.

Just before the trial commenced, the plaintiff offered an amended "Pretrial Conference Memorandum" which stated that the equipment had been sold for $40,500. The defendants objected and, apparently, moved to strike the memorandum or, in the alternative, to continue the trial. After a lengthy discussion and argument in chambers, the defendants' motion was overruled. The trial court then made the following statement for the record:

> THE COURT: Regarding the filing of the amended pretrial order, so that there's no misunderstanding, the Court will grant leave to file that. I don't think that that raises any intricate issues that are not [sic] a surprise to the defendant. The Court feels that if it was — that if there is anything, it's a waiver on behalf of the defendant not to raise — whether the sale was commercially reasonable. Just so that there's a record made.

During the trial both parties offered evidence concerning the sale of the equipment. The plaintiff produced letters to the defendants notifying them when each item of the equipment would be sold. Frank Ludu, a credit analyst employed by the plaintiff, when recalled as a witness by the defendants, testified that each item of equipment was sold on the *date of the letters* notifying the defendants as to when the equipment would be sold.

At the close of the plaintiff's evidence, and again at the close of all of the evidence, the defendants moved to dismiss on several grounds, including the failure of the plaintiff to prove that the sales of the equipment were commercially reasonable and made after proper notice. These motions were overruled. During the argument on the motion to dismiss at the close of all of the evidence, there was further discussion as to whether the sale of the equipment and the notices of sale were in issue. The

record shows the following:

> MR. WENCE: Your Honor, the plaintiff didn't put on any evidence concerning the reasonableness of the sale because our understanding that a pretrial order eliminated that as a relevant issue in this case, that there had been a waiver of that affirmative defense on the issue of commercial reasonablyness (sic).
>
> MR. COBB: Where is that?
>
> MR. WENCE: I believe that's in the minutes that we had at the bench the first — right at the outset of the trial.
>
> THE COURT: I said you were permitted to do it. I said I didn't think that waived any of the pleadings. I think you indicated to me that you did not —
>
> MR. WENCE: Right, and there's no — there's no —
>
> THE COURT: — that you did not have to do it because of the contract.
>
> MR. WENCE: Did not have to do?
>
> THE COURT: You did not have to dispose of the property in a — you know, it was up to you as to however you wanted to dispose of the property.
>
> MR. WENCE: Oh.
>
> THE COURT: That was my understanding.
>
> MR. WENCE: I understand.
>
> THE COURT: I just indicated to you that I didn't think that changed, that your pretrial memo, the amendment, changed any of the pleadings. That's what Mr. Cobb was objecting to, and I said I didn't think that that did.

During the instructional conference the defendants attempted to amend their answer by adding a paragraph alleging that " 'the plaintiff failed to give proper notice of the sale of the security,' and, two, 'that the plaintiff failed to sell said computer in a commercially reasonable manner or reasonably commercial — commercially reasonable price.' " That motion was overruled.

The defendants also submitted a requested instruction concerning the sale of the equipment, which was refused.

So far as the lease agreement itself is concerned, it is clear that under Neb. U.C.C. § 1-201 (Reissue 1980) the lease was, as a matter of law, one intended for security. In that respect the

statute provides:

> (37) "Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation. . . . Whether a lease is intended as security is to be determined by the facts of each case; however, (a) the inclusion of an option to purchase does not of itself make the lease one intended for security, and (b) *an agreement that upon compliance with the terms of the lease the lessee shall become or has the option to become the owner of the property for no additional consideration or for a nominal consideration does make the lease one intended for security.*

(Emphasis supplied.)

Under the statute the plaintiff, as the secured party, was required to prove compliance with Neb. U.C.C. § 9-504(3) (Reissue 1980) as a condition to recovering a deficiency judgment. In *DeLay First Nat. Bank & Trust Co. v. Jacobson Appliance Co.*, 196 Neb. 398, 402, 243 N.W.2d 745, 748 (1976), we held: " 'Compliance with the Uniform Commercial Code for notification as to the disposition of collateral is a condition precedent to a secured creditor's right to recover a deficiency.' "

In *Butte State Bank v. Williamson*, 215 Neb. 296, 299, 338 N.W.2d 598, 600 (1983), we held:

> The bank's complaint that the court improperly allowed the untimely amendment of defendant's answer so as to assert lack of notice as a defense is legally insignificant. Compliance with the notice requirements of § 9-504(3) being a condition precedent to the bank's right to recover a deficiency judgment, it was incumbent upon it to have proved the fact, irrespective of defendant's answer.
>
> Having failed to carry its burden of proof, the bank, on the facts elicited in the trial, is not entitled to a deficiency judgment as a matter of law.

The letter-notices, copies of which were received in evidence, referred to sales which would take place 14 days after the dates of the letters. Ludu, however, testified that each sale took place on the date of the letter. Yet, the issues as to the commercial reasonableness of the sales and the adequacy of the notices were

not submitted to the jury.

Upon the record presented, we believe the plaintiff was entitled to rely on the ruling of the trial court that the commercial reasonableness of the sales and the adequacy of the notices were not issues in the case. For that reason the judgment is reversed and the cause remanded for a new trial on those issues and only those issues.

If upon a new trial it is determined that the sales of the equipment were commercially reasonable and made after adequate notice to the defendants, the verdicts shall be reinstated; if not, the judgment shall be for the defendants.

REVERSED AND REMANDED WITH DIRECTIONS.

PAULINE KLEVEN, APPELLANT, V. MILLY BRUNNER, APPELLEE.
429 N.W.2d 384

Filed September 23, 1988. No. 87-160.

1. **Foreclosure: Parties.** Generally, a foreclosure sale may not operate against the rights of any individual not served and made a party to that proceeding.
2. **Real Estate: Title: Vendor and Vendee.** Under an executory contract for the sale of real estate, equitable title to the premises is conveyed to the vendee.
3. **Judicial Sales: Foreclosure: Title: Vendor and Vendee.** Under a judicial sale resulting from the foreclosure of an executory land contract, equitable title to the premises remains in the vendee, and generally is not divested until confirmation of the sale and execution of the sheriff's deed.
4. **Mortgages: Foreclosure.** As a general rule, a mortgagor of real estate is entitled to the possession thereof until confirmation of the foreclosure sale, and by reason thereof has a proprietary interest in the rents and profits.
5. **Landlord and Tenant: Leases.** As a general rule, a tenant possesses a right to a demand for payment of rent and to a reasonable opportunity to pay. There must be neglect or refusal to pay on the part of a tenant before the landlord may claim a forfeiture of the lease or a judgment of ouster for nonpayment of rent.
6. _____: _____. Provisions of the law and of leases regarding forfeitures for nonpayment of rent are not for the purpose of enabling the landlord to obtain undue advantage of a tenant by a forfeiture of the leases on technical and inequitable grounds.
7. **Landlord and Tenant: Title: Leases.** As a general rule, a lessee of real estate cannot acquire any greater interest in the property than that held by the landlord, and such lessee takes subject to all claims of title enforceable against

the lessor.

8. **Waiver: Words and Phrases.** A waiver, according to the generally accepted definition, is the voluntary and intentional relinquishment of a known right, claim, or privilege.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Robert M. Brenner, of Robert M. Brenner Law Office, for appellant.

No appearance for appellee.

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

PER CURIAM.

This is an appeal from an order of the district court which denied and dismissed plaintiff's action for forcible entry and detainer. Assigned as errors are the finding that defendant had a valid lease on the premises, the finding that plaintiff had waived her right to receive certain rental payments, and the dismissal of plaintiff's petition on both causes of action.

On July 25, 1980, the plaintiff, Pauline Kleven, sold by contract of sale a commercial property located in Scottsbluff to Economy Furniture, Inc. (Economy). On May 20, 1983, Economy executed a lease agreement with the defendant, Milly Brunner, for a term of 48 months from June 20, 1983, at a monthly rental of $375. This lease provided that rent payments were to be made at the office of Economy. Thereafter, Economy defaulted on its purchase contract with Kleven, which was then foreclosed. On May 9, 1986, the district court entered its decree; a sheriff's sale was held on September 16; and the sale was confirmed and a sheriff's deed delivered to Kleven on October 3, 1986. Although plaintiff testified that she was at all times aware of the occupancy of a portion of the premises by the defendant's beauty salon, the defendant was not made a party to the foreclosure action, nor was any notice given to her.

On the other hand, defendant testified that she knew that the property had been sold because she read in the newspaper the account of the sheriff's sale. Her first contact with the new

owner was during approximately the last week in October 1986, when plaintiff's attorney, Robert Brenner, stopped by the beauty salon and told Brunner that he was now taking care of the building and they needed to talk. A meeting was held on October 25, during which they discussed various problems with the building, which included the claim that Brunner had paid expenses and upkeep which properly should have been paid by the landlord.

It was Brunner's testimony that in November of 1985, when Economy went out of business, she did not know to whom she should make rental payments. Therefore, at the suggestion of Economy's manager, she claimed, she opened a trust account in the name of Economy and deposited the rental payments up through October of 1986.

On November 20, 1986, defendant sent a rent check to Brenner. This check was retained, but not cashed.

On December 15, 1986, a notice to quit was served on the defendant, giving as a reason "failure to pay rent or fulfill other rental agreements since November, 1985, or to enter into a lease arrangement satisfactory to lessor." Defendant failed to vacate the premises and, on December 20, mailed in another rent payment to Brenner. The latter responded with a letter similar to one sent following the November 20 payment, acknowledging receipt of the check and indicating that a statement and report as to past-due payments during the defendant's occupancy of the premises had not been received. The letter went on to state: "Please provide that information immediately. We do not presently acknowledge that a lease in fact continues to exist. We have not and will not negotiate the check until an understanding is agreed upon as I informed you in our conference." This action for forcible entry and detainer, in which plaintiff sought restitution of the premises and past-due rental payments, was filed on December 29, 1986.

After a trial to the court, judgment was entered in favor of the defendant, and the court found that defendant had a valid lease for the premises and that plaintiff had waived her right to receive rent from defendant for the month of December 1986, and all prior months.

The facts do not seem to be in dispute. The written lease

agreement between Economy and Brunner is a standard lease with no exceptions material to this case. Defendant's occupancy was unaffected by the foreclosure sale because such a sale may not operate against the rights of any individual not served and made a party to that proceeding. *Kerr v. McCreary*, 84 Neb. 315, 120 N.W. 1117 (1909). Furthermore, under an executory contract for the sale of real estate, equitable title to the premises is conveyed to the vendee. *Hendrix v. Barker*, 49 Neb. 369, 68 N.W. 531 (1896). To that extent, the vendee stands in shoes similar to those of a holder of the legal title during a foreclosure; i.e., the vendee retains equitable title with all rights flowing therefrom until confirmation of the sale, and possibly the execution and delivery of a sheriff's deed. *Hatch v. Shold*, 62 Neb. 764, 87 N.W. 908 (1901). See, also, *Ryan v. Kolterman*, 215 Neb. 355, 338 N.W.2d 747 (1983).

Under these doctrines, Economy retained a right to redeem at any time before the October 3 order of confirmation. Unless otherwise provided for in the contract of sale between Kleven and Economy, which contract does not appear in the record, Economy was entitled to collect the rents until that date. As a general rule, a mortgagor of real estate is entitled to the possession thereof until confirmation of the foreclosure sale, and by reason thereof has a proprietary interest in the rents and profits. *Clark v. Missouri, Kansas & Texas Trust Co.*, 59 Neb. 53, 80 N.W. 257 (1899).

Accordingly, it would appear that the first rental payment which Brunner would have been obligated to make to Kleven would have been the one due October 20. However, it does not seem that Kleven made any attempt to notify Brunner of Kleven's rights as the new owner nor to seek payment of the rent which she believed to be due from Brunner. "A tenant possesses a right to a demand for payment of rent and to a reasonable opportunity to pay. There must be neglect or refusal to pay on his part before the landlord may claim a forfeiture of the lease or a judgment of ouster for nonpayment of rent." *Marine Equipment & Supply Co. v. Welsh*, 188 Neb. 385, 387, 196 N.W.2d 911, 913 (1972). See, also, *Farmer v. Pitts*, 108 Neb. 9, 187 N.W. 95 (1922). "Such provisions of the law and of leases regarding forfeitures for nonpayment of rent are not for the

purpose of enabling the landlord to obtain undue advantage of a tenant by a forfeiture of the lease on technical and inequitable grounds." *Id.* at 16, 187 N.W. at 97.

Further support for the conclusion that Brunner should not be deemed in breach of her obligations may be found in *House v. Lewis*, 108 Neb. 257, 187 N.W. 784 (1922). In *House*, the tenant (Lewis) failed to make a rent payment when he was unable to locate House at the customary place of payment when he went there to discuss matters pertaining to the lease. In denying the landlord a forfeiture, the court stated that

> [t]he plaintiff [House] under the contract must call or send for the rent at the place where the same is payable. If he fails to do so, he is himself in default and cannot charge dereliction to his tenant, who was ready to pay him at the place fixed by the law.

Id. at 262, 187 N.W. at 786.

As a general rule, a lessee of real estate cannot acquire any greater interest in the property than that held by the landlord, and such lessee takes subject to all claims of title enforceable against the lessor. *Schrunk v. Andres*, 221 Minn. 465, 22 N.W.2d 548 (1946). Disregarding the fact that Kleven failed to give Brunner notice of the foreclosure proceedings, Kleven did not try the case on that theory. Although the letters from her attorney to Brunner were equivocal and were as consistent with recognizing Brunner's leasehold rights as they were with treating Brunner as a trespasser, her petition sought relief on the basis of Brunner's failure to make the rental payments. She alleged that Brunner "has failed to pay her rent for a period of at least since November of 1985," that "the terms with Economy Furniture of payment required . . . $325.00 per month due on the first day of each and every month," and that "the Defendant has admitted and failed to pay the monthly rent from a period of at least November, 1985 to the present date."

We believe that Kleven, by her actions, recognized Brunner's rights under the lease in question. We have determined that Brunner had not defaulted on the terms of the lease so as to work a forfeiture, and therefore Kleven's first assignment of error is without merit.

We turn now to the trial court's finding that Kleven's failure

to cash the checks amounted to a waiver of any claim for rent. In her brief, Kleven seems to argue that she seeks to recover rent only from the time of confirmation of the foreclosure sale; i.e., October 3, 1986.

" 'A waiver, according to the generally accepted definition, is the *voluntary and intentional* relinquishment of a known right, claim, or privilege.' " (Emphasis supplied.) *Branch v. Wilkinson*, 198 Neb. 649, 663, 256 N.W.2d 307, 316 (1977).

The record quite clearly indicates that Kleven's refusal to cash the checks for November and December was predicated upon her belief that she was acting in a manner necessary to preserve her right to recover the earlier rents owed to Economy. In each of her counsel's letters to Brunner, he indicated that he was seeking "a statement and report as to the past due payments that have been made since your occupancy of the property."

Kleven's conduct does not appear to rise to the level of waiver. At no time did she, through her words or actions, "voluntarily" or "intentionally" relinquish her "right, claims, or privilege" to collect the rents owed her under the terms of a valid lease. Rather, Kleven sought to *preserve* a different set of rights.

Kleven should be entitled to prove her right to rents accruing before she received an order of confirmation and a deed, in proceedings in which Economy, perhaps, may be a necessary party. At that time, Brunner should be given the opportunity to seek, as an offset against the rents which she now holds in a trust account, the reasonable and necessary expenses properly chargeable to Economy during the period of time that it was the landlord.

The judgment of the district court is therefore affirmed in part and, in part, reversed and remanded for further proceedings consistent with this opinion.

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

IN RE INTEREST OF L.O. AND B.O., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. C.O.D., APPELLANT.

429 N.W.2d 388

Filed September 23, 1988. Nos. 87-1015, 87-1016.

1. **Parental Rights.** A parent's failure to make reasonable efforts to comply with a court-ordered plan of rehabilitation presents an independent reason justifying termination of parental rights.
2. **Parental Rights: Evidence.** 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 District Court for Phelps County: WILLIAM G. CAMBRIDGE, Judge. Affirmed.

Richard J. Hove for appellant.

Stephen R. Illingworth, of Tringe & Illingworth, Special Phelps County Attorney, for appellee.

Robert A. Ide, guardian ad litem.

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

SHANAHAN, J.

The county court for Phelps County, as a juvenile court, terminated the parental rights of the mother, C.O.D., in her two daughters, L.O. and B.O., as the result of C.O.D.'s failure to correct conditions leading to the adjudication that L.O. and B.O. were juveniles within the Nebraska Juvenile Code, Neb. Rev. Stat. §§ 43-245 et seq. (Cum. Supp. 1982, Reissue 1984 & Cum. Supp. 1986). The mother appealed to the district court, which affirmed.

> "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., 227 Neb. 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)). See, also, *In re Interest of L.H.*, 227 Neb. 857, 420 N.W.2d 318 (1988).

In March and April of 1982, the State filed two separate petitions, alleging that L.O. (born August 3, 1979) and B.O. (born April 5, 1982) lacked proper parental care by reason of the fault or habits of their mother and were, therefore, juveniles under the Nebraska Juvenile Code. See § 43-247(3)(a) (Cum. Supp. 1982). C.O.D. was unmarried at the birth of her daughters and the filing of the State's petitions. The court ordered temporary placement of the children with the Department of Social Services (DSS) pending further hearing on the petitions.

At the adjudication hearing on July 14, 1982, C.O.D., accompanied by her court-appointed attorney, admitted the allegations in the State's petitions. The court determined that it had subject matter jurisdiction under § 43-247(3)(a) and that C.O.D. had neglected her daughters, and ordered that the children remain in foster homes supervised by DSS.

Involved in the court's determination that C.O.D.'s daughters were neglected within the meaning of § 43-247(3)(a) are several factual factors. In 1979 and 1981, C.O.D. attempted suicide. In 1980 and 1981, C.O.D. hosted several nighttime parties at her trailer house, some lasting all night, during which L.O. was allowed to stay up until she became exhausted. At such parties, the mother frequently allowed L.O. to drink alcohol to the point of intoxication, and to smoke cigarettes and marijuana. When partygoers objected to L.O.'s ingestion of intoxicants, C.O.D. responded that L.O. was her child and she would raise her as she wanted. There was also evidence that C.O.D. physically abused L.O. by striking the child's surgical incisions. C.O.D.'s "off and on" roommate, who complained to the Phelps County Sheriff's Department about the mother's treatment of L.O., testified that the mother did not regularly feed and bathe L.O. C.O.D. was a part-time employee at a

cafe.

After the adjudication hearing and at a hearing on August 4, 1982, the court ordered a plan of rehabilitation for C.O.D. The plan called for C.O.D.'s two 1-hour visitations of each child at a day-care center. The foster parents brought the children to the visitation site. C.O.D. was required to move from Phelps County and establish a residence in Kearney (Buffalo County) for participation in vocational rehabilitation. In addition to vocational rehabilitation, C.O.D. was ordered to attend counseling for drug and alcohol abuse, attend parenting classes, and have a medical evaluation. The court also ordered that C.O.D. be evaluated for drug abuse, and directed C.O.D. to cooperate with personnel of DSS.

During subsequent court hearings, the plan ordered in August 1982 was modified or supplemented. B.O. was moved to a foster home in Kearney, but L.O. remained with her foster family in Holdrege; visitation was continued and funds for transportation were supplied; C.O.D. was to continue her present employment at a nursing home, and demonstrate her stability and ability to provide a suitable home for her children; and, if the mother complied with the provisions of the plan, the frequency of visitation in the mother's home would be increased, with transportation provided by DSS. C.O.D. and her children were also scheduled for counseling with a clinical psychologist.

C.O.D. failed to comply with most of the plan's provisions. She delayed her move to Kearney, and her cooperation with the social workers was merely occasional. Visitation was so sporadic that the foster parents refrained from telling the children when their mother was scheduled to see them lest the children become upset and disappointed when C.O.D. failed to appear for visitation. C.O.D. failed to keep appointments for drug and alcohol counseling, failed to undergo evaluation for substance abuse, and failed to attend parenting classes. C.O.D. was discharged from employment at a nursing home due to absences, tardiness, and sleeping on the job.

On April 7, 1984, C.O.D., then 22 years of age, married B.D., age 17. B.D., Jr., was born of C.O.D.'s marriage and remained in C.O.D.'s custody.

On June 10, 1985, the State filed two separate petitions for termination of C.O.D.'s parental rights in her daughters and alleged that reasonable efforts, under the direction of the court, had failed to correct the conditions leading to the adjudication. See § 43-292(6) (Reissue 1984).

At the termination hearings, evidence disclosed that since July of 1982, C.O.D. had changed residences approximately 15 times. C.O.D. and her husband had lived in Missouri since May of 1985, and had visited her children only twice in the year preceding the termination hearings.

Dr. O'Neill, a clinical psychologist, testified that when a child expects a parental visit which does not occur, "then that would be very disruptive and painful to the child, make the child angry, make her difficult — make it difficult for her to trust." Dr. O'Neill also testified that he counseled the mother, her husband, and the children in 1984 as an attempt to reunite the family. According to Dr. O'Neill, C.O.D. lacked the parenting skills and emotional stability required for proper care of her children, and was insecure and unable to provide a predictable, orderly world for herself or her children. Although C.O.D. did care for her young son, she was expecting her fourth child, and Dr. O'Neill felt "it would be absolutely overwhelming to her . . . with two additional children." Dr. O'Neill testified that a trial period of reunification would be "a very calculated risk to do so and I think that every indication that we have is that the children will suffer. . . . I don't see enough hope or possibility that it will succeed to justify the gamble." Dr. O'Neill concluded that C.O.D. is "too much of a child herself to be a parent" and that termination of C.O.D.'s parental rights would be in the best interests of her daughters.

C.O.D. admitted that she quit attending alcohol counseling and parenting classes, and stated that she did not follow through with the plan because she "didn't agree with all of it." Regarding her husband, C.O.D. acknowledged that he strikes her and is a source of anguish. According to C.O.D., her husband "has problems with accepting the girls because they're not his," and sees nothing wrong with having alcohol and drugs around the house in the presence of children. At the time of the termination hearing, C.O.D.'s husband was in jail. At the

termination hearing, when asked: "If it comes down to a decision between [B.D., her husband] and your girls, who's it going to be?" C.O.D. answered: "I couldn't make that choice."

The court determined that reasonable efforts to correct the conditions leading to the adjudication had failed on account of C.O.D.'s conduct, that the mother failed to follow the rehabilitation plans, and that the best interests of L.O. and B.O. required termination of C.O.D.'s parental rights in the children. The county court then terminated C.O.D.'s parental rights in L.O. and B.O. and placed the children in DSS' custody. On appeal, the district court affirmed the judgment terminating C.O.D.'s parental rights.

C.O.D. claims the judgment of parental rights termination is erroneous because (1) the trial court used evidence which related to events before the birth of B.O. to determine that B.O. was a juvenile under § 43-247(3)(a); (2) the plans of rehabilitation should have included a trial period to ascertain whether C.O.D. could adequately care for her daughters; and (3) the trial court incorrectly determined that reasonable rehabilitative efforts had failed to correct the conditions leading to the adjudication and that the best interests of the children necessitated termination of C.O.D.'s parental rights in L.O. and B.O.

In her first assignment of error, C.O.D. apparently challenges the July 14, 1982, adjudication concerning both daughters, contending that the conditions which led to the adjudication involved events which occurred before B.O. was born. C.O.D. argues that no evidence relates to the conditions which existed during the week when the mother had B.O.'s custody before temporary removal of the child pursuant to court order. However, at the adjudication hearing, the mother admitted the allegations in the petitions concerning both L.O. and B.O. The adjudications which followed became final and appealable orders in 1982. *In re Interest of Z.R.*, 226 Neb. 770, 415 N.W.2d 128 (1987); *In re Interest of L.D. et al.*, 224 Neb. 249, 398 N.W.2d 91 (1986). C.O.D. failed to appeal from the adjudications. In the absence of C.O.D.'s timely appeal, we lack jurisdiction to review the 1982 adjudication orders. See *In re Interest of Z.R., supra*. Moreover, we are reminded that a

juvenile court "need not await certain disaster to come into fruition before taking protective steps in the interest of a minor child." *In re Interest of S.P., N.P., and L.P.*, 221 Neb. 165, 166-67, 375 N.W.2d 616, 617 (1985). The mother's first assignment of error has no merit.

The mother claims the rehabilitation plans should have included a trial period of reunification by giving the mother an opportunity to show that she could care for the children. "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 L.H.*, 227 Neb. 857, 863, 420 N.W.2d 318, 321 (1988).

The evidence shows C.O.D. was not complying with the rehabilitative plan and that the conditions which led to the adjudication and removal of the children were not removed and did not improve. The rehabilitative plan was reasonable, notwithstanding absence of a trial period of reunification. The initial rehabilitative plan was modified in efforts to reunite the family, and to accommodate the mother's ever-changing priorities, but appointments for visitation, counseling, and evaluation were ignored by the mother. Dr. O'Neill's testimony and opinion about experimentally reuniting C.O.D. with her children cast grave doubt on the potential success of such a situation. The mother's immaturity and instability persisted to jeopardize the children's well-being. Under such circumstances, the mother's right to maintain or regain custody of her children was far outweighed by the paramount interest which the public has in the protection of the rights of children. See, *In re Interest of W.*, 217 Neb. 325, 348 N.W.2d 861 (1984); *In re Interest of M.*, 215 Neb. 383, 338 N.W.2d 764 (1983). " 'A parent afforded a program of rehabilitation must realize that the courts will examine a pattern of parental conduct in determining an appropriate disposition for the best interests of a child. . . .' " (Emphasis omitted.) *In re Interest of S.P., L.P., and N.P., supra* at 167, 375 N.W.2d at 617-18 (quoting *In re Interest of D.*, 218 Neb. 23, 352 N.W.2d 566 (1984)). C.O.D.'s second assignment of error is without merit.

In her final assignment of error, C.O.D. argues that the

evidence is insufficient to support findings that reasonable efforts had failed to correct the conditions leading to the adjudication and that the best interests of the children necessitated termination of parental rights.

Section 43-292 provides:

> 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 parent's failure to make reasonable efforts to comply with a court-ordered plan of rehabilitation presents an independent reason justifying termination of parental rights. *In re Interest of L.H., supra*; *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 417 N.W.2d 147 (1987). See, also, § 43-292(6) (termination of parental rights; failure to correct conditions leading to adjudication). Regarding termination of parental rights under § 43-292(6):

> [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.

In re Interest of J.S., A.C., and C.S., supra at 267, 417 N.W.2d at 158. See, also, *In re Interest of L.H., supra*.

The evidence clearly and convincingly establishes that C.O.D. has willfully failed to comply with the rehabilitation plan ordered by the court. The provisions of the plan contained reasonable remedial requirements aimed at correcting or eliminating the conditions which resulted in the adjudication. The plan was modified to accommodate the mother's schedule and allowed for visitation at the mother's request. Financial assistance was provided by DSS to assist in C.O.D.'s compliance with the court-ordered plan. Obviously, C.O.D. failed to use the resources available for her rehabilitation. C.O.D. eventually and effectively refused alcohol counseling and parenting classes because she disagreed with the plan. The harm to C.O.D.'s children caused by her failure to rehabilitate is all too evident. Although C.O.D. suggests that she may be able to alter the situation, the children have been in foster care for approximately 6 years, awaiting such change and parental rehabilitation. Under the circumstances, prospects for the children must take into account the past conduct of a parent, not just a parental promise about the future.

> "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). . . .
>
> . . . .
>
> . . . "[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).

In re Interest of L.H., 227 Neb. 857, 863, 865, 420 N.W.2d 318, 321-22 (1988).

We, therefore, find clear and convincing evidence that C.O.D. has willfully failed to comply with the rehabilitation plan ordered by the juvenile court to correct the conditions leading to the adjudication and that termination of parental rights is in the best interests of L.O. and B.O.

The judgments terminating C.O.D.'s parental rights in L.O. and B.O. are affirmed.

AFFIRMED.

HEADNOTES
Contained in this Volume

Abandonment 135
Accord and Satisfaction 705
Accounting 842
Actions 15, 148, 200, 239, 520, 632, 746
Administrative Law 10, 27, 148, 178, 197, 301, 530, 657, 672, 676, 837
Affidavits 392
Alcoholic Liquors 530
Alimony 859
Appeal and Error 4, 10, 15, 21, 27, 37, 43, 49, 52, 53, 57, 60, 67, 86, 89, 111, 139, 148, 160, 178, 192, 197, 203, 204, 220, 231, 239, 249, 259, 271, 278, 293, 297, 301, 339, 348, 359, 369, 379, 382, 392, 406, 427, 436, 439, 448, 453, 478, 504, 520, 524, 530, 542, 548, 556, 563, 568, 580, 596, 605, 619, 626, 635, 641, 657, 683, 691, 705, 720, 727, 746, 755, 778, 785, 796, 802, 815, 823, 837, 842, 859
Arrests 482
Assault 421
Assignments 339, 382
Attorney and Client 427, 855
Attorney Fees 406

Banks and Banking 339
Blood, Breath, and Urine Tests 103, 439, 493
Boundaries 520
Breach of Contract 43, 453, 596, 746

Certificate of Title 67
Child Support 83, 831
Circumstantial Evidence 427
Claims 43, 334, 580, 746, 755, 802, 842
Collateral Attack 204, 619
Collateral Estoppel 478
Commission of Industrial Relations 301
Confessions 53
Conflict of Interest 427
Consideration 21
Conspiracy 427
Constitutional Law 60, 89, 139, 148, 204, 224, 427, 482, 493, 530, 563, 575, 657, 683, 822
Contempt 674

Contracts 21, 121, 160, 339, 382, 453, 548, 652, 705, 715, 778, 785, 842
Conversion 720
Convictions 220, 293, 348, 427, 436, 672
Corporations 15, 249
Corroboration 348
Costs 746
Counties 239
Courts 148, 520, 657
Criminal Law 89, 111, 128, 421, 439, 448, 563, 575, 681, 683
Crops 548

Damages 43, 121, 259, 453, 596, 626, 746, 855
Debtors and Creditors 249, 339, 796
Decedents' Estates 406, 580
Declaratory Judgments 740, 837
Directed Verdict 231, 379, 641, 705, 727, 785
Dismissal and Nonsuit 632
Divorce 344
Drunk Driving 297
Due Process 575, 619, 657, 802

Effectiveness of Counsel 278, 427, 568
Employer and Employee 771
Employment Contracts 771
Employment Security 284
Equal Protection 224, 530
Equity 249, 453, 520, 548, 580, 605, 778, 831, 842
Estoppel 369
Evidence 37, 43, 53, 60, 67, 89, 114, 128, 184, 220, 297, 301, 496, 504, 530, 556, 563, 580, 619, 715, 720, 755, 785, 855, 889
Expert Witnesses 785, 855

Final Orders 203, 619
Foreclosure 239, 453, 883
Foreign Judgments 619, 831
Fraud 4, 49, 249, 580, 867

Garnishment 796
Guaranty 15, 334

Hearsay 563
Homicide 220, 421

Identification Procedures 448
Immunity 482
Implied Consent 103, 439, 493
Indictments and Informations 348, 411, 568
Initiative and Referendum 657
Intent 4, 121, 220, 421, 427, 453, 837

Intoxication 614
Investigative Stops 439
Invitor-Invitee 867

Judgments 67, 128, 204, 239, 369, 379, 596, 641, 796, 802, 831
Judicial Notice 197
Judicial Sales 883
Jurisdiction 203, 301, 344, 619, 657, 769
Juror Qualifications 504
Jurors 504
Jury Instructions 1, 259, 321, 504, 542, 641, 705
Jury Trials 453, 746

Kidnapping 568

Labor and Labor Relations 284
Landlord and Tenant 548, 883
Leases 382, 548, 878, 883
Legislature 139, 204, 224, 530, 657, 729, 837
Lesser-Included Offenses 568
Liability 4, 114, 160, 249, 580, 705, 815, 867
Licenses and Permits 493, 672
Liens 239, 471, 548
Limitations of Actions 200, 369, 657
Liquor Licenses 178, 197, 530

Malpractice 855
Mandamus 657
Medical Assistance 802
Medical Malpractice 1
Mental Health 496
Minors 837
Miranda Rights 89, 493
Modification of Decree 49, 83, 674
Mortgages 548, 883
Motions for Continuance 392
Motions to Suppress 53, 57, 297, 439, 448, 683
Motor Vehicles 67, 231, 297, 321, 493, 672, 691
Municipal Corporations 802

Negligence 114, 160, 231, 267, 321, 614, 691, 785, 815, 867
Negotiable Instruments 580
New Trial 619
Notice 339, 471, 580, 619, 657, 674, 815, 831, 878

Other Acts 128

Parental Rights 135, 271, 359, 889
Parties 15, 239, 348, 740, 883

Penalties and Forfeitures 755
Pleadings 114, 121, 160, 200, 239, 267, 301, 369, 453, 619, 632, 674, 720, 746, 878
Pleas 128, 568, 681
Police Officers and Sheriffs 53, 482, 683
Postconviction 278, 575
Prejudgment Interest 43, 746, 755, 802, 842
Presumptions 60, 128, 139, 605, 619, 837, 867
Pretrial Procedure 184, 683, 878
Prior Convictions 128
Prisoners 482, 575, 802
Probable Cause 439
Probation and Parole 111, 556
Proof 43, 53, 60, 121, 128, 184, 249, 259, 278, 297, 301, 334, 369, 496, 524, 548, 580, 605, 657, 676, 755, 778, 785, 815, 823, 855, 867, 878
Property Division 49, 851, 859
Prosecuting Attorneys 482
Proximate Cause 160
Public Officers and Employees 657
Public Policy 224, 657, 729
Public Service Commission 524

Railroads 321
Real Estate 239, 778, 883
Records 128
Reformation 580, 715
Replevin 67, 478
Restitution 681
Right to Counsel 128
Right-of-Way 691
Rules of Evidence 89

Sales 67, 471, 705
Schools and School Districts 37, 520
Search and Seizure 683
Search Warrants 57, 683
Security Interests 334, 548, 878
Self-Incrimination 493
Sentences 111, 220, 293, 348, 556, 563, 568, 575, 635, 681, 683
Service of Process 301, 619, 831
Sexual Assault 128, 348, 568
Specific Performance 778
Standing 520
States 530, 619, 632
Statutes 57, 139, 204, 224, 439, 471, 530, 619, 657, 676, 837
Subrogation 580
Summary Judgment 4, 121, 160, 184, 203, 239, 382, 392, 580, 614, 619, 691, 720, 815, 867

Supreme Court 729

Tax Sale 239
Taxation 60, 239, 605, 676, 822
Teacher Contracts 37
Tenancy in Common 548
Termination of Employment 27, 771
Time 184, 339, 478, 496, 596, 657
Title 720, 883
Trial 67, 89, 128, 160, 204, 231, 297, 301, 392, 453, 478, 504, 556, 580, 705, 727, 746, 785, 855, 878
Trusts 239, 548

Uniform Commercial Code 334, 471, 548, 705, 878

Valuation 60, 605, 822
Vendor and Vendee 883
Verdicts 231, 259, 293, 369, 504, 542, 626, 641, 705, 785

Wages 78, 755
Waiver 453, 568, 842, 883
Witnesses 67, 301, 482, 563
Words and Phrases 57, 60, 78, 114, 121, 135, 139, 160, 220, 267, 284, 339, 348, 471, 482, 496, 542, 548, 580, 657, 705, 720, 755, 815, 837, 867, 883
Workers' Compensation 52, 78, 160, 224, 823