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BOSSELMAN, INC., A NEBRASKA CORPORATION, ET AL., APPELLANTS, V. STATE OF NEBRASKA AND NEBRASKA LIQUOR CONTROL COMMISSION, APPELLEES, CITY OF LINCOLN, NEBRASKA, A MUNICIPAL CORPORATION, INTERVENOR-APPELLEE.

432 N.W.2d 226

Filed December 2, 1988. No. 87-103.

1. **Declaratory Judgments: Statutes.** An action for declaratory judgment is an appropriate remedy to determine the validity, construction, or interpretation of a statute.
2. **Declaratory Judgments.** Whether to entertain an action for declaratory judgment is within the discretion of the trial court.
3. **Due Process: Property.** Due process is a flexible concept calling for such procedural protections as are appropriate in a particular situation; the protection U.S. Const. amend. XIV affords to property extends to benefits to which one has a claim or entitlement under state law or practice.
4. **Constitutional Law: Liquor Licenses.** The holder of a liquor license has a constitutionally protected interest in obtaining a renewal thereof.
5. **Constitutional Law: Legislature.** The Legislature cannot delegate its powers to make law to local governing bodies without imposing adequate standards to guide the discretion of those bodies.

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

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

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

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

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

PER CURIAM.

The second session of the 89th Legislature enacted 1986 Neb. Laws, L.B. 911, codified in Neb. Rev. Stat. §§ 53-101.03, 53-103, 53-117.03, 53-117.04, 53-131, 53-132, 53-133, 53-134, 53-134.01, and 53-1,116 (Cum. Supp. 1986), which undertakes a number of substantive and procedural changes in the regulation and control of the retail sale of alcoholic liquors

under the Nebraska Liquor Control Act, Neb. Rev. Stat. §§ 53-101 et seq. (Reissue 1984 & Supp. 1985). Principal among the substantive changes and central to the purpose of the subject enactment is the grant to local governing bodies of the option to make recommendations concerning approval or denial of alcoholic beverage licenses, which recommendations are binding upon the defendant-appellee Nebraska Liquor Control Commission. L.B. 911, §§ 1, 3, and 4; §§ 53-101.03 and 53-131 (Cum. Supp. 1986). Prior law gave local governing bodies the option of making nonbinding recommendations to the commission. § 53-131 (Reissue 1984). Plaintiffs-appellants, Bosselman, Inc., Rite-Way Oil & Gas Company, Inc., Gas 'N Shop, Inc., Kwik Shop, Inc., Contemporary Industries Nebraska, Inc., and Wymodak, Inc., all holders of at least one liquor license subject to yearly renewal, seek a declaration that, among other things, empowering the local governing bodies to make binding recommendations constitutes a delegation of the State's legislative power in violation of Neb. Const. art. II, § 1, which, among other things, distributes the governmental powers of this state to three separate departments: legislative, executive, and judicial. Defendants-appellees, State of Nebraska and its aforesaid commission, and intervenor-appellee, City of Lincoln, hereinafter collectively referred to as the "regulators," deny the license holders' claim and further assert that this suit does not fall within the purview of the declaratory judgment statutes, Neb. Rev. Stat. §§ 25-21,149 et seq. (Reissue 1985). The district court entertained but dismissed the suit, finding L.B. 911 constitutional. We agree the suit was properly brought, but conclude the enactment unconstitutionally delegates the State's legislative power to local governing bodies. Accordingly, we reverse the judgment of the district court.

We begin by questioning whether the city has the "direct and immediate" legal interest required to properly intervene in this litigation. *Basin Elec. Power Co-op v. Little Blue N.R.D.*, 219 Neb. 372, 363 N.W.2d 500 (1985). However, we also note that its presence in no way alters the nature of the matters before us. That being so, and since none of the parties complain about the city's presence, we do not concern ourselves further with the

propriety of its intervention, and proceed to an analysis of the regulators' claim that declaratory judgment may not be used to challenge the constitutional validity of L.B. 911.

Contrary to the regulators' claim that the constitutionality of the enactment cannot be tested by a suit for declaratory judgment, such an action has long been recognized as an appropriate remedy for determining the validity, construction, or interpretation of a statute. *Midwest Messenger Assn. v. Spire*, 223 Neb. 748, 393 N.W.2d 438 (1986); *Mullendore v. School Dist. No. 1*, 223 Neb. 28, 388 N.W.2d 93 (1986); *Lincoln Dairy Co. v. Finigan*, 170 Neb. 777, 104 N.W.2d 227 (1960). Whether to entertain such an action is within the discretion of the trial court. *Omaha Nat. Bank v. Spire*, 223 Neb. 209, 389 N.W.2d 269 (1986); *Mullendore v. School Dist. No. 1, supra*; *Sim v. Comiskey*, 216 Neb. 83, 341 N.W.2d 611 (1983).

The regulators in effect claim that entertaining the suit constituted an abuse of discretion by the trial court because the license holders possess no legally protectable interest or right, and thus lack any standing to challenge the enactment. In making that claim, the regulators point to *Beisner v. Cochran*, 138 Neb. 445, 293 N.W. 289 (1940), and *Alcoholic Resocialization Conditioning Help, Inc. v. State*, 206 Neb. 788, 295 N.W.2d 281 (1980), which make the general statement that a citizen has no vested right in statutory licenses, permits, or privileges. The regulators further point to the language of § 53-149 (Reissue 1984), which provides that a liquor license is "purely a personal privilege, good for not to exceed one year after issuance unless sooner revoked as in this act provided, and *shall not constitute property . . .*" (emphasis supplied), and to § 53-150 (Reissue 1984), which provides that the "renewal privilege herein provided for shall not be construed as a vested right . . . ." In *Bali Hai', Inc. v. Nebraska Liquor Control Commission*, 195 Neb. 1, 8, 236 N.W.2d 614, 618 (1975), we stated that under § 53-149, 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 . . . .' " Recently, this language was repeated in *Gas 'N Shop v. Nebraska Liquor Control Comm.*, 229 Neb. 530, 427 N.W.2d

784 (1988), where due process guarantees were not at issue. The cited language appears to originate in *Marsh & Marsh v. Carmichael*, 136 Neb. 797, 801-02, 287 N.W. 616, 619 (1939), in which we also said,

> "There is no vested right in a license to sell intoxicating liquors, which the state may not take away at pleasure. . . . Such licenses are not contracts between the state or municipality issuing them and the licensee, but are mere temporary permits to do what otherwise would be unlawful. . . ."

We must recognize, however, that characterizing an interest as a privilege as distinguished from a right is no longer useful for the purpose of determining whether procedural due process protections apply to the interest. In *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972), the U.S. Supreme Court, in the course of holding that a nontenured professor had no constitutionally protected interest in reemployment for the next year, nonetheless observed that it had "fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights." 408 U.S. at 571. The *Roth* Court further noted that in order to determine whether due process requirements apply, a court must look not to the "weight" but to the nature of the interest at stake and must look to see if the interest is within U.S. Const. amend. XIV's protection of liberty and property, saying:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. . . .
>
> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

408 U.S. at 577.

In accordance with the teaching of *Roth*, this court, in *Braesch v. DePasquale*, 200 Neb. 726, 265 N.W.2d 842 (1978), observed that due process is a flexible concept calling for such procedural protections as are appropriate in a particular situation and that the protection the 14th amendment affords to property extends to benefits to which one has a claim or entitlement under state law or practice.

Although the societal interests in operating a motor vehicle are different than the societal interests in the sale and purchase of alcoholic beverages, it is nonetheless worthy of note that in *Bell v. Burson*, 402 U.S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971), the U.S. Supreme Court held that procedural due process protections were applicable to state action suspending or revoking vehicle operators' licenses, because once licenses are issued, their continued possession may become essential in the pursuit of a livelihood.

Recent cases which recognize that the right-privilege dichotomy is no longer useful in the type of due process analyses involved in these circumstances hold that a licensee has a constitutionally protected interest in obtaining the renewal of a liquor license. As stated by the Michigan Supreme Court in *Bundo v Walled Lake*, 395 Mich. 679, 693, 238 N.W.2d 154, 160 (1976), once a liquor license issues, the holder no longer has probationary status but could "reasonably assume . . . that there was a great likelihood that his license would be renewed." Similarly, the Supreme Court of Alaska, in *Frontier Saloon, Inc. v. Alcoholic Beverage Con. Bd.*, 524 P.2d 657 (Alaska 1974), held that a liquor license already granted is a species of property entitled to due process protection, not merely a privilege subject to withdrawal or denial at the whim of the state, because suspension thereof would represent a potential economic loss to the licensee's business.

Accordingly, the district court did not abuse its discretion by entertaining this suit.

We thus reach the question of whether, as the license holders assert, L.B. 911 unconstitutionally delegates the State's legislative power to local governing bodies. In *Lincoln Dairy Co. v. Finigan*, 170 Neb. 777, 104 N.W.2d 227 (1960), certain

milk processors challenged as an unconstitutional delegation a statute which empowered the director of the Department of Agriculture and Inspection to adopt by regulation minimum standards for grade A milk products in general compliance with the Milk Ordinance and Code of the U.S. Public Health Service, violation of which would constitute a misdemeanor. In declaring that the statute unconstitutionally delegated to an administrative officer the Legislature's power to define crimes, this court said:

> It is fundamental that the Legislature may not delegate legislative power to an administrative or executive authority. Smithberger v. Banning, 129 Neb. 651, 262 N.W. 492, 100 A.L.R. 686. The Legislature does have power to authorize an administrative or executive department to make rules and regulations to carry out an expressed legislative purpose, or for the complete operation and enforcement of a law within designated limitations. Such authority is administrative in its nature and its use by administrative officers is essential to the complete exercise of the powers of all departments. State ex rel. Martin v. Howard, 96 Neb. 278, 147 N.W. 689. . . .
>
> The limitations of the power granted and the standards by which the granted powers are to be administered must, however, be clearly and definitely stated in the authorizing act.

170 Neb. at 780-81, 104 N.W.2d at 230-31. Such standards may not rest on indefinite, obscure, or vague generalities, or upon extrinsic evidence not readily available. *Id.*

The suggestion made by one of the regulators that the doctrine announced in *Lincoln Dairy* does not apply to delegations to local governing bodies has already been considered and rejected by this court. In *Lennox v. Housing Authority of City of Omaha*, 137 Neb. 582, 290 N.W. 451 (1940), this court noted that the Legislature could not delegate its powers to make law to the housing authority and council of the city of Omaha without imposing adequate standards to guide the discretion of those local bodies.

In applying the tenets stated in *Lincoln Dairy*, this court has held: " 'Where the Legislature has provided reasonable

limitations and standards for carrying out the delegated duties, there is no unconstitutional delegation of legislative authority.' " *Ewing v. Scotts Bluff Cty. Bd. of Equal.*, 227 Neb. 798, 805, 420 N.W.2d 685, 690 (1988); *In re Application U-2*, 226 Neb. 594, 413 N.W.2d 290 (1987). In *State ex rel. Douglas v. Nebraska Mortgage Finance Fund*, 204 Neb. 445, 464, 283 N.W.2d 12, 24 (1979), we declared: "The exercise of a legislatively delegated authority to make rules and regulations to carry out an expressed legislative purpose, or for the complete operation or enforcement of a law with clearly designated limitations and standards, is not an exercise of legislative power." We went on to observe:

> The question of how far the Legislature should go in filling in the details of the standards which an administrative agency is to apply raises large issues of policy in which the Legislature has a wide discretion, and the court should be reluctant to interfere with such discretion. Such standards in conferring discretionary power upon an administrative agency must be reasonably adequate, sufficient, and definite for the guidance of the agency in the exercise of the power conferred upon it and must also be sufficient to enable those affected to know their rights and obligations. 1 Am. Jur. 2d, Administrative Law, § 117, p. 923. The modern tendency is to be more liberal in permitting grants of discretion to an administrative agency in order to facilitate the administration of laws as the complexity of economic and governmental conditions increases. 1 Am. Jur. 2d, Administrative Law, § 118, p. 925. This is particularly true where . . . the violation of any such regulation does not constitute a criminal act.

204 Neb. at 465, 283 N.W.2d at 24.

The question therefore becomes whether the enactment provides the local governing bodies with adequate, sufficient, and definite standards within which they are to exercise their discretion.

L.B. 911, § 6, amended § 53-134(7) to provide that in performing their licensing functions, "the considerations of the local governing body shall include, but not be limited to," the

following criteria:

> the adequacy of existing law enforcement and the recommendation of law enforcement agencies in the area . . . existing motor vehicle and pedestrian traffic flow in the vicinity of the proposed licensed premises . . . zoning restrictions . . . the sanitation or sanitary conditions on or about the proposed licensed premises . . . the existence of a citizens' protest and any other evidence in support of or opposition to the application . . . the existing population of the city, village, or county, as the case may be, its projected growth, the existence of licenses in such city, village, or county, and the class of such licenses . . . the nature of the neighborhood or community where the proposed licensed premises are located . . . whether the type of business or activity proposed to be operated in conjunction with the proposed license is and will be consistent with the public interest, and . . . any licensing standards enacted by such local governing body pursuant to section 53-134.01.

§ 53-134 (Cum. Supp. 1986). Section 53-134.01 (Cum. Supp. 1986) empowers a local governing body to adopt by ordinance more restrictive licensing standards than those of the commission, based on that "particular community's needs or standards," provided those more restrictive standards do not conflict with the act.

The requirement that licensing standards adopted by a local governing body be based on its "needs or standards" does not provide sufficient guidance to meet the requirements of a constitutional delegation of legislative power. Further, the provision of § 53-134(7), that the local governing bodies are not limited to a consideration of the designated criteria, which include those standards duly adopted by local ordinance, in effect purports to empower local governing bodies to consider criteria beyond those they adopt pursuant to the provisions of § 53-134.01, for which the enactment sets no standards at all.

Thus, the conclusion that L.B. 911 delegates this State's legislative power to the local governing bodies in violation of Neb. Const. art. II, § 1, is inescapable.

It is equally apparent that without the delegation to the local

governing bodies contemplated by L.B. 911, no part of the enactment is workable. Accordingly, no part of the enactment is severable from the portion thereof which contains the unconstitutional delegation, and as a consequence, the entire enactment is unenforceable. *Snyder v. IBP, inc.*, 229 Neb. 224, 426 N.W.2d 261 (1988); *State v. Monastero*, 228 Neb. 818, 424 N.W.2d 837 (1988). It is therefore unnecessary to consider the license holders' other claims of constitutional infirmity.

REVERSED.

VERNON E. PETERSON, APPELLANT AND CROSS-APPELLEE, V. DONALD PETERSON, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF HERMAN E. PETERSEN, DECREASED, APPELLEE AND CROSS-APPELLANT.

432 N.W.2d 231

Filed December 2, 1988. No. 87-155.

1. **Res Judicata.** Any right, fact, or matter in issue and directly adjudicated upon, or necessarily involved in, the determination of an action before a court of competent jurisdiction in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties or their privies, irrespective of whether the claim or demand, purpose, or subject matter of the two suits is the same.
2. **Property: Undue Influence: Equity: Appeal and Error.** An action to set aside inter vivos transfers of property on the basis that they were made as the result of undue influence is one in equity and, as such, is reviewed by the Nebraska Supreme Court de novo on the record.
3. **Property: Undue Influence: Proof.** In an action to set aside inter vivos transfers of property, undue influence must be proved by clear and convincing evidence.
4. **Decedents' Estates: Undue Influence: Appeal and Error.** An action alleging undue influence in a probate context lies at law, and, as such, the findings of the trier of fact will not be disturbed unless clearly wrong.
5. **Decedents' Estates: Undue Influence: Proof.** Undue influence in the probate context must be proved by a preponderance of the evidence.
6. **Joint Accounts.** A certificate of deposit in the names of multiple parties is a type of joint account.
7. **Undue Influence: Joint Accounts.** An allegation of undue influence in effecting a change in the ownership of a joint account sounds in law, rather than in equity.
8. **Undue Influence: Joint Accounts: Evidence.** Clear and convincing evidence is required to sustain a finding of undue influence in effecting a change in the ownership of a joint account.

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

Kent F. Jacobs, of Blevens & Jacobs, for appellant.

Daniel F. Kaplan, of Perry, Guthery, Haase & Gessford, P.C., and, on brief, Earl J. Witthoff, of Perry, Perry, Witthoff, Guthery, Haase & Gessford, P.C., for appellee.

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

CAPORALE, J.

Plaintiff-appellant, Vernon E. Peterson, claims his brother, defendant-appellee, Donald Peterson, exercised undue influence upon their now-dead uncle, Herman E. Petersen, as the consequence of which the uncle caused the title to certain certificates of deposit to be changed to plaintiff's detriment. The district court dismissed plaintiff's petition, and plaintiff appeals, assigning as error the district court's conclusion that plaintiff failed to adduce clear and convincing evidence of undue influence. In turn, defendant has cross-appealed, asserting the district court erred in not awarding him an attorney fee because this action is barred by the doctrine of res judicata and is therefore frivolous and not brought in good faith. We affirm.

The record establishes that plaintiff enjoyed a close relationship over a 40-year period with his reclusive bachelor uncle, having operated a salvage business from a portion of his uncle's farm and having been permitted to erect a building on part of the farm in which both plaintiff and the uncle stored items. Plaintiff visited the uncle at the latter's home frequently, indeed on a virtually daily basis, and otherwise ministered to the uncle's needs, including taking the uncle to distant appointments as needed, for which plaintiff, on at least one occasion, received payment.

On January 5, 1984, plaintiff left his home for a winter vacation in Arizona. On January 9, 1984, defendant found the then 86-year-old uncle lying on the floor of his home with a broken hip. Defendant summoned an ambulance, and the uncle was transported to a hospital where he underwent hip

replacement surgery the following day. The uncle remained in the hospital until January 28, 1984, when he was discharged to a nursing home.

In the meantime, on January 17, 1984, the uncle's attorney met with the uncle in his hospital room in connection with the preparation of a general power of attorney giving defendant authority to conduct the uncle's affairs. According to the attorney, the uncle recognized him at that time, was very conversational, and appeared to understand what he was doing. He appeared forceful, interested in the matter at hand, and was not, in the attorney's opinion, under anyone's domination at that time. The attorney thought the uncle was "very positive as to what he wanted."

On that same day, defendant, in taking stock of the uncle's assets pursuant to the uncle's request to see to his affairs, found several certificates of deposit held in joint tenancy by the uncle and plaintiff. Later that same day, the attorney discussed the state of title to these instruments with the uncle. According to the attorney,

> I went up there and he was alone then and I just told him that — I related what his will had said and where he had divided the assets equally among the three nephews and the niece . . . but that apparently he had some CD's that were going a different direction and he told me, he said that's not what I want. He said I want it to all go equally to my nephews and niece . . . .

The following day, January 18, 1984, the attorney again visited the uncle in his hospital room, again out of the presence of other family members. In the attorney's words,

> I went in and talked to [the uncle] again and asked him to restate how he wanted his property divided and how he wanted his will made and he restated that he didn't want to have any trouble after his death and that he felt that equal division would be best . . . .
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> . . . .
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> . . . [H]e appeared to be resolute and I thought he was clear-minded and think he still had pain but I couldn't detect that he was under the influence of anything that marred his judgment or anything.

The attorney prepared a document setting out the uncle's intent at the time, because

> if there was any doubt in anyone's mind that this would be a good way to recollect what we had done and so I went in to [the uncle] and discussed the power of attorney that we had made the day before and the last will and testament, and the finding of the assets and other — in [plaintiff's] name, and reviewed everything that had taken place to the best of my ability, and he said yes, this is what I want done. I want my assets to be divided among all of them equally . . . .

At the attorney's suggestion, the uncle then signed the following statement:

> I, the undersigned, Herman E. Petersen, hereby state that I have made Donald Peterson my Power of Attorney; in checking over my property I find that many of my assets held in various banking institutions have been placed in my name in joint tenancy with other parties. I have also made my Will, in which it is my wish that my nephew, Vernon Peterson, is to be given credit for the construction of a building that he built upon my real estate. Subject to that, I want my property divided equally between my three nephews, namely Vernon Peterson, LeRoy F. Peterson, and Donald Peterson, and my niece, namely Doris H. Stephens.
>
> In order to carry out my wish of an equal division of my property, I have directed my Power of Attorney to instruct all of the institutions to place the ownership of my assets in my name only, and not to have a second name upon any of my accounts; I make this instruction, realizing now that if I did not make this instruction that upon my death, those properties would go only to the person whose name appears on that asset with my name, and this would destroy my wish that said properties be divided equally.

The will the uncle executed earlier that day conforms with the foregoing statement of intent.

On January 20, 1984, defendant used the power of attorney to have plaintiff's name removed from the instruments in question. Plaintiff returned from Arizona the next day. On

January 23, 1984, a confrontation between plaintiff and defendant took place in the attorney's office over what had taken place in plaintiff's absence. It is plaintiff's contention that "[the uncle] just told me he wanted me to have [the certificates of deposit] upon his death for looking after him." In an effort to resolve this dispute, the attorney, plaintiff, and defendant met that afternoon in the uncle's hospital room. According to the attorney, during this meeting

> [plaintiff] expressed anger about the appointment of [defendant], and [the uncle] said this is what he had wanted and this is what he was going to do and [plaintiff] said well, I will just go back to wherever he came from, Arizona or somewhere, and they had an exchange there and at that time [the uncle] pointed his finger [at plaintiff] and said I will take you out of my will if you keep this up.

In the attorney's opinion, the uncle was forceful in his manner at this meeting and not under anyone's domination. The uncle died a month later, on February 24, 1984.

The attorney's recitation of the events was corroborated by defendant and supported by the testimony of the brother of both plaintiff and defendant and of the nurses who attended the uncle in the hospital following his hip injury.

The uncle was also attended, while in the hospital, by his family physician, who testified that following surgery, the uncle was mentally alert and knew what was going on around him. This physician, who had known the uncle for 10 to 15 years, testified that the uncle was not one to be influenced by others and that this had not changed following surgery. However, he also testified that the day before the power of attorney was signed, the uncle had received Seconal and Valium at different times and that, although these drugs should not have affected the uncle's thinking processes at the time the power of attorney was signed, the effects of these drugs on older people are unpredictable.

Arrayed against the foregoing is plaintiff's evidence. The uncle's tenant, who visited the uncle in the hospital on January 19, 1984, was convinced that "this old gentleman did not fully understand what he had signed because as — I had this grain in the bin, see, and [defendant] having been given power of

attorney, [the uncle] shouldn't have been asking me to sell the grain for him which he did."

A former neighbor of the uncle, who saw him at the hospital on several occasions, stated that the uncle "thought he was in a nursing home instead of being at the hospital." In the neighbor's opinion, the uncle seemed "real different" in the hospital than when she had known him years before.

An 80-year-old acquaintance of the uncle since childhood shared the uncle's hospital room for a time. According to this witness,

> The mood that [the uncle] was in, he could be talked into anything at that time.
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> . . . .
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> . . . He was in the bed beside of me and he said that was a torture chamber, he said. He had that broken hip, see, and he was kind of grouchy, and it seemed like he didn't care for nothing at that time.

According to plaintiff, his uncle was generally confused and had been wrongly told plaintiff had gone to Arizona "for good."

We first address defendant's cross-appeal, for if his contention that the doctrine of res judicata bars this action is correct, we need not consider plaintiff's appeal. Defendant argues that plaintiff's allegation of undue influence was litigated in earlier proceedings in which plaintiff unsuccessfully contested the uncle's last will and testament in district court and, in subsequent probate proceedings, unsuccessfully sought to assert in the county court a claim against the estate for the amount of the very certificates of deposit now in question. Indeed, the bill of exceptions developed as a result of the will contest was offered in evidence in this case and comprises a major portion of the evidence bearing on the undue influence issue allegedly exercised with respect to the certificates of deposit.

Defendant correctly points out that any right, fact, or matter in issue and directly adjudicated upon, or necessarily involved in, the determination of an action before a court of competent jurisdiction in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and

cannot again be litigated between the parties or their privies, irrespective of whether the claim or demand, purpose, or subject matter of the two suits is the same. *NC+ Hybrids v. Growers Seed Assn.*, 228 Neb. 306, 422 N.W.2d 542 (1988); *Vantage Enterprises, Inc. v. Caldwell*, 196 Neb. 671, 244 N.W.2d 678 (1976). However, the matter of undue influence regarding the power of attorney under which the title to the certificates of deposit was changed was not in issue and directly adjudicated upon, or necessarily involved in, the determination of the prior will contest between the parties.

In reaching its finding that undue influence was not practiced upon the uncle in connection with his will, the jury as the finder of fact was concerned with the inferences to be drawn from the evidence concerning the circumstances under which that document came into existence, a day after execution of the power of attorney in question. Although evidence concerning the subject power of attorney and treatment of the certificates of deposit overlaps that concerning the execution of the will, the jury in the will contest was not required to decide whether defendant procured a change in the title to the certificates as the result of undue influence. Thus, the matter in issue in the present case was neither directly adjudicated upon, nor necessarily involved in, the determination of the will contest.

On the other hand, plaintiff's county court claim against the estate for the value of the certificates of deposit was made on the basis that those certificates constituted payment for services plaintiff had rendered the uncle and that the undue influence defendant had practiced deprived plaintiff of their value. Therefore, the undue influence at issue in plaintiff's county court claim against the estate is the very undue influence at issue in the present case.

However, defendant moved for summary judgment in the claim proceedings on the ground that the will contest had determined the issue adversely to plaintiff. The county court sustained defendant's motion, saying the issue "may not now be raised." Plaintiff appealed that decision to the district court which, correctly or incorrectly, ruled that the county court lacked jurisdiction to determine the matter. As a result, the district court vacated the summary judgment granted

defendant and remanded the matter to the county court "for further proceedings consistent" with the district court's ruling. The county court then dismissed plaintiff's claim. As a consequence, no adjudication was ever made on the merits of plaintiff's claim against the estate.

Thus, the action at hand is not barred by the doctrine of res judicata, and its pursuit cannot be said to be frivolous or in bad faith. See *Lutheran Medical Center v. City of Omaha*, 229 Neb. 802, 429 N.W.2d 347 (1988). Accordingly, the district court was correct in not awarding attorney fees to defendant.

The foregoing resolution of defendant's cross-appeal means that we must concern ourselves with plaintiff's appeal. As part of the analysis of the issue presented by plaintiff's specific assignment of error, whether the evidence supported his allegations, we must both determine the scope of our review and settle upon the quantum of evidence required to prove undue influence in this type of case.

An action to set aside inter vivos transfers of property on the basis that they were made as the result of undue influence is one in equity and, as such, is reviewed by this court de novo on the record. *Fremont Nat. Bank & Trust Co. v. Beerbohm*, 223 Neb. 657, 392 N.W.2d 767 (1986). In such cases undue influence must be proved by clear and convincing evidence. *In re Estate of Price*, 223 Neb. 12, 388 N.W.2d 72 (1986). However, an action alleging undue influence in a probate context lies at law, and, as such, the findings of the trier of fact will not be disturbed unless clearly wrong. *In re Estate of Marsh*, 216 Neb. 129, 342 N.W.2d 373 (1984). Undue influence in the probate context must be proved by a preponderance of the evidence. *In re Estate of Price, supra.*

A certificate of deposit in the names of multiple parties is a type of joint account. Neb. Rev. Stat. § 30-2703(a) (Reissue 1985) provides: "A joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent." So far as is relevant to our inquiry, the comment thereto states that the statute, of which the quoted subsection is a part, "reflects the assumption that a person who deposits funds in a multiple-party account

normally does not intend to make an irrevocable gift of all or any part of the funds represented by the deposit. Rather, he usually intends no present change of beneficial ownership."

Clearly, the creation or termination of a joint account is neither a present transfer of property nor a testamentary device, but represents instead a hybrid transaction, sharing aspects of both gift and bequest. In an action by the deceased mother's estate against the estate of her deceased son, this court, relying upon the aforesaid statutory provision and comment, determined that the evidence failed to clearly and convincingly establish that the mother intended a gift to her son of moneys she deposited in a joint account with her son and another, and thus upheld the award of a judgment in favor of the mother's estate for the moneys the mother had deposited in the joint account. *In re Estate of Redpath*, 224 Neb. 845, 402 N.W.2d 648 (1987).

Similarly, in the present case the evidence fails to clearly and convincingly establish that the uncle intended an irrevocable inter vivos gift to plaintiff of the moneys placed in the joint certificates of deposit. Indeed, the evidence clearly and convincingly establishes the opposite is true; even the plaintiff testified that the certificates of deposit were not to become his until his uncle's death. Furthermore, Neb. Rev. Stat. § 30-2706 (Reissue 1985) expressly provides:

> Any transfers resulting from the application of section 30-2704 [which details the incidents of the right of survivorship in, among other things, joint accounts] are effective by reason of the account contracts involved and this statute and are not to be considered as testamentary or subject to Articles 22 to 25 of this code.

The scope of this court's review of the district court's findings of fact regarding an allegation of undue influence in the creation or termination of a joint account is a matter of first impression. In *Redpath, supra*, conversion was alleged, not undue influence, nor did we discuss the scope of review on the question. In *Rorabaugh v. Garvis*, 198 Neb. 223, 252 N.W.2d 161 (1977), this court again did not discuss the standard the court applied in reviewing the evidence, leading to the conclusion a gift had been intended. And, finally, in *Parkening*

v. Haffke, 153 Neb. 678, 46 N.W.2d 117 (1951), decided prior to the enactment of § 30-2703, an accounting was sought, which this court treated as a matter in equity.

One who knowledgeably creates a joint account with another arguably does so with the present intent to employ the account's survivorship characteristic in substitution for a testamentary device. Like testamentary devices, under § 30-2703 creation of a joint account, without more, accomplishes no present transfer of title to property. If, as in this case, all sums deposited into the joint account are deposited by one person, the joint account contemplates transfer of title to those funds to the other person or persons named on the account upon the death of the depositor. Of course, others named as joint holders of the account have the power to withdraw funds from the account before the death of the depositor, but under § 30-2703, they arguably do not have the right to do so. *In re Estate of Redpath, supra*. See, also, *Craig v. Hastings State Bank*, 221 Neb. 746, 380 N.W.2d 618 (1986), exploring the depository bank's right to set off the debts of one cotenant of a joint account against the account, when the other cotenant had contributed the funds thus reached.

Moreover, the creator of a joint account, like the maker of a will and unlike the giver of a gift, may change his or her mind during any lucid moment prior to death. These considerations suggest that joint accounts share more in the character of testamentary devices than they do in the character of present transfers of property, or gifts. Accordingly, we conclude that an allegation of undue influence in effecting a change in the ownership of a joint account sounds in law, rather than in equity. Thus, as noted earlier, the findings of the district court are not to be disturbed unless clearly wrong.

While, as established earlier, only a preponderance of the evidence is needed to sustain a finding of undue influence in a probate contest, in view of the language of § 30-2703(a) requiring clear and convincing evidence to overcome the statutory assumption that no gift is intended by depositing funds in a joint account, we hold that clear and convincing evidence is required to sustain a finding of undue influence in effecting a change in the ownership of such an account. (For

another application of the clear and convincing standard of proof in a law action, see *Castellano v. Bitkower*, 216 Neb. 806, 346 N.W.2d 249 (1984), which required such quantum of proof in a suit to recover on lost promissory notes.)

Thus, the district court held the plaintiff to the correct standard of proof, and the record provides no basis for concluding that the district court's finding of no undue influence under that standard is clearly wrong. Accordingly, the judgment of the district court must be, and hereby is, affirmed.

AFFIRMED.

ROBERT W. KOEPP, APPELLANT, V. HOLLY JENSEN, DIRECTOR OF THE DEPARTMENT OF MOTOR VEHICLES, STATE OF NEBRASKA, APPELLEE.

432 N.W.2d 237

Filed December 2, 1988. No. 87-259.

1. **Appeal and Error.** Errors assigned but not discussed will generally not be considered by this court.
2. **Administrative Law: Due Process: Notice.** Procedural due process requires notice and an opportunity to be heard.
3. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Blood, Breath, and Urine Tests.** The Director of Motor Vehicles may delegate the task of determining whether a motor vehicle operator's license should be revoked for refusing to take a breath test for alcohol.
4. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Due Process.** Where the Director of Motor Vehicles delegates the decisionmaking to a subordinate and that decisionmaker is apprised of the evidence and considers it before revoking a motor vehicle operator's license, due process of law is satisfied.
5. **Administrative Law: Motor Vehicles: Due Process: Appeal and Error.** Due process is satisfied where the district court or Supreme Court reviews de novo a decision of the Director of Motor Vehicles.

Appeal from the District Court for Hall County: WILLIAM H. RILEY, Judge. Affirmed.

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

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

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

FAHRNBRUCH, J.

Robert W. Koepp appeals the 1-year revocation of his motor vehicle operator's license for refusing to submit to a breath test for alcohol. We affirm.

Koepp challenges the manner in which the revocation was imposed by Holly Jensen, the director of the Nebraska Department of Motor Vehicles. The order of revocation was affirmed by the Hall County District Court.

Koepp claims the district court erred six times, which assignments can be summarized as follows: (1) The court erred in failing to find that there is sufficient reason in the record to justify Koepp's refusal to submit to the breath test; (2) the court erred in finding that Jensen had statutory authority to delegate revocation procedures to another; and (3) the court erred in failing to find that Koepp was denied due process under the law.

On March 19, 1986, after drinking in a bar in Grand Island, Koepp was stopped by a Grand Island police officer, Officer Michael Durant, for driving without his headlights on and for weaving on the road. Officer Durant testified that Koepp's eyes were bloodshot, he had a strong odor of alcoholic beverage on his breath, and his movements were uncoordinated. The officer asked Koepp to perform four field sobriety tests, which Koepp attempted and failed.

The officer then at 1:10 a.m. arrested Koepp for driving while under the influence of alcohol. Koepp was taken to the Hall County jail, where he was asked to perform the same sobriety tests. Koepp did not attempt any of the tests.

Officer Durant had Koepp read an implied consent advisement postarrest form which addressed the consequences of refusing to submit to a chemical test. Koepp signed the form without question. Durant then attempted to establish the required 15-minute waiting period before administering a breath test. Koepp, however, would not cooperate by allowing the officer to determine if he had anything in his mouth. Koepp

was cited for refusing to submit to the test. A notarized report of the refusal was forwarded to the Department of Motor Vehicles.

An implied consent hearing was held on May 13, 1986, pursuant to Neb. Rev. Stat. § 39-669.16 (Reissue 1984). A hearing officer made a recommendation to Gerald Pankonin, staff attorney for the Department of Motor Vehicles.

Pankonin testified that as a part of his job, he reviews a written memorandum concerning the evidence adduced at a hearing, as well as the hearing officer's recommendation. Pankonin then makes the decision as to whether a motor vehicle operator's license should be revoked. After Pankonin makes the determination regarding revocation, he sends the order to a secretary, who types it. The secretary then affixes a stamped facsimile of Jensen's signature on the order.

Jensen is consulted only in cases that are in "gray areas" or are "close calls." Pankonin did not contact Jensen regarding Koepp's case because it was a "simple enough case." An order was issued by the Department of Motor Vehicles, bearing Jensen's stamped signature, revoking Koepp's license for 1 year. Koepp appealed to the Hall County District Court, where the case was heard de novo. See *Porter v. Jensen*, 223 Neb. 438, 390 N.W.2d 511 (1986). See, also, Neb. Rev. Stat. § 60-420 (Reissue 1984). The Hall County District Court affirmed the revocation order from the Department of Motor Vehicles.

The appellant expressly elected to forgo discussion of the first assignment of error by not discussing it in his brief. "Errors assigned but not discussed will generally not be considered by this court." *State v. Burke*, 225 Neb. 625, 629, 408 N.W.2d 239, 244 (1987); *State v. Bishop*, 224 Neb. 522, 399 N.W.2d 271 (1987); *State v. Lynch*, 223 Neb. 849, 394 N.W.2d 651 (1986); Neb. Ct. R. of Prac. 9D(1)d (rev. 1986).

With respect to the delegation issue, we addressed nearly an identical situation in *Fulmer v. Jensen*, 221 Neb. 582, 379 N.W.2d 736 (1986). There, the plaintiff's operator's license was revoked by a determination made by the deputy director of the Department of Motor Vehicles. As did the staff attorney in the present case, the deputy director in *Fulmer* reviewed the evidence as submitted by the hearing officer and then made the

determination. In *Fulmer*, both the revocation order and the certificate of service attached thereto bore Jensen's signature.

As this court noted in *Fulmer*, Neb. Rev. Stat. § 60-1503 (Reissue 1984) specifically provides, "The Director of Motor Vehicles shall have authority to employ such personnel, including legal, and technical advisors as may be necessary to carry out the duties of his office."

The *Fulmer* court held at 585, 379 N.W.2d at 739, "The authority of the director to delegate her implied consent revocation duties is fairly implied by § 60-1503." For the reasons set forth in *Fulmer*, we conclude that Jensen lawfully delegated to Pankonin her responsibilities regarding implied consent determinations and the use of her signature stamp with regard thereto.

Koepp claims he was denied due process because Jensen did not hear his case, yet her facsimile signature was stamped on the order. This court has held that procedural due process requires notice and an opportunity to be heard. See, *Dieter v. State*, 228 Neb. 368, 422 N.W.2d 560 (1988); *Bockbrader v. Department of Insts.*, 220 Neb. 17, 367 N.W.2d 721 (1985); *Atkins v. Department of Motor Vehicles*, 192 Neb. 791, 224 N.W.2d 535 (1974). Koepp does not complain that he did not receive notice or that he did not have an opportunity to be heard, but rather that he did not have an opportunity to be heard by Jensen.

Relying upon *Morgan v. United States*, 298 U.S. 468, 56 S. Ct. 906, 80 L. Ed. 1288 (1936), appellant claims that the individual who heard his case was not the individual who decided it and, therefore, the Department of Motor Vehicles' revocation was invalid. In *Morgan*, the U.S. Secretary of Agriculture made a decision against the appellants, apparently without considering or being apprised of the evidence. *Morgan* stands for the proposition that the individual who makes the determinations must be apprised of and consider the evidence which justifies them.

In Koepp's case, the evidence is clear that the decisionmaking was lawfully delegated to Pankonin and that he made the revocation decision. Before finalizing the case, Pankonin reviewed a written memorandum concerning the evidence adduced at the hearing, as well as the hearing examiner's

recommendation. Had the Secretary of Agriculture followed the procedure used for Koepp, the decision in *Morgan* likely would have been compatible with the conclusion we reach in this case. As stated in *Morgan*, 298 U.S. at 478-79:

> If the Secretary had assigned to the Assistant Secretary the duty of holding the hearing, and the Assistant Secretary accordingly had received the evidence taken by the examiner, had heard argument thereon and had then found the essential facts and made the order upon his findings, we should have had simply the question of delegation.

Under those circumstances, it would have been proper for the Assistant Secretary to make the decision after being apprised of the evidence and after considering the evidence.

Since we have found that the Director of Motor Vehicles may delegate the task of determining whether a motor vehicle operator's license should be revoked for refusing to take a breath test for alcohol, and because the procedure suggested by the U.S. Supreme Court was followed in revoking Koepp's license, the appellant was not denied due process of law.

Additionally, Koepp appealed to the district court, where his case was heard de novo. Therefore, due process was satisfied in the district court hearing, as evidence was heard anew and an independent decision was made by the trial judge.

Likewise, this court reviews de novo, as in equity, the findings of the trial court on appeal from a revocation of a motor vehicle operator's license under the implied consent statute. *Wohlgemuth v. Pearson*, 204 Neb. 687, 285 N.W.2d 102 (1979); *Emmons v. Jensen*, 221 Neb. 444, 378 N.W.2d 147 (1985).

In the courts, in Koepp's case, the evidence was twice considered anew by the decisionmakers. His claim of lack of due process has no validity. The decision of the district court must be affirmed.

AFFIRMED.

WHITE, J., concurs.

STATE OF NEBRASKA, APPELLEE, V. JUAN TREVINO, APPELLANT.

432 N.W.2d 503

Filed December 2, 1988. No. 87-410.

1. **Criminal Law: Jurisdiction: Juvenile Courts: Waiver: Appeal and Error.** Whether to waive jurisdiction over a criminal proceeding to the juvenile court is a matter within the discretion of the district court, and such decision will not be reversed on appeal absent an abuse of that discretion.
2. **Criminal Law: Jurisdiction: Juvenile Courts: Waiver.** Neb. Rev. Stat. §§ 29-1816 (Reissue 1985) and 43-202.01 (Reissue 1978) provide a balancing test in which public protection and security are weighed against practical, and not problematical, rehabilitation in determining whether there should be a waiver of jurisdiction over a criminal proceeding to the juvenile court.
3. **Criminal Law: Jurisdiction: Juvenile Courts.** The probability of success and the duration of rehabilitative treatment must be considered in determining whether detention will be in the juvenile justice system or in the criminal justice system.
4. **Criminal Law: Jurisdiction: Juvenile Courts: Waiver.** The district court may properly refuse to waive jurisdiction over a criminal proceeding to the juvenile court where the district court complies with the provisions of statute and makes a statement of its findings which provides sufficient specificity to permit meaningful review by this court.
5. **Trial: Words and Phrases.** "Judicial abuse of discretion" means that the reasons or rulings of the trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.
6. **Verdicts: Appeal and Error.** After a jury has considered all the evidence and returned a verdict of guilty, that verdict may not, as a matter of law, be set aside on appeal for insufficiency of the evidence, if the evidence sustains some rational theory of guilt.
7. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence; the verdict of the fact finder must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support the verdict.
8. **Homicide: Evidence: Intent.** The state of mind required for second degree murder may be inferred from the evidence of the criminal act.
9. **Homicide: Intent: Words and Phrases.** Malice, in the context of second degree murder, denotes that condition of the mind which is manifested by the intentional doing of a wrongful act without just cause or excuse and is any willful or corrupt intention of the mind.
10. **Trial: Evidence: Appeal and Error.** The admission or exclusion of evidence is a matter within the discretion of the trial court, whose ruling is not to be disturbed on appeal absent an abuse of that discretion.
11. **Due Process: Identification Procedures.** A claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it.

12. **Trial: Identification Procedures.** Evidence of an extrajudicial identification is admissible when made under circumstances precluding the suspicion of unfairness or unreliability and where the person making the out-of-court identification is present at the trial and subject to cross-examination.
13. _____: _____. The factors to be considered in determining the likelihood of misidentification are the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation, coupled with the ability to cross-examine the person making the out-of-court identification.
14. _____: _____. An in-court identification is not to be suppressed if based on an independent recollection untainted by the intervening identifications.
15. **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 absent an abuse of discretion.
16. **Expert Witnesses: Trial.** The opinion of an expert witness is properly admitted into evidence where the scientific or technical basis of the opinion and the specific facts on which it is based are before the jury, and the opposing party has the opportunity to cross-examine such witness as to these foundational matters.
17. _____: _____. It is no abuse of discretion to admit expert testimony regarding the analysis of a substance necessarily consumed in testing, provided that the scientific or technical basis of the expert's opinion and the specific facts of the case on which the expert's opinion is based are before the jury and that the opposing party has the opportunity to cross-examine the expert as to these foundational matters.
18. _____: _____. Expert testimony is admissible only if it will be of assistance to the jury in its deliberations and relates to an area not within the competency of ordinary citizens.
19. _____: _____. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, expert testimony may be admissible.
20. **Expert Witnesses: Juries.** It is not for an expert to suggest to a jury how a witness' testimony shall be weighed or evaluated.
21. **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.
22. **Sentences.** In imposing a sentence, a trial court should consider, among other things, 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.
23. **Sentences: Double Jeopardy: Trial.** Where a legislature specifically authorizes cumulative punishment under two statutes proscribing the same conduct, the prosecution, in a single trial, may seek and the court impose such cumulative punishment without offending the double jeopardy clause of the fifth

amendment to the U.S. Constitution.

24. **Sentences: Weapons.** The language of Neb. Rev. Stat. § 28-1205(3) (Reissue 1985), to the effect that sentences under its provisions must be imposed consecutively to any sentence imposed for the predicate felony, is mandatory and not within the discretion of the sentencing court.
25. **Assault: Lesser-Included Offenses.** Assault in the second degree is not a lesser-included offense of attempted murder in the second degree.

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

Gregory J. Beal, of Gregory J. Beal & Associates, P.C., for appellant.

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

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

CAPORALE, J.

This appeal arises from the consolidated trials of two cases before a jury. In the first case, defendant-appellant, Juan Trevino, was adjudged guilty of the second degree murder of Marco Perez, the use of a firearm to commit that felony against Perez, the attempted second degree murder of Mark Heil, and the use of a firearm to commit that felony against Heil. In the second case, Trevino was adjudged guilty of a first degree assault upon Heil and of using a firearm in the commission of that felony. Trevino was thereafter sentenced to imprisonment on each of these convictions, as detailed in part V of the ANALYSIS portion of this opinion. He assigns 12 errors, which may be summarized as claiming that the district court erred in (1) not waiving jurisdiction of Trevino, who was not quite 18 years old at the time of the crimes, to the juvenile court, (2) finding the evidence sufficient to support the verdicts, (3) admitting certain evidence, (4) excluding certain evidence, and (5) imposing excessive sentences. We affirm.

ANALYSIS

Because of the breadth of this appeal, which embraces events from the pretrial refusal to waive jurisdiction in favor of the juvenile court to the imposition of sentences after conviction,

we shall, rather than first setting forth the many facts of record, deal with them as we consider, in turn, each summarized assignment of error.

I. Jurisdiction

Trevino first asserts that the district court erred in not waiving jurisdiction over him to the juvenile court. Neb. Rev. Stat. § 29-1816 (Reissue 1985) provides, in relevant part, that upon proper motion, the district court shall consider whether it should waive jurisdiction of one who was less than 18 years of age at the time the alleged crimes were committed to the juvenile court for proceedings under the Nebraska Juvenile Code. Section 29-1816 further provides that after considering the criteria set forth in Neb. Rev. Stat. § 43-202.01 (Reissue 1978), now Neb. Rev. Stat. § 43-276 (Reissue 1984), the case shall be transferred unless "a sound basis exists for retaining the case." Section 43-202.01 lists the following matters to be considered by a county attorney in determining whether to file a criminal charge or juvenile court petition:

> (1) The type of treatment such minor would most likely be amenable to; (2) whether there is evidence that the alleged offense included violence or was committed in an aggressive and premeditated manner; (3) the motivation for the commission of the offense; (4) the age of the minor and the ages and circumstances of any others involved in the offense; (5) the previous history of the minor, including whether he had been convicted of any previous offenses or adjudicated in juvenile court and, if so, whether such offenses were crimes against the person or relating to property, and other previous history of antisocial behavior, if any, including any patterns of physical violence; (6) the sophistication and maturity of the child as determined by consideration of his home, school activities, emotional attitude and desire to be treated as an adult, pattern of living, and whether he has had previous contact with law enforcement agencies and courts and the nature thereof; (7) whether there are facilities particularly available to the juvenile court for treatment and rehabilitation of the minor; (8) whether the best interest of the minor and the security of the public

> may require that the minor continue in custody or under supervision for a period extending beyond his minority and, if so, the available alternatives best suited to this purpose; and (9) such other matters as he deems relevant to his decision.

We have previously determined that whether to waive jurisdiction over a criminal proceeding to the juvenile court is a matter within the discretion of the district court and that such decision will not be reversed on appeal absent an abuse of that discretion. *State v. Ryan*, 226 Neb. 59, 409 N.W.2d 579 (1987); *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977), *overruled on other grounds State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986).

Trevino's wife, then age 20, testified that Trevino was a high school student at the time of the crimes. Her testimony also indicates, however, that the couple then had at least one child who resided with them, that the young family had traveled to Nebraska so that Trevino could secure employment to provide for his family, that the family was then dependent upon Trevino for support, and that Trevino participated as a partner with his wife in raising their child. Reviewing the considerations set forth in § 43-202.01, the district court found that

> the alleged offense included violence, and is alleged to have been committed in an aggressive and premeditated manner. . . . [T]hat the motivation for the commission of the offense is not clear, but it is alleged to have evil intent. . . . [T]hat the age of the juvenile is almost eighteen, and that the others involved in this matter are older people. . . . [T]here's nothing before the court as to previous record at this time. But I consider that slight consideration at this time. . . . [T]hat the juvenile is a married man, and has some sophistication and maturity as indicated by his coming to Nebraska to work, and he has been treated as an adult. . . . [W]ith this type of crime the facilities available to the juvenile court are not particularly important to me. . . . [T]he best interests of the juvenile, and particularly security of the public requires that he be continued in custody under supervision for a period extending beyond his minority. And that the available alternative, the best

alternative is that the defendant be prosecuted as an adult.

Sections 29-1816 and 43-202.01 provide a balancing test in which public protection and security are weighed against practical, and not problematical, rehabilitation in determining whether there should be a waiver of jurisdiction over a criminal proceeding to the juvenile court. *State v. Ryan, supra*; *State v. Alexander*, 215 Neb. 478, 339 N.W.2d 297 (1983). The probability of success and the duration of rehabilitative treatment must be considered in determining whether detention will be in the juvenile justice system or in the criminal justice system. *State v. Ryan, supra*; *State v. Alexander, supra*. The district court may properly refuse to waive jurisdiction over a criminal proceeding to the juvenile court where the district court complies with the provisions of statute and makes a statement of its findings which provides sufficient specificity to permit meaningful review by this court. *State v. Stewart, supra*. The record discloses the district court's compliance with these requirements.

As this court has previously noted in the civil context, "judicial abuse of discretion" means that the reasons or rulings of the trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. See, e.g., *Wachtel v. Beer*, 229 Neb. 392, 427 N.W.2d 56 (1988); *D.S. v. United Catholic Soc. Servs.*, 227 Neb. 654, 419 N.W.2d 531 (1988); *Bittner v. Miller*, 226 Neb. 206, 410 N.W.2d 478 (1987); *Fredericks v. Western Livestock Auction Co.*, 225 Neb. 211, 403 N.W.2d 377 (1987). The district court did not abuse its discretion in refusing to waive jurisdiction over the person of Trevino in these proceedings. Trevino's first assignment of error is without merit.

II. Sufficiency of Evidence

Trevino's second summarized assignment of error asserts the district court erred in determining the evidence was sufficient to support the verdicts of guilt. We begin by noting that in making those determinations, we are bound by the rule that after a jury has considered all the evidence and returned a verdict of guilty, that verdict may not, as a matter of law, be set aside on appeal for insufficiency of the evidence, if the evidence sustains some

rational theory of guilt. *State v. Lewis, ante* p. 224, 430 N.W.2d 686 (1988); *State v. Jackson,* 225 Neb. 843, 408 N.W.2d 720 (1987); *State v. Evans,* 215 Neb. 433, 338 N.W.2d 788 (1983). Moreover, in determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence; the verdict of the fact finder must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support the verdict. *State v. Quiring, post* p. 535, 432 N.W.2d 243 (1988); *State v. Jones, post* p. 528, 432 N.W.2d 523 (1988); *State v. Bustos, post* p. 524, 432 N.W.2d 241 (1988); *State v. Lewis, supra; State v. Tatara, ante* p. 279, 430 N.W.2d 692 (1988).

The application of these rules, as the analysis which follows establishes, compels the conclusion that the evidence overwhelmingly supports each of the jury's six findings of guilt and that the district court was thus correct in its determination to overrule each of Trevino's many motions challenging the sufficiency of this evidence; thus, Trevino's second summarized assignment of error is without merit.

At about 12:50 on the morning of September 14, 1986, Marco Perez, then age 19, and his brother, Ramon Perez, then about age 17, stopped at the Madrid Tavern in Madrid, Nebraska, for something to eat. Mark Heil and his sister, Melissa, were traveling with the Perezes in Ramon Perez' automobile and had been driving around together for about half an hour. Although there may have been some beer in the automobile, Ramon Perez, who is a nondrinker, had not consumed any of it. Ramon Perez parked his automobile on Main Street, slightly north and west of the Madrid Tavern and immediately north of a parked pickup truck.

All four passengers in the Perez automobile then entered the Madrid Tavern, where Chet Harger was working. Trevino was among the several patrons already in the tavern. The two Perez brothers ordered some fast-food items from Harger. While the four traveling companions were waiting, Trevino asked them if they would care to wager $1,000 against Trevino's ability to drink a glass of unidentified liquid; the four declined, took their

food, and left the tavern. They had been inside the tavern a total of 2 or 3 minutes.

Outside, the four stood between the Perez automobile and the pickup truck, talking. After several minutes, Ramon Perez observed Trevino and another person leave the tavern. Trevino was carrying a sack. Trevino and his companion paused outside the tavern, Trevino handed the sack to his companion, and the companion then walked north or northeast across a vacant lot and disappeared. Trevino walked to the edge of the sidewalk near the tavern, pointed a handgun at Marco Perez, said, "You'd better get the fuck out of here," and started shooting. Mark Heil jumped at Trevino, knocking him to the ground. Another shot was fired, and Trevino, by then under Heil, rolled Heil over onto the sidewalk.

People then began to emerge from the tavern, Nick Ross among them. Trevino started moving toward the tavern, pointing his gun at the doorway. Ross retreated within the tavern and told someone inside to call an ambulance.

Trevino then returned to the site of the shootings and pointed his gun at Jon Gilliland and Shelly Lee, who had been some distance away talking to each other. By this time Melissa Heil was screaming, and Trevino pointed his gun at her, saying, "[Y]ou'd better get out of here, she's next." Ramon Perez grabbed Melissa, moved behind his automobile, and then sent Melissa running down the street for help.

Gilliland had been in his pickup truck, which was stopped in the middle of Main Street just north of the scene of the shootings, speaking with Lee through the open window on the driver's side for about a half hour, up to the time of the shootings. Gilliland had noticed the Perezes and Heils standing between the Perez automobile and the pickup truck. Then, according to Gilliland,

> A man came out of the bar, and I heard the first shot. And we looked over there, and I thought it was a firecracker at first. Then, there was couple more shots fired in this direction, pretty rapid. And I didn't know at the time who it was that fell, but it was Marco. And then he turned around this way, and Mark approached him, and there was a couple more shots fired, and that's when Melissa

screamed and come back to my pickup.

After hesitating, Gilliland moved his pickup truck toward the gunman, pulling to within 5 feet of him. Gilliland looked at the gunman, who was carrying a small, shiny gun in his right hand, for 10 or 15 seconds. The gunman then told Gilliland to "[l]eave or I'll shoot," and Gilliland drove off to get the Heils' father.

From about 8 feet away, Trevino and Ramon Perez stared at each other for a time, then Trevino lowered his gun and moved off across a vacant lot to the east, toward the back of a residential building nearby. Police officers arrived minutes later.

Some minutes later, returning to the scene with the Heils' father, Gilliland saw the gunman running east on Highway 23, about one block north of the scene of the shootings. Gilliland gave chase in his pickup truck, following the gunman east on Highway 23, then north into an alley, closing to within 15 feet of the gunman and getting another look at his face. The gunman fell, and Gilliland returned to the scene of the shootings and notified the police officers of the gunman's location.

At approximately 1:10 on the morning of the foregoing events, officers of the Perkins County Sheriff's Department responded to a "shots-fired" call originating in Madrid. When they received the call, then Sheriff Jim Crown and Deputies Scott Phillips and Todd Hatcher happened to be together in a patrol vehicle approximately 2 miles west of Madrid on Highway 23. Three minutes after receiving the call, the officers arrived at the scene and found a crowd gathered in front of the tavern. Upon approaching the crowd, the officers observed Mark Heil lying on the ground, suffering from a wound to the neck. Hatcher subsequently noticed Marco Perez lying in the street, suffering from wounds to the head and chest.

Hatcher used the patrol vehicle radio to summon medical assistance, ascertained that there was nothing he could do to aid the victims himself, and moved the vehicle so as to illuminate a nearby vacant lot. Gilliland then approached Hatcher and stated that the person involved in the shooting was nearby, on the other side of Highway 23. Minutes later, as the ambulances arrived, Hatcher, Crown, and Phillips began moving in the direction indicated by Gilliland. In Hatcher's words,

> I went around the corner to go east, and Sheriff Crown went east with me. And I don't — I believe Officer Phillips was behind me at that point. And walking down between these two buildings, and a subject came running down on an angle almost straight towards me here. And I hollered "Freeze" and about the same time Sheriff Crown hollered "Freeze". And he yelled back, "Go ahead shoot, kill me" and swung around between here and kept running east.

Hatcher observed that the suspect "wasn't running normal like a normal person would run. It was kind of a staggered step."

Hatcher pursued the runner, catching him at the back door of a nearby residential building then occupied by Trevino and his family. Crown patted the suspect down and announced there was no gun; Hatcher then handcuffed the suspect. Crown next spoke with two women who had appeared at the door from within the building, one of whom was Trevino's wife, as Hatcher and Phillips escorted the handcuffed suspect back toward their patrol vehicle. At this time, Hatcher observed that the suspect appeared "[u]naware of his surroundings and was kind of out of it." Hatcher felt the suspect may then have been intoxicated; however, no tests of intoxication were performed.

As Hatcher and Phillips escorted the suspect to their vehicle, they walked into the view of the crowd. Some members of the crowd, including Gilliland, Ross, Harger, Raymond Walrod, Todd Marten, and possibly Ramon Perez, approached the two officers, who held the handcuffed suspect between them. Gilliland identified the suspect as the person who had done the shooting. Neither at this time nor later did the police present these persons with a view, nor with photographs, of any other persons as suspects in these crimes.

Approximately 15 to 20 minutes after the deputies arrived in Madrid, the suspect was placed in the patrol vehicle; he was then driven by Phillips to the Perkins County jail in Grant, Nebraska, and subsequently identified as Trevino.

Hatcher and Crown remained at the scene and commenced an investigation, speaking with those present. Hatcher searched the scene of the shooting and the surrounding area for a gun, but none was ever found. Hatcher did find several spent .25-caliber cartridge cases in the immediate area of the

shootings and a spent bullet in the roof of the Perez automobile at the scene. Photographs were taken of the physical evidence, as well as of what appeared to be bloodstains where each of the victims had been found.

The officers learned that a second person may have been with Trevino around the time of the shootings; however, this person was never located.

At approximately 10:20 a.m. on September 14, 1986, Trevino was booked into the Lincoln County jail. In the course of a search prior to admitting him to the jail population, 20 rounds of live .25-caliber Winchester expanding point automatic weapon ammunition were found on Trevino's person.

During the course of performing an autopsy, Dr. Dorothy Wycoff, an anatomic pathologist, removed two spent bullets from Marco Perez' body. She marked them for identification and turned them over to Crown. At trial, Wycoff testified that death was caused by bullet wounds to Marco Perez' heart and lungs.

Investigator Mark Bohaty, a firearms and toolmark examiner with the Nebraska State Patrol Criminalistics Laboratory, testified that the four spent cartridge casings found at the scene of the shootings by police officers had all been fired from the same gun and were identical to the live ammunition recovered from Trevino's person during booking, all being .25-caliber automatic expanding point shells and bullets manufactured by Winchester. Examination of the bullets recovered from Marco Perez' body indicated that they, too, were .25-caliber expanding point bullets manufactured by Winchester.

Forensic serologist Betty Jane Khreiss of the State Patrol Criminalistics Laboratory examined drops or spatters of blood found on the jeans Trevino was wearing when taken into custody. She determined that this blood was the same type in terms of blood group and genetic markers as Mark Heil's blood, and not the same as Trevino's blood. Trevino's expert forensic serologist testified that the bloodstain tests performed by Khreiss were, in his opinion, not reliable. Trevino's expert admitted, however, that his opinion in this regard was the

subject of considerable dispute within the scientific community.

On December 3, 1986, while Trevino was in the booking room of the Keith County Sheriff's Department facility in Ogallala, apparently awaiting transfer to another facility, a Spanish-speaking sheriff's deputy overheard a conversation in Spanish between Trevino and another Hispanic jail inmate, the English translation of which was: "[Inmate] Hey, man, what are you doing here? . . . [Trevino] They said I killed a man. . . . [Inmate] Well, did you do it? . . . [Trevino] Yes, I killed him and he's dead."

Thomas Mahan, then an inmate at the Hitchcock County jail awaiting sentencing, testified as to a conversation he had, out of the hearing of others, on the evening of Saturday, January 24, 1987, when Trevino was brought to that jail. According to Mahan,

> When Mr. Trevino first started discussing his case with me, he told me he was in here for murder and attempted murder of two people. And he told me that he didn't do it, and he told me that his partner or some guy that was with him is the one that done it.

However, in a series of conversations spanning the following day, during which no one else was present, Trevino told Mahan that

> he was in this bar drinking some tequila with this other guy, and they got up to leave. He went over and bought a six-pack of beer. And the beer was put in a paper bag, and they were walking out. And when him and this other fellow were outside they heard some people laughing. So, he hands the beer to him, and he tells his buddy, he says . . . "I'm going to scare the shit out of them". And he told me he pulled out his gun, and walked over and held the gun up to the guy's head and the gun went off. And he said, he just walked up to scare them, but the gun went off and he thought the safety was on. And then he said, he couldn't remember much more except somebody jumping him, and he said he shot him. And then he said that he got up and started to run, and he was running past some old cars and some crates or pallets or something, and run into some bushes. And then he hid in some tank or something.

> And he said, he hit the ground and the next thing he knows his friend or his buddy or whatever was there, and helped picked him up. He gave the gun to him and they both split in different directions. And then he said that he got up, and said the next thing he remembered he was on his porch and that's when he got arrested.

Following a court appearance on the succeeding day, Trevino repeated this story to Mahan, but stated that he had run home following the shootings and given the gun to his wife before he was apprehended. Trevino also told Mahan about a plan to persuade the jury of his innocence by presenting himself with longer hair than he had had at the time of the shootings, and with glasses, and by pretending in court to be left-handed.

The next day, again following a court appearance, Trevino repeated the same story of the crime to Mahan, but this time told Mahan that he had hidden the gun near the scene, and he drew a map showing the location of the gun. Mahan, worried by the prospect of continuing to share a cell with Trevino, then contacted jail officials. Mahan subsequently met with a Hitchcock County attorney, a sheriff's deputy, and two investigators from the Perkins County attorney's office, none of whom asked Mahan to solicit any additional information from Trevino.

Two days later, on Thursday, Trevino initiated yet another conversation with Mahan:

> He started asking me questions about an automatic gun firing and casings coming out of the gun. He couldn't understand how the casings from the weapon got on the sidewalk. . . . He — said he was standing this way, and held out his hand like this. And he said when the gun fired casings went this way, and he couldn't figure out how the casings wound up on the sidewalk, which was in the other direction. And I explained to him that when you fire an automatic weapon, the casings should come out and back, instead [of] straight out to the side.

Mahan also stated that he had been offered no inducements by the Perkins County attorney or anyone else for his testimony, apart from an attempt to keep his name out of the papers. Upon cross-examination, Mahan stated that Trevino

said he had told Mahan things he had not told his defense attorney.

Ramon Perez' recitation of the facts and in-court identification of Trevino as the assailant were corroborated at trial by the Heils and by Gilliland and Harger, as well as by three bar patrons, Martens, Ross, and Walrod.

We shall now consider, in turn, each of Trevino's six convictions.

1. Murder of Perez

As noted earlier, the jury first found Trevino guilty of second degree murder in the death of Marco Perez. Neb. Rev. Stat. § 28-304 (Reissue 1985) provides as follows: "(1) A person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation. (2) Murder in the second degree is a Class IB felony."

We have held that the essential elements of second degree murder are that the murder be done purposely and maliciously. *State v. Ettleman*, 229 Neb. 220, 425 N.W.2d 894 (1988). As noted in *Ettleman*, the state of mind required for second degree murder may be inferred from the evidence of the criminal act. Furthermore, malice, in the context of second degree murder, has been said to denote that condition of the mind which is manifested by the intentional doing of a wrongful act without just cause or excuse and is any willful or corrupt intention of the mind. The evidence adduced at trial supports the jury's implicit findings that Trevino intentionally aimed his loaded gun at Marco Perez and, with intent but without premeditation, shot Perez in the head and chest, causing his death.

2. Murder Firearm Use

The jury also found Trevino guilty of use of a firearm to commit a felony against Marco Perez, specifically, the felony of second degree murder. Neb. Rev. Stat. § 28-1205(1) (Reissue 1985) provides in relevant part as follows:

> Any person who uses a firearm . . . to commit any felony which may be prosecuted in a court of this state, or any person who unlawfully possesses a firearm . . . during the commission of any felony which may be prosecuted in a court of this state commits the offense of using firearms to commit a felony.

As noted previously, second degree murder is a felony. A gun is obviously a firearm, and Trevino does not urge otherwise. The evidence adduced at trial supports the jury's finding that Trevino used a gun to feloniously shoot and kill Marco Perez.

3. Attempted Murder of Heil

The jury also found Trevino guilty of attempted second degree murder of Mark Heil. The crime of second degree murder, defined at § 28-304 quoted above, is a Class IB felony. Neb. Rev. Stat. § 28-201 (Reissue 1985) provides in relevant part as follows:

> (2) When causing a particular result is an element of the crime, a person shall be guilty of an attempt to commit the crime if, acting with the state of mind required to establish liability with respect to the attendant circumstances specified in the definition of the crime, he intentionally engages in conduct which is a substantial step in a course of conduct intended or known to cause such a result.
>
> (3) Conduct shall not be considered a substantial step under this section unless it is strongly corroborative of the defendant's criminal intent.
>
> (4) Criminal attempt is:
>
> (a) A Class II felony when the crime attempted is a . . . Class IB felony . . . .

The evidence adduced at trial supports the jury's implicit finding that Trevino intentionally, but without premeditation, shot Mark Heil in the neck, an act "intended or known to cause" Heil's death. It cannot seriously be argued, and Trevino does not argue, that the conduct of intentionally shooting another person in the neck demonstrates anything but one's intent to kill the other person. See, also, *State v. Jackson*, 225 Neb. 843, 408 N.W.2d 720 (1987).

4. Attempted Murder Firearm Use

The jury next found Trevino guilty of use of a firearm to commit a felony against Mark Heil, specifically, the felony of attempted second degree murder. Section 28-304, defining second degree murder, § 28-201, defining the crime of attempt, and § 28-1205, defining the crime of use of a firearm to commit a felony, are quoted above and hence need not be set forth again. The evidence adduced at trial supports the jury's implicit

finding that Trevino used a gun to shoot Mark Heil in the neck in an attempt to cause Heil's death.

5. Assault of Heil

The jury also found Trevino guilty of first degree assault against Mark Heil. Neb. Rev. Stat. § 28-308 (Reissue 1985) provides as follows: "(1) A person commits the offense of assault in the first degree if he intentionally or knowingly causes serious bodily injury to another person. (2) Assault in the first degree shall be a Class III felony."

Dr. L.C. Potts, a physician and surgeon from Grant, Nebraska, attended Mark Heil in the Perkins County Hospital emergency room immediately after the shooting. According to Potts, Heil was then in critical condition, suffering paralysis from the neck down from what was indicated to be a bullet wound to the neck.

Mark Heil testified that as a result of the shooting, he was hospitalized for a month and spent an additional 3 1/2 months in a rehabilitation center. At the time of trial, a year and a half after the shooting, Mark Heil had no use of his legs, some use of his arms, and no use of his hands. There is ample evidence to support the jury's implicit finding that Trevino had intentionally or knowingly caused serious bodily injury to Mark Heil.

6. Assault Firearm Use

Finally, the jury found Trevino guilty of a second use of a firearm to commit a felony against Mark Heil, specifically, the felony of first degree assault. Section 28-308, defining first degree assault, and § 28-1205, defining the crime of use of a firearm to commit a felony, have already been set forth. The evidence supports the jury's implicit finding that Trevino used a gun to shoot Mark Heil in the neck in the course of intentionally or knowingly causing serious bodily harm to Mark Heil.

III. Evidence Admitted

Trevino's next summarized assignment of error urges upon this court the view that the district court erred in admitting certain evidence over Trevino's objections, repeatedly stated in motions in limine, motions to suppress, and objections at trial. Specifically, Trevino complains of the district court's rulings (1) admitting in-court identifications of Trevino as the gunman by

eyewitnesses to the crimes, (2) allowing Mark Heil to testify within view of the jury, and (3) admitting Khreiss' testimony. We shall consider each of these complaints in turn, mindful overall that the admission or exclusion of evidence is a matter within the discretion of the trial court, whose ruling is not to be disturbed on appeal absent an abuse of that discretion. *State v. Wells*, 229 Neb. 89, 425 N.W.2d 338 (1988).

1. Eyewitness Identifications

The gist of Trevino's argument as to the admission of the eyewitness identifications of Trevino was stated by defense counsel at the suppression hearing: "Mr. Trevino is taken into custody, is brought himself in handcuffs to an angry crowd. He's the only Hispanic that they see, he's handcuffed between two officers, what would any crowd say under those circumstances. If anything could be suggestive or violating due process that would be."

A claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it. *State v. Richard*, 228 Neb. 872, 424 N.W.2d 859 (1988) (quoting *Stovall v. Denno*, 388 U.S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967)). In *Richard, supra*, this court stated that evidence of an extrajudicial identification is admissible when made under circumstances precluding the suspicion of unfairness or unreliability and where the person making the out-of-court identification is present at the trial and subject to cross-examination.

The factors to be considered in determining the likelihood of misidentification, the first aspect of the *Richard* test, are the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. *State v. Richard, supra* (quoting *Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972)).

The evidence adduced at trial shows that each of the eyewitnesses had ample opportunity to observe Trevino during a period of at least 30 minutes leading up to the shootings, during the shootings, and immediately following the shootings,

all prior to the time Trevino ran off and was subsequently returned to the scene in custody. While several of the eyewitnesses gave Trevino only passing attention until the shootings took place, others had their attention fixed on him. In particular, Walrod, who was in the tavern when Trevino arrived and before the arrival of the victims, had his attention drawn to Trevino when, in his words, "I see him over there take the gun from underneath his coat on this side, and bring it around and stick [it] in this right side underneath his jeans and shirt there." At this time, Walrod was standing between 20 and 25 feet from Trevino, and nothing obstructed his view of Trevino. After the shooting, Walrod saw Trevino return to the open door of the tavern and point his gun at it. As previously discussed, both Ramon Perez and Gilliland also had their attention fixed on Trevino for significant periods around the time of the shootings and before Trevino's later appearance on the scene in custody.

Although Trevino attempts to make much of minor variations in the eyewitnesses' descriptions of Trevino, the record shows that all of the eyewitnesses to these crimes were remarkably consistent in describing Trevino as a young, Hispanic male of medium height and build, having, at the time of the crimes, remarkably short hair. Photographs of Trevino taken in the course of booking some 9 hours after the crimes conform to this description. Both at the scene and later in court, all eyewitnesses who identified Trevino as the assailant exhibited a high degree of certainty in their identifications. Finally, the amount of time which elapsed between the shootings and the subsequent "confrontation" between the eyewitnesses and Trevino, then in custody at the scene, was, by all accounts, about 20 minutes. It was clearly permissible for the district court to infer that the eyewitnesses' memory of the events they had witnessed would be fresh and accurate after the passage of such a short time.

As to the second aspect of the *Richard* test, the ability to cross-examine the person making the extrajudicial identification, we note that each of the eyewitnesses to the crimes who identified Trevino at the scene or who viewed him in custody at the scene was produced by the prosecution at trial

and subjected to cross-examination.

Trevino urges that the eyewitnesses' in-court identifications were tainted by the view they had of Trevino in custody 20 minutes after the shootings. The evidence is to the contrary, indicating that the eyewitnesses' in-court identifications were based on independent recollections of observations made prior to, during, and immediately following the shootings and before Trevino reappeared upon the scene in custody. An in-court identification is not to be suppressed if based on an independent recollection untainted by the intervening identifications. *State v. Richard*, 228 Neb. 872, 424 N.W.2d 859 (1988) (citing *United States v. Crews*, 445 U.S. 463, 100 S. Ct. 1244, 63 L. Ed. 2d 537 (1980)). Furthermore, two eyewitnesses to the crimes who did not see Trevino in custody at the scene, Mark and Melissa Heil, also positively identified Trevino in court as the assailant and were themselves subjected to cross-examination.

2. In-Person Testimony of Mark Heil

Trevino next argues that Mark Heil should not have been permitted to appear before the jury

> for the reason that [his] injury and disability . . . would be a highly inflammatory matter . . . . When they brought Mark Heil in the Courtroom incapacitated in a wheel chair, there was a marked change in the response and consideration of the jury with respect to any evidence offered after that time in the trial of the case in the opinion of the defendant's counsel.

Brief for appellant at 37. The record before us is devoid of evidence regarding Mark Heil's physical appearance at the time of trial and similarly devoid of evidence regarding the jury's observable or otherwise communicated reaction to Heil's appearance, the proffered opinion of Trevino's counsel notwithstanding.

Trevino's argument seems to take two tacks: on the one hand, Trevino appears to argue that Mark Heil's physical appearance was somehow "inadmissible"; on the other, that there was jury misconduct in the sense that the jury was improperly swayed by emotion upon the sight of Mark Heil, presumably being drawn to render a false verdict as a result.

It can be inferred from Mark Heil's testimony regarding the

loss of the use of his hands and legs that Heil was not independently ambulatory and required some assistance in taking the stand. Such observable aspects of Mark Heil's postshooting condition are clearly relevant to the element of "serious bodily injury" contained in the charge of first degree assault against Trevino. § 28-308. It is within the trial court's discretion to admit or exclude evidence on the ground of relevancy, and such rulings will be upheld absent an abuse of discretion. *State v. DeGroot, ante* p. 101, 430 N.W.2d 290 (1988); *State v. Hinn*, 229 Neb. 556, 427 N.W.2d 791 (1988). The district court did not abuse its discretion in allowing Mark Heil to testify in view of the jury.

Neither is there anything in the record to support Trevino's alternative contention that the jury was guilty of some sort of misconduct by permitting itself to be emotionally swayed by Mark Heil's appearance, rather than fairly considering the evidence.

In *State v. Woodward*, 210 Neb. 740, 745, 316 N.W.2d 759, 762 (1982), this court, commenting on language now found at Neb. Rev. Stat. § 27-606(2) (Reissue 1985), observed,

> While it is true that one may not inquire as to whether the presence of the evidence affected the juror's mind, it is proper and necessary that evidence be presented by the objecting party to show that *extraneous prejudicial information* was improperly brought to the jury's attention. In this case, that burden, required to be carried by Woodward, was not met.

(Emphasis in original.)

Accordingly, the district court did not abuse its discretion in permitting the jury to observe the consequences of Trevino's actions.

3. Khreiss Testimony

Trevino next urges upon this court the view that

> the acceptance of [Khreiss'] evidence over the defendant's objection was highly prejudicial and that a substantial miscarriage of justice did occur. [Khreiss] did not determine whether or not her specimen had been contaminated. Further, she consumed the entire sample, so that her work could not be checked. She used a test

> acknolwedged [sic] to be unreliable by the very person who developed the test under a grant from the LEAA, Dr. Grunbaum.

Brief for appellant at 44. Moreover, Trevino complains that Khreiss "did not produce photographs taken through her microscope so that the defendant's witness could examine her findings." Brief for appellant at 43. This second complaint is unavailing, for, as the State correctly points out in its brief in this court at 33 (citations to the record omitted),

> there is nothing in the record to indicate that she was asked to do so by either party . . . . Further the defendant did not request a continuance to obtain such photographs either for his cross-examination of Ms. Khreiss or the subsequent testimony of his own expert witness . . . . The record does disclose that defense counsel vigorously cross-examined Ms. Khreiss concerning the basis for her opinion and the facts on which it was based.

Trevino's assertions regarding Khreiss' "sample" apparently relate to her testimony concerning the bloodstains found on the jeans Trevino was wearing when booked, stains which Khreiss testified matched Mark Heil's blood type and genetic characteristics, but not Trevino's.

The opinion of an expert witness is properly admitted into evidence where the scientific or technical basis of the opinion and the specific facts on which it is based are before the jury, and the opposing party has the opportunity to cross-examine such witness as to these foundational matters. See *State v. Miner*, 216 Neb. 309, 343 N.W.2d 899 (1984).

In *State v. Batchelor*, 191 Neb. 148, 214 N.W.2d 276 (1974), the defendant was convicted of criminal sale of a controlled substance. The State's expert, a chemist who had analyzed a tablet seized from the defendant, had been called to testify about the chemical composition of the tablet, and was allowed to do so over defendant's objection notwithstanding the fact that the chemist's tests had entirely consumed the tablet, leaving nothing for the defendant to test independently. This court held that the district court did not abuse its discretion in finding that the defendant had not been "negligently or intentionally deprived of a right to analyze the tablet," and that the

admission of the chemist's testimony was proper. *Id.* at 149, 214 N.W.2d at 277.

In *State v. Vernon*, 218 Neb. 539, 356 N.W.2d 887 (1984), this court, quoting *California v. Trombetta*, 467 U.S. 479, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984), concluded that " 'the Due Process Clause of the Fourteenth Amendment does not require that law enforcement agencies preserve breath samples in order to introduce breath-analysis tests at trial.' " *Vernon* at 541-42, 356 N.W.2d at 890. See, also, *Arizona v. Youngblood*, ____ U.S. ____, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988).

Clearly, it is no abuse of discretion to admit expert testimony regarding the analysis of a substance necessarily consumed in testing, provided that the scientific or technical basis of the expert's opinion and the specific facts of the case on which the expert's opinion is based are before the jury and that the opposing party has the opportunity to cross-examine the expert as to these foundational matters. See, *State v. Miner, supra*; *State v. Vernon, supra*; *State v. Batchelor, supra*.

Although the tests Khreiss performed consumed the stains on Trevino's jeans, the scientific basis of Khreiss' expert opinion regarding these stains and the relevant facts of the case were before the jury, and Trevino had the opportunity to cross-examine Khreiss regarding the scientific or technical basis of her opinion and the specific facts upon which it was based.

Trevino also complains that the tests performed by Khreiss were not reliable. Trevino's expert offered this opinion at trial, and the jury determined the weight it would accord this opinion. (We note that Trevino's expert was not the "Dr. Grunbaum" mentioned in Trevino's brief in this court; in fact, no "Dr. Grunbaum" offered any testimony at all, although his name was mentioned in questions propounded by Trevino's counsel at trial.)

Trevino's third summarized assignment of error is without merit.

IV. Evidence Excluded

Trevino's next summarized assignment of error asserts that the district court erred in refusing to admit the testimony of Dr. Kenneth Deffenbacher and in refusing to admit certain testimony of Hollis Compton, Trevino's private investigator.

We shall deal first with testimony offered through Deffenbacher, and then with Compton's.

1. Deffenbacher Testimony

The district court sustained the State's motion in limine to exclude the proffered testimony of Deffenbacher as to the reliability of eyewitness testimony. In an offer of proof outside the presence of the jury, Trevino then set forth that Deffenbacher, a professor of psychology, would testify concerning "human perception and memory." Specifically, Deffenbacher was prepared to testify that high levels of stress interfere with memory for details of the stressful event and that presentation of a weapon in a high-stress situation interferes with perception of other things in the situation. In the course of this offer of proof, Deffenbacher himself noted that it is difficult for research scientists investigating memory to simulate real-life situations. In Deffenbacher's words,

> The really tough one is simulating high levels of real life terror. To do that one might have to, without someone else's knowledge, aforeknowledge, stick a gun in their face. That's illegal and unethical. And so we try to do our best. There have been a couple of field studies where a psychologist happened by right after a shooting takes place or something. But in general we try to do our best to ethically scare people in the laboratory.

Moreover,

> in the behavioral social sciences, as in many other sciences, scientific results are probablistic [sic]. That is, there is a value stated, and in this particular case I would be talking about the typical amount of effect on a typical person in similar circumstances. Now, clearly any given individual in that circumstance might have — the variable might have more effect on them or less. But short of actually being able to test extensively a given individuals [sic], the best prediction still as to how much affect [sic] that variable would have on him or her is the average amount of effect obtained in studies obtained over a large number of people. So it's probablistic [sic] information, but we use probablistic [sic] information a lot in life to make justments [sic] about things we should do.

This court considered the admissibility of expert psychological opinion regarding the reliability of eyewitness testimony in *State v. Ammons*, 208 Neb. 812, 305 N.W.2d 812 (1981):

> The general rule is that expert testimony is admissible only if it will be of assistance to the jury in its deliberations and relates to an area not within the competency of ordinary citizens. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, expert testimony may be admissible. Neb. Rev. Stat. § 27-702 . . . . The expert testimony offered by the defendant in this case met none of those requirements. The accuracy or inaccuracy of eyewitness observation is a common experience of daily life. Such testimony would invade the province of the jury.

Id. at 814-15, 305 N.W.2d at 814.

Trevino seeks to distinguish *Ammons, supra*, by asserting:

> In [*Ammons*], the Nebraska Supreme Court excluded such evidence for the reason that there was one basic witness who had ample opportunity to make an independent identification of the accused, and there were not conflicting eye-witness accounts. In cases such as the present case, you have a multitude of witnesses, no two of which give the same account for the same incident.

Brief for appellant at 46. Setting aside this mischaracterization of what we have already observed to be, on the whole, remarkably consistent testimony by a variety of eyewitnesses to these crimes, Trevino's brief misses the point of this court's holding in *Ammons*.

Ammons is not concerned with the expert's ability to explain inconsistency among witnesses but, rather, with the expert's ability to assist the jury in understanding evidence which is beyond the ken of common experience, howsoever many witnesses testify and regardless of the consistency or inconsistency of their testimony. *Ammons* stands for the proposition that it is not for an expert to suggest to the jury how a witness' testimony shall be weighed or evaluated; it is not, in short, for an expert to testify as Deffenbacher offered.

Deffenbacher himself alluded to two of the reasons for this rule. First, investigations of eyewitness reliability cannot duplicate many real-world conditions, and it is with behavior in the real world that the court is concerned and the jury acquainted. It is ironic that Deffenbacher chose as his example of the research scientist's limitation in this regard precisely the condition to which many of the eyewitnesses in this case had been subjected: a gun had been stuck in their faces, creating a condition which Deffenbacher indicated would not be within the scope of his discipline's power to re-create and study.

Second, the knowledge of behavioral scientists, such as psychologists, is probabilistic, couched in terms of averages, standard deviations, curves, and differences between groups. A court, however, is not concerned with the average eyewitness' reliability but with the reliability of the specific witnesses before it, who may vary from the average in probabilistic but ultimately unknown ways. It is not the research behavioral social scientist who is in a position to assess a specific witness' reliability; the jury, which views the witness as an individual, is best able to collectively determine, on the basis of common human experience as yet unsurpassed by laboratory research, how to weigh what an individual witness has to say.

This issue is controlled by this court's holding in *State v. Ammons, supra*. Clearly, the trial court properly exercised its discretion in refusing to receive Deffenbacher's testimony.

2. Compton Testimony

Trevino also complains of the district court's ruling sustaining the State's objection to the following question propounded through his attorney to Compton:

> Q. Have you — after reading the statements and making your investigation in this case and interviewing the witnesses that you have interviewed, based upon your examination of the scene of the crime, the manner in which it was handled, the persons involved, do you have an opinion as to whether or not the investigation in this matter is complete? And if you have an opinion, please just state yes or no?
>
> [Compton] No, — Excuse me, yes, I have an opinion.
>
> . . .

Q. And what is that opinion?

The State then interposed an objection, which the court sustained.

Trevino asserts, in essence, that the investigating officers could have done more than they did to identify and locate the other man seen leaving the Madrid Tavern with Trevino shortly before these shootings occurred. Apparently, Trevino would have this court conclude, in the absence of an offer of proof at trial, that Compton's testimony, if allowed, would have been to this effect. Assuming for purposes of argument that such would have been Compton's testimony, the fact remains there would be no relevance to such a statement. It was with Trevino's guilt or innocence that the trial was concerned, not with the investigation per se. That investigation either produced sufficient evidence to sustain a finding of guilt or it did not, a question resolved against Trevino by the jury and clearly supported by the evidence adduced at trial.

V. Sentences

Finally, in his last summarized assignment of error, Trevino asserts that the sentences imposed by the district court are excessive in general, and, specifically, in that a sentence was imposed twice for Trevino's use of a firearm to commit a felony upon Mark Heil, once with regard to attempted murder and once with regard to assault.

As frequently stated, 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. Lewis, ante* p. 224, 430 N.W.2d 686 (1988); *State v. Berkman, ante* p. 163, 430 N.W.2d 310 (1988); *State v. Thomas,* 229 Neb. 635, 428 N.W.2d 221 (1988); *State v. Maeder*, 229 Neb. 568, 428 N.W.2d 180 (1988). In imposing a sentence, a trial court should consider, among other things, 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. Thomas, supra.*

For the crime of second degree murder of Marco Perez, the district court sentenced Trevino to life imprisonment, with

solitary confinement each year on September 14. Neb. Rev. Stat. § 28-105 (Reissue 1985) provides that the penalty for second degree murder, as a Class IB felony, shall be "Maximum-life imprisonment Minimum-ten years imprisonment." We find no abuse of discretion in the sentence pronounced.

For the crime of attempted second degree murder of Mark Heil, the district court sentenced Trevino to imprisonment for a period of 15 to 30 years, to be served consecutively to the sentence for second degree murder. Section 28-105 provides that the penalty for attempting to commit a second degree murder, as a Class II felony, shall be "Maximum-fifty years imprisonment Minimum-one year imprisonment." We find no abuse of discretion in the sentence pronounced.

For the crime of first degree assault of Mark Heil, the district court sentenced Trevino to 3 to 6 years' imprisonment, to be served concurrently with the sentence for attempted second degree murder. Section 28-105 provides that the penalty for a first degree assault, as a Class III felony, shall be "Maximum-twenty years imprisonment, or twenty-five thousand dollars fine, or both." We find no abuse of discretion in the sentence pronounced.

For the crime of use of a firearm in the Perez murder, the district court sentenced Trevino to 3 years' imprisonment, consecutive to all sentences above. Section 28-105 provides that the penalty for the use of a firearm in the commission of a felony is a maximum of 20 years' imprisonment, or a $25,000 fine, or both. We find no abuse of discretion in the sentence pronounced.

Finally, for the crime of use of a firearm in the attempted murder of Mark Heil, the district court sentenced Trevino to 3 years, to be served consecutively to all sentences above; and for use of a firearm in the assault on Mark Heil, the district court sentenced Trevino to an additional 3 years, to be served consecutively to all sentences above.

Trevino's suggestion that imposing multiple punishments in the form of two convictions for the use of a firearm upon Mark Heil in but a single event somehow offends the double jeopardy clause of the 5th amendment to the U.S. Constitution, as

applied to the states by the 14th amendment to that Constitution, finds no support in the law. As noted in *Missouri v. Hunter*, 459 U.S. 359, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983), where a legislature specifically authorizes cumulative punishment under two statutes proscribing the same conduct, the prosecution, in a single trial, may seek and the court impose such cumulative punishment without offending the double jeopardy clause of the fifth amendment to the U.S. Constitution.

Section 28-1205(3) provides: "The crime defined in this section shall be treated as a separate and distinct offense from the felony being committed, and sentences imposed under the provisions of this section shall be consecutive to any other sentence imposed."

This court has held that the language of § 28-1205(3), to the effect that sentences under this section must be imposed consecutively to any sentence imposed for the predicate felony, is mandatory and not within the discretion of the sentencing court. *State v. Stratton*, 220 Neb. 854, 374 N.W.2d 31 (1985). Moreover, this court has previously determined that assault in the first degree is not a lesser-included offense of attempted murder in the second degree. *State v. Lovelace*, 212 Neb. 356, 322 N.W.2d 673 (1982).

Trevino was sentenced for use of a firearm in the commission of two separate felonies committed upon the person of Mark Heil. Section 28-1205 mandates separate sentencing for each instance of the use of a firearm to commit a felony. The jury having found Trevino guilty of both of the distinct predicate offenses of attempted second degree murder and first degree assault, the consecutive sentences imposed by the district court are supported by the law and the evidence, and mandated by the language of § 28-1205. Once again, we find no abuse of discretion in the sentence pronounced.

DECISION

There being no merit to any of Trevino's assignments of error, the judgments and sentences of the district court are affirmed.

AFFIRMED.

GRANT, J., dissenting in part.

I dissent only from the judgment of this court affirming defendant's convictions and sentences for the two crimes of assault in the first degree and use of a firearm in the commission of that felony. The decisive point on this issue is not raised by defendant but seems to me to be such plain error it should be addressed.

I agree completely that defendant's convictions and sentences as to the crime of murder in the second degree and the use of a firearm in the commission of that felony, in the murder of Marco Perez, should be affirmed. I also agree completely that the convictions and sentences as to defendant's crime of attempted murder in the second degree and the use of a firearm in the commission of that felony, in the attempted murder of Mark Heil, should be affirmed. I believe it was error for the trial court to impose an additional conviction and sentence on defendant for first degree assault and use of a firearm, also arising from the attempted murder of Mark Heil. As I understand the facts, both the charge of attempted murder in the second degree and the charge of first degree assault rest on defendant's action in shooting Mark Heil in the neck.

The action of this court, in my judgment, constitutes a violation of defendant's right not to be "twice put in jeopardy for the same offense"—a right guaranteed to defendant by Neb. Const. art. I, § 12, and by U.S. Const. amend. V. That right encompasses the right to be protected "against multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969). I, therefore, respectfully dissent from the affirmance of that part of defendant's conviction and sentencing.

The opinion of the majority on this point rests, in large part, on this court's holding in *State v. Lovelace*, 212 Neb. 356, 322 N.W.2d 673 (1982), where we held that assault in the first degree is not a lesser-included offense of attempted murder in the second degree. In the *Lovelace* case, the conviction of Lovelace for the crime of first degree assault was reversed and the case dismissed on the grounds that Lovelace was charged only with attempted murder in the second degree and the use of a firearm on the commission of that felony. The ground for the reversal

and dismissal of the first degree assault charge was apparently that defendant had not been afforded his constitutional rights, in that the crime of assault in the first degree had never been charged against defendant, and that since this court determined such an assault was not a lesser-included offense of attempted second degree murder, defendant had never been properly charged, arraigned, and tried on the charge of which he was convicted. That determination acted as a constitutional shield for the defendant in requiring that he had to be afforded due process before he could be convicted. The *Lovelace* case addressed the double jeopardy issue in dicta only, in that it invited further prosecution of Lovelace on the assault offense, because the assault offense was held to be a separate and distinct crime. That use of a constitutional shield in *Lovelace* has been transformed to a constitutional sword in the hands of the State in the present case before us.

I recognize, as does the majority opinion, that in *Missouri v. Hunter*, 459 U.S. 359, 368-69, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983), the U.S. Supreme Court stated:

> Thus far, we have utilized that rule [in *Whalen v. United States*, 445 U.S. 684, 100 S. Ct. 1432, 63 L. Ed. 2d 715 (1980)] only to limit a federal court's power to impose convictions and punishments when the will of Congress is not clear. Here, the Missouri Legislature has made its intent crystal clear. Legislatures, not courts, prescribe the scope of punishments.
>
> Where, as here, a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the "same" conduct under [*Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932)], a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial.

That holding permits the imposition of a consecutive sentence for using a firearm in both the second degree murder of Marco Perez and the attempted second degree murder of Mark Heil, because, as the majority opinion notes, the Legislature of Nebraska, in Neb. Rev. Stat. § 28-1205(3)

(Reissue 1985), has specifically provided for such cumulative punishment.

The Nebraska Legislature, however, has not authorized cumulative punishments for the same conduct in attempting murder and committing an assault, when those offenses arise from the "same conduct." In this case, the majority has used a judicial interpretation of "lesser-included offenses" as a springboard to impose cumulative sentences for the same offense. I believe such action violates defendant's constitutional, double jeopardy rights. I would reverse and dismiss defendant's convictions for first degree assault and use of a firearm in that assault. I would affirm defendant's other convictions.

BOSLAUGH, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. JOSE FERNANDO BUSTOS, APPELLANT.

432 N.W.2d 241

Filed December 2, 1988. No. 87-624.

1. **Right to Counsel.** The right of an indigent criminal defendant to counsel does not include the right to counsel of the defendant's own choice.
2. _____. A criminal defendant's mere distrust of, or dissatisfaction with, his or her attorney is not a sufficient reason to require appointment of substitute counsel.
3. **Convictions: Appeal and Error.** In determining whether the evidence is sufficient to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact, and the conviction must be sustained if, taking the view of the evidence most favorable to the State, there is sufficient evidence to support the conviction.
4. **Controlled Substances: Proof: Evidence.** Constructive possession of an illegal substance may be proved by direct or circumstantial evidence, and may be shown by the accused's proximity to the substance at the time of arrest or by a showing of dominion over the substance.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Affirmed.

Lee A. Larsen, Assistant Sarpy County Public Defender, for appellant.

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

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

CAPORALE, J.

Following a jury trial, defendant-appellant, Jose Fernando Bustos, was adjudged guilty of one count of possessing heroin and one count of possessing cocaine, all in violation of Neb. Rev. Stat. § 28-416(3) (Cum. Supp. 1984), and was thereafter sentenced to terms of imprisonment of 20 months to 5 years on each count, the second sentence to be served concurrently with the first. Bustos assigns as error the district court's (1) reappointment of the public defender to represent him and (2) failure to dismiss the charges. We affirm.

Bustos' name and address had come to the attention of Omaha metropolitan police officers while they were investigating and intercepting the telephone conversations of a suspected drug dealer in the fall of 1984. Omaha police subsequently obtained a warrant to intercept Bustos' telephone conversations as well. These interceptions yielded information which the officers believed related to drug transactions, and they subsequently observed a meeting between Bustos and the suspected drug dealer at a carwash in Sarpy County.

Following the interception of a conversation in which Bustos and the suspected dealer seemed to have a falling out, the investigating police officers immediately sought and received a search warrant from the district court for Douglas County authorizing a search of Bustos' residence in Sarpy County. This search resulted in the discovery and seizure of heroin, cocaine, and cocaine residue.

An attorney, privately retained by Bustos, moved to suppress the aforedescribed evidence. Shortly after the district court overruled that motion, it sustained the privately retained attorney's motion to withdraw made pursuant to Bustos' request.

After a subsequent hearing in chambers, of which there is no record in this court, the district court appointed the Sarpy County public defender's office to represent Bustos. That very day, the Sarpy County public defender, Thomas Garvey, filed a motion to withdraw, making the following representations, which are not otherwise of record in this court: that he, Thomas Garvey, was originally appointed to represent Bustos; that Bustos then, after failing to abide by the advice of the public defender's office, obtained private counsel; that after having been reappointed, the same offer of the county attorney for a plea bargain was forwarded to Bustos, who again, contrary to Garvey's advice, rejected it; that Bustos had hired private counsel and spoken to at least three other attorneys; and that the public defender's office questioned Bustos' indigency. After hearing argument, the district court denied Garvey's motion to withdraw from Bustos' representation.

At trial, Bustos moved for dismissal following the close of the State's case notwithstanding the fact the evidence established that the drugs seized were found in Bustos' bedroom. Bustos' motion was overruled, and he rested without adducing evidence.

Bustos' first assignment, that the district court erred in appointing for him in forma pauperis the same attorney whom he had rejected at an earlier stage of the proceeding, finds no support in the record. There is nothing before us which suggests any reason attorney Garvey should not have represented Bustos. It appears Bustos' assertion that he should have had other counsel rests on the fact that Garvey gave advice Bustos did not like and did not accept and that this situation created hostility between the two.

As this court has recently and repeatedly observed, the right of an indigent criminal defendant to counsel does not include the right to counsel of the defendant's own choice. *State v. Reddick, ante* p. 218, 430 N.W.2d 542 (1988); *State v. McCoy,* 228 Neb. 178, 421 N.W.2d 780 (1988) (citing *State v. El-Tabech*, 225 Neb. 395, 405 N.W.2d 585 (1987); *State v. Hoffman*, 224 Neb. 830, 401 N.W.2d 683 (1987)). A criminal defendant's mere distrust of, or dissatisfaction with, his or her attorney is not a sufficient reason to require appointment of

substitute counsel. *State v. Reddick, supra*; *State v. McCoy, supra* (citing *State v. Clark*, 216 Neb. 49, 342 N.W.2d 366 (1983); *State v. Blunt*, 197 Neb. 82, 246 N.W.2d 727 (1976)). Bustos' first assignment of error is without merit.

Bustos' second assigned error in effect challenges the sufficiency of the evidence to support the verdicts.

In determining whether the evidence is sufficient to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact, and the conviction must be sustained if, taking the view of the evidence most favorable to the State, there is sufficient evidence to support the conviction. *State v. Trevino, ante* p. 494, 432 N.W.2d 503 (1988); *State v. Swift, ante* p. 373, 431 N.W.2d 643 (1988); *State v. Lewis, ante* p. 224, 430 N.W.2d 686 (1988).

Section 28-416(3) provides:

> A person knowingly or intentionally possessing a controlled substance, except marijuana, unless such substance was obtained directly or pursuant to a valid prescription or order from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this article, shall be guilty of a Class IV felony.

Both heroin (Neb. Rev. Stat. § 28-405 Schedule I(b)(11) (Cum. Supp. 1984)) and cocaine (§ 28-405 Schedule II(a)(4)) are "controlled substances" within the purview of § 28-416(3). Constructive possession of an illegal substance may be proved by direct or circumstantial evidence, and may be shown by the accused's proximity to the substance at the time of arrest or by a showing of dominion over the substance. *State v. Lee*, 227 Neb. 277, 417 N.W.2d 26 (1987). Clearly, the jury's implicit inference that the drugs seized were within Bustos' dominion is supported by the evidence. Bustos' second assignment of error is also without merit.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MARVEL JONES, APPELLANT.

432 N.W.2d 523

Filed December 2, 1988. No. 87-1008.

1. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to sustain a criminal conviction, it is not the province of the Supreme Court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence; such matters are for the finder of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
2. **Convictions: Circumstantial Evidence.** Circumstantial evidence is sufficient to support a conviction if such evidence and the reasonable inferences that may be drawn therefrom establish guilt beyond a reasonable doubt.
3. **Circumstantial Evidence.** In a criminal case established by circumstantial evidence, the State is not required to disprove every hypothesis but that of guilt.
4. **Effectiveness of Counsel: Proof.** To sustain a claim of ineffective assistance of counsel as a violation of the sixth amendment to the U.S. Constitution and thereby obtain a reversal of a defendant's conviction, the defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense, that is, a demonstration of reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.
5. **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 on the part of the sentencing judge.

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

Paul M. Conley for appellant.

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

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

CAPORALE, J.

Following a jury trial, defendant-appellant, Marvel Jones, was adjudged guilty of robbery in violation of Neb. Rev. Stat. § 28-324(1) (Reissue 1985), and sentenced to imprisonment for a period of 8 to 15 years. Jones' five assignments of error can be summarized as claiming that the district court erred in (1) finding the evidence sufficient to sustain the conviction, (2) failing to find Jones had been denied the effective assistance of

counsel at trial, and (3) pronouncing an excessive sentence. We affirm.

Immediately before the opening of the evidentiary portion of Jones' trial to the jury, his court-appointed trial attorney asked the court to allow Jones to address the court directly, outside the presence of the jury. The court granted this request, whereupon Jones said: "I tried to get hold of my attorney all this time, and I never got hold to [sic] him. I have called from the jail, and I have called, and I have — I just could never get no, you know, I could never contact him." The trial attorney stated that he had met with Jones or communicated with him by letter on 10 separate occasions prior to trial but had received no phone messages from him. The district court refused to appoint substitute counsel for Jones but did offer to allow Jones to proceed pro se. Jones declined the offer, and the case proceeded to trial with the aforesaid court-appointed trial attorney representing Jones.

The evidence revealed that on April 3, 1987, Dan Terhune was working the midnight to 8 a.m. shift at the Kwik Shop located at 3301 Holdrege Street in Lincoln and was the only employee on duty at that time. At about 2 a.m., a man ran into the store wearing a hat, gloves, and mask, and carrying a gun. The gunman approached Terhune, pointed the gun at his chest, and demanded money. Terhune put food stamps, cash, coins, and receipts from his cash register into a paper sack carried into the store by the gunman. The food stamps were in a bundle that Terhune had assembled and marked earlier in the evening; the receipts were internal bookkeeping documents that bore, among other identifying marks, the Kwik Shop's store number. The cash amounted to about $120, mostly in bills smaller than $10, and some change. The gunman took the sack and left the store, heading south, and Terhune called the police.

Terhune described the gunman as wearing a light-colored "sailor's hat" with the brim pulled down, a white mask similar to a race car driver's balaclava, a light-colored jacket, brown gloves with light-colored fur lining, and blue jeans. In his left hand, he was carrying a large, silver-gray gun, which resembled an automatic weapon rather than a revolver. According to Terhune, the gunman was approximately 5 feet 8 inches tall,

weighed about 155 to 160 pounds, and was slight of build. Although Terhune could not see the gunman's face or skin, he, based on the man's speech patterns, thought it likely the gunman was black.

Lincoln Police Department Investigator G. Jeff Gade was near the intersection of 27th and Vine Streets in an unmarked police cruiser at 2:11 on the morning of the robbery. After learning of the robbery via police radio, Gade stopped his cruiser on Vine Street between 27th and 28th and waited. About a minute later, Gade observed a vehicle stop on the north side of Vine Street at 30th and remain stationary at a stop sign for almost 30 seconds. As there was no other traffic on Vine Street at this time, Gade's suspicions were aroused, and as the other vehicle began to move, Gade maneuvered his cruiser so as to arrive at 30th Street at the same time as the other vehicle.

Gade observed that the vehicle was a brown Chevrolet Caprice four-door with a tan vinyl top and that there were two people inside, both in the front seat, the driver being a black female and the passenger a black male. Gade followed the vehicle south on 30th Street for 5 to 7 minutes as it slowly meandered through a residential neighborhood there. During this time, Gade observed the driver of the vehicle commit several traffic infractions.

After a time, a marked police cruiser, answering Gade's radio call for assistance, pulled between Gade's unmarked cruiser and the suspect vehicle. As the marked cruiser drew closer, the suspect vehicle slowed to about 5 miles per hour and pulled slightly to the right; at 3123 R Street, the passenger jumped out and ran off. Gade, 25 to 35 feet back in his cruiser, saw this person in his headlights as he ran off. He described the individual as "a black male approximately five six to five eight, 140 pounds, slender build, medium-length Afro hair, wearing a tan or light-colored jacket or shirt which was not tucked in, a pair of dark-colored pants and dark shoes." Gade immediately stopped his cruiser and gave chase on foot, but lost sight of the suspect in an alley nearby.

In the meantime, Scott Beggs, the police officer who had joined Gade in pursuit of the Chevrolet, stopped the automobile on 31st Street between R and S Streets. Inside,

Beggs found Gloria Patterson, the driver, and took her into custody.

Patterson testified at Jones' trial under grant of use immunity pursuant to Neb. Rev. Stat. § 29-2011.02 (Reissue 1985). According to Patterson, Jones was in her vehicle, a brown Chevrolet Impala with white vinyl top, on the morning of the robbery. At that time, Jones was wearing a light-colored shirt and white hat. At Jones' request, at 1:30 or 2 a.m., Patterson drove him to the Kwik Shop at 33d and Holdrege Streets. Jones left the vehicle, ran into the store, came out a short time later, and ran away toward 34th Street. Patterson drove off, but moments later came upon Jones and let him back into the vehicle. At this time, Patterson saw that Jones carried a sack and a gun.

Patterson drove to near 33d and Vine Streets, where another vehicle began following hers. Jones told Patterson to "lose him," and Patterson "turned a few corners" but was unable to shake the vehicle following them, at which point Jones informed Patterson that he would jump out of her vehicle, which he did. Patterson was then stopped, and subsequently told police officers that Jones had been her passenger and where he lived.

Lincoln Police Officer Paul Aksamit, a dog handler, was called in with his police dog to track the suspect. In an alley at 2800 P Street, a black male carrying a brown paper sack ran toward Aksamit. Aksamit ordered the individual to stop, and took him into custody. In court, Aksamit identified Jones as the person he took into custody that evening. Although at the time of his arrest the temperature was about 40 degrees and there was patchy snow on the ground, Jones was wearing dark-colored pants and no shirt, and was in stocking feet.

Several items were found on the ground near Jones when he was taken into custody, including the gun, the gloves, and the paper sack admitted into evidence at trial. The sack was found to contain $125 in cash and coins, $17 in food stamps, and two Kwik Shop receipts. After daybreak, the area where Jones had been captured was searched, resulting in the discovery of several items of clothing behind a nearby air-conditioner. These items of clothing were also admitted into evidence at trial. At

the time of his arrest, Jones lived about one block from where the items of clothing were found; the clothing was located about two blocks from where the arrest took place.

At trial, Terhune identified the hat, mask, jacket, and gloves received in evidence as identical to the items worn by the gunman, and the gun, apparently a BB or pellet gun, and paper sack received in evidence as identical to those carried by the gunman. Terhune also recognized the bundle of food stamps and receipts received in evidence as those taken by the gunman.

At the close of the State's case, Jones, through his trial attorney, moved for dismissal, a motion which the court overruled. Jones, again through his trial attorney, subsequently rested without calling any witnesses and moved for a directed verdict, which motion was also overruled.

In his first assignment of error, Jones urges upon this court the view that the evidence is not sufficient to sustain his conviction. It is well established that in determining the sufficiency of the evidence to sustain a criminal conviction, it is not the province of the Supreme Court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence; such matters are for the finder of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Trevino, ante* p. 494, 432 N.W.2d 503 (1988); *State v. Berkman, ante* p. 163, 430 N.W.2d 310 (1988); *State v. McDonald, ante* p. 85, 430 N.W.2d 282 (1988); *State v. Anderson,* 229 Neb. 427, 427 N.W.2d 764 (1988).

Section 28-324(1) defines the crime in question as follows: "A person commits robbery if, with the intent to steal, he forcibly and by violence, or by putting in fear, takes from the person of another any money or personal property of any value whatever."

Circumstantial evidence is sufficient to support a conviction if such evidence and the reasonable inferences that may be drawn therefrom establish guilt beyond a reasonable doubt. In a criminal case established by circumstantial evidence, the State is not required to disprove every hypothesis but that of guilt. *State v. McDonald, supra.* As the foregoing recitation of the

record demonstrates, the evidence fully supports the jury's finding that Jones, with the intent to steal, took money or other personal property of value from the person of Terhune by putting Terhune in fear. Jones' first assignment of error is clearly without merit.

In his second summarized assignment of error, Jones asserts he was denied his right, under the sixth amendment to the U.S. Constitution, to the effective assistance of counsel at trial. We have said that in order to assert a successful claim of ineffective assistance of counsel, a defendant must prove (1) that his or her attorney failed to perform as well as an attorney with ordinary training and skill in the criminal law in the area, (2) that defendant's interests were not conscientiously protected, and (3) that if the attorney had been effective, there is a reasonable probability the results would have been different. E.g., *State v. Reddick, ante* p. 218, 430 N.W.2d 542 (1988); *State v. Harton, ante* p. 167, 430 N.W.2d 313 (1988); *State v. Painter,* 229 Neb. 278, 426 N.W.2d 513 (1988); *State v. Costanzo*, 227 Neb. 616, 419 N.W.2d 156 (1988); *State v. Juhl*, 218 Neb. 792, 359 N.W.2d 109 (1984). In reality, however, a showing that a defendant's interests were not conscientiously protected is subsumed in a showing that the attorney failed to perform as well as an attorney with ordinary training and skill in the criminal law in the area. Thus, to sustain a claim of ineffective assistance of counsel as a violation of the sixth amendment to the U.S. Constitution and thereby obtain reversal of a defendant's conviction, the defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense, that is, a demonstration of reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *State v. Hawthorne, ante* p. 343, 431 N.W.2d 630 (1988); *State v. Evans,* 218 Neb. 849, 359 N.W.2d 790 (1984). See, also, *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Regarding the first component of this test, Jones makes essentially three arguments. The first is that his trial attorney did not thoroughly question the State's witnesses and failed to present any defense witnesses. Apart from speculating that the

trial attorney might have succeeded in confusing Terhune on the stand, Jones himself fails to bring to this court's attention the nature of any favorable testimony which might have been elicited from any of the State's witnesses or from anyone else; a sober reading of the record suggests that the trial attorney labored under the same handicap. See, *State v. Costanzo, supra*; *State v. Pribil*, 227 Neb. 397, 417 N.W.2d 786 (1988); *State v. Broomhall*, 227 Neb. 341, 417 N.W.2d 349 (1988).

Jones next contends that the trial attorney should have objected to the court's statement at the conclusion of Terhune's testimony that he might be called again and thus should "keep a number with the County Attorney's office where *we* can get hold of you." (Emphasis supplied.)

In Jones' view,

> The inference is that the prosecution and the judiciary are combined and that the State's witness was also the Court's witness. Had Marvel Jones been represented by defense counsel who was actively participating in the trial, a motion for mistrial or a cautionary admonition should have come forth to protect Defendant's right to a fair and impartial trial.

Brief for appellant at 11. The interpretation Jones places on the statement is a strained one; in the context made, the statement is more reasonably interpreted as meaning that Terhune should keep the county attorney's office, which called him as a witness, advised as to his whereabouts so that anyone connected with the trial could reach him if desired.

Thus, whether to interpose an objection of the sort suggested by Jones to the questioned comment is one of trial strategy; accordingly, the failure to have made such an objection will not support an inference of ineffective assistance of counsel. See, *State v. Costanzo, supra*; *State v. Meis*, 223 Neb. 935, 395 N.W.2d 509 (1986); *State v. Jackson*, 226 Neb. 857, 415 N.W.2d 465 (1987).

Lastly, Jones argues that the fact a second charge, that of using a firearm in the commission of a felony, was voluntarily dismissed by the State rather than upon motion of his trial attorney somehow proves that his trial attorney was ineffective. Again, it is a matter of trial strategy whether to move to dismiss

a charge the State apparently could not have proved because of the nature of the device used to put Terhune in fear. The trial attorney may well have thought Jones' interests would have been better served had the court dismissed that charge at the close of the State's evidence for a failure of proof.

Thus, Jones has failed to satisfy the first component of the test in this court of ineffective assistance of counsel. That being so, we must conclude that Jones' second summarized assignment of error is, for that reason alone, without merit.

Finally, Jones urges upon us the view that the sentence pronounced by the district court was excessive. 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. Berkman, ante* p. 163, 430 N.W.2d 310 (1988); *State v. Thomas*, 229 Neb. 635, 428 N.W.2d 221 (1988).

Robbery is a Class II felony. § 28-324. Neb. Rev. Stat. § 28-105 (Reissue 1985) provides that the penalty for a Class II felony shall be "Maximum-fifty years imprisonment Minimum-one year imprisonment." The sentence meted out to Jones is within the limits prescribed by statute, and we find no basis on which we can say the district court abused its discretion. Thus, Jones' third assignment of error is also without merit.

AFFIRMED.

FAHRNBRUCH, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. GALYN QUIRING, APPELLANT.
432 N.W.2d 243

Filed December 2, 1988. No. 88-054.

1. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to sustain a criminal conviction, it is not the province of the Supreme Court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence; such matters are for the finder of fact, and the verdict must be sustained if, taking the view most

favorable to the State, there is sufficient evidence to support it.

2. **Trial: Witnesses.** In a jury-waived trial of a criminal case, the court, as the trier of fact, is the sole judge of the credibility of witnesses and the weight to be given to their testimony.

Appeal from the District Court for Thayer County: ORVILLE L. COADY, Judge. Affirmed.

Thomas R. Lamb, of Berry, Anderson, Creager & Wittstruck, P.C., for appellant.

Daniel L. Werner, Thayer County Attorney, for appellee.

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

PER CURIAM.

On May 15, 1987, the defendant-appellant, Galyn Quiring, was cited for an axle weight violation at a weigh station located at the junction of U.S. Highways 81 and 136 near Hebron, Thayer County, Nebraska. At his July 27, 1987, arraignment, defendant waived reading of the complaint and pled not guilty. The matter was tried to the Thayer County Court immediately following arraignment, without objection. The county court found the defendant guilty of "overweight - single axle" in violation of Neb. Rev. Stat. § 39-6,180(2) (Reissue 1984) and sentenced him to pay a $750 fine and costs of $21. Defendant appealed to the district court. The district court for Thayer County affirmed the judgment of the county court, and defendant appealed to this court, alleging that the evidence was insufficient to establish his guilt beyond a reasonable doubt. We affirm.

In determining the sufficiency of the evidence to sustain a criminal conviction, it is not the province of the Supreme Court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence; such matters are for the finder of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Anderson*, 229 Neb. 427, 427 N.W.2d 764 (1988). In a jury-waived trial of a criminal case, the court, as the trier of fact, is the sole judge of the credibility of witnesses and the

weight to be given to their testimony. *State v. Berkman, ante* p. 163, 430 N.W.2d 310 (1988).

Viewing the evidence in the light most favorable to the State, the record shows that on May 15, 1987, at the time and place in question, defendant was hauling a load of plastic pipe in a 1984 Kenworth truck with a trailer. Defendant had 10 years' truck driving experience and had been driving this particular truck for 2 months. The truck was equipped with an air device capable of distributing the weight upon the trailer over the axles of the vehicle.

As defendant approached the Hebron weigh station, he rounded a gradual curve and pulled from the highway onto the scale. Defendant activated the air system of the trailer, thus "dumping" the air. Defendant testified this action had the effect of raising the back axle off the ground "so that way it doesn't drag on the pavement when you go around the corner" and causes the weight to settle on the third axle.

An officer of the Nebraska State Patrol Carrier Enforcement Division weighed the steering axle, the drive axle, and the two trailer axles. Those weights were recorded on a scale ticket showing the individual weight for each axle at the time it was weighed. When so weighed, the third axle weighed 25,170 pounds, which exceeded the gross load limit by 5,170 pounds.

Because trucks are not allowed to leave the scale overloaded and are required to legalize their loads before leaving, the officer directed that the truck be reweighed. Defendant testified that during the time he was on the scale, the trailer had been "airing back up" and that it takes about 3 minutes for the rear axle to return to its normal operating configuration after "dumping the air." Upon reweighing 2 minutes later, a second scale ticket showed that the weight upon the third axle was 14,830 pounds.

The officer then asked defendant to come back upon the scales to be weighed exactly as he came down the highway, and defendant did so. The scale tickets for this reweighing show the changes in the weight of the third axle as defendant returned the air to the position it was when he was operating the vehicle on the highway. Those values ranged from 26,120 to 26,810 pounds. Defendant then legalized the load upon the third axle

and was allowed to leave the scale.

Defendant was cited for violating § 39-6,180(2), in that the third axle was carrying a gross load which was 5,170 pounds in excess of the legal limit of 20,000 pounds. The officer explained to defendant that he was overweight on the third axle. Defendant stated to the officer that he keeps the truck that way, that he runs heavy on that axle, and that doing so saves wear and tear on the highway and on his tires. Defendant further stated that he carries that weight on his semitrailer all the time and that he had been issued citations before and was not going to pay this citation.

The county court concluded that as defendant came around the curve and proceeded toward the scale, he "did commence to air backup." The testimony and viewing of the witnesses, however, indicated to the trial judge that defendant started airing back up to get to legal weight, having been running illegally on the single axle, and that defendant was driving with in excess of 25,170 pounds on that axle as he pulled into the station.

The county court, as trier of fact, resolved any conflicts in the evidence in favor of the State. There is sufficient evidence in the record to sustain defendant's conviction. The decision of the Thayer County District Court, affirming the judgment of the county court for Thayer County, is affirmed.

AFFIRMED.

RANDALL CHRISTOPHER DEWEY, APPELLANT, V. DEBRA KAY DEWEY, APPELLEE.

432 N.W.2d 48

Filed December 2, 1988. No. 88-491.

Appeal from the District Court for Saline County: ORVILLE L. COADY, Judge. Affirmed.

Lynn B. Lamberty, of Steinacher, Vosoba & Hanson, for appellant.

Patrick J. Craven for appellee.

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

PER CURIAM.

This is a dissolution action in which the petitioner husband has appealed. He assigns as error only the trial court's action in the division of the property of the parties and the trial court's failure to determine a value for the real estate owned by the parties and awarded to petitioner.

With regard to the latter, we note that no request was made that the court make specific findings of facts. This court's de novo review establishes that there is no merit in this assignment.

We have reviewed the trial court's judgment de novo on the record, and we determine the trial court did not abuse its discretion in the division of the marital assets. Accordingly, the decree of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. MARTIN WALTERS, APPELLEE.
432 N.W.2d 528

Filed December 2, 1988. No. 88-676.

1. **Motions to Suppress: Appeal and Error.** In determining the correctness of a trial court's ruling on a motion to suppress, the Supreme Court will uphold the trial court's findings of fact unless those findings are clearly erroneous.
2. _____: _____. In determining whether a trial court's findings on a motion to suppress are clearly erroneous, the Supreme Court recognizes the trial court as the "trier of fact" and takes into consideration that the trial court has observed witnesses testifying regarding such motion to suppress.
3. **Constitutional Law: Search Warrants.** The fourth amendment's warrant clause forbids the issuance of warrants except those particularly describing the place to be searched and the persons or things to be seized.
4. **Search Warrants: Police Officers and Sheriffs.** A description in a search warrant is sufficient if the officer, equipped with the search warrant, can, with reasonable effort, ascertain and identify the place to be searched.
5. _____: _____. The test to determine the sufficiency of a search warrant's description of the place to be searched is whether the description provides

sufficient particularity to enable the executing officer, with reasonable effort, to locate and identify the site to be searched, and whether there is any reasonable probability that other premises might be mistakenly searched pursuant to the warrant.

6. _____: _____. Even if the numerical address for the site to be searched is incorrect, the warrant may still be valid if the description is adequate to direct the officer to the correct place for the search.
7. **Search Warrants: Affidavits: Probable Cause.** A claim that a search warrant's supporting affidavit is insufficient due to a falsehood or a statement with reckless disregard for the truth is not sustained when the affidavit supports a finding of probable cause after elimination of the questioned information.

Appeal from the District Court for Hall County: WILLIAM H. RILEY, Judge. Reversed.

Mark J. Young, Deputy Hall County Attorney, for appellant.

Barry Waid, Hall County Public Defender, for appellee.

SHANAHAN, J.

In its information, the State charged Martin Walters with receipt and retention of stolen property. See Neb. Rev. Stat. § 28-517 (Reissue 1985). The district court for Hall County sustained Walters' motion for suppression of physical evidence, which the police obtained by a warrant-authorized search, and Walters' statements at police headquarters after the search in question. The State appeals from the suppression order for review by a judge of this court, pursuant to Neb. Rev. Stat. § 29-824 (Reissue 1985).

On March 17, 1988, Capt. Kyle Hetrick of the Grand Island Police Department received a telephone call from an unidentified informant who stated that Walters had offered to sell the informant a Fender guitar, a cassette player, and a Suzuki keyboard, which matched the description of property recently taken in local burglaries. The informant did not know the exact address of Walters' apartment, where the informant had indicated the stolen property was located, but, according to Hetrick, described Walters' residence: "[The informant said] it was on the — It was an apartment building on the northeast corner of 6th and Walnut. He advised the apartment was on the main floor and he didn't know the number, but he said, 'You walk in, and it's the first door on the left.' "

The next day, Captain Hetrick drove to the area described by the informant and ascertained the address of the building in which he believed Walters resided. Captain Hetrick then spoke with the apartment manager, Rudy Plate, who informed Hetrick that Walters did indeed rent a unit in the described building. Plate, however, was uncertain about the precise identifying number assigned to Walters' apartment. As related by Hetrick:

> [Plate] told me that it was Apartment 2 or 4, but he wasn't sure because he manages so many apartments, but he also described it as the first apartment — or he described it as being on the main floor. He didn't know if it was the first one on the left, but he described it as being on the main floor.

Nothing indicated how many apartment units were contained within the building located at 324 West 6th Street.

On March 18, Hetrick applied for a search warrant and supported the application by his affidavit, which contained the location of Walters' apartment according to the description given by the informant, namely, "Northeast corner of 6th and Walnut, main floor with the entrance to his [Walters'] apartment on the immediate left as you enter the foyer . . . ." In his affidavit, Hetrick further stated: "[T]he manager of that apartment house, Rudy Plate, has advised that a Martin Walters lives at 324 West 6th, Apartment #2 . . . ." Hetrick's affidavit did not reflect Plate's uncertainty or alternative indication concerning the number for Walters' apartment. At the suppression hearing, Hetrick testified: "I just neglected to put that [Plate] had told me 2 or 4." On the basis of Hetrick's affidavit, the county court issued a warrant authorizing the search of "324 West Sixth Street, Apartment 2."

Accompanied by three other police officers, on March 18, Captain Hetrick then proceeded to the building described in the search warrant. As he entered the building, Hetrick noticed that the door to the apartment on his left was partially open. Although Hetrick saw the apartment clearly bore "1" on its door, Hetrick approached the apartment, knocked at the open door, and asked the individuals inside whether the apartment was the Martin Walters residence. A male occupant answered

"yes" and shortly thereafter identified himself as Martin Walters. After giving Walters a copy of the search warrant, Hetrick and the other officers commenced their search, during which the officers discovered and seized a guitar, a cassette player, a keyboard, and a videocassette player and tapes, all of which had been reported stolen in various burglaries in the area.

When the officers searched Walters' apartment, no one lived in apartment 2, which was located on the second floor of the apartment building.

Several hours after the search, and in response to Hetrick's request, Walters went to the police station, where, after receipt of the "*Miranda* warning," see *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), Walters admitted his possession of stolen property and was subsequently charged with receiving and retaining stolen property. Before trial, Walters filed a motion

> to suppress the fruits of the search and seizure and subsequent arrest made . . . for the reason that the search and seizure and arrest were made without probable cause or without benefit of a proper warrant and were unreasonable within the meaning of the 4th Amendment to the United States Constitution.

On the basis of the foregoing evidence, the district court sustained Walters' suppression motion.

The State contends that the search warrant for Walters' apartment was valid and Walters' statements to the police were not the "fruit of the poisonous tree," that is, were not the product of a constitutionally invalid search of Walters' apartment.

"In determining the correctness of a trial court's ruling on a motion to suppress, the Supreme Court will uphold the trial court's findings of fact unless those findings are clearly erroneous." *State v. Copple*, 224 Neb. 672, 689, 401 N.W.2d 141, 154 (1987).

"In determining whether a trial court's findings on a motion to suppress are clearly erroneous, the Supreme Court recognizes the trial court as the 'trier of fact' and takes into consideration that the trial court has observed witnesses testifying regarding such motion to suppress." *State v. Dixon*,

222 Neb. 787, 795, 387 N.W.2d 682, 687 (1986).

To support its contention that the search warrant is valid, the State relies on *Maryland v. Garrison*, 480 U.S. 79, 107 S. Ct. 1013, 94 L. Ed. 2d 72 (1987). In *Garrison*, Baltimore police officers obtained a warrant to search the third-floor apartment of one Lawrence McWebb, who was believed to be involved in the distribution of controlled substances. Officers correctly stated the address and location of McWebb's apartment, and "reasonably believed that there was only one apartment on the premises described in the warrant." 480 U.S. at 80. In the midst of their search authorized by the warrant, police discovered that the third floor of the building actually contained two separate apartments. As soon as the officers discovered that the third floor contained two apartments, they stopped their search. However, before discovering the two-apartment situation on the third floor, the police saw and seized heroin, cash, and drug paraphernalia in Garrison's apartment. Garrison was convicted of possession of heroin with intent to distribute that narcotic.

Thus, in *Garrison*, the issue before the Supreme Court was whether a warrant-authorized search of a place, which was more broadly described than was appropriate for the warrant, "invalidated a warrant that undoubtedly would have been valid if it had reflected a completely accurate understanding of the building's floor plan." 480 U.S. at 85.

The Court in *Garrison* stated:

> The Warrant Clause of the Fourth Amendment categorically prohibits the issuance of any warrant except one "particularly describing the place to be searched and the persons or things to be seized." The manifest purpose of this particularity requirement was to prevent general searches. By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit. . . .
>
> In this case there is no claim that the "persons or things to be seized" were inadequately described or that there was no probable cause to believe that those things might

be found in "the place to be searched" as it was described in the warrant. With the benefit of hindsight, however, we now know that the description of that place was broader than appropriate because it was based on the mistaken belief that there was only one apartment on the third floor of the building at 2036 Park Avenue. The question is whether that factual mistake invalidated a warrant that undoubtedly would have been valid if it had reflected a completely accurate understanding of the building's floor plan.

Plainly, if the officers had known, or even if they should have known, that there were two separate dwelling units on the third floor of 2036 Park Avenue, they would have been obligated to exclude respondent's apartment from the scope of the requested warrant. But we must judge the constitutionality of their conduct in light of the information available to them at the time they acted. Those items of evidence that emerge after the warrant is issued have no bearing on whether or not a warrant was validly issued. Just as the discovery of contraband cannot validate a warrant invalid when issued, so is it equally clear that the discovery of facts demonstrating that a valid warrant was unnecessarily broad does not retroactively invalidate the warrant. The validity of the warrant must be assessed on the basis of the information that the officers disclosed, or had a duty to discover and to disclose, to the issuing magistrate. . . . [T]he warrant, insofar as it authorized a search that turned out to be ambiguous in scope, was valid when it issued.

. . . If the officers had known, or should have known, that the third floor contained two apartments before they entered the living quarters on the third floor, and thus had been aware of the error in the warrant, they would have been obligated to limit their search to McWebb's apartment. Moreover, as the officers recognized, they were required to discontinue the search of respondent's apartment as soon as they discovered that there were two separate units on the third floor and therefore were put on notice of the risk that they might be in a unit erroneously

included within the terms of the warrant. . . .

. . . .

. . . [T]he validity of the search of [Garrison's] apartment pursuant to a warrant authorizing the search of the entire third floor depends on whether the officers' failure to realize the overbreadth of the warrant was objectively understandable and reasonable. Here it unquestionably was. The objective facts available to the officers at the time suggested no distinction between McWebb's apartment and the third-floor premises.

For that reason, the officers properly responded to the command contained in a valid warrant even if the warrant is interpreted as authorizing a search limited to McWebb's apartment rather than the entire third floor. Prior to the officers' discovery of the factual mistake, they perceived McWebb's apartment and the third-floor premises as one and the same; therefore their execution of the warrant reasonably included the entire third floor. Under either interpretation of the warrant, the officers' conduct was consistent with a reasonable effort to ascertain and identify the place intended to be searched within the meaning of the Fourth Amendment.

Maryland v. Garrison, 480 U.S. 79, 84-89, 107 S. Ct. 1013, 94 L. Ed. 2d 72 (1987), involved a warrant description which was too comprehensive inasmuch as the description covered not only the named suspect's apartment, but also the living quarters of another. *Garrison*, however, seems far from controlling and is clearly factually distinguishable from Walters' case. In Walters' case, excessive inclusion is not a problem; rather, the warrant inaccurately stated Walters' apartment number. In view of the record presented in Walters' case, two inquiries are important: First, does the warrant describe with particularity the place to be searched? Second, what impact does Captain Hetrick's affidavit, which misstated information given to him by the apartment manager, have on the validity of the warrant?

PARTICULARITY OF DESCRIPTION

The fourth amendment's warrant clause forbids the issuance of warrants except those "particularly describing the place to be searched, and the persons or things to be seized." U.S. Const.

amend. IV. A description in a search warrant is sufficient if the officer, equipped with the search warrant, can, with reasonable effort, ascertain and identify the place to be searched. *Steele v. United States No. 1*, 267 U.S. 498, 45 S. Ct. 414, 69 L. Ed. 757 (1925).

The test to determine the sufficiency of a search warrant's description of the place to be searched is whether the description provides sufficient particularity to enable the executing officer, with reasonable effort, to locate and identify the site to be searched, and whether there is any reasonable probability that the other premises might be mistakenly searched pursuant to the warrant. *United States v. Gitcho*, 601 F.2d 369 (8th Cir. 1979).

In *State v. Kleinberg*, 228 Neb. 128, 421 N.W.2d 450 (1988), a five-judge panel, which included three judges of this court (two of whom dissented), considered a situation where a warrant was issued to search Kleinberg's person, but the officer's affidavit, supporting issuance of the warrant, contained only information that Kleinberg's automobile was the site of contraband. Equipped with a search warrant, officers proceeded to search Kleinberg's car, notwithstanding that the warrant directed search of Kleinberg's person, and discovered contraband which served as the basis for conviction of Kleinberg. In a 3-to-2 opinion, the majority stated:

> In this case the warrant referred to the affidavit, and the affidavit accompanied the warrant and was served on the defendant at the same time as the warrant. Under these circumstances, the affidavit may be used to cure the defect in the warrant resulting from the error of the scrivener.

Id. at 134, 421 N.W.2d at 454. Two judges of this court dissented, stressing that the circumstances demanded an application for a warrant to search Kleinberg's automobile when officers did not find contraband on Kleinberg's person. Thus, *Kleinberg* relates to a search warrant's nonconformity to the affidavit supporting issuance of the warrant and, consequently, affords no assistance in a case such as Walters' where the search warrant and supporting affidavit conformed with each other but failed to comport with actuality, namely, the correct address for Walters' residence.

In the present case, both the warrant and supporting affidavit incorrectly described Walters' apartment as No. "2," whereas the apartment number was "1."

Even if the numerical address is wrong, the warrant may still be valid if the description is adequate to direct the officer to the correct place for the search. *56,700 Dollars in U.S. Currency v. State*, 710 S.W.2d 65 (Tex. App. 1986). As expressed in 2 W. LaFave, Search and Seizure, A Treatise on the Fourth Amendment § 4.5(a) at 212-13 (2d ed. 1987):

> Thus, the name of an apartment complex or business enterprise will prevail over a street address, as will a detailed physical description which speaks to the precise location or appearance or character of the premises. Similarly, the name of the occupant of an apartment will prevail over the stated apartment number or floor.

In *United States v. Clement*, 747 F.2d 460 (8th Cir. 1984), the court upheld a search of defendant's apartment 3, although the warrant authorized a search of apartment 4. After noting that the officers who executed the warrant knew where the defendant's apartment was, the court concluded that "there was no probability of a mistaken search, and we cannot conclude that the inaccurate address in the warrant should operate to invalidate the search." *Id.* at 461.

In *United States v. Gitcho, supra* at 371-72, the court stated:

> Other factors which have been cited in upholding searches made pursuant to search warrants which contained some inaccuracies in the description of the premises to be searched are that the address given in the warrant, even if incorrect, still describes the same piece of property . . . that the premises intended to be searched are adjacent to those described and all are under the control of the defendant . . . that the incorrect address describes a place not in existence, or that other parts of the description which are correct limit the place to be searched to one place . . . and that the premises which were intended to be searched had previously been surveilled or were being surveilled while the warrant was obtained.

(Citations omitted.) Accord, *Mansell v. State*, 756 S.W.2d 95 (Tex. App. 1988); *Carr v. State*, 529 So. 2d 805 (Fla. App.

1988); *United States v. Burke*, 784 F.2d 1090 (11th Cir. 1986); *State v. Sanders*, 155 Ga. App. 274, 270 S.E.2d 850 (1980) (incorrect hotel room number); *Com. v. Petrone*, 17 Mass. App. 914, 455 N.E.2d 1227 (1983). For cases invalidating warrants under similar circumstances, see, *State v. Manzella*, 392 So. 2d 403 (La. 1980), and *State v. Morales*, 395 N.W.2d 655 (Iowa App. 1986).

The above-stated factors are merely constituents in a larger inquiry, namely, whether a description in a search warrant enables officers to locate and identify the particular premises to be searched. In Walters' case, both the apartment manager and the informant accurately described the location of Walters' apartment unit. The manager stated that Walters' apartment was on the main floor. There was only one apartment on the main floor. The informant supplied an even more detailed description of the precise location of Walters' apartment. Furthermore, the supporting affidavit for the search warrant manifests that Hetrick was seeking authorization to search the apartment of Walters, a fact which Hetrick confirmed before serving the warrant and searching apartment 1. While the warrant misidentifies the apartment number, information in the affidavit makes it clear that Hetrick intended to search Walters' apartment, which was "on the immediate left as you enter the foyer." Such particularity prevented a general search of the apartment building. Furthermore, no one lived in apartment 2 when the search in question occurred. Thus, there was only a very remote or extremely slim possibility that Hetrick would mistakenly search a residence other than Walters'.

Consequently, Walters' case presents an issue of first impression in Nebraska. Neither counsel's nor my research has disclosed a decision of the U.S. Supreme Court which is specifically based on the precise constitutional point involved in Walters' case or an opinion of the U.S. Supreme Court which supplies inescapable inferences or compelled conclusions concerning the fourth amendment question raised in this appeal. Research has failed to provide an opinion by the U.S. Supreme Court, on the particular fourth amendment question involved in this appeal, which may serve as an appropriate

analog to dispose of the question raised in the present appeal. In the absence of controlling precedent by the U.S. Supreme Court or this court, the fourth amendment question in Walters' case necessitates review and resolution by the entire Supreme Court of the State of Nebraska.

SUFFICIENCY OF THE AFFIDAVIT

What is clear from our cases is that factual inaccuracies in the affidavit, even those which result from deliberate falsehoods on the part of the officer, do not automatically vitiate the warrant. A claim that a search warrant's supporting affidavit is insufficient due to a falsehood or a statement with reckless disregard for the truth is not sustained when the affidavit supports a finding of probable cause after elimination of the questioned information. *State v. Robish*, 214 Neb. 190, 332 N.W.2d 922 (1983). See, also, *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). Without again setting forth the contents of the affidavit, the description of the location of Walters' apartment was sufficient to supply probable cause to issue the warrant, even when the incorrect apartment number is disregarded.

Under the circumstances, I conclude that, for the purpose of this appeal, the district court was clearly erroneous in its suppression of evidence in Walters' case. Therefore, the district court's judgment is reversed.

REVERSED.

TERRY L. JONES ET AL., APPELLANTS, V. EMPLOYERS MUTUAL CASUALTY CO., APPELLEE.

432 N.W.2d 535

Filed December 9, 1988. No. 86-1023.

1. **Appeal and Error.** On appeal of a law action in which a jury was waived, the findings and conclusions of the trial court have the effect of a jury verdict and will not be set aside unless clearly wrong.

2. **Insurance.** An insurance company has the right to restrict its liability by including limitations in the policy, and if the limitations are clearly stated and unambiguous, the insurance company is entitled to have the terms enforced.
3. _____. Construction ought not be employed to make a plain insurance agreement ambiguous for the purpose of interpreting it in favor of the insured. The policy should be given meaning and effect according to the sense of the terms which the parties have used, and if they are clear they should be taken in their plain and ordinary sense.
4. **Insurance: Proof.** On a claim under an insurance policy, the insured has the burden to bring himself or herself within the terms of the policy.
5. **Pleadings: Reformation.** A party to a lawsuit is entitled to rely on the pleadings in preparing and trying his or her case. The right to reformation must be properly raised by the pleadings.
6. **Pleadings: Trial.** Leave to amend pleadings to conform to the evidence rests within the discretion of the trial court.
7. **Reformation: Proof.** 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.
8. **Contracts: Presumptions.** There is a strong presumption that a written instrument correctly expresses the intention of the parties to it.

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

Robert B. Creager, of Berry, Anderson, Creager & Wittstruck, for appellants.

Robert T. Grimit, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellee.

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

HASTINGS, C.J.

Plaintiffs appeal from a judgment generally in favor of the defendant on various claims for damages under a policy of insurance. The plaintiffs consist of a partnership, a corporation, and two individuals. However, at the time of trial, Terry L. Jones, who together with his wife owned all of the stock in Jones Oil Company, Inc., a Nebraska corporation, was the president of Jones Oil Company, and further reference in this opinion to the plaintiffs will be in the name of Jones only. The defendant, Employers Mutual Casualty Company, issued the policy involved in this litigation and will be referred to as

Employers.

Jones assigns as error the failure of the trial court to allow recovery of damages, the finding by the trial court that the losses were subject to policy exclusions, and the failure of the court to allow reformation of the policy. The trial court made extended findings of fact and conclusions of law in its final judgment order.

Because this is a law action in which a jury was waived, the findings and conclusions of the trial court have the effect of a jury verdict and will not be set aside unless clearly wrong. *Gottsch Feeding Corp. v. Red Cloud Cattle Co.*, 229 Neb. 746, 429 N.W.2d 328 (1988); *Fisbeck v. Scherbarth, Inc.*, 229 Neb. 453, 428 N.W.2d 141 (1988). However, whether the plaintiffs' loss was covered by the insurance policy is a question of law. *Roth v. Farmers Mut. Ins. Co.*, 220 Neb. 612, 371 N.W.2d 289 (1985).

The business in which Jones is engaged involves retail and wholesale distribution of gasoline and other petroleum products, as well as the ownership and operation of several service stations throughout Nebraska. In the normal course of business during the period in question, Jones would purchase gasoline from the refinery at one of the terminals in Nebraska. He would cause the gasoline to be transported by common carriers to one or more stations, where it would be transferred to storage tanks at those locations. Jones would charge the operators of the stations his cost plus a profit of 3 cents per gallon.

At the time the carrier would pick up the gasoline at the terminal, the pump would meter the exact number of gallons loaded, and that amount was stamped onto a manifest which was signed by the trucker. When the carrier would deliver the gasoline to the station, the station operating personnel would sign the manifest indicating the receipt of the number of gallons on the manifest. Except in the case of a delivery to a company-owned station, Jones retained no further interest in the gasoline.

At a company-owned station, the procedure for delivery was the same. However, Jones apparently retained title to the gasoline in that instance and would be paid for all gasoline sold

by the station operator as it was sold to the latter's customers. To ascertain the amount due Jones, the station operator was required to record the number of gallons sold from each pump each day (calculated by subtracting the beginning-of-the-day reading from the beginning-of-the-next-day reading). The operator then multiplied the total number of gallons sold by the price asked by Jones (e.g., 3 cents per gallon over Jones' cost), and submitted the daily report and the money owed to Jones. At the locations in question, the station operator was compensated by charging his customers more money per gallon than Jones charged him, and that difference would be his profit.

On October 31, 1980, Jones purchased an "all-risk" policy of insurance from Employers to cover his various properties, including his service stations. The policy was renewed on October 31, 1981, for an additional year.

At the end of the fiscal year, October 31, 1981, Jones' comptroller informed Jones' accountant that the company's records indicated a shortage in the physical inventory at the stations located in Gothenburg, Nebraska, and at 33d and Cornhusker in Lincoln. The company calculated its perpetual inventory by keeping a running record of gallons shipped to the station minus the number of gallons reported by the station operators as sold. The company also conducted a physical inventory by measuring with a dip stick the amount of gasoline actually in the tanks at the station. It was a discrepancy between the perpetual inventory and the physical inventory which triggered the concern in the accountants. The amount of gasoline which the perpetual inventory indicated was in the tanks at the stations exceeded the actual storage capacity of the tanks.

GOTHENBURG STATION

The first step taken to try to ascertain the nature of the problem which created the shortage at Gothenburg was to hire an independent party to remeasure the physical inventory.

The accountants next set out to reconcile the shortage by analyzing all documents and records from November 1980 to January 24, 1982, relating to the deliveries and daily sales of the gasoline. As a result of this analysis, the shortage was

determined to be 47,725.9 gallons, worth $56,617.24.

Jones himself also investigated the cause of the loss at Gothenburg. He hired a firm to check the tanks for leakage and to check the accuracy of the meters. He offered a $1,000 reward for information pertaining to the alleged theft.

He also contacted the Nebraska State Patrol, which assigned the case to an investigator. That investigator monitored the station for five nights from a cafe to watch for someone stealing the gasoline from the fill spouts. Jones deliberately ordered fuel in excess of the then known capacity of the tanks to try to determine whether the common carrier driver might just keep "his mouth shut" and go ahead and shortchange Jones. However, the driver immediately reported when the tank was full.

Although none of the investigative techniques employed were successful, there were no further shortages after Jones discussed the shortage with the operator of the station.

33d AND CORNHUSKER STATION

Shortly thereafter, a shortage at the Cornhusker Highway location in Lincoln was discovered. Jones' accountant determined that the shortage there was worth $36,140.21. The investigation into the loss was essentially the same as the investigation undertaken at Gothenburg; i.e., the accountants doublechecked their records and the police department set up a surveillance at night. During the course of the investigation, the operator of the station was interviewed and confessed to turning the meters back. That is, he was tampering with the meters so that his record of reported sales was less than his actual sales, and thus the money that he was remitting to Jones was far less than the money he was actually bringing in. However, the operator only confessed to shorting Jones approximately 3,200 to 3,500 gallons, much less than the 29,322.4 gallons the accountants had determined the shortage to be. After the arrest of the operator, no further shortages occurred at the Cornhusker station.

EXPLOSION AT ST. PAUL, NEBRASKA

On June 1, 1982, an explosion occurred at Jones' station in St. Paul, Nebraska. The comptroller calculated that the station lost 1,685 gallons, presumably due to leakage. The total worth

of this gasoline was $1,965.05. The parties stipulated that the station was reasonably closed for repairs for 14 days. There was also evidence introduced as to the cost of those repairs.

ACTION OF TRIAL COURT

Jones filed claims with Employers for the losses sustained at the three locations. Employers denied coverage. Jones subsequently brought suit against Employers, and the case was tried on January 27, 28, and 29, 1986, with closing arguments had in March. On April 8, 1986, Jones moved to amend the petition, in part seeking reformation of the policy to conform to the intent of the parties. The court overruled the motion.

On October 24, 1986, the court issued its order awarding Jones $2,001.24 for his business interruption claim at the St. Paul station, and denying him recovery for all other claims. The court also ordered reasonable attorney fees to be determined after further showing and argument. The court has not yet taken action on the matter of fees.

INSURANCE POLICY TERMS

The policy of insurance applicable in this case contains as endorsements forms MP 00 13 and MP 00 14, both of which apply to Cornhusker Highway, but only MP 00 13 relates to St. Paul and Gothenburg. MP 00 13 states in part: "This policy does not insure under this form against: . . . 6. unexplained or mysterious disappearance of any property, or shortage disclosed on taking inventory . . . ." MP 00 14 is almost identical, but it eliminates the word "any" before property and adds "of property" after shortage.

Also included within the policy was endorsement MP 04 50, including employee dishonesty blanket coverage. In substance, that form provided for coverage for loss of money, securities, and other property resulting directly from fraudulent or dishonest acts committed by an *employee*.

Finally, attached to the policy was a "Deductible Endorsement" (form 2050.4), which applied a $1,000 deductible amount to each occurrence.

ANALYSIS

Although the briefs discuss a number of issues, a resolution of this case depends upon the exclusion as to inventory, the deductible clause, and the denial of reformation.

The trial court held that the provision of the policy which excluded coverage for loss due to shortage of property disclosed by inventory precluded recovery by Jones. The principal case cited by Employers in support of that conclusion is *Paramount Paper Products Co., Inc. v. Aetna Cas. & Sur. Co.*, 182 Neb. 828, 157 N.W.2d 763 (1968).

In *Paramount*, the clause under consideration provided in part: " 'This Policy does not apply: . . . (b) to loss, . . . the proof of which, either as to its factual existence or as to its amount, is dependent upon an inventory computation or a profit and loss computation . . . .' " *Id.* at 829-30, 157 N.W.2d at 764. In that case, the plaintiff's printing plant noticed a large discrepancy between the amount of paper purchased and the amount used in the business. An investigation uncovered two thefts by employees, in which the goods were recovered and no claim was made. The plaintiff then sought to determine, through inventory computations, the amount of any other loss alleged to be attributable to employee theft. Unit-basis inventories were converted to dollar values; these values were compared to the dollar value of the goods sold; and a loss was determined.

After noting that other courts' decisions in this area ranged from strict interpretation of the exclusionary clause, to liberal construction of the clause, to a denial that reasonably reliable unit-basis inventories actually constituted inventory computations, this court disallowed recovery for the plaintiff based on the clause. The court was particularly bothered by the untrustworthiness of a unit-basis inventory converted and computed to account for dollar values, sales, purchases, waste, etc. The court concluded:

> [P]laintiff has failed to prove by either direct or circumstantial evidence any loss whatsoever by reason of employee dishonesty. It has simply shown that such dishonesty had existed and, by inference, it seeks to attribute its entire loss revealed by an inventory computation to employee dishonesty.

Id. at 839, 157 N.W.2d at 769.

Other cases have also considered the situation in which evidence of some employee dishonesty existed. *Prager & Bear,*

Inc. v. Federal Ins. Co., 66 Cal. App. 3d 970, 136 Cal. Rptr. 340 (1977), involved facts very similar to the instant case. The plaintiff in *Prager* kept records of daily receipts and shipments, which were tabulated daily and monthly as part of a perpetual inventory. A physical count of the goods was made each June and December. After the physical count in June 1970, plaintiff noted a large discrepancy between the perpetual inventory records and the actual count. When the discrepancy grew after the physical counts in December 1970 and June 1971, plaintiff filed an insurance claim. The claim was denied on the basis of the inventory shortage exclusion clause. The warehouse manager eventually confessed to fraudulent activity between September 1971 and April 1972, but the insurance company refused to compensate the plaintiff for losses occurring outside of this time period.

The California court extensively discussed various cases which had considered how much independent evidence, outside of inventory shortages, is required to raise an inference of employee dishonesty. The court concluded that despite the employee's confession of dishonesty between September 1971 and April 1972, there was no evidence tending to prove that the losses occurring before and after this time period were the result of employee dishonesty. The court held that "[n]otwithstanding the reliability of such inventory computation methods," the plaintiff "was not entitled to prove the fact *or* amount of such losses by inventory computations." (Emphasis supplied.) 66 Cal. App. 3d at 979, 136 Cal. Rptr. at 345.

In *Gillette Company v. Travelers Indemnity Company*, 365 F.2d 7 (7th Cir. 1966), plaintiff's employee stole merchandise, which was recovered. Plaintiff then used inventory computations to determine that other losses had occurred, and the amount of those losses. The court held that the plaintiff had not proved further employee dishonesty and strictly applied the inventory exclusion to deny recovery based on the inventory computations alone.

Many other cases have considered the use of inventory comparisons for corroboration of independent evidence of employee dishonesty. See, *Danal Jewelry Co. v. Fireman's Fund Ins.*, 107 R.I. 33, 264 A.2d 320 (1970) (inventory

comparisons not permitted to establish full amount of loss, where employees caught with stolen goods); *Fort Smith Tobacco & Candy Co. v. American Guar. & L. Ins. Co.*, 208 F. Supp. 244 (W.D. Ark. 1962) (even though some loss proved to be caused by employee dishonesty, any inference that entire loss as shown by inventory shortage was caused by employee dishonesty was too uncertain and speculative to be permissible); *Locke Distributing Co. v. Hartford Acc. & Indem. Co.*, 407 S.W.2d 658 (Mo. App. 1966) (inventory comparisons not permitted as evidence even though employees confessed to dishonesty).

To be sure, there are cases to the contrary, particularly holdings that once there is proof that a loss has been suffered by reason of theft, there is no prohibition as to the use of inventory records to show the amount of the loss. Thus, it becomes a question of policy. We believe the wiser course is to give effect to the clear meaning of the exclusionary clause.

The plain language of the exclusionary clause precludes the use of the inventory comparisons. The loss was clearly discovered upon taking inventory. This court has held that an insurance company has the right to restrict its liability by including limitations in the policy, and if the limitations are clearly stated and unambiguous, the insurance company is entitled to have the terms enforced. *Swedberg v. Battle Creek Mut. Ins. Co.*, 218 Neb. 447, 356 N.W.2d 456 (1984); *Great Plains Ins. Co., Inc. v. Kalhorn*, 203 Neb. 799, 280 N.W.2d 642 (1979); *Lonsdale v. Union Ins. Co.*, 167 Neb. 56, 91 N.W.2d 245 (1958).

> " 'Construction ought not to be employed to make a plain agreement ambiguous for the purpose of interpreting it in favor of the insured. The policy should be given meaning and effect according to the sense of the terms which the parties have used, and if they are clear they should be taken in their plain and ordinary sense.' "

(Emphasis omitted.) *Roth v. Farmers Mut. Ins. Co.*, 220 Neb. 612, 616, 371 N.W.2d 289, 292 (1985), quoting *Swedberg, supra*, and *Safeco Ins. Co. of America v. Husker Aviation, Inc.*, 211 Neb. 21, 317 N.W.2d 745 (1982). The trial court was correct in its conclusion that the claims as to Gothenburg and

Cornhusker were barred by the inventory shortage exclusion.

There is an added factor at Cornhusker, and that has to do with the fact that the dealer-operator confessed to stealing "around" 3,200 to 3,500 gallons' worth of gasoline. Jones claims, through inventory records, a loss of approximately 30,000 gallons at Cornhusker. Jones apparently had told the police that the shortage was in the vicinity of 16,000 gallons. It is apparent that, based upon those discrepancies, the trial court concluded that the evidence of loss or damages was not credible. Jones had the burden of proving his damages. The evidence as to the damages was conflicting and inconclusive and, in the case of the inventory records, not allowable under the policy.

The loss at St. Paul falls in a somewhat different category. The primary damage was caused by explosion, which everyone agrees was covered. However, the loss of gasoline was not the result of the explosion. The shortage again was discovered by the inventory method, which is excluded by the policy. There seems to be no dispute as to the recovery allowed by the trial court for actual damage of property in the explosion.

There is yet another reason why Jones has failed in his burden of proof, which is applicable to his claimed losses at all locations. Jones' policy carried a deductible clause. The district court found that Jones had not proved how many separate losses had occurred and the amount of each loss. Presumably, if the shortage was the result of multiple incidents, the amount of each individual loss might not exceed the deductible, and thus would not be covered.

The testimony throughout the trial reflects that Jones had no way of knowing whether one or several incidents contributed to the shortage. All he could say was that a shortage had occurred between two inventory periods. The deductible was $1,000 per occurrence. Therefore, if, for example, more than 36 incidents occurred at the Cornhusker station within the time period between inventories, that shortage would not be covered. The insured has the burden to bring himself within the terms of the policy. *Ditloff v. State Farm Fire & Cas. Co.*, 225 Neb. 375, 406 N.W.2d 101 (1987); *Swedberg v. Battle Creek Mut. Ins. Co.*, *supra*. This Jones failed to do.

Jones also claims that his losses should have been covered under the employee blanket bond coverage. The simple answer to that is that the operators were not employees. Whether they were lessees or independent contractors is not important. They were not treated as employees on the books and records of Jones' business. No tax or Social Security was withheld. Jones himself, when asked if he considered them as employees, answered, "I tried very hard to prove that they were not employees." By the plain language of the endorsement and the facts in the record, there was no coverage in this instance.

Finally, Jones complains that the trial court erred in denying his request to amend his petition, some 2 months after trial, to seek reformation of the policy. Throughout the trial, Jones attempted to introduce evidence which appeared to bear on that issue to which objections were made and sustained. However, he also insisted at all times that he was not trying to reform the policy. Rather, he argued that a defendant is entitled to avail himself of a defense based on the real contract between the parties without first having the instrument reformed. He cites us to *Garbark v. Newman*, 155 Neb. 188, 51 N.W.2d 315 (1952), in support of that contention.

Garbark was an action at law in which the answer of the defendant requested reformation of a written document, whereupon the trial court transferred the case to the equity docket because of the request for reformation, denied the plaintiff's demand for a jury trial, and heard and decided the case without a jury. It was stated in *Garbark* at 192-93, 51 N.W.2d at 320:

> The modern system of practice does not make it necessary to secure a formal reformation of a written instrument, where it differs from the true agreement entered into between the parties, in order to enforce the instrument as it should have been made. Likewise it is now recognized that a defendant is entitled to avail himself of a defense based on the real contract between the parties, where the written instrument fails to show the true agreement, without first having the instrument reformed.

All that case stands for, with respect to the issue under consideration, is that *if* Jones would have raised properly the

issue of reformation before trial, it would not have been necessary, contrary to the pre-*Garbark* rule, to transfer the case to the equity docket to determine first any equitable claims or defenses.

The problem here is that Jones did not raise in a timely fashion the issue of reformation. As a matter of fact, he denied that such issue existed. The opposing party is entitled to rely on the pleadings in preparing and trying his or her case. "The right to reformation must be properly raised by the pleadings." 66 Am. Jur. 2d *Reformation of Instruments* § 104 at 634-35 (1973). See, also, *Strauss v. Monitor Specialty Co.*, 89 Neb. 176, 131 N.W. 193 (1911).

Leave to amend pleadings to conform to the evidence rests within the discretion of the trial court. *Remington v. Bryan*, 205 Neb. 372, 288 N.W.2d 253 (1980). There is a real question as to whether the proof submitted was sufficient, in any event, to support such amendment.

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. *J. J. Schaefer Livestock Hauling v. Gretna St. Bank*, 229 Neb. 580, 428 N.W.2d 185 (1988); *Ridenour v. Farm Bureau Ins. Co.*, 221 Neb. 353, 377 N.W.2d 101 (1985). 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. *Childers v. Conservative Sav. & Loan Assn.*, 229 Neb. 715, 429 N.W.2d 325 (1988); *Du Teau Co. v. New Hampshire Fire Ins. Co.*, 156 Neb. 690, 57 N.W.2d 663 (1953). Even considering Jones' offers of proof, he has not clearly and convincingly shown that his conception of the policy's coverage was anything other than the actual agreed-upon coverage of the policy, that he was not aware of the policy's provisions, or that he was misled as to the policy's provisions. As a matter of fact, counsel's argument at trial supports these conclusions. There is a strong presumption that a written instrument correctly expresses the intention of the parties to it. *Gretna St. Bank, supra*; *Ridenour, supra*. Jones

has not overcome that presumption.

The judgment of the district court is affirmed.

AFFIRMED.

NELLIE G. MILLER, APPELLEE, V. FERNAN H. RADTKE AND ESTELLA L. RADTKE, APPELLANTS.

432 N.W.2d 542

Filed December 9, 1988. No. 87-152.

1. **Trial: Parties: Pleadings.** A party may at any time invoke the language of his opponent's pleadings on an issue being tried as rendering certain facts indisputable.
2. **Ejectment: Pleadings.** Defendant's general denials in an ejectment action are sufficient to raise the question of the defendant's equity in the property as a defense to the ejectment action.
3. **Ejectment: Pleadings: Equity: Appeal and Error.** In an ejectment action, where defendant presents an equitable defense, the case is tried, and reviewed, as an action in equity.
4. **Vendor and Vendee: Real Estate: Contracts: Ejectment: Foreclosure.** In enforcing a vendor's rights in a land contract, ejectment is a more severe disposition than is the remedy of strict foreclosure.
5. **Real Estate: Contracts: Foreclosure.** A contract for the purchase of real estate may be strictly foreclosed where it is clear that the property is of less value than the contract price and that it would not bring a surplus over and above the amount due if a sale were ordered, and such procedure would not offend against justice and equity.
6. **Vendor and Vendee: Ejectment: Real Estate: Contracts.** Ejectment of a vendee may be granted as a remedy for violating the terms of a land contract only where the equities of the particular case justify such a disposition, where the property is of less value than the contract price, and where such a procedure would not offend against justice and equity.

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

Guy G. Curtis, of Curtis & Curtis, for appellants.

Ronald D. Mousel, of Mousel Law Firm, P.C., for appellee.

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

GRANT, J.

On April 17, 1985, the plaintiff-appellee, Nellie G. Miller,

filed a "Petition in Ejectment" in the district court for Furnas County against the defendants-appellants, Fernan H. and Estella L. Radtke. The petition, among other things, prayed that the court find that plaintiff had "properly elected forfeiture of the contract and is entitled to keep previous payments of defendant as liquidated damages" and that defendants "be removed and Plaintiff placed in possession of said real estate (including . . . growing crops)." On May 20, 1985, through an attorney from Georgia, defendants filed a pleading entitled "Defendants' Answer and Defensive Pleadings." On June 9, 1986, the trial of the matter was held before the judge, sitting without a jury.

On September 21, 1986, in a journal entry judgment, the court found, "The pleadings of the case are made up by the ejectment peition [sic], a general denial and a reply in the nature of a general denial. No equitable defenses are before the Court." The district court rendered judgment for the plaintiff for possession of the property and ordered the deed and other documents held in escrow returned to plaintiff. The court denied defendants' motion for new trial, and defendants timely appealed to this court. In this appeal, defendants' assignments of error may be summarized as errors of the trial court (1) in finding there were no equitable defenses before the court, and (2) in granting possession of the property in question to plaintiff without considering defendants' large equity in the property. We reverse and dismiss.

The record shows the following. On January 2, 1965, the defendants entered into a land contract for the purchase of 840 acres of farm ground in Furnas County. The vendors, George and Nellie Miller, agreed to sell the property for $98,000. The contract provided for a $15,000 downpayment (made in 1965), with the remaining $83,000 payable in 25 equal annual installments with interest of 5 percent. If payment was not received within 60 days of the due date (December 15 of each year), the agreement provided that all payments made by the defendants would "be forfeited . . . and retained by the [Millers] as liquidated damages in full satisfaction of all the damages sustained," with the Millers having the "right to re-enter and take possession of" the property upon a breach by

the defendants. The contract also made time of the essence and contained an "adverse condition" clause giving the defendants the option of paying only the annual interest for any 2 consecutive years should they be unable to tender the entire payment. After entering into this agreement, a deed was placed in escrow, and the Millers moved to Norton, Kansas. In 1975, George Miller died. This action was begun by Nellie Miller, hereinafter referred to as plaintiff.

For the 18 years following the execution of the agreement, the defendants timely made their payments under the contract. In 1982, Fernan Radtke told plaintiff of the financial difficulties he was having. He requested that plaintiff deed over to the Radtkes 200 acres of the original 840-acre tract. Plaintiff testified that after she had executed the deed conveying the 200-acre parcel to Radtkes, Fernan Radtke promised to pay her $6,000. Radtke paid the $6,000. The trial court found that this payment was not intended by the parties as payment on the land contract, or as an annual installment, but implicitly found it was in consideration of plaintiff's aiding in the transaction by giving defendants a deed to the 200 acres in question. Defendants allege no error in this finding.

Following the execution of this deed, the defendants sold the 200 acres for $83,000. None of this money was applied to the balance due under the land contract. On December 3, 1982, defendants made their 1982 installment under the contract.

Apparently, defendants' financial troubles continued, although they were buying their farm under the most favorable terms. On October 5, 1983, defendants, without the knowledge of plaintiff, entered into a land contract with Leroy and Eloise Dixon to sell 320 of the remaining 640 acres. The Dixons agreed to purchase the property for $128,000 and made a $20,000 downpayment. An additional $10,000 was to be paid on March 1, 1984, and the balance paid over 15 years. The Dixons made no payments other than the $20,000 downpayment. Fernan Radtke testified that the $20,000 received from this transaction was used to meet other obligations and was not used to reduce the balance owed under the Radtke-Miller land contract. Defendants timely made their 1983 installment on the Radtke-Miller contract.

Defendants failed to make the payment due December 15, 1984. At that time, the unpaid balance on the Radtke-Miller contract was $34,076.11, and seven more payments were owing. On April 17, 1985, plaintiff filed her petition in ejectment.

At the trial, Fernan Radtke testified that the 320 acres remaining after the Radtke-Dixon transaction had a value of $200,000. No other testimony as to value of that property was adduced. During defendants' tenure they expended $28,100 in improving the main dwelling house and roads to that house. The house was located on the 320 acres retained by defendants. The defendants installed four water wells (two on the retained land), leveled the farm ground, installed an irrigation system, remodeled the second house, installed fencing, and completely restored the barn. Testimony does not show the value of these improvements, but it is clear that substantial improvements were made to the 320 acres retained by the defendants, as well as to the 320 acres which were the subject of the Radtke-Dixon transaction.

Plaintiff attached to her petition in ejectment a copy of the land contract and an amortization schedule showing that the defendants had timely paid 18 of the 25 annual installments. The schedule also showed that after the 18th payment, defendants had paid to plaintiff $48,923.89 on the principal and $57,079.19 as interest and that $34,076.11 was the balance owing under the contract.

A party may at any time invoke the language of his opponent's pleadings on an issue being tried as rendering certain facts indisputable. *Stahlhut v. County of Saline*, 176 Neb. 189, 125 N.W.2d 520 (1964). See, also, *Cook v. Beermann*, 202 Neb. 447, 276 N.W.2d 84 (1978), where we held that matters contained in pleadings are judicial admissions insofar as the adversary is concerned. The fact that the defendants had made a substantial number of payments under the contract was therefore before the district court as part of plaintiff's petition.

Moreover, the defendants' equity in the property was before the district court, if evidence was adduced on the question, because of defendants' answer in their pleadings. The answer

admitted or denied, by paragraph number, the allegations of the petition. Paragraph 10 of plaintiff's petition alleged that, "therefore, Plaintiff has a legal estate in the above-described real estate; that Plaintiff is entitled to possession of such real estate; and, that Defendant is unlawfully keeping Plaintiff from possession of such real estate." Defendants' answer stated, as to that allegation, "The defendants deny the allegations contained in paragraph 10 of the petition." Based on these pleadings the district court held that there were no equitable defenses before it. We do not agree.

While defendants did not plead any affirmative defenses, defendants' general denials in an ejectment action are sufficient to raise the question of the defendants' equity in the property as a defense to the ejectment action. We stated in *Dale v. Hunneman*, 12 Neb. 221, 224, 10 N.W. 711, 712 (1881), "If the defendant possesses an equity which negatives the plaintiff's right of possession, such equity may be proved under a general denial, as it is a mere defense to the action." Plaintiff's reliance, in her brief, on Neb. Rev. Stat. § 25-811 (Reissue 1985), which sets out generally what an answer shall contain, is misplaced. A defendant's answer to a petition in ejectment is not governed by § 25-811, but by Neb. Rev. Stat. § 25-2125 (Reissue 1985). This section provides in pertinent part:

> It shall be sufficient in [an ejectment] action if the defendant in his answer denies generally the title alleged in the petition, or that he withholds possession, as the case may be; but if he denies the title of the plaintiff, possession by the defendant shall be taken as admitted.

It is at least of historical interest to note that this statute is substantively identical with the statute originally enacted as Rev. Stat. § 627 (1866). The pleading differences in ejectment cases have long been noted by this court. In *Fitch v. Walsh*, 94 Neb. 32, 33, 142 N.W. 293, 294 (1913), we quoted from *Franklin v. Kelley*, 2 Neb. 79 (1873):

> "It is undoubtedly true that the theory of the system of pleading under the code generally is that the facts necessary to constitute a cause of action or defense shall be stated. But, in respect of actions for the recovery of real property, another rule has been adopted. Why this is so is

> not very clear. . . ."

See, also, *Staley v. Housel*, 35 Neb. 160, 52 N.W. 888 (1892); *Pinkham v. Pinkham*, 61 Neb. 336, 85 N.W. 285 (1901). While an action for ejectment may be defeated on equitable grounds, *White v. Whitney*, 68 Neb. 739, 94 N.W. 1012 (1903), for a defendant to prevail, his equitable title must be superior to that of the plaintiff's, *Blazier v. Johnson*, 11 Neb. 404, 9 N.W. 543 (1881). In this case, by making a general denial to plaintiff's petition, the defendants admitted possession, but generally deny plaintiff's title or right to possession. The issues in the trial are thus made up. The issue as to defendants' equity in the land was before the court and should have been considered by the court in the trial of the ejectment issue.

The next problem is to determine how the case should be tried and reviewed in this court. The case presents a petition in law seeking ejectment and an answer which raises an equitable defense. The general rule in such cases was set out in *White v. Medico Life Ins. Co.*, 212 Neb. 901, 902-03, 327 N.W.2d 606, 608 (1982), as follows: "Although a defendant may present any defense, legal or equitable [citations omitted], interposing an equitable defense does not convert an action otherwise at law into one in equity." We adhere to this general rule, but note that actions in ejectment constitute an exception to that rule. In an ejectment action, where defendant presents an equitable defense, the case is tried, and reviewed, as an action in equity. We stated in *Tillson v. Holloway*, 94 Neb. 635, 143 N.W. 939 (1913):

> When in an action of ejectment the defendant alleges an equitable title to the land and right of possession thereunder, and all other defenses have been eliminated, the trial of the issue so presented is essentially the trial of an action in equity, and, upon appeal, this court will try the issue *de novo*, "without reference to the conclusion reached in the district court."

(Syllabus of the court.) We have not changed that rule in the ensuing years. Our review is therefore de novo on the record. *Southern Lumber & Coal v. M. P. Olson Real Est.*, 229 Neb. 249, 426 N.W.2d 504 (1988).

The methods of enforcing land contracts were summarized

in T. Dysart, Foreclosures in Nebraska § 186 (1929), where the remedies of a vendor in a land contract were classified, in order of increasing severity toward the vendee in such a contract, as (1) foreclosure, where the land is sold as in other foreclosures, and the vendor is reimbursed out of the proceeds; (2) strict foreclosure, where the vendee is required to pay the balance due within a specified time or be disbarred of all interest in the land; and (3) ejectment, where the vendee is eliminated from the title, and the vendor acquires title and possession without giving the vendee an opportunity to redeem and without returning payments already made to the vendor. It is readily apparent that in enforcing a vendor's rights in a land contract, ejectment is a more severe disposition than is the remedy of strict foreclosure.

This court has consistently held that a land contract may be strictly foreclosed, but only in certain factual situations where the procedure would be equitable.

We stated in *Riffey v. Schulke*, 193 Neb. 317, 319, 227 N.W.2d 4, 6 (1975), as follows:

> A contract for the purchase of real estate may be strictly foreclosed where it is clear that the property is of less value than the contract price and that it would not bring a surplus over and above the amount due if a sale were ordered, and such procedure would not offend against justice and equity.

See, also, *Ryan v. Kolterman*, 215 Neb. 355, 338 N.W.2d 747 (1983); *Ruhl v. Johnson*, 154 Neb. 810, 49 N.W.2d 687 (1951).

Plaintiff, in her brief at 4, is honorably forthright in conceding that, "as a general rule, equity abhors forfeitures" and, at 5, that "it is true that the remedy by strict foreclosure is a harsh one and that, normally, the courts will decree a strict foreclosure of land contracts only under peculiar and special circumstances." In this case, ejectment of a vendee may be granted as a remedy for violating the terms of a land contract only where the equities of the particular case justify such a disposition, where the property is of less value than the contract price, and where such a procedure would not offend against justice and equity.

In this case, the remedy of ejectment offends against justice and equity. As stated above, defendants made payments on the

contract for 18 years and substantially improved the property. The evidence was uncontroverted at the trial that the land had a value far in excess of the amount owing on the contract. It may be true that defendants acted inequitably in not paying the land contract, in full or in substantial part, at times when sales of portions of the land itself generated substantial sums in 1982 and 1983. The balancing of the equities, however, on this de novo review, can only lead to the conclusion that ejectment is much too harsh a remedy for plaintiff in this case. Plaintiff must be left to other remedies. The judgment is reversed and the cause dismissed.

REVERSED AND DISMISSED.

STATE OF NEBRASKA, APPELLEE, V. ISABEL GREENO, APPELLANT.
432 N.W.2d 547

Filed December 9, 1988. No. 87-987.

1. **Appeal and Error.** This court will not consider on appeal issues which are not both assigned and discussed.
2. **Trial: Evidence: Appeal and Error.** As a general rule, if a party does not make a timely objection to evidence, the party waives the right on appeal to assert prejudicial error in the reception of such evidence.
3. **Trial: Appeal and Error.** An objection made to the argument of opposing counsel after the jury has retired generally is not timely and will not be reviewed on appeal.
4. **Trial: Waiver.** Failure to assert a timely objection at the time of trial, as a general rule, constitutes a waiver of the objection.
5. **Trial: Prosecuting Attorneys: Motions for Mistrial: Juries.** The general rule is that remarks made by the prosecutor in final argument which do not mislead or unduly influence the jury do not rise to a level sufficient to require granting a mistrial.
6. **Trial: Prosecuting Attorneys.** It is not prejudicial for the prosecutor to make remarks based on deductions and inferences drawn from the evidence.
7. **Trial: Juries: Appeal and Error.** The impact of any comment made at trial depends on the atmosphere at trial. The trial judge is in a better position to measure the impact a comment has on a jury, and such judge's decision will not be overturned unless clearly wrong.
8. **Criminal Law: Evidence: Convictions.** Where two persons are charged with the same criminal offense but are tried separately, the fact that one defendant has been convicted is inadmissible against the other defendant.

9. **Trial: Evidence: Convictions: Appeal and Error.** Normally, error in admitting certain testimony is harmless where the conviction is supported by substantial evidence in addition to the inadmissible statement.
10. **Trial: Evidence: Juries.** Ordinarily, when an objection to improper evidence is sustained and the jury is instructed to disregard it, such an instruction is deemed sufficient to prevent prejudice.
11. **Criminal Law: Trial.** A defendant is entitled to a fair trial, not a perfect one.

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

Charles F. Fitzke, Scotts Bluff County Public Defender, for appellant.

Robert M. Spire, Attorney General, Royce N. Harper, and Melanie Whittamore for appellee.

HASTINGS, C.J., WHITE, CAPORALE, and FAHRNBRUCH, JJ., and REAGAN, D.J.

HASTINGS, C.J.

The defendant was found guilty by a jury in Scotts Bluff County of fraudulently obtaining low-income energy assistance from the State. On appeal, she assigns as error the trial court's refusal to grant a mistrial.

The defendant filed a false application for energy assistance from the State of Nebraska. Her sister, Eloise Giron, was employed by the State and was responsible for the approval of applications for the Nebraska low-income energy assistance program. She processed and "verified" the defendant's application, resulting in the defendant's receiving $165 fraudulently from the State. Giron was convicted for her participation in the scheme in a separate trial conducted prior to the defendant's.

The defendant assigns as error, inter alia, the court's refusal to grant a mistrial after allegedly prejudicial statements were made by the prosecutor during voir dire, and after the State allegedly failed to prove the statements it made during voir dire. Neither of these assignments of error are discussed in the defendant's brief. This court will not consider issues which are not both assigned and discussed. *Nuttelman v. Julch*, 228 Neb. 750, 424 N.W.2d 333 (1988).

The remainder of the defendant's assignments of error are actually several variations on one theme: that the defendant was prejudiced by repeated references to her sister's trial.

Discussion of Giron and her duties at the Department of Social Services was integral to the cases of both the prosecution and the defense, and the jury was necessarily made aware of Giron's collusion with the defendant. The defendant does not argue that all references to Giron's participation in the fraud were prejudicial. However, the defendant does contend that all references to Giron's *trial* worked together to create prejudice, especially in light of Giron's volunteered testimony that she had been convicted.

Because of the nature of the fraud, many of the witnesses at the defendant's trial had also testified at Giron's trial, and much of the evidence introduced at the defendant's trial had also been introduced at Giron's trial. In the course of the defendant's trial, many references were made to the previous trial and previous testimony. However, many of these references were made by defense counsel, and of the references made by the prosecutor, none were objected to. "It is well settled by this court that if a party does not make a timely objection to evidence, the party waives the right on appeal to assert prejudicial error in the reception of such evidence." *State v. Todd*, 226 Neb. 906, 908-09, 416 N.W.2d 13, 15 (1987).

Giron was called as a witness for the defense. On direct examination by defense counsel, Giron volunteered that she had been "on trial two weeks ago." Subsequently, on cross-examination, the State asked Giron several questions about her previous testimony. At one point, Giron responded, "I'm going to take the 5th because I really don't recall everything word for word." The court instructed her that mere lack of knowledge was not a proper ground for taking the fifth amendment, then asked her if she refused to answer on the grounds that it would tend to incriminate her. Giron replied, "*I've already been found guilty* but, yes, I still do take the 5th." (Emphasis supplied.) The court cautioned the jury that the volunteered information was "unrelated to the case at hand" and should be disregarded. The defense then moved for a mistrial, which was denied by the court.

When cross-examination continued, both Giron and the State continued to refer to Giron's trial and her previous testimony. While making no more direct references to her conviction, Giron did state that other workers in her office "wanted to prove me the way they proved me," and admitted that she was bitter "because of the outcome of my trial."

On rebuttal, the State called a witness who was asked if she had testified at a previous trial. Defense counsel at that time requested a mistrial, and the motion was subsequently heard and denied.

During closing argument, the prosecutor stated: "There is no one person that did this; there are two, and you have seen them both in this courtroom today." He concluded, "I proved that there are not one but two worms in the woodpile." Neither of these statements were objected to by defense counsel, but after the jury had been read the instructions and retired to the jury room to deliberate, the defense again moved for mistrial. Defense counsel argued that the continued references to Giron's involvement "refresh[ed] once again to the recollection of these jurors that she slipped and said that she was guilty in that case." The motion was denied, and the defendant was convicted.

We note at the outset that defendant's argument concerning the impropriety of the prosecutor's closing remarks cannot be considered on appeal, as no objection was timely made. The sequence of events in *Lemmon v. State*, 173 Neb. 387, 113 N.W.2d 525 (1962), was identical to the case at hand: After the prosecutor's closing argument, the jury received instructions and retired, and only then did the defense counsel move for mistrial based on the allegedly improper remarks made by the prosecutor. This court held, "An objection made to the argument of opposing counsel after the jury has retired is not timely and will not be reviewed on appeal." *Id.* at 388, 113 N.W.2d at 526. See, also, *State v. Benzel*, 220 Neb. 466, 477, 370 N.W.2d 501, 511 (1985), in which the defense did not object during the closing argument or before the jury retired, and this court held, "The failure to make a timely objection is equivalent to failing to make an objection at all and waives any right to complain"; *State v. Keithley*, 227 Neb. 402, 408, 418 N.W.2d 212, 216 (1988), in which no objection was made at the

time of argument, and this court held, "Failure to assert a timely objection at the time of trial constitutes a waiver of the objection."

Moreover, "The general rule is that remarks made by the prosecutor in final argument which do not mislead or unduly influence the jury do not rise to a level sufficient to require granting a mistrial." *State v. Fraser, ante* p. 157, 162-63, 430 N.W.2d 512, 515 (1988); *State v. Benzel, supra*; *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984), *cert. denied* 469 U.S. 1028, 105 S. Ct. 447, 83 L. Ed. 2d 372. The State's allusions to Giron's involvement certainly did not surprise or mislead the jury during closing arguments; by that time, Giron's participation had been made abundantly clear. "[I]t is not prejudicial for the prosecutor to make remarks based on deductions and inferences drawn from the evidence." *Benzel, supra* at 478, 370 N.W.2d at 511. Furthermore, the remarks were not in and of themselves unduly influential on the jury. "The impact of any comment made at trial depends on the atmosphere at trial. The trial judge is in a better position to measure the impact a comment has on a jury, and his decision will not be overturned unless clearly erroneous." *Id.* at 477-78, 370 N.W.2d at 511. We cannot say that under the circumstances the trial court was in error.

By failing to object when the State referred to the previous trial, and indeed, by bringing up Giron's trial himself, defense counsel waived any arguments on the matter.

However, there remains the question of whether Giron's volunteered testimony disclosing her conviction was sufficiently prejudicial to warrant a mistrial. As in *State v. Robertson*, 219 Neb. 782, 366 N.W.2d 429 (1985), we emphasize that the evidence in question relates to the codefendant's *conviction*, and not merely to the codefendant's participation in the crime.

The clear rule of law in this country is that where two persons are charged with the same criminal offense but are tried separately, the fact that one defendant has been convicted is inadmissible against the other defendant. See *State v. Robertson, supra*. However, case law suggests that the result may be different where, as here, the conviction of the

codefendant is disclosed through the unresponsive testimony of a witness, rather than as the result of a direct question by the prosecutor. In any event, admission of a codefendant's conviction will not be the basis for a mistrial unless it creates undue prejudice which was not, or could not be, negated through curative measures undertaken by the court.

State v. Robertson, supra, while not directly on point, considered the admissibility of a jury's verdict finding a codefendant guilty. In *Robertson*, the prosecutor asked the codefendant whether she had been convicted for her part in the crime for which the defendant was being tried, to which the codefendant replied yes. This court found that "evidence of a codefendant's conviction on the same charge has no place in the State's case in chief against a defendant." *Id.* at 791, 366 N.W.2d at 435. However, the court did not consider the question of voluntary, unsolicited testimony by the witness, divulging her conviction.

In *State v. Riendeau*, 448 A.2d 735 (R.I. 1982), the Rhode Island court affirmed the conviction of the defendant, who at his own trial had volunteered information about his codefendant's conviction and jail sentence in answer to a question that arguably did not require such a response. While reaffirming the rule that evidence of one defendant's conviction is inadmissible against another defendant as substantive proof of guilt, the court nevertheless found that the testimony did not result in sufficient prejudice to warrant a new trial, since the defendant had volunteered the information, the trial court immediately cautioned the jurors to disregard the information, the trial court gave jury instructions reminding the jury that they were not to consider the codefendant's fate, and other evidence in the case overwhelmingly established the defendant's guilt.

In *Moore v. State*, 515 N.E.2d 1099 (Ind. 1987), the investigating officer, in his testimony, mentioned the codefendant's conviction. The Indiana court noted that "[t]he question of whether the admission of a co-defendant's conviction requires reversal depends on the facts and circumstances surrounding the case." *Id.* at 1103. Here, since the officer made "only a brief mention" of the codefendant's conviction, and the prosecutor did not use the conviction

directly to argue the defendant's guilt, the court found that the prejudice to the defendant was insubstantial.

In *State v. Brown*, 67 N.C. App. 223, 313 S.E.2d 183 (1984), *review denied* 311 N.C. 764, 321 N.E.2d 147, the court held that the admission into evidence on direct examination that the codefendant had been convicted was erroneous. Although the admission of the evidence was erroneous, however, the court held it did not constitute *prejudicial* error requiring a new trial. The court found that since the codefendant had testified regarding his participation in the scheme, the jury was already fully aware of his guilt.

The *Brown* case relied in part on *State v. Bryant*, 236 N.C. 745, 73 S.E.2d 791 (1953). In *Bryant*, as the jury was leaving the jury box, the codefendant entered a plea of guilty to the crime for which the defendant was on trial. The trial court denied the defendant's motion for mistrial, but immediately cautioned the jury that if it had overheard the codefendant's guilty plea, it should not consider it. The North Carolina Supreme Court affirmed, explaining that since the codefendant had testified to facts which disclosed his participation in the crime, "[t]he jury was already fully apprized of his guilt," *id.* at 747, 73 S.E.2d at 792, and thus, no prejudice resulted from its overhearing the codefendant's guilty plea.

In *United States v. Dougherty*, 810 F.2d 763, 767 (8th Cir. 1987), the prosecutor informed the jury during opening argument that a codefendant " 'who has himself been convicted of a felony offense relating to this investigation' " would be called as a witness. The defendant's motion for mistrial was denied. Although the appellate court expressed disapproval over the prosecutor's actions, it found that in the totality of circumstances of the entire trial, the defendant had not been prejudiced by the prosecutor's statement. The court came to this conclusion by examining the cumulative effect of the prosecutor's misconduct, the strength of the properly admitted evidence of the defendant's guilt, and the curative actions taken by the trial court. The prosecutor had made no further references to the codefendant's conviction and had taken additional measures to see that the codefendant did not discuss the conviction on direct examination; there was overwhelming evidence of the defendant's guilt irrespective of

the prosecutor's comment; and the trial court had given a cautionary instruction to the jury to alleviate any possible prejudice.

In the present case, the witness disclosed her conviction in response to a question by the court that did not require such a response. The prosecutor did not ask her whether she had been convicted, nor did he use that fact to argue the defendant's guilt. The jury was immediately cautioned to disregard Giron's statement, and upon submission of the case to the jury, the court instructed it not to consider any volunteered information regarding the outcome of any other trial. Moreover, there was overwhelming, properly admitted evidence of the defendant's guilt regardless of Giron's statement that she had been convicted for her part in the fraud.

Although the statement was not properly admissible evidence, the prejudice resulting therefrom was insubstantial and did not necessitate the granting of a mistrial. *State v. Watkins*, 227 Neb. 677, 687, 419 N.W.2d 660, 666 (1988) (error in admitting statement was harmless where conviction was supported by "substantial, even overwhelming, evidence" in addition to inadmissible statement); *State v. Ebberson*, 209 Neb. 41, 46, 305 N.W.2d 904, 908 (1981) ("even if [the witness' answer] had been wholly unresponsive it was clearly not so prejudicial as to require a new trial. Ordinarily, when an objection to improper evidence is sustained and the jury is instructed to disregard it, such an instruction is deemed sufficient to prevent prejudice"); *State v. Kirby*, 185 Neb. 240, 253-54, 175 N.W.2d 87, 95-96 (1970) ("The answer was unexpected, and the court immediately instructed the jury to disregard it [and] specifically admonished the jury that it was not to consider any evidence stricken by the court. . . . [T]he defendant is entitled to a fair trial but not a perfect one"). See, also, *Lutwak v. United States*, 344 U.S. 604, 619, 73 S. Ct. 481, 97 L. Ed. 593 (1953), cited in *Kirby, supra* ("In view of the fact that this record fairly shrieks the guilt of the parties, we cannot conceive how this one admission could have possibly influenced this jury to reach an improper verdict"). The judgment of the district court is affirmed.

AFFIRMED.

GLENN A. CHRISTENSEN, JR., ET AL., APPELLEES, V. CITY OF TEKAMAH, APPELLANT.

432 N.W.2d 798

Filed December 9, 1988. No. 88-425.

1. **Summary Judgment.** A motion for summary judgment can properly be granted where there exists no genuine issue of material fact, the ultimate inferences to be drawn from those facts are clear, and the movant is entitled to judgment as a matter of law.
2. **Ordinances: Boundaries.** An ordinance creating a sanitary sewer extension district under Neb. Rev. Stat. § 19-2402 (Reissue 1987) must state the outer boundaries of the district.
3. **Boundaries: Ordinances: Intent.** Where a metes and bounds description, taken as a whole, is sufficiently clear to indicate the intended bounds of the area, with the courses and distances set out clearly, and there is clear indication of the legislative intent that such courses and distances control, conflicting statements therein erroneously fixing particular points or bounds at specified property or street lines may be rejected as inadvertent error.
4. **Boundaries.** An inadvertent error in a legal description may be disregarded if no reasonable person could be misled by the error.
5. **Ordinances: Parties.** All taxpayers who might be affected in some way by the decision in a suit to declare an ordinance creating a sanitary sewer extension district void are not indispensable parties to the suit.
6. **Ordinances: Actions: Statutes.** Neb. Rev. Stat. §§ 19-2422 and 19-2423 (Reissue 1987) are not applicable to a suit to declare an ordinance void for a fundamental defect.

Appeal from the District Court for Burt County: DARVID D. QUIST, Judge. Affirmed.

Ralph M. Anderson, Jr., of Anderson & Anderson, for appellant.

Gregory P. Drew for appellees.

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

BOSLAUGH, J.

This action was commenced to obtain a declaratory judgment that ordinance No. 852 of the City of Tekamah, Nebraska, which created sanitary sewer extension district No. 86-1, was void because it failed to state the outer boundaries of the district. The plaintiffs alleged the description contained in the ordinance was so defective that it "does not identify nor

furnish the means of identifying the property to be included in the district." The plaintiffs also sought to enjoin the city from collecting special assessments levied under the ordinance and from taking any action requiring the plaintiffs to connect with the sewer.

The plaintiffs are landowners whose property has been specially assessed for benefits. The defendant is the city.

The primary issue is whether the description of the property included in the district is so defective that the ordinance is void. The trial court found that the ordinance was void, sustained the plaintiffs' motion for summary judgment, and granted the injunction requested by the plaintiffs.

Neb. Rev. Stat. § 19-2402 (Reissue 1987) requires that the ordinance "state the outer boundaries of the district." The description contained in the ordinance is as follows:

> LIMITS OF DISTRICT: Commencing at the Northeast Corner of Outlot 3 in Section 30, Township 21 North, Range 11 East, Burt County, Nebraska, said point being the Southwest Corner of the intersection of 13th Street (Highway 75) and "E" Street in the City of Tekamah; thence west on the north line of said Outlot 3 to the east right-of-way line of the Chicago Northwestern Railroad (abandoned); thence southerly along said right-of-way line to the south line of Lot 6 in said Section 30, said point being 1,325 feet +/- north of the south line of said Section 30; thence east along said south line Lot 6 extended toa [sic] point 259.45 feet +/- east of the center line of 13th Street (Highway 75; thence north parallel with 13th Street to a point 359.45 feet +/- east of the Northeast Corner of said Outlot 3; thence west 359.45 feet +/- to the place of beginning.

The problem is with the eastern boundary of the district and the fixing of the northeast corner of the district.

From the southeast corner of the district, the description states, "thence north parallel with 13th Street to a point 359.45 feet +/- east of the Northeast Corner of said Outlot 3; thence west 359.45 feet +/- to the place of beginning." Thirteenth Street is 80 feet wide at the south end of the district. Near the north end of the district, 13th Street is 100 feet wide. If the east

boundary line of the district is to be "parallel with 13th Street," the northeast corner of the district is only 319.45 feet, not 359.45 feet, east of the place of beginning. This was clearly established by the testimony of James Peschel, the project manager for the engineering firm which was hired by the city, whose deposition was received in evidence. But if the northeast corner of the district is 359.45 feet east of the place of beginning, then the east boundary is not "parallel with 13th Street." This discrepancy makes it impossible to determine how much property is included along the eastern boundary of the district.

In *Hansen v. City of Norfolk*, 201 Neb. 352, 267 N.W.2d 537 (1978), this court noted, with regard to the description of property:

> "Where . . . the description, taken as a whole, is sufficiently clear to indicate the intended bounds of the subject parcel, with the courses and distances set out correctly therein, and there is clear indication of the legislative intent that such courses and distances control, conflicting statements therein erroneously fixing particular points or bounds at specified property or street lines will be rejected as inadvertent error. Under such circumstances the courses and distances will prevail . . . and, the description being sufficiently definite to indicate the legislative intent, the zoning amendment is valid."

Id. at 358, 267 N.W.2d at 541, quoting *Miner v. City of Yonkers*, 19 Misc. 2d 321, 189 N.Y.2d 762 (1959). In *Hansen*, the court adopted a "reasonable person" standard. "No reasonable person could be misled by the description, and the evidence is clear that neither [the plaintiff] nor anyone else was misled or confused by it." *Hansen, supra* at 358, 267 N.W.2d at 540.

The decision in the *Hansen* case does not control this case. In this case, either a course or a distance is in error. Since it is impossible to determine how much property is included within the district, the finding of the district court that the ordinance is void was proper. Summary judgment was a proper remedy since no material fact was in dispute.

A motion for summary judgment can properly be granted

where there exists no genuine issue of material fact, the ultimate inferences to be drawn from those facts are clear, and the movant is entitled to judgment as a matter of law. *Aldridge v. School Dist. of North Platte*, 225 Neb. 580, 407 N.W.2d 495 (1987).

The city contends that declaratory relief should not have been granted because not all taxpayers affected by the assessment were joined as plaintiffs and, therefore, parties in interest were not made parties, as required by Neb. Rev. Stat. § 25-21,159 (Reissue 1985) of the Uniform Declaratory Judgments Act. The city argues the cause should be dismissed for lack of jurisdiction, and relies on *Niklaus v. Abel Construction Co.*, 164 Neb. 842, 83 N.W.2d 904 (1957), for the proposition that "all taxpayers which may be affected by a taxpayer's suit are potential parties plaintiff." Brief for appellant at 15. The actual language from the case is: "In a taxpayer's action potentially all of the taxpayers and citizens are parties." *Niklaus* at 850, 83 N.W.2d at 910. The principle of law is correct, but the fact that all taxpayers may be potential parties does not mean that they are *indispensable* parties. There is no requirement that all taxpayers who might be affected in some manner by the result of the litigation be made parties to the action.

The city also contends that the plaintiffs waived their right to contest the assessment by failing to file an appeal within 10 days of the levy, as required by Neb. Rev. Stat. §§ 19-2422 and 19-2423 (Reissue 1987). Section 19-2422 requires that persons feeling aggrieved by the levy appeal to the district court, challenging the amount or validity of the assessment. The notice of appeal must be filed within 10 days of the levy of the special assessment, and a petition must be filed in the district court within 30 days of the levy. Neb Rev. Stat. §§ 19-2423 and 19-2425 (Reissue 1987). In this case, the plaintiffs attack the formation of the district, not the amount of the assessments that have been levied against their property. A special assessment is subject to collateral attack for a fundamental defect. *Nebco, Inc. v. Speedlin*, 198 Neb. 34, 251 N.W.2d 710 (1977).

The judgment is affirmed.

AFFIRMED.

IN RE APPLICATIONS A-15145, A-15146, A-15147, AND A-15148 OF THE CATHERLAND RECLAMATION DISTRICT. CATHERLAND RECLAMATION DISTRICT, APPELLEE, V. LOWER PLATTE NORTH NATURAL RESOURCES DISTRICT ET AL., APPELLANTS, CENTRAL PLATTE NATURAL RESOURCES DISTRICT ET AL., APPELLEES.

433 N.W.2d 161

Filed December 16, 1988. No. 86-692.

1. **Waters: Appeal and Error.** Regarding the granting of water diversion applications, our standard of review is to (1) search for errors appearing in the record; (2) determine whether the judgment conforms to law and whether it is supported by competent and relevant evidence; and (3) determine whether the director's action was arbitrary, capricious, or unreasonable.
2. **Waters.** The director's order granting or denying a water diversion application shall specify the reasons for such action, including a discussion of the required factors for consideration, and shall document such decision by reference to the hearing record, if any, and to any other sources used by the director in making the decision.
3. **Political Subdivisions: Natural Resources Districts.** As a political subdivision, a natural resources district has only that power delegated to it by the Legislature. A grant of power to a political subdivision is strictly construed.
4. **Waters.** An application to divert water is simply a request for permission to appropriate public waters of the state. Approval of an application merely authorizes the successful applicant to begin construction and to take other measures necessary to perfect the application into an appropriation. No rights shall be deemed to have been acquired until the provisions of Neb. Rev. Stat. § 46-237 (Reissue 1984) shall have been complied with.
5. _____. Until the application to appropriate is acted upon by the Department of Water Resources favorably to the applicant and the issuance of a permit is directed, the applicant has no property right of any kind as against the state. The applicant has only an inchoate, incipient, conditional right of procedural priority over later applicants.
6. _____. A water right applicant has no transferable property right in a mere application to divert water.
7. **Assignments.** Assignments of procedural rights are void.

Appeal from the Nebraska Department of Water Resources. Vacated and dismissed.

George E. Svoboda, of Sidner, Svoboda, Schilke, Wiseman, Thomsen, Holtorf & Boggy, for appellants Lower Platte North N.R.D. et al.

Martin D. Johnson for appellant City of Grand Island.

Lyle B. Gill, Fremont City Attorney, for appellant City of Fremont.

Michael E. Kelley, Kearney City Attorney, for appellant City of Kearney.

Christopher H. Meyer for appellants National Wildlife Federation and Nebraska Wildlife Federation.

Robert B. Crosby and Steven G. Seglin, of Crosby, Guenzel, Davis, Kessner & Kuester, for appellee Catherland Reclamation District.

Richard G. Kopf, of Cook, Kopf & Doyle, P.C., and James E. Doyle IV, of Cook & Doyle, P.C., for appellee Central Platte N.R.D.

Jeffrey J. Davidson and Mark A. Warnquist, of Crowell & Moring; Gene D. Watson and John C. McClure; and Bruce A. Peterson for amici curiae Nebraska Public Power District and Central Nebraska Public Power and Irrigation District.

Robert M. Spire, Attorney General, and LeRoy W. Sievers for State of Nebraska.

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

FAHRNBRUCH, J.

This is an appeal from an order of the Nebraska Director of Water Resources (Director) granting Catherland Reclamation District the right to divert and store water from the Platte and Little Blue Rivers. We vacate the Director's order and dismiss the diversion applications.

Among the objectors are cities, individuals, natural resources districts, and both the Nebraska and National Wildlife Federations.

This is the third appeal of this matter to the Supreme Court, and will hereafter be referred to as *Little Blue III*. Previous decisions regarding this controversy may be found at 206 Neb. 535, 294 N.W.2d 598 (1980) (*Little Blue I*), and 210 Neb. 862, 317 N.W.2d 726 (1982) (*Little Blue II*). Specifics of the proposed irrigation project are discussed fully in *Little Blue I*

and will not be repeated here.

Little Blue Natural Resources District (Little Blue) originally filed four applications: A-15145, A-15146, A-15147, and A-15148. Applications A-15145 and A-15147 requested approval to divert and impound water from the Little Blue River. Applications A-15146 and A-15148 requested approval to divert and impound water from the Platte River. It is not clear whether the Director originally approved or denied A-15145 and A-15147. But A-15146 and A-15148, concerning Platte River water, were denied.

Prior to the hearings in *Little Blue III*, our opinions in this matter were confined to A-15146 and A-15148. Yet the Director's order in *Little Blue III* approves all four of the original applications. This curiosity is not questioned by any party. Apparently, the objectors have appealed the Director's approval of all four applications. Therefore, A-15145, A-15146, A-15147, and A-15148 are all subjects of this appeal.

In *Little Blue I*, the Director denied A-15146 and A-15148 because of this court's holding in *Osterman v. Central Nebraska Public Power and Irrigation District*, 131 Neb. 356, 268 N.W. 334 (1936), that water could not be diverted from one stream basin to another. In *Little Blue I*, we reversed *Osterman* and held that "the unappropriated waters of every natural stream within the State of Nebraska may be diverted from one basin to another, except when such diversion is contrary to the public interest . . . ." 206 Neb. at 548, 294 N.W.2d at 604. The cause was remanded for the Director to determine whether the proposed project would be in the public interest.

In *Little Blue II*, we also reversed the Director's decision granting the applications. The cause was remanded for a hearing on the proposed diversion's effect on endangered species under The Nongame and Endangered Species Conservation Act, Neb. Rev. Stat. §§ 37-430 to 37-438 (Reissue 1978).

The hearing before the Director in *Little Blue III* commenced September 13, 1983. Before the Director concluded the hearing, a new issue was injected in April 1985, when Little Blue purportedly assigned its four applications to Catherland Reclamation District (Catherland). In return for the

assignment, Catherland released Little Blue from further obligation to prosecute the applications. Catherland also released Little Blue from its obligations under an August 25, 1984, "Agreement." The "Release and Discharge" given to Little Blue by Catherland recites that Little Blue is released and discharged from certain obligations "even if said Assignment [of the applications to Catherland] shall hereafter be determined to be invalid." Documents evidencing this purported assignment were filed with the Director. On May 3, 1985, over objection, the Director approved the intended assignment and substituted Catherland for Little Blue as the party in interest.

In July 1985, there were several days of additional evidence in *Little Blue III*. Thereafter, in an order of July 29, 1986, the Director found that the proposed diversion would have no effect on endangered species. The applications were granted. On appeal, a composite of objectors' assigned errors includes: (1) the Director's approval of the assignment of the applications by Little Blue to Catherland; (2) the Director's failure to grant an evidentiary hearing before approving the assignment of applications; (3) sufficiency of the evidence to sustain the Director's findings regarding endangered species; (4) the Director's refusal to consider the sufficiency of water in the Platte River to support the proposed project; (5) the Director's finding that the proposed project is economically feasible; (6) various procedural and evidentiary rulings; (7) the Director's findings regarding ground water issues; and (8) the Director's finding that the proposed project is in the public's interest.

Regarding the granting of water diversion applications, our standard of review is to (1) search for errors appearing in the record; (2) determine whether the judgment conforms to law and whether it is supported by competent and relevant evidence; and (3) determine whether the Director's action was arbitrary, capricious, or unreasonable. See, Neb. Rev. Stat. § 46-210 (Reissue 1984); *In re Application A-15738*, 226 Neb. 146, 410 N.W.2d 101 (1987).

Although it had an opportunity in two of its briefs in this court to respond to the objectors' assignment of error No. 1, Catherland did not do so. It apparently was content to rely

upon its position before the Director that Neb. Rev. Stat. § 2-3233 (Reissue 1987) permits assignments of applications. As hereafter explained, that reliance was misplaced.

We determine that Little Blue's purported assignment to Catherland of its applications for diversion of water is invalid. Therefore, it is unnecessary for us to consider objectors' other assigned errors or Catherland's claim of the unconstitutionality of certain statutes not relevant to our disposition of this case.

We note that Neb. Rev. Stat. § 46-289 (Reissue 1984) requires:

> The director's order granting or denying an application shall specify the reasons for such action, including a discussion of the required factors for consideration, *and shall document such decision by reference to the hearing record, if any,* and to any other sources used by the director in making the decision.

(Emphasis supplied.) The Director's order in *Little Blue III* does discuss the required factors for consideration. Although the Director placed considerable reliance upon some testimony of several witnesses, specific citation to the record is lacking.

It was around April 29, 1985, that the objectors learned of Little Blue's intent to assign its application to Catherland. That day, several objectors filed a motion with the Department of Water Resources requesting a hearing on the purported assignment. The motion also requested that an appropriate public notice of the hearing be given. On May 1, 1985, Catherland filed documents showing Little Blue's purported assignment of the applications at issue to Catherland. Objections to the assignment were filed with the department at 12:50 p.m. on May 3, 1985. The Director held a hearing that same day, May 3, 1985, at 2:30 p.m. After argument, he immediately announced his ruling that the assignment was valid and ordered that Catherland be substituted for Little Blue as the applicant of record. The Director gave no statutory or case law supporting the validity of the assignment of an application for appropriation of water. The objectors claim that the Director's ruling was arbitrary, capricious, and unreasonable. We agree.

The Director was clearly wrong in holding the assignment to be valid. The assignment is clearly invalid as a matter of law.

As the objectors point out, there is no statutory authority permitting Little Blue to assign an application for water diversion. As a political subdivision, Little Blue has only that power delegated to it by the Legislature. A grant of power to a political subdivision is strictly construed. *Nebraska League of S. & L. Assns. v. Johnson*, 215 Neb. 19, 337 N.W.2d 114 (1983); *Vap v. City of McCook*, 178 Neb. 844, 136 N.W.2d 220 (1965). See, also, *Little Blue II*.

At all relevant times herein, § 2-3233 gave natural resources districts the power to acquire and dispose of water rights in accordance with Neb. Rev. Stat. ch. 46, art. 2 (Reissue 1984), and to acquire and dispose of personal property. Little Blue did not assign or transfer a "water right" to Catherland; it attempted to assign only pending applications to divert water. As hereinafter determined, applications for water rights are not personal property and are not assignable. Further, we find no provision within chapter 46, article 2, for the assignment of a water right application from one entity or individual to another.

An application to divert water is simply a request for permission to appropriate public waters of the state. § 46-233. Approval of an application merely authorizes the successful applicant to begin construction and to take other measures necessary to perfect the application into an appropriation. § 46-235. After an application is approved, § 46-237 requires that the applicant file a map or plat with the department detailing the proposed irrigation project. That section further provides that "no rights shall be deemed to have been acquired until the provisions of this section shall have been complied with . . . ."

By simply filing its applications to divert water, Little Blue received no "water right" which could be "disposed of" pursuant to § 2-3233. We find nothing in the statutes or their legislative history evidencing a legislative intent to grant natural resources districts the power to transfer to another entity an application for water diversion. Therefore, Little Blue was not statutorily authorized to transfer its application to Catherland. This court has made it clear that a water right applicant has no transferable property right in a mere application to divert water.

> The initial step for procuring an appropriation right for irrigation purposes is the filing of an application for such permit. The granting of the application, in full or in part, is an adjudication which fixes the maximum volume of the appropriation, the rate of diversion, and the priority date. If an applicant is dissatisfied with the terms of the appropriation allowed, he must appeal, or the order becomes a final and binding adjudication. Its grant by the department is notice to senior and junior appropriators, as well as new applicants, of the extent of the appropriation. *The grant of the appropriation by the department, however, is a conditional right which becomes a perfected and completed appropriation only when the works are completed and the waters put to a beneficial use in compliance with the conditions and limitations of the grant.* It confers upon the applicant the prior right to the water against all subsequent applicants during the progress of the work if, and only if, he finally complies with the conditions and limitations of the appropriation as adjudicated by the department.

(Emphasis supplied.) *North Loup River P. P. & I. Dist. v. Loup River P. P. Dist.*, 162 Neb. 22, 28, 74 N.W.2d 863, 867 (1956).

Catherland sought the assignment of Little Blue's applications to take advantage of Little Blue's priority date. Permitting the assignment of applications could lead to collusion, thereby defeating the rights of other parties along a river. This would occur where, as here, an applicant no longer wished to pursue its application, but, instead of abandoning it, transfers it to someone who desires an early priority date. By such a procedure, parties having filed applications in the intervening period could be effectively deprived of their priority rights. Clearly, the effect of allowing such assignments is against the public interest.

That an assignment of a water diversion application is invalid is supported by *United States v. Fallbrook Public Utility District*, 165 F. Supp. 806, 855 (S.D. Cal. 1958), which held:

> Until the application to appropriate is acted upon by the State Water Rights Board favorably to the applicant, and the issuance of a permit is directed, the applicant has

> no property right of any kind as against the state. [The applicant has only] an inchoate, incipient, conditional right of procedural priority over later applicants . . . .

Thus, if Little Blue could assign anything, it would only be its inchoate, incipient, conditional right of procedural priority over later applicants, not its application. Carried to its logical conclusion, allowing assignments of procedural priority over later applicants would result in unfair advantage to the highest bidder. It has been held, and we so hold, that assignments of procedural rights are void. See *Name Brand Furniture Warehouse v. Cuyahoga Cty. Bd. of Revision*, No. 52192 (Ohio App. June 4, 1987). We specifically hold that applications for water rights are not personal property under § 2-3233.

Because of the invalidity of the assignment to it from Little Blue, Catherland had no standing to pursue Little Blue's applications for diversion of water from the Platte and Little Blue Rivers, either before the Director or before this court. Little Blue's abandonment of its applications is evidenced by its attempt to assign them and its acceptance of a release from further obligation to prosecute the applications.

Accordingly, the order of the Director must be vacated and the applications dismissed.

VACATED AND DISMISSED.

JOHN R. GILLESPIE, APPELLANT, V. STATE OF NEBRASKA ET AL., APPELLEES.

432 N.W.2d 801

Filed December 16, 1988. No. 87-204.

Motor Vehicles: Licenses and Permits: Revocation. Revocation of an individual's license to operate a motor vehicle as the result of accumulation of 12 or more points within a period of 2 years, see Neb. Rev. Stat. § 39-669.27 (Reissue 1984), is not an act of a state official done pursuant to, or in enforcing, the provisions of the Driver License Compact.

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

Leonard P. Vyhnalek for appellant.

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

BOSLAUGH, SHANAHAN, and GRANT, JJ., and ENDACOTT and QUIST, D. JJ.

ENDACOTT, D. J.

On May 30, 1985, the director of the Department of Motor Vehicles revoked John R. Gillespie's license to operate a motor vehicle because he had accumulated 12 points within a 2-year period. See Neb. Rev. Stat. § 39-669.27 (Reissue 1984). Plaintiff accumulated these points on the basis of six speeding convictions: one in Nebraska in 1983, three in Kansas in 1984, and two more in Nebraska in 1985.

On June 5, 1985, Gillespie appealed the director's order to the district court for Lincoln County, his county of residence. That court stayed the order of revocation pending a final determination of the appeal. Defendants demurred to the petition on appeal, claiming a lack of subject matter jurisdiction. The demurrer was sustained. Gillespie filed an amended petition. At the same time, pursuant to Neb. Rev. Stat. § 25-410 (Reissue 1985), Gillespie filed a motion to transfer venue to the district court for Lancaster County. The motion was sustained, and the case was transferred. Defendants then filed a motion for summary judgment, contending that the district court for Lancaster County also lacked jurisdiction. Summary judgment was granted. This appeal followed.

Defendants contend that because some points were accumulated for out-of-state convictions, the Driver License Compact, 2A Neb. Rev. Stat. app. at 840 (Reissue 1985), requires that, pursuant to Neb. Rev. Stat. § 84-917(2) (Reissue 1987) of the Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 et seq. (Reissue 1987), Gillespie's appeal could only be brought in Lancaster County, where the director's action was taken. We cannot agree.

The Driver License Compact, of which both Nebraska and Kansas are members, is an interstate agreement for the

exchange in a uniform manner of information regarding the commission of traffic offenses. Article II of the compact reads in part: "The licensing authority of a party state shall report each conviction of a person from another party state occurring within its jurisdiction to the licensing authority of the home state of the licensee." Article III(b) states: "As to other convictions [such as speeding], reported pursuant to Article II, the licensing authority in the home state shall give such effect to the conduct as is provided by the laws of the home state." Article VIII, § 6, provides: "Any act or omission of any official or employee of this state done or omitted pursuant to, or in enforcing, the provisions of the Driver License Compact shall be subject to review in accordance with the state administrative procedure a[c]t . . . ."

The Driver License Compact contains no provision for the accumulation of points or the revocation of a license on points assessed for successive traffic violations. As to speeding convictions in other states, the compact merely establishes a cooperative procedure for reporting those convictions to our Department of Motor Vehicles. Speeding convictions occurring in Nebraska are reported to the department pursuant to Neb. Rev. Stat. § 39-669.22 (Reissue 1984). The department then gives such effect to both in-state and out-of-state speeding convictions reported as is provided by the laws of the State of Nebraska. The assessment and accumulation of points for speeding convictions occurs under Neb. Rev. Stat. § 39-669.26 (Reissue 1984). The revocation of an individual's license for the accumulation of 12 or more points within a period of 2 years occurs under § 39-669.27. In the case at bar, the revocation did not, in the language of article VIII, § 6, of the compact, constitute an act of a state official done "pursuant to, or in enforcing, the provisions of the Driver License Compact." Such revocation was not, therefore, appealable to the district court for Lancaster County under § 84-917 of our Administrative Procedure Act. Instead, an appeal was properly brought in this case in the district court for Lincoln County, the county of Gillespie's residence, pursuant to Neb. Rev. Stat. § 39-669.28 (Reissue 1984). A contrary holding would create a trap for the unwary: If all points were accumulated on the basis of in-state

convictions, appeal would be brought in the county of residence, but if even a single point had been assessed on the basis of an out-of-state conviction, appeal could be brought only in Lancaster County.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

EVERLASTING GOLDEN RULE CHURCH, A MISSOURI CORPORATION, APPELLEE, V. DAKOTA TITLE & ESCROW COMPANY, A NEBRASKA CORPORATION, APPELLANT.

432 N.W.2d 803

Filed December 16, 1988. No. 87-209.

1. **Summary Judgment.** Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from material facts, and when the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** 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.
3. **Venue: Appeal and Error.** Where the record does not show an abuse of discretion, a ruling on a motion to transfer venue will not be disturbed on appeal.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Affirmed.

Michael McCormack and Thomas J. Donnelly, of McCormack, Cooney, Mooney & Hillman, for appellant.

Michael M. O'Brien, of Matthews & Cannon, P.C., for appellee.

HASTINGS, C.J., WHITE, and CAPORALE, JJ., and QUIST, D.J., and COLWELL, D.J., Retired.

HASTINGS, C.J.

Defendant, Dakota Title & Escrow Company, has appealed from the judgment of the district court entered following the sustaining of plaintiff's motion for summary judgment. Defendant's assignments of error include the denial by the district court of defendant's motion for summary judgment, the granting of plaintiff's motion for summary judgment, and the failure of the trial court to grant a change of venue.

On August 31, 1983, the Everlasting Golden Rule Church (plaintiff), the defendant, World-Wide Steel Systems, Inc., and SWN Investment entered into an escrow agreement in reference to the purchase of real property described as "Lot 1, SWN Investments #2, a subdivision as surveyed, platted and recorded, Sarpy County, Nebraska." The pertinent portions of the agreement provided as follows:

> A. Seller [plaintiff] shall place the sum of $16,000.00 in an escrow account to be held by the Escrow Agent [defendant]; which sum represents an amount sufficient to protect the Buyer [SWN Investment] against a possible judgment lien against said property resulting from an action involving the Seller and the property described herein, which action is filed at Doc. 54, No. 187 of the District Court of Sarpy County, Nebraska, and is entitled "Clifford D. Gullett, Plaintiff, vs. World-wide Steel Systems, Inc., a Nebraska Corporation; The Everlasting Golden Rule Church, a Missouri Corporation, and Kelly Green, Defendants".
>
> B. That said sum shall be held pending resolution of said lawsuit, and upon resolution shall be distributed pursuant to the court's order.

Clifford D. Gullett, the plaintiff referred to in the escrow agreement, had obtained a judgment against World-Wide in an Iowa court, which, together with interest, amounted to $13,808.12 (apparently, the judgment was for $11,530.48 and accumulated interest to reach the sum of $13,808.12) as of April 19, 1983. On that date, Gullett filed a petition in equity in the district court for Sarpy County against World-Wide, the church, and Kelly Green. That case may be found at docket 54, page 187, and is the action referred to in the escrow agreement.

The petition alleged generally that World-Wide is a mere facade for the personal dealings of Green and that in an effort to hinder his creditors, Green transferred the property (the property described in the escrow agreement) from World-Wide to the church with the intent to hinder, delay, and defraud the creditors of World-Wide and Green. The petition further prayed that the court annul and set aside the transfer and that judgment be awarded the plaintiff against Green in the sum of $13,808.12, plus interest from March 1, 1983.

On April 16, 1984, Gullett filed another petition in the district court for Sarpy County seeking to register the Iowa judgment referred to above. In that action, found at docket 59, page 4, Gullett's motion for summary judgment in the amount of $11,530.48 plus interest of $4,003.58 as of August 30, 1984, was sustained and judgment entered accordingly. Gullett's attorney, on September 18, 1984, filed a praecipe with the clerk of the district court for Sarpy County for a

> writ of execution to levy upon all personal property of World-Wide Steel Systems, Inc., or specifically, any funds held by Dakota Title & Escrow Company, of World-Wide Steel Systems, Inc. under an Escrow Agreement dated August 31, 1983, to satisfy Plaintiff's judgment in the amount of $15,517.17.

On the same day, Gullett's attorney also filed a praecipe for a "writ of execution and levy upon all funds held by Dakota Title & Escrow Company Company [sic], of Kelly Green, under an Escrow Agreement dated August 31, 1983, to satisfy plaintiff's judgment in the amount of $300.00."

On September 18, 1984, the clerk of the district court issued the writs of execution as requested. One writ on its face showed that it pertained to the case of *Gullett v. World-Wide Steel Systems, Inc.*, at docket 59, page 4, and recited a judgment due of $15,517.17 plus costs in the amount of $88.36. The other writ pertained to the case of *Gullett v. World-Wide Steel Systems, Inc., et al.*, at docket 54, page 187 (the case referred to in the escrow agreement), and recited an amount of $300 due on a judgment, together with $224.98 in costs.

Both writs were served on the defendant on September 21, 1984, by a deputy sheriff. The sum of $15,948.14, covering

judgment, costs, service, and return, was collected on the writ in docket 59, page 4; and $51.86, covering a portion of the judgment, costs, service, and return, was collected on the writ in docket 54, page 187. These amounts were paid by the deputy sheriff into the district court for Sarpy County. The sum of $16,000 was then paid over to Gullett, and a satisfaction of judgment for the second lawsuit (not the one involved in the escrow agreement) was filed on September 26, 1984.

Gullett, now having recovered all moneys to which he was entitled, albeit in a roundabout fashion, moved to dismiss the first lawsuit (the one involved in the escrow agreement). An order of dismissal in docket 54, page 187, was entered by the court on January 22, 1985. At the same time, the court ordered that "any monies now on deposit with Dakota Title and Escrow Company, or received by Dakota Title and Escrow Company in the future pursuant to an escrow agreement dated August 31, 1983 . . . should be paid to Kelly Green, President of the Everlasting Golden Rule Church."

Dakota Title, having already paid out the money on deposit pursuant to the writs of execution, refused to pay Green and the church. On February 8, 1985, the church filed the present action in the district court for Douglas County against Dakota Title for breach of contract. The petition alleged that Dakota Title violated the covenants of the escrow agreement by paying out the $16,000 to a creditor of World-Wide.

Generally, Dakota Title's defense was that it had paid out the money to the sheriff in accordance with the writs of execution. The only problem with this contention, innocent though Dakota Title may have been, is that it did not pay out the money in accordance with a proper court order of the district court for Sarpy County in docket 54, page 187.

There were no disputed questions of fact. 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. *Wilson v. F & H Constr. Co.*, 229 Neb. 815, 428 N.W.2d 914 (1988). 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. *Id.*

Although it is possible to engender a great deal of sympathy for the position in which Dakota Title finds itself, the fact remains that it paid the money under the writ of execution without challenge when it should have been quite apparent that such payment was not being made "pursuant to the court's order" (in docket 54, page 187) as provided for in the escrow agreement. Plaintiff was entitled to judgment as a matter of law.

Dakota Title's contention regarding the refusal of the district court for Douglas County to grant a change of venue to the district court for Sarpy County is apparently premised on the fact that all prior proceedings had been had in the latter court. However, this is not sufficient justification for a mandatory change of venue. Where the record does not show an abuse of discretion, a ruling on a motion to transfer venue will not be disturbed on appeal. *Johnsen v. Parks*, 189 Neb. 712, 204 N.W.2d 804 (1973). There was no abuse of discretion.

The judgment of the district court is affirmed.

AFFIRMED.

BOYD E. BURHOOP, APPELLANT, V. JEAN M. BURHOOP, APPELLEE.
433 N.W.2d 166

Filed December 16, 1988. No. 87-228.

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

Boyd E. Burhoop, pro se.

Steven M. Curry, of Sampson, Curry & Hummel, for appellee.

BOSLAUGH, WHITE, CAPORALE, and SHANAHAN, JJ., and JAMES MURPHY, D.J.

PER CURIAM.

In the first appearance of this dissolution of marriage action in this court, we, among other things, affirmed the alimony awarded the respondent-appellee wife, Jean M. Burhoop. *Burhoop v. Burhoop*, 221 Neb. 657, 380 N.W.2d 254 (1986). In the matter presently before us, the petitioner-appellant husband, Boyd E. Burhoop, assigns as error the district court's failure to modify or revoke the alimony payments previously awarded the wife.

We, as we are required, have reviewed the trial court's action de novo on the record; we determine therefrom that the trial court did not abuse its discretion in denying the husband's application. Accordingly, the action of the trial court is affirmed.

AFFIRMED.

FRANK J. SVOBODA, APPELLANT, V. FIRST NATIONAL BANK OF O'NEILL, APPELLEE.

432 N.W.2d 806

Filed December 16, 1988. No. 87-264.

1. **Summary Judgment: Appeal and Error.** In an appellate review of 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.
2. **Summary Judgment.** Summary judgment is properly granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue concerning any material fact or as to the ultimate inferences deducible from such facts and that the moving party is entitled to judgment as a matter of law.

Appeal from the District Court for Rock County: EDWARD E. HANNON, Judge. Reversed and remanded for further proceedings.

Vince Kirby for appellant.

Michael G. Helms, of Schmid, Mooney & Frederick, P.C., for appellee.

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

WHITE, J.

This is an action seeking the imposition of a constructive trust on 480 acres of real estate situated in Rock County. The plaintiff, Frank J. Svoboda, is appealing from the judgment of the district court which sustained the motion of the defendant, First National Bank of O'Neill, for summary judgment.

In an appellate review of 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. *Bedrosky v. Hiner, ante* p. 200, 430 N.W.2d 535 (1988). Summary judgment is properly granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue concerning any material fact or as to the ultimate inferences deducible from such facts and that the moving party is entitled to judgment as a matter of law. *Bedrosky v. Hiner, supra.*

In the district court, the only evidence admitted in the summary judgment proceeding was the affidavit of Svoboda, with copies of both a December 23, 1983, decree of foreclosure and a contract Svoboda alleges he and Donald Kaup entered into.

In his affidavit, Svoboda alleges that he entered into a contract to purchase some land located in Rock County from Kaup. Appellant Svoboda defaulted on the contract, and Kaup brought a foreclosure action against the appellant. In the U.S. District Court a decree of foreclosure was entered on December 23, 1983.

Svoboda further alleges that on December 7, 1984, he and Kaup entered into a written agreement. This agreement provided for the purchase of the foreclosure decree by the appellant for $200,000. Svoboda was at that time represented by William Griffin, who had represented him throughout the foreclosure proceedings. Prior to March 13, 1985, it is alleged

that Griffin, who was representing the appellant, was retained by First National Bank of O'Neill, the appellee in this action, in an attempt to purchase the appellant's rights by virtue of the December 7 contract he had with Kaup. Svoboda later found out that the appellee bank succeeded in purchasing all of the appellant's rights in the contract he had with Kaup regarding the decree of foreclosure.

Additionally, Svoboda alleges that a fiduciary relationship existed between him and Griffin and that Griffin breached a fiduciary duty to the appellant by representing the appellee bank. The appellant states that the appellee bank was not a bona fide purchaser for value because the knowledge of their attorney, Griffin, as to Svoboda's interest in the property, is imputed to his client, the appellee in this case. Because of the knowledge of the preexisting relationship with Svoboda, the acquisition of the property was accomplished with at least constructive knowledge of the breach of fiduciary duty, and, therefore, a constructive trust should be imposed upon the real estate to the benefit of the appellant.

In support of its motion for summary judgment, the appellee attempted to introduce a certified copy of the federal foreclosure proceedings between the appellant and the seller, Kaup, alleging that this present action by Svoboda is barred by the doctrine of res judicata, as the same facts constituting Svoboda's cause of action in this case were raised as a defense to the confirmation of the foreclosure in federal district court. The copies of these proceedings were properly excluded by the district court for noncompliance with Neb. Rev. Stat. § 25-1332 (Reissue 1985). Although copies of these proceedings were properly excluded, the district court nonetheless granted the appellee's motion for summary judgment, finding that this action was merely a collateral attack of the federal foreclosure proceedings and the issues presented were therefore res judicata.

We disagree with the conclusion of the district court that this action is barred by the doctrine of res judicata. The only evidence admitted by the district court in the summary judgment proceeding was the affidavit of Svoboda regarding the breach of fiduciary duty allegedly committed by his

attorney, with copies of both the December 23, 1983, decree of foreclosure and the contract Svoboda alleges he and Kaup entered into.

Reviewing this affidavit and the accompanying papers in the light most favorable to the nonmoving party, Svoboda, it cannot be said that the bank is entitled to judgment as a matter of law. If Svoboda's allegations are true, and in a motion for summary judgment we must assume they are, material issues remain requiring resolution. Because the prior federal proceedings were properly excluded, there is no evidence on the record in support of the appellee's contention that Svoboda's claims are barred by the doctrine of res judicata. Viewing only the record before this court, we do not know what was argued in the prior federal proceedings. Therefore, the motion for summary judgment was improperly granted, and this action must be reversed and remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

FLYNN FRANKLIN, INDIVIDUALLY AND AS FATHER AND NEXT FRIEND OF DAMIEN FRANKLIN, A MINOR, APPELLANT, V. CITY OF OMAHA, APPELLEE.

432 N.W.2d 808

Filed December 16, 1988. No. 87-482.

1. **Summary Judgment.** A summary judgment will be granted where there is no genuine issue of material fact or as to the ultimate inferences to be drawn therefrom and the moving party is entitled to judgment as a matter of law.
2. **Political Subdivisions Tort Claims Act: Notice.** Substantial compliance with the statutory provisions pertaining to a claim's content supplies the requisite and sufficient notice to a political subdivision in accordance with Neb. Rev. Stat. § 13-905 (Reissue 1987), when the lack of compliance has caused no prejudice to the political subdivision.

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

James E. Schaefer for appellant.

Herbert M. Fitle, Omaha City Attorney, James E. Fellows, and Sheri E. Long for appellee.

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

PER CURIAM.

The district court for Douglas County sustained the motion of defendant, City of Omaha, for summary judgment and dismissed the plaintiff's petition. Plaintiff, Flynn Franklin, appeals. We reverse.

At issue in this case is the adequacy of the notice of claim under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 13-901 to 13-926 (Reissue 1987) (formerly §§ 23-2401 et seq.).

Section 13-905 provides in part, "All such claims shall be in writing and shall set forth the time and place of the occurrence giving rise to the claim and such other facts pertinent to the claim as are known to the claimant."

In a letter addressed to the city clerk of the City of Omaha, dated September 17, 1985, and received by the city clerk on September 19, the appellant notified the city as follows: (1) that the persons making claim against the city are Flynn Franklin, Toni Hill Franklin, and Damien Franklin, a minor; (2) that the claim was made to recover for personal injuries suffered by Flynn Franklin and Damien Franklin, and loss of consortium to Toni Hill Franklin, in a rear-end collision with a car driven by Leon Straughn, who was fleeing from a pursuing Omaha Police Department cruiser operated by an Omaha police officer on November 3, 1984; (3) that Flynn Franklin's injuries included a severe back injury and permanent disability and that Damien Franklin's injuries included a broken leg, a dislocated hip, and permanent injury; and (4) that demand is made for the sum of $1,450,000 damages to all claimants.

A summary judgment will be granted where there is no genuine issue of material fact or as to the ultimate inferences to be drawn therefrom and the moving party is entitled to judgment as a matter of law. *Glen Park Terr. #1 Homeowners Assn. v. M. Timm, Inc., ante* p. 48, 430 N.W.2d 40 (1988).

Is the failure to specify the place of the accident and/or the

exact time fatal to the consideration of the claim?

We are aware that a number of states have adopted a strict construction approach to the notice-of-claim requirements. *Norland v. Mason City*, 199 N.W.2d 316 (Iowa 1972); *Elkhorn School Dist. v. East Troy School Dist.*, 110 Wis. 2d 1, 327 N.W.2d 206 (1982). This court, in a case decided after the briefs in this case were submitted, took a different approach.

In *Chicago Lumber Co. v. School Dist. No. 71*, 227 Neb. 355, 417 N.W.2d 757 (1988), we held that "substantial compliance with the statutory provisions pertaining to a claim's content supplies the requisite and sufficient notice to a political subdivision in accordance with § 23-2404, when the lack of compliance has caused no prejudice to the political subdivision." *Id.* at 369, 417 N.W.2d at 766.

In *Chicago Lumber Co.*, the claim arose out of a failure of the school district to require a contractor's bond. Neb. Rev. Stat. § 52-118 (Reissue 1984). The contractor performed the work, received payment, and did not pay the supplier, Chicago Lumber Company.

In the claim letter to the school district, the claimant specified neither the exact location of the school building in the district for which the goods were furnished, nor the date on which such goods were furnished. We held as follows:

> The purpose of § 23-2404 is not to require a statement of fact to the extent that the governmental subdivision's absolute liability is verbally demonstrated in the documentary or written claim. Rather, the written claim required by § 23-2404 notifies a political subdivision concerning possible liability for its relatively recent act or omission, provides an opportunity for the political subdivision to investigate and obtain information about its allegedly tortious conduct, and enables the political subdivision to decide whether to pay the claimant's demand or defend the litigation predicated on the claim made. *Campbell v. City of Lincoln*, 195 Neb. 703, 240 N.W.2d 339 (1976).

Id. at 368-69, 417 N.W.2d at 765-66.

We note that the evidence submitted at the hearing on the motion did not suggest that the city was unable to determine

either the basis of the claim or its place and time of happening. No assertion is made that the city was in any way prejudiced by the claimed omissions.

No prejudice having been demonstrated, the court was in error in sustaining the motion for summary judgment. Accordingly, the judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. SIDNEY E. VANN, APPELLANT.
432 N.W.2d 810

Filed December 16, 1988. No. 87-806.

1. **Arrests: Search and Seizure.** An arrest may not be used as a pretext to search for evidence.
2. **Arrests: Search and Seizure: Words and Phrases.** A pretext arrest is one where the arrest is only a sham, a front being used as an excuse for making a search.
3. **Motions to Suppress: Appeal and Error.** At a hearing to suppress evidence, the court, as the trier of fact, is the sole judge of the credibility of witnesses and the weight to be given to their testimony and other evidence. The Supreme Court will uphold the trial court's finding of fact in a suppression hearing unless those findings are clearly wrong.
4. **Arrests: Appeal and Error.** The determination of whether an arrest is pretextual is a question of fact for the trial court. This court will not reverse a trial court's finding on this question unless the finding is clearly erroneous.

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

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

Sidney E. Vann, pro se.

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

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

GRANT, J.

On July 17, 1986, defendant-appellant, Sidney E. Vann, was charged by information in the district court for Douglas County with possession with intent to deliver a controlled substance in violation of Neb. Rev. Stat. § 28-416(1)(a) (Reissue 1985). On July 10, 1987, this information was amended to include a habitual criminal charge, pursuant to Neb. Rev. Stat. § 29-2221 (Reissue 1985). The defendant filed an amended motion to suppress physical evidence. This motion was denied after a suppression hearing was held on June 26, 1987. A jury trial was held on July 13 to 17, 1987. The jury found defendant guilty. After a habitual criminal hearing, defendant was sentenced to serve a term of 15 to 25 years in the Nebraska Penal and Correctional Complex. Defendant timely appealed to this court. Defendant's counsel assigns a single error: that the court erred in overruling defendant's motion to suppress physical evidence. Defendant has filed pro se briefs assigning other errors which will be discussed hereinafter. We affirm.

On June 25, 1986, the manager of a Residence Inn hotel in Omaha called the Omaha police narcotics unit to inform the police that a resident of the hotel, Sidney Vann, was acting in an unusual manner in that he was paying his bill in cash and the hotel was having a hard time collecting the bill; in that Vann requested his room not be cleaned by the hotel's personnel; in that many long-distance telephone calls were being made, particularly to California; and in that Vann left his room and returned at unusual hours, including visits to the hotel registration desk at 3 or 4 a.m. On June 30, 1986, the manager requested Vann to leave the hotel. Vann's final bill was paid in cash after he had been locked out of his room to effect payment. At trial, the manager identified Vann as the defendant herein.

The manager's call to the police narcotics unit was noted in police records, but no actual investigation was made until July 1, 1986, because of then-pending, ongoing narcotics investigations in other unrelated cases. On July 1, narcotics investigators went to the Residence Inn.

On July 2, 1986, the owners of M3 Video, a videocassette

movie rental store in Omaha, reported to a police officer, whose assignment was to investigate theft cases, that a person named Sidney Vann had rented six videocassette movies from M3 Video on June 23, 1986, that he had not returned the cassettes by June 30, and that those cassettes had a value of $360. The M3 Video owners informed the police theft investigator that Vann had furnished M3 with nonexistent and fraudulent addresses and telephone numbers, but that M3 had traced Vann to the Residence Inn in Omaha.

On July 1, while the narcotics officers were at the Residence Inn, they were informed that while hotel employees were cleaning Vann's room after he was evicted, a tray with a white residue had been found. This tray and residue were disposed of by the hotel prior to police arrival. Residence Inn employees provided the narcotics officers with a description of Vann's vehicle and with its California license number.

On July 2, 1986, the police narcotics officers located Vann's vehicle at the Omaha Best Western Airport Inn and placed the car under surveillance. The manager of the Airport Inn informed the officers that Vann and his wife were living in room 206. The officers requested that any trash removed from room 206 be saved for investigation. Pursuant to this request, hotel employees provided officers with trash from room 206. This trash was taken to police headquarters and examined. Some of the trash was considered to have evidentiary value, was logged into the police property unit, and was later forwarded to a chemist for examination.

During this same time period, the theft investigation officer followed up on the M3 Video theft. Using information furnished to him by the owners of M3 Video, the theft investigation officer went to the Residence Inn on July 2, 1986, and was informed by the Residence Inn that Vann had been "evicted" and that the Residence Inn had called the police narcotics unit. The theft investigation officer contacted the narcotics unit and was informed by the narcotics officers that Vann had been located at the Airport Inn. Officers of the two units consulted together about the suspect Vann, who was being investigated by each unit.

On July 3, 1986, the theft investigation officer obtained a

felony arrest warrant for Vann for the videocassette theft. The officer from the theft investigation unit informed officers from the narcotics unit about the warrant, and at approximately 9:50 a.m. on July 3, 1986, officers from both units went to the Airport Inn to arrest Vann.

Officers knocked on the door of room 206. A party who identified himself as Sidney Vann answered the door. Vann was dressed only in his underwear. He allowed the officers into the room, and a majority of the eight officers entered the room. This group consisted of nonuniformed officers from both the theft investigation unit and the narcotics unit, and two uniformed field officers. The arrest warrant was read to Vann, and then the officers asked Vann if they could search the room. Vann refused. While Vann dressed, Officer Mackevicius of the police theft investigation unit saw a "cellophane baggy with a white powdery substance sitting on top of the coffee table . . . ." Officer Mackevicius brought this bag to the attention of one of the narcotics officers. Vann and his wife, who was also in the room, were then taken to central police headquarters. A narcotics officer was left to secure the room. The officer testified that neither he nor any other officer searched the room at this time. Narcotics officers were sent to obtain a search warrant for the room and Vann's car.

At approximately 1:40 p.m., the officers from the narcotics unit returned to room 206 with a search warrant. A search of the room and Vann's car was then conducted by the narcotics officers. This search produced physical evidence used at the trial.

We first consider the assignment of error in defendant's counsel's brief, that is, that the trial court erred in overruling defendant's motion to suppress. In reviewing a trial court's ruling after a suppression hearing, this court does not reweigh the evidence or resolve conflicts in the evidence. At a hearing to suppress evidence, the court, as the trier of fact, is the sole judge of the credibility of witnesses and the weight to be given to their testimony and other evidence. The Supreme Court will uphold the trial court's findings of fact in a suppression hearing unless those findings are clearly wrong. *State v. Marco, ante* p. 355, 432 N.W.2d 1 (1988).

Defendant's underlying contention is that his arrest for theft was only a pretext to a search for evidence of violation of various Nebraska narcotics laws. Defendant contends that an arrest based on a pretext is illegal per se and that evidence obtained as a result of such a pretextual arrest must be suppressed.

We agree fully with the statement, relied on by defendant, set out in *United States v. Lefkowitz*, 285 U.S. 452, 467, 52 S. Ct. 420, 76 L. Ed. 877 (1932), that "[a]n arrest may not be used as a pretext to search for evidence." That proposition has been widely accepted in various courts across the nation. See *Warren v. City of Lincoln, Neb.*, 816 F.2d 1254 (8th Cir. 1987), *reh'g en banc granted* 825 F.2d 176, and cases cited therein. We have no general disagreement with the statement in *Warren*, 816 F.2d at 1257: "An arrest ostensibly for one purpose but in reality for the primary purpose of furthering an ulterior goal is unreasonable under the fourth and fourteenth amendments [to the U.S. Constitution]." It is necessary, of course, to determine what is a "pretextual arrest" before the statement quoted may be said to have validity.

Defendant relies, in large part, on lengthy quotations from an article by Burkoff, *The Pretext Search Doctrine, Now You See It, Now You Don't*, 17 U. Mich. J.L. Ref. 523 (1984). In that article, a pretext arrest is referred to as one "where the arresting officer was in fact making the arrest to search the arrestee incident to arrest for a reason which was legally insufficient to support the arrest." *Id.*

The word "pretext" is defined in Webster's Third New International Dictionary, Unabridged 1797 (1981), as "a purpose or motive alleged or an appearance assumed in order to cloak the real intention or state of affairs."

In *Taglavore v. United States*, 291 F.2d 262, 265 (9th Cir. 1961), the court determined that a pretext arrest was one "[w]here the arrest is only a sham or a front being used as an excuse for making a search . . . ."

In interpreting the phrase, we hold that the determination of whether an arrest is pretextual is a question of fact for the trial court. This court will not reverse a trial court's finding on this question unless the finding is clearly erroneous. See *U.S. v.*

Portwood, 857 F.2d 1221 (8th Cir. 1988).

Viewing the situation before the court in this case, it is clear that defendant's arrest was not pretextual. Defendant's contention that the arrest was a pretext would lead to the conclusion that various departments of law enforcement authorities could not cooperate with one another in the discharge of their duties. In this case, there was clear evidence before the theft investigation unit of the Omaha Police Division that defendant Vann had committed a Class IV felony, in that he had stolen $360 worth of videotapes. At the same time, there were strong indications known to narcotics investigators of the Omaha police that defendant Vann was violating the narcotics laws of this State.

When the two units of police became aware of the fact that one person was the subject of two investigations, it would offend all notions of efficiency, commonsense, and orderly procedures if the two units did not cooperate fully.

Defendant was legally arrested on a properly issued felony warrant on charges of felony theft. At the time of his legal arrest, officers of both police units saw a cellophane baggie containing a white powder in plain view at the scene of the arrest. Defendant refused to permit a search of his room under those circumstances. His request was honored and a proper search warrant obtained before any search was undertaken.

Later, a theft charge was filed and was proceeding toward trial, in a case separate and distinct from defendant's narcotics case, until defendant absented himself from the jurisdiction where the cases were pending. When defendant returned to the jurisdiction, the narcotics case was first tried, and after conviction in that case, the theft case was dismissed. The theft charge, on which defendant's arrest was based, was obviously not a sham. The officers had reasonable grounds to proceed on the felony theft alone.

The evidence before the trial court was overwhelming that defendant's arrest in this case was not pretextual, and we affirm the trial court's action in refusing to grant defendant's motion to suppress.

We make the foregoing analysis with full knowledge of the fact that defendant did not object, at trial, to receipt of the

physical items which were the subject of defendant's motion to suppress. Such failure, on defendant's part, to object at trial furnishes an independent ground of affirmance. *State v. Carter*, 226 Neb. 636, 413 N.W.2d 901 (1987).

We have also reviewed the record with regard to errors raised by defendant in two pro se briefs filed in this case. The errors are either without merit or are answered by the foregoing discussion.

The judgment of the trial court is affirmed.

AFFIRMED.

WHITE, J., concurs.

STATE OF NEBRASKA, APPELLEE, V. TED FOSTER, ALSO KNOWN AS THEODORE JAMES FOSTER, APPELLANT.

433 N.W.2d 167

Filed December 16, 1988. No. 87-810.

1. **Criminal Law: Verdicts: Appeal and Error.** The court will not interfere with a guilty verdict based upon evidence in a criminal case unless that evidence is so lacking in probative force that it can be said that, as a matter of law, the evidence is insufficient to support a verdict beyond a reasonable doubt.
2. **Criminal Law: Directed Verdict.** In a criminal case a court can direct a verdict only when there is a complete failure of evidence to establish an essential element of the crime charged, or evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained.
3. **Criminal Law: Appeal and Error.** Factual findings of a judge who serves as the trier of fact in a criminal case will not be disturbed on appeal unless clearly wrong.
4. **Criminal Law: Lesser-Included Offenses: Directed Verdict.** Where the State fails to demonstrate a prima facie case on the crime charged, but does so on a lesser-included offense, the trial court in its discretion may direct a verdict on the crime charged and submit the evidence to the trier of fact for consideration on the lesser-included offense.

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

E. Dean Hascall, of Hascall, Jungers & Garvey, for appellant.

Robert M. Spire, Attorney General, and LeRoy W. Sievers for appellee.

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

PER CURIAM.

The defendant, Ted Foster, was convicted following a trial to the court in the district court for Sarpy County of attempted first degree assault. He appeals.

On December 5, 1986, at approximately 5 p.m., Johnnie Royce Crim, the victim, was driving south on U.S. Highway 73-75 on his way home from work. As he was approaching the Giles Road intersection, he noticed a brown car, driven by the defendant, traveling parallel with him on his right side. Since Crim was traveling in the right-hand lane, he thought the defendant's car would make a right turn onto Giles Road, but it did not. After going through the intersection, the defendant's car began swerving toward his car in an S-type fashion. The defendant then hit Crim's passenger side window with a tire iron, although the window did not break. The tire iron ricocheted out of the defendant's hand and went flying back behind the car while both vehicles were still moving. The defendant stopped his car, apparently to get the tire iron, and Crim pulled his car to the side of the road to see why the defendant was hitting his car with the tire iron. Crim, looking in his rearview mirror, saw the defendant get out of his car and begin to come toward him. Crim got out of his car and proceeded toward the defendant at a slight jog. When Crim got about 5 feet away from the defendant, the defendant swung his leg out to kick him. Crim then jumped in the air and kicked the defendant in the face. During the fight which ensued, Crim noticed his car was rolling backward. Crim stopped fighting and went to his car, pulled it over, and shifted it into "park." While Crim was parking the car, the defendant went behind his car to retrieve the tire iron. After parking his car, Crim got out and went over to the defendant's car. The defendant approached Crim and said, "Just get back in your car and let me leave." Crim put up his hands to defend himself saying, "Don't hit me with that." The defendant struck Crim in the

back of the head with the tire iron. The blow knocked Crim to the ground and caused bleeding behind his left ear. Crim was taken to the hospital for treatment. His hospital record, introduced into evidence, reflected a bruise on his arm and a laceration to his scalp for which treatment was provided, including cleansing the wound and suturing it. The record also shows that Crim did not suffer any fractures or appreciable soft tissue swelling, and concluded by stating he has a "normal skull." Apparently, from the record, the injury was not severe enough to prevent Crim from working.

The defendant was arrested and charged with one count of first degree assault, in violation of Neb. Rev. Stat. § 28-308 (Reissue 1985). The defendant waived a trial by jury and was tried in the district court for Sarpy County. At the close of the State's case in chief, defendant moved to dismiss the information. The court took the motion under advisement, and the defendant introduced evidence. At the close of all the evidence defendant renewed his motion to dismiss, which the court again took under advisement. After closing argument by both counsel, the court noted that "there's a first degree assault charge against Mr. Foster, and its my impression as a matter of law that that charge fails because I feel that the — that the evidence is insufficient for any reasonable minds to conclude that there was a serious bodily injury." By journal entry and letter to counsel, both dated June 29, 1987, the court found the defendant not guilty of first degree assault, but guilty of attempted first degree assault as a lesser-included offense of such charge. In the letter, the judge stated that he "felt the evidence was totally insufficient to establish a serious bodily injury, a required element of the crime of first degree assault."

The defendant assigns four errors, which can be consolidated into two: The district court erred by (1) overruling defendant's motion to dismiss both at the close of the State's case in chief and at the close of the trial, and (2) considering and convicting the defendant of attempted first degree assault as a lesser-included offense of the charge of first degree assault.

Addressing both of defendant's consolidated errors together, we note that the standard of review is that

"[the court] will not interfere with a guilty verdict based

> upon evidence in a criminal case unless that evidence is so lacking in probative force that it can be said that, as a matter of law, the evidence is insufficient to support a verdict beyond a reasonable doubt."

State v. Lewis, ante p. 224, 227-28, 430 N.W.2d 686, 688 (1988).

> In a criminal case a court can direct a verdict only when there is a complete failure of evidence to establish an essential element of the crime charged, or evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained.

State v. Katzman, 228 Neb. 851, 854, 424 N.W.2d 852, 855 (1988).

A review of the record shows that the court should have directed a verdict on the first degree assault charge at the close of the evidence. The State failed to prove "an essential element of the crime charged," namely, a serious bodily injury. "The factual findings of a judge who serves as the trier of fact in a criminal case will not be disturbed on appeal unless clearly wrong." *State v. Ladehoff*, 228 Neb. 812, 817, 424 N.W.2d 361, 364 (1988). The trial court was correct in its determination that the State failed to prove serious bodily injury. As we stated in *State v. Pribil*, 224 Neb. 28, 30, 395 N.W.2d 543, 546 (1986), a serious bodily injury is an " '*injury* which involves a substantial risk of death, or which involves substantial risk of serious permanent disfigurement, or protracted loss or impairment of the function of any part or organ of the body.' " (Emphasis supplied.) Contrary to the State's assertion, the method of inflicting the injury is of no relevance in this particular case. The evidence showed that the victim suffered only minor injuries despite the fact that he was hit with an object which could have caused a considerable injury.

Having determined that the court should have granted a directed verdict on first degree assault, this court must now address an issue we left open in *State v. Pribil, supra*. *Pribil* was a prosecution for first degree assault in which the jury was also instructed on the lesser-included charge of attempted first degree assault and returned a verdict of guilty of attempted assault. "At the close of the State's case, defendant's counsel

moved the trial court to dismiss the complaint, arguing that the State had offered no evidence to prove the existence of one of the material elements of first degree assault, that being the victim's serious bodily injury." *Id.* at 30, 395 N.W.2d at 546. The court, noting that the first degree assault charge was properly submitted to the jury, then found that the submission of the lesser-included offense was proper.

The unanswered question in *Pribil* is, What happens when the State fails to submit enough evidence to make out a prima facie case for the principal crime charged? The defendant argues that the trial court must direct a verdict as a matter of law, leaving nothing for the trier of fact to consider, including any lesser-included offenses. We disagree.

The Supreme Court of North Dakota has considered this issue. In *State v. Morris*, 331 N.W.2d 48 (N.D. 1983), the defendant moved for a judgment of acquittal at the close of the State's case. We note that North Dakota's motion for acquittal is procedurally the same as our motion for a directed verdict. The court stated,

> When ruling on a motion for judgment of acquittal . . . the trial court must, first, assume the truth of the evidence which supports the State's case, and then, second, decide whether or not a reasonable person would be justified in concluding from this evidence that all the elements of the crime have been established beyond a reasonable doubt.

Id. at 55. The court held:

> A trial court's granting of a motion for judgment of acquittal with respect to the major offense charged does not preclude submission of the case to the jury on the basis of the lesser included offense instruction unless, of course, the granting of the motion for acquittal extends to the lesser included offense.

Id. at 56. We agree, and therefore hold that where the State fails to demonstrate a prima facie case on the crime charged, but does so on a lesser-included offense, the trial court in its discretion may direct a verdict on the crime charged and submit the evidence to the trier of fact for consideration on the lesser-included offense.

The evidence abundantly supports the conviction for the

offense of attempted first degree assault. No other error appearing, we affirm.

AFFIRMED.

WHITE, J., dissenting.

I dissent. The majority holds that where the State fails to demonstrate a prima facie case on the crime charged, but does so on a lesser-included offense, the trial court in its discretion may direct a verdict on the crime charged and submit the evidence to the trier of fact for consideration on the lesser-included offense.

This court's current position on instructing the jury on lesser-included offenses, beginning with the rule's inception in *State v. Pribil*, 224 Neb. 28, 395 N.W.2d 543 (1986), and most recently articulated in *State v. Costanzo*, 227 Neb. 616, 419 N.W.2d 156 (1988), is that a court sua sponte may give a lesser-included offense instruction, but it is not required to do so unless the evidence warrants it and a party requests it. That rule has not, and should not, be applied where the prosecutor has failed to make a prima facie case on the crime charged, the very situation presented in this case.

Under the majority's view the burden on the prosecutor to correctly charge the defendant with the proper crimes and to prove those charges has been shifted to the court. In essence, the prosecutor would not be required to charge the defendant with a crime capable of proof, but so long as some evidence of a lesser charge was presented, the court would be allowed to decide whether a lesser-included offense should be submitted to a jury or to consider itself as a factfinder. In my view the court becomes an active participant in the process instead of a disinterested presiding judge. I submit that this active participation offends notions of fairness and due process.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL ZEMUNSKI, APPELLANT.

433 N.W.2d 170

Filed December 16, 1988. No. 87-950.

1. **Criminal Law: Jury Trials: Waiver.** The right to trial by jury is personal and may be waived by a criminal defendant.
2. _____: _____: _____. A voluntary waiver of the right to trial by jury must be express and intelligent.
3. _____: _____: _____. Once trial by jury is knowledgeably and voluntarily waived, a defendant has no absolute right to withdraw or revoke the waiver and demand a jury trial.
4. **Criminal Law: Jury Trials: Waiver: Appeal and Error.** Whether one accused of a crime who has previously waived the right to trial by jury will be permitted to withdraw the waiver is within the discretion of the trial court; there is no error absent an abuse of discretion.
5. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to sustain a criminal conviction, it is not the province of the Supreme Court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence; such matters are for the finder of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
6. **Criminal Law: Trial: Witnesses.** In a bench trial of a criminal case, the court, as trier of fact, is the sole judge of the credibility of witnesses and the weight to be given their testimony.
7. **Burglary: Evidence: Proof.** Evidence of any act of physical force by which the obstruction to entering is removed, such as opening a closed screen door to enter an apartment, is sufficient to prove a breaking under Neb. Rev. Stat. § 28-507(1) (Reissue 1985).
8. **Burglary: Intent.** Intent sufficient to support a conviction for burglary may be inferred from the facts and circumstances surrounding an illegal entry, and no actual theft or asportation of property is required.

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

Patrick T. O'Brien, of Bauer, Galter & O'Brien, for appellant.

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

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

CAPORALE, J.

Following a bench trial, defendant-appellant, Michael Zemunski, was adjudged guilty of burglary in violation of Neb. Rev. Stat. § 28-507(1) (Reissue 1985). Zemunski's assignments of error combine to urge the view that the district court erred in (1) refusing to allow him to withdraw his counseled waiver of a jury and (2) determining the evidence sufficient to support the charge. We affirm.

This case was called for trial before a jury as scheduled. At that time Zemunski moved for a continuance to the next jury panel on the basis that he had "other matters that complicate the preparation for and readiness for trial at this time." The requested continuance was denied, whereupon Zemunski advised the court personally and through counsel that he wanted to waive a jury. In a colloquy with the court, Zemunski acknowledged he did so freely and voluntarily, acknowledged the presence of a jury prepared to then and there try his case, acknowledged that by waiving a jury he would be waiving the right to a speedy trial, and acknowledged having discussed his rights with his attorney. Zemunski denied being under the influence of alcohol, narcotics, or other "pills," and denied having received any threats or promises from anyone. The district court found on the record "beyond a reasonable doubt [Zemunski] freely, voluntarily, knowingly and intelligently waives his right to a jury trial . . . ." The district court then accepted the waiver of trial by jury and set the matter for a bench trial.

Zemunski's subsequent motions to withdraw his jury waiver were overruled, and the matter proceeded to trial before a judge. The record establishes that on the evening of October 9, 1986, and the early morning following, Lincoln Police Officer Todd Beam, as part of a burglary task force, was working in plain clothes and an unmarked police cruiser. His assignment was to check Lincoln businesses in the area north of O Street and east of 27th Street.

At approximately 1:45 a.m., acting on information overheard on his police radio, Beam went to inspect the Phillips 66 gas station at 70th and Vine Streets. As Beam parked his vehicle in front of the gas station, he looked through the glass

doors of the service bay area and noticed a shadow moving within the building. After parking the vehicle, Beam approached the building on foot and "observed a white male party inside the gas station. He was crouched down walking in the, oh, in the area along which would be the west wall of that service bay area." Beam was approximately 10 feet from the shadowy man at that time. A moment later, the man straightened up and looked Beam in the face, at which time Beam got a "very good" look both at the man's face and at his clothing, as the bay area was well lighted. Beam described the man as having dark brown or black, somewhat curly and longish hair and as wearing a windbreaker, blue jeans, and dark shoes. Moreover, Beam recognized the man as Zemunski, whom Beam had known in high school.

Zemunski immediately turned and ran to the rear of the gas station, triggering its alarm system. Beam thereupon circled around the west side of the building to apprehend Zemunski, but Zemunski beat Beam to the back door and ran out while Beam was yet 15 feet away. Beam then identified himself as a police officer and ordered Zemunski to halt, but Zemunski instead ran to the east, away from Beam.

Beam chased Zemunski across Vine Street, through a church parking lot on the southeast corner of 70th and Vine, and into a residential area beyond, where he lost sight of Zemunski. The entire chase lasted 20 to 30 seconds, in Beam's estimation. Beam radioed to his dispatcher the intruder's last observed position and direction of flight, and several other officers soon joined Beam in the area, searching for Zemunski.

Lincoln Police Officer Leo Nissen was also working the special plainclothes burglary detail on the morning of October 10, 1986. At 1:45 that morning, he heard Beam's radio transmission and joined the search, taking up a position at 73d and Vine Streets, facing southwest. After about 15 minutes, Nissen saw a person enter the Vine Street area from midblock, walking rapidly. Nissen moved his vehicle toward the man, who began running away. Nissen gave chase in his vehicle, apprehending Zemunski near Meadow Lane School.

Ten minutes after Beam lost sight of Zemunski, he learned that one of the searching officers had apprehended a suspect

near Meadow Lane School. Beam went there, observed Zemunski in the back seat of a patrol vehicle, and positively identified him at the scene as the person Beam had seen in the gas station. At this time Zemunski appeared winded, and was breathing heavily and perspiring; he was wearing clothes which matched Beam's earlier description.

Beam then returned to the gas station to help complete the investigation. Outside, Beam observed fresh, moist footprints on the lid of a dumpster near the rear wall of the gas station. The footprints disclosed "a fine pattern of kind of zig-zagged lines," a pattern which matched the soles of the shoes Zemunski was wearing when apprehended.

In the back office area of the gas station, Beam observed a vinyl gun pouch and firearm setting on an office chair and a crowbar and sledge hammer on the floor beside the chair, all of which he took into custody. The back door of the gas station appeared not to have been forced open.

William Masters, the owner of the gas station, was summoned to the station and found the front door locked upon his arrival. He testified that the sledge hammer and revolver found in the back office were normally secured at other gas station locations, and had been so secured when he left the gas station at 6 p.m. the preceding day. Masters also testified that he had never before seen the slightly damaged crowbar found on the floor in the back office; that the back door, normally braced closed with 2-by-4 lumber, was ajar when he arrived; that a skylight above the service bays had been opened; and that a garden hose, not his own, hung from the open skylight to the floor, something neither Masters nor his employee Mark Allensworth had ever seen before. However, the gas station safe was intact, apparently untouched, and no personal property was missing.

Allensworth had closed the gas station at 8 p.m. the preceding evening. When he left the gas station shortly after 8 on October 9, 1986, there was no hammer or crowbar on the floor of the back office and nothing on the chair in the office.

In court, Beam identified Zemunski as the person Beam had seen in the gas station. Zemunski produced as an alibi a woman with whom he was living at the time of trial, who testified that

she had spent the evening of October 9, 1986, until "1, 1:30" of the following morning, with Zemunski at a restaurant in Lincoln, discussing her credit problems. However, on cross-examination, she admitted that she was "not really positive about the date."

Zemunski took the stand in his own defense, testifying that he had met the alibi witness at the restaurant on October 9, 1986, and had remained there with her until the early morning hours of October 10. According to Zemunski, after leaving the restaurant, he drove to the area of 56th and Fremont Streets to the home of his wife's friend, thinking his wife might be visiting there. His wife's vehicle not being there, Zemunski headed home, but encountered car trouble and was forced to park the vehicle off Vine Street on East Eldora Lane, approximately three-quarters of a block from a public telephone located in the Meadow Lane Shopping Center at 70th and Vine Streets, and three blocks from his home. After checking the vehicle and failing to restart it, Zemunski walked to the public telephone in the shopping center and called his wife, but she was not at home at that time.

Zemunski then started back toward his vehicle, at which point the gas station alarm sounded, as the result of which, according to Zemunski, he "was startled. I tripped and fell and then I got up and I ran." Zemunski ran along the route outlined in the testimony of Beam, because that was the shortest route back to his vehicle. Zemunski explained his actions thus:

> Well, with a criminal record, I thought no matter whether it was a false alarm or whatever, I would be to blame for no matter what it was. I had been asked on several different occasions by police officers what I was doing out or where I was the night before on a few different occasions, and I figured, well, I'll just always be branded as someone who has the potential to do things illegally.

Zemunski, who testified he saw no one chasing him, stopped running after a time and stood still, trying to catch his breath. Eventually, a police cruiser came upon the scene, and Zemunski again started running. He was subsequently apprehended as outlined above. Zemunski denied having been inside the subject gas station that evening and stated he was not the man Beam

had seen there.

As to the first assignment of error, it has long been the rule that the right to trial by jury is personal and may be waived by a criminal defendant. *State v. High*, 225 Neb. 690, 407 N.W.2d 776 (1987), citing *State v. Carpenter*, 181 Neb. 639, 150 N.W.2d 129 (1967). A voluntary waiver of this right must be express and intelligent. *State v. Bishop,* 224 Neb. 522, 399 N.W.2d 271 (1987), *cert. denied* 484 U.S. 924, 108 S. Ct. 285, 98 L. Ed. 2d 246 (citing *State v. Miles,* 202 Neb. 126, 274 N.W.2d 153 (1979)).

The record establishes that the district court clearly and carefully informed Zemunski of his rights and of the implications of waiver of trial by jury and that, therefore, Zemunski was knowledgeable at the time of waiver. By his own admission, Zemunski chose to waive his right to jury trial at the time to gain a tactical advantage through delay; thus, he himself established that his waiver was voluntary. Zemunski's waiver was properly received by the district court.

Later, the tactical objective of delaying trial having been achieved, Zemunski sought to withdraw his waiver. Once trial by jury is knowledgeably and voluntarily waived, a defendant has no absolute right to withdraw or revoke the waiver and demand a jury trial. *State v. Kaba*, 217 Neb. 81, 349 N.W.2d 627 (1984). Whether one accused of a crime who has previously waived the right to trial by jury will be permitted to withdraw the waiver is within the discretion of the trial court; there is no error absent an abuse of discretion. *State v. Kaba, supra.*

No abuse of discretion being evident, Zemunski's assignment of error in this connection is without merit.

The second assignment is controlled by the rule that in determining the sufficiency of the evidence to sustain a criminal conviction, it is not the province of the Supreme Court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence; such matters are for the finder of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Trevino, ante* p. 494, 432 N.W.2d 503 (1988); *State v. Jones, ante* p. 528, 432 N.W.2d 523 (1988); *State v. Bustos, ante* p.

524, 432 N.W.2d 241 (1988); *State v. Swift, ante* p. 373, 431 N.W.2d 643 (1988); *State v. Quiring, ante* p. 535, 432 N.W.2d 243 (1988); *State v. Tatara, ante* p. 279, 430 N.W.2d 692 (1988). Moreover, in a bench trial of a criminal case, the court, as trier of fact, is the sole judge of the credibility of witnesses and the weight to be given their testimony. *State v. Quiring, supra*; *State v. Tatara, supra*.

Section 28-507(1) provides as follows: "A person commits burglary if such person willfully, maliciously, and forcibly breaks and enters any real estate or any improvements erected thereon with intent to commit any felony or with intent to steal property of any value." Evidence of any act of physical force by which the obstruction to entering is removed, such as opening a closed screen door to enter an apartment, is sufficient to prove a breaking under this statute. *State v. Sutton*, 220 Neb. 128, 368 N.W.2d 492 (1985). Intent sufficient to support a conviction for burglary may be inferred from the facts and circumstances surrounding an illegal entry, and no actual theft or asportation of property is required. *State v. Vaughn*, 225 Neb. 38, 402 N.W.2d 300 (1987).

Clearly, the evidence adduced at trial amply supports Zemunski's conviction. Zemunski was observed and recognized within the gas station by Beam. An inspection of the gas station after Zemunski's capture disclosed entry through the previously closed skylight, a search of the back office for valuables which resulted in discovery of the owner's pistol, and a hasty exit through the back door, triggering a burglar alarm. It was for the district court to determine the weight and credibility to be accorded the witnesses, including Zemunski's alibi witness.

Zemunski's final assignment of error is also without merit.

AFFIRMED.

FAHRNBRUCH, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL J. MASUR, APPELLANT.

432 N.W.2d 815

Filed December 16, 1988. No. 87-1005.

1. **Convictions: Appeal and Error.** In determining the sufficiency of evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact, and a finding of guilty made by the trier of fact must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
2. **Minors: Alcoholic Liquors: Circumstantial Evidence: Proof.** Knowledge and consciousness of possession are essential elements of the crime of possession of alcoholic liquor by a minor. The fact of possession may be proved by circumstantial evidence.
3. **Controlled Substances: Alcoholic Liquors: Evidence: Convictions.** Ordinarily, when liquor, narcotics, or contraband materials are found on a defendant's premises or in an automobile possessed and operated by him, the evidence of unlawful possession is deemed sufficient to sustain a conviction, in the absence of any other reasonable explanation for its presence.
4. **Evidence: Appeal and Error.** The admission or exclusion of evidence is a matter within the sound discretion of the trial court and will be upheld absent an abuse of discretion.
5. **Probation and Parole: Sentences: Appeal and Error.** An order denying probation and a sentence imposed within the statutorily prescribed limits will not be disturbed on appeal unless there has been an abuse of discretion.

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

Barbara Thielen, of Taylor, Fabian, Thielen & Thielen, for appellant.

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

BOSLAUGH, SHANAHAN, and GRANT, JJ., and ENDACOTT and QUIST, D. JJ.

BOSLAUGH, J.

After a trial to the court, the defendant, Michael J. Masur, was found guilty of possession of alcoholic liquor by a minor. He was fined $375 and sentenced to 45 days in the county jail. Upon appeal to the district court, the judgment was affirmed.

The defendant has appealed to this court and contends that

the evidence was not sufficient to sustain the finding of guilty, that the trial court erred in receiving testimony concerning the defendant's age and the registration of his automobile, and that the sentence imposed was excessive.

The record shows that a little after 10 p.m. on May 21, 1987, Thomas E. Sherman, the chief of police of Tecumseh, Nebraska, found the defendant sitting in the driver's seat of his automobile, which was parked in an alley. The door on the right side of the automobile was open, and Vance L. Whitwer was standing outside the automobile. When Sherman approached the defendant's vehicle, he saw a 12-pack box of Bud Light beer on the floor behind the front passenger's seat. The defendant's automobile is a midsize, two-door, brown Chevrolet. The front seat is a bench seat, but the back of the seat is divided and folds forward. The box contained three unopened cans of Bud Light beer. A third person who had been a passenger in the defendant's vehicle was also at the scene.

Sherman testified that he determined the defendant's birth date, June 6, 1968, from a file on the defendant kept in Sherman's office.

Michael L. McDonald, a police officer, was called to the scene of the arrest. McDonald testified that he was familiar with the defendant and the defendant's operation of his vehicle in Tecumseh. In connection with an offense subsequent to May 21, 1987, McDonald verified from the registration records that the defendant's automobile was registered in the name of the defendant as owner. McDonald also testified that the defendant stated that the beer did not belong to him, and one of the other boys stated that the beer did not belong to the defendant.

In determining the sufficiency of evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact, and a finding of guilty made by the trier of fact must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. LynCook*, 227 Neb. 719, 419 N.W.2d 686 (1988).

Knowledge and consciousness of possession are essential

elements of the crime of possession of alcoholic liquor by a minor. *State v. Reeder*, 183 Neb. 425, 160 N.W.2d 753 (1968). The fact of possession may be proved by circumstantial evidence. *State v. Laue*, 225 Neb. 57, 402 N.W.2d 313 (1987).

> Ordinarily, when liquor, narcotics, or contraband materials are found on a defendant's premises or in an automobile possessed and operated by him, the evidence of unlawful possession is deemed sufficient to sustain a conviction, in the absence of any other reasonable explanation for its presence. *State v. Britt*, 200 Neb. 601, 264 N.W.2d 670 (1978); *State v. Torrence*, 192 Neb. 720, 224 N.W.2d 177 (1974); *State v. Rys*, 186 Neb. 341, 183 N.W.2d 253 (1971).

State v. Harris, 218 Neb. 75, 77, 352 N.W.2d 581, 582 (1984).

In *State v. Embrey*, 188 Neb. 649, 198 N.W.2d 322 (1972), four minors were convicted of possession of alcoholic liquor. At the time the automobile which was being operated by Richard L. Grovijohn was stopped, the defendants Embrey and Schlecht were passengers in the automobile. In affirming the convictions we said at 651-52, 198 N.W.2d at 324:

> The defendants contend that the evidence is insufficient to establish knowledge or consciousness of actual or constructive possession of the beer except as to Darrell Bunn, who bought it, and Richard Grovijohn, the driver in control of the car. We cannot agree. The evidence established that all four of the defendants had gone to a party together earlier in the evening. The car occupied by the defendants was parked in an alley behind a bar and Officer Petz watched while defendant Bunn got in the car carrying the beer. When the defendants came out of the alley, they attempted to avoid the patrol cruiser. The Grovijohn car was a two-door car and the beer was on the floor of the back seat when the officers removed it a few minutes later. At the time the officers stopped the car on the highway and during the proceedings there, one or both of the officers testified that they smelled alcohol on the breath of each of the defendants, although the beer in the car had not been opened. While the defendants' testimony

tended to disavow knowledge of actual or constructive possession, nevertheless the evidence was sufficient to establish knowledge and consciousness of possession, and to sustain the verdict of guilty. See State v. Reeder, 183 Neb. 425, 160 N.W.2d 753.

The evidence in this case was largely uncontroverted. The defendant offered no evidence other than Whitwer's plea of guilty to possession of alcoholic liquor by a minor on the date in question.

In this case the beer in question was in a box clearly labeled, in large letters, "BUD LIGHT." The box was on the floor of the rear seat of the defendant's automobile, well within his reach from the driver's seat. In that respect the evidence is somewhat similar to the evidence in *State v. Reeder, supra.* We find the evidence was sufficient to support the finding of guilty.

The testimony of the chief of police as to the defendant's age was based upon information that the witness had obtained on prior occasions and recorded in a file which he maintained in his office. He further testified that this date appeared on the defendant's driver's license.

"The admission or exclusion of evidence is a matter within the sound discretion of the trial court and will be upheld absent an abuse of discretion." *State v. Ryan*, 226 Neb. 59, 90, 409 N.W.2d 579, 598 (1987). We find no abuse of discretion in regard to the receipt of this evidence.

Unlawful possession of alcoholic liquor by a minor is a Class III misdemeanor, with a maximum penalty of 3 months' imprisonment and a fine of $500. The defendant has a history of prior offenses, including convictions for the same offense on December 5, 1985, and February 26, 1987. In view of the circumstances, the sentence imposed was not an abuse of discretion.

"[A]n order denying probation and a sentence imposed within the statutorily prescribed limits will not be disturbed on appeal unless there has been an abuse of discretion . . . ." *State v. Evans*, 215 Neb. 433, 444-45, 338 N.W.2d 788, 795 (1983).

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT TEMPLE, APPELLANT.
432 N.W.2d 818

Filed December 16, 1988. No. 88-078.

1. **Sentences.** A sentence validly imposed takes effect from the time that it is imposed, and a subsequent and different sentence is a nullity.
2. **Criminal Law: Sentences.** The pronouncement of the sentence in open court in the presence of the defendant is an important part of the sentencing procedure in most criminal cases.
3. _____: _____. In imposing sentence the court should state with care the precise terms of the sentence which is imposed.
4. **Judgments.** Rendition of a judgment includes the announcement by the court of the judgment.
5. **Records: Presumptions: Appeal and Error.** Ordinarily, the record of a lower court imparts absolute verity, but where there is a conflict between the record of a judgment and the verbatim record of the proceedings in open court, the latter prevails.
6. _____: _____: _____. While a recital in a journal entry appearing in the transcript is presumptively true, an affirmative showing in the bill of exceptions that it is not true prevails over the presumption.

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

Clay B. Statmore for appellant.

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

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

BOSLAUGH, J.

Upon a plea of guilty to third degree assault, the defendant, Robert Temple, was fined $500 and costs and sentenced to 90 days in the county jail. Upon appeal to the district court, the judgment was affirmed.

The defendant has now appealed to this court. His assignment of error relates to the proceedings at the arraignment in the county court on August 20, 1987. The bill of exceptions of that proceeding shows the following took place:

> MR. STATMORE: Please enter the appearance of Clay Statmore for the defendant. Good morning. At this time the defendant, wishes to change his plea to Count 1 from

not guilty to guilty. And it's our understanding that the State would move to dismiss Count 2.

THE COURT: Is that correct, John?

MR. COLBORN: That is correct, Your Honor.

THE COURT: May we have the report on Count 1?

MR. COLBORN: State's evidence would be that July 6, 1987, Officer Snoad of the Lincoln Police Department made contact with a Pearl Temple, 7001 Hook Drive, here in Lincoln, Lancaster County, Nebraska. Pearl Temple reported that she'd gotten into an argument with her husband, the defendant. Stated that the defendant began choking her with his hands around her neck. She tried to get him to stop, was unable to do this. Stated that an Alvin Temple, who is the defendant's brother, then pulled the defendant off of her. The defendant was contacted and cited. All these events occurring in Lancaster County, Nebraska. There were marks on her neck that were — photographs were taken of.

THE COURT: Anything else?

MR. STATMORE: Your Honor, we're seeking probation in this matter. It's my understanding the State has no objection.

MR. COLBORN: Yeah, I have no objection to that, Your Honor, that a PSI be ordered. I think the victim —

THE COURT: 18th of September okay?

MR. STATMORE: 10th of September?

THE COURT: 18th.

MR. STATMORE: 18th of September. That'll be fine.

MR. COLBORN: That'd be fine, Your Honor. The victim has indicated to me that she feels the defendant needs counseling treatment. I pass that on to the Court.

THE COURT: Okay. You can go with the bailiff into the clerk's office. Order a presentence investigation. Find the defendant guilty Count 1. Count 2 is dismissed.

The "case action summary" for that date, apparently a record of notes made by the judge of the county court as to what took place during the proceeding, and which appears on page 5 of the supplemental transcript, shows the following:

CASE ACTION SUMMARY Page ____of____
Criminal and Traffic
State vs. Temple, Robert Case No. 87NO7-8350

Date AUG 20 1987 atty statement.
2
Dismissed on motion of the County Attorney
_____(Date)
1
Defendant changes plea to guilty. The Court hereby finds a factual basis for the entry of the plea, accepts the plea of guilty and enters judgment of conviction finding the defendant guilty as charged. Defendant fined $ 1- plus costs.

/s/ Neal Dusenberry
Judge

The defendant contends that the notation on the case action summary was the imposition of a sentence and that the county court was without jurisdiction to impose a different and more severe sentence upon the defendant. The defendant relies upon the rule that a sentence validly imposed takes effect from the time that it is imposed and that a subsequent and different sentence is a nullity. *State v. Christiansen*, 217 Neb. 740, 351 N.W.2d 67 (1984).

The difficulty with the defendant's contention is that the record in this case shows that no sentence was imposed on the defendant at the hearing on August 20, 1987. After the sentencing hearing on September 18, 1987, the defendant appealed to the district court. On October 19, 1987, the district court remanded the case to the county court for a further hearing "to determine if crossed out sentence on page 5 of the transcript was in fact given."

The further hearing was held in the county court on December 18, 1987. The bill of exceptions for that hearing contains the following statements on the record by Judge Dusenberry explaining what happened in regard to the notation made on the case action summary on August 20, 1987:

> And going back on the page 5 that they're referring to was on August 20th, 1987 where Mr. Statmore present, count 2 dismissed on the motion of the county attorney. Then I

made a finding where a straight sentence stamp— and I think about that time, Mr. Statmore, you asked for a presentence investigation so I put two slashes through that and ordered a presentence investigation. So the stamp— first stamp that's crossed out is in error. Do you agree on that?

. . . .

. . . On page 5, there is an entry by me on the 20th of August, "Count 2 dismissed by the County Attorney" and it's dated and stamped— or put a stamp on there which is a straight sentence, and the defendant asked for— through his attorney asked for a presentence investigation and I crossed it off, but didn't put in there, "in error". . . .

. . . .

. . . Okay, for the record, this is a case that I handled initially back on the 20th of September [sic] and for your information, Mr. Statmore. Then on—and you can ask Ms. Thorson after we get out of here—on about 95 percent of the assault cases, there is a straight sentence, and it has been my practice since 1970—first of September to be exact—when an individual pleads guilty to a misdemeanor, at that time, I—I'm eliminating suspended license and drunk driving—at that time, I place a pleads guilty stamp on it so that I can go ahead and sign it while they're getting in the preliminary stuff and normally the first part of the report is preliminary which is really not—doesn't get to the crucial part, and that way we can expedite processing cases through this court so the stamp is placed on as was done on this case on the 20th of September [sic], and most attorneys that are going to ask for a presentence investigation do before they plead guilty and ask for a presentence investigation. That avoids the possibility of getting a stamp placed on here and alerts the Court that the defendant is interested in probation. And so that's the reason it was done on this particular case. It was placed—Count 1, I marked the Count 1, the fine I had not determined at the time and it was not announced, so it's not a sentence until it's announced. The form had been signed, it's true, but the sentence hadn't been pronounced,

> and using the same form, I went ahead and filled it out and put $500 plus costs is on the stamp, plus 90 days in the jail, and still could have used the form, so there hasn't been any change in the thing so I'll affirm that it was in error and it'll go back up to the District Court. You may leave.
>
> MR. STATMORE: Is the court saying that—if I might inquire that the original entry on August 20th was signed before the factual basis was given, or while it was given?
>
> THE COURT: I always do that when it's on—what I just explained on the record. When the guy—when the individual in this case here plead [sic] guilty to Count 1, Count 2's dismissed, I just stamp it, "2's dismissed, 1 is—"put the stamp on it and 1—1 down there and sign it while—with the preliminary part, but they normally don't get to the crucial part of the officer's report until after I've added it. If I started getting into that, then I quit writing, but normally that's what's happened. That's what happened in this particular case here.

The notation on the case action summary for December 18, 1987, contains the following: "Stamp on 20 Aug 87 was entered in error. Defendant pled guilty, at which time stamp was placed on file after all evidence was presented. Defendants attorney asked for pre Sentence investigation, at which time court crossed off straight sentence stamp and used the presentence stamp."

The pronouncement of the sentence in open court in the presence of the defendant is an important part of the sentencing procedure in most criminal cases. In imposing sentence, the court should state with care the precise terms of the sentence which is imposed. It has long been the rule in this state that rendition of a judgment includes the announcement by the court of the judgment. See, Neb. Rev. Stat. § 25-1301(2) (Reissue 1985); *Ricketts v. Continental Nat. Bank*, 169 Neb. 809, 101 N.W.2d 153 (1960); *State ex rel. Kaipus v. Board of Trustees of S. & I. Dist. No. 113*, 200 Neb. 525, 264 N.W.2d 422 (1978).

Although, ordinarily, the record of a lower court imparts absolute verity, where there is a conflict between the record of a judgment and the verbatim record of the proceedings in open

court, the latter prevails. In *State v. Painter*, 223 Neb. 808, 811, 394 N.W.2d 292, 295 (1986), we said:

> The evidence disclosed in the bill of exceptions therefore corrects whatever error exists in the journal entry. In the case of *State v. Schroder*, 218 Neb. 860, 867, 359 N.W.2d 799, 805 (1984), we said: " '[W]hile a recital in a journal entry appearing in the transcript is presumptively true, an affirmative showing in the bill of exceptions that it is not true prevails over the presumption.' " See, also, *Waite v. State*, 169 Neb. 113, 98 N.W.2d 688 (1959).

See, also, *Kehl v. Omaha Nat. Bank*, 126 Neb. 695, 254 N.W. 397 (1934).

It is clear from the record in this case that Judge Dusenberry started to make a written record on August 20, 1987, of something that never happened. No sentence was ever imposed on the defendant on that date. The notation to the contrary was in error and should have been corrected, which was what Judge Dusenberry did.

The judgment of the district court is correct, and it is affirmed.

AFFIRMED.

FAHRNBRUCH, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. JOSEPH C. LAMERE, APPELLANT.

432 N.W.2d 822

Filed December 16, 1988. No. 88-123.

1. **Motions to Suppress: Appeal and Error.** Upon appeal, this court will uphold the trial court's findings of fact on a motion to suppress unless those findings are clearly wrong.
2. **Criminal Law: Police Officers and Sheriffs: Investigative Stops: Probable Cause.** A police officer may, in appropriate circumstances and in an appropriate manner, approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest. However, an investigatory stop must be justified by objective manifestation, based upon the

totality of the circumstances, that the person stopped has been, is, or is about to be engaged in criminal activity.

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

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

Robert M. Spire, Attorney General, Dale A. Comer, and David Edward Cygan for appellee.

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

HASTINGS, C.J.

Defendant has appealed from his conviction of operating a motor vehicle while his driver's license was suspended. He waived trial by jury, and by agreement the case was submitted to the court on stipulated evidence from a pretrial suppression hearing. Assigned as error is the overruling of defendant's motion to suppress and exclude evidence. We affirm.

Upon appeal, this court will uphold the trial court's findings of fact on a motion to suppress unless those findings are clearly wrong. *State v. Beerbohm*, 229 Neb. 439, 427 N.W.2d 75 (1988).

On October 18, 1987, Officer Jacobson of the Omaha Police Department, while patrolling in the area of 31st and Farnam Streets in Omaha, observed the defendant driving a 1977 light blue Chevrolet station wagon. The officer's attention was first attracted to this vehicle because the five or six occupants "made a very noticeable glance" his way; they were all "looking directly at" him. At about the same time, the officer observed that the vehicle was traveling at a noticeably slower speed than the 30-miles-per-hour speed limit. The officer then proceeded to follow the defendant's vehicle for several blocks, during which time it was necessary for other traffic to pass them. During this time, the officer made the further observation that the license plates did not seem to match the vehicle, that is, the automobile was dirty, whereas the plates looked brand new, as if they had just come out of the package.

Becoming suspicious, Officer Jacobson ran a check on the

license plates through the police information channel. He was put on standby for a minute, as the radio operator was busy. In the meantime, as the station wagon approached the intersection of 31st and Leavenworth Streets, the traffic light changed to yellow. Instead of slowing down to stop, the defendant's vehicle speeded up, leaving the officer facing a red light. Officer Jacobson then activated his top red lights, went through the intersection, and stopped the defendant's vehicle. Just as the officer started to exit his own vehicle, the check came back on his license plate inquiry, and he discovered that the license plates belonged to a 1972 green Chevrolet Caprice, not the same vehicle as that which the defendant was driving. Officer Jacobson then left his cruiser, approached the defendant, and asked for his driver's license and vehicle registration. Upon obtaining defendant's name, the officer returned to his own vehicle, did a data check, and found that defendant's license had been suspended for his lifetime. The defendant was then arrested for, among other things, operating a vehicle while his license was suspended.

Defendant's motion for suppression of evidence gained as a result of this stop and arrest was heard on the basis of the above-stated testimony and was overruled.

This court has determined that a police officer may, in appropriate circumstances and in an appropriate manner, approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest. *State v. Beerbohm, supra.* However, an investigatory stop must be justified by objective manifestation, based upon the totality of the circumstances, that the person stopped has been, is, or is about to be engaged in criminal activity. *State v. Dail*, 228 Neb. 653, 424 N.W.2d 99 (1988); *State v. Ege*, 227 Neb. 824, 420 N.W.2d 305 (1988). See, also, *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

Without regard to the "glances" or the "mismatched" license plates, the fact of the matter is that the defendant violated the law in the presence of the officer. Neb. Rev. Stat. § 39-614(2)(a) (Reissue 1984) provides that vehicular traffic which faces a yellow signal upon approaching an intersection "shall stop

before entering the nearest crosswalk at the intersection, but if such stop cannot be made in safety a vehicle may be driven *cautiously* through the intersection . . . ." (Emphasis supplied.) Defendant obviously did not stop, and speeding up to cross an intersection on a yellow light is hardly driving in a cautious manner.

The district court was correct in overruling the motion to suppress, and its judgment of conviction is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CYNTHIA A. WIGGINS, APPELLANT.

432 N.W.2d 824

Filed December 16, 1988. No. 88-147.

1. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact. The verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
2. **Convictions: Circumstantial Evidence.** Circumstantial evidence is sufficient to support a conviction if such evidence and reasonable inferences that may be drawn from the evidence establish the defendant's guilt beyond a reasonable doubt.

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

Elizabeth Stuht Borchers, of Marks & Clare, for appellant.

Robert M. Spire, Attorney General, Gary P. Bucchino, Omaha City Prosecutor, and J. Michael Tesar for appellee.

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

FAHRNBRUCH, J.

Cynthia A. Wiggins appeals her shoplifting conviction and the imposition of a $50 fine. We affirm the conviction and

sentence.

The defendant was found guilty by the Douglas County Court of violating Neb. Rev. Stat. § 28-511.01(1)(a) (Reissue 1985), which prohibits shoplifting. On appeal, the conviction and sentence were affirmed by the Douglas County District Court. Wiggins then appealed to this court, claiming the evidence is insufficient to convict her.

In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact. The verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Tatara, ante* p. 279, 430 N.W.2d 692 (1988); *State v. Zellner*, 228 Neb. 272, 422 N.W.2d 96 (1988); *State v. Babcock*, 227 Neb. 649, 419 N.W.2d 527 (1988).

Taking the view most favorable to the State, the record reflects that on July 23, 1987, Wiggins entered a Walgreens drugstore in Omaha, Nebraska. She purchased a prescription and paid for that at the prescription counter. Before leaving the store, Wiggins selected some wrapping paper and subsequently proceeded to the cash register. As Wiggins was standing by a rack of film about 20 feet from the register, a Walgreens cashier saw a box of Kodak film sliding from the wrapping paper into Wiggins' purse. The flat package of wrapping paper was folded into a funnel shape. The cashier could not tell precisely what kind of Kodak film she saw, but thought it was about a five-pack of film. Wiggins paid for the wrapping paper and left the store.

The cashier called an assistant store manager and alerted him as to what she had seen. The assistant manager, wearing a Walgreens blue uniform, followed Wiggins out the door. He called to Wiggins, who was about 15 to 20 yards ahead of him, and asked her if he could speak with her for a minute. Wiggins ran to her car, put it in reverse, backed out at a high rate of speed, and left the parking lot.

The assistant manager noted Wiggins' license plate number and called the police. He and a police officer drove to Wiggins'

home to identify the car, but the car was not there. As the police officer and assistant manager were returning to the Walgreens store, Wiggins passed them going in the opposite direction. The officer turned around and followed her, with his lights activated. Wiggins did not stop until she drove onto the front yard grass at her residence. The officer obtained Wiggins' identification and told her that her car had been involved in a shoplifting. The officer did not search her or her purse.

Wiggins testified she did purchase a prescription and wrapping paper at Walgreens. She testified that she had a box of exposed Kodak disc film in her purse which she intended to have developed. The defendant testified that she never took the box of film from her purse. She said that the cashier must have seen the film in her purse. Whether the cashier saw the film sliding down the wrapping paper into Wiggins' purse or whether the clerk saw it in Wiggins' purse was for the trier of fact. The county judge, as the trier of fact, obviously accepted the cashier's version of the facts rather than the defendant's version.

A four-pack Kodak box containing six exposed film discs Wiggins introduced into evidence has a Walgreens price sticker affixed to it. It was that box of undeveloped film, Wiggins said, she had in her purse. Wiggins said she did not leave the film for processing because negatives from other films developed by Walgreens had not yet been returned to her. She said she did not want to take a chance of losing all of her negatives. The defendant testified she did not remember the other negatives until she was in the Walgreens store.

Wiggins claimed she neither heard nor saw anyone follow her out of the Walgreens store. She further testified that she walked to her car and then left the parking lot in a normal fashion.

We have held that circumstantial evidence is sufficient to support a conviction if such evidence and reasonable inferences that may be drawn from the evidence establish the defendant's guilt beyond a reasonable doubt. *State v. Zellner*, 228 Neb. 272, 422 N.W.2d 96 (1988); *State v. Nesbitt*, 226 Neb. 32, 409 N.W.2d 314 (1987); *State v. Hunt*, 224 Neb. 594, 399 N.W.2d 806 (1987).

When viewed most favorably to the State, the direct and

circumstantial evidence and all reasonable inferences which may be drawn therefrom are sufficient to find beyond a reasonable doubt that Wiggins shoplifted.

Wiggins' conviction and sentence are affirmed.

AFFIRMED.

IN RE INTEREST OF S.L.P., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. B.P. AND L.P., APPELLANTS.

432 N.W.2d 826

Filed December 16, 1988. No. 88-320.

1. **Parental Rights: Appeal and Error.** In an appeal from a judgment terminating parental rights, the Supreme Court tries factual questions de novo on the record, and is thus required to reach a conclusion independent of the trial court. However, where the evidence is in conflict, this court may consider and give weight to the trial court's observation of the witnesses and acceptance of one version of the facts rather than another.
2. **Parental Rights.** A court need not await certain disaster to come into fruition before taking protective steps in the interest of a minor child.
3. _____. In termination of parental rights cases, the primary consideration is the best interests of the juvenile.
4. **Constitutional Law: Equal Protection.** Equal protection guarantees that similar persons will be dealt with similarly by the government.
5. _____: _____. When examining a claim of deprivation of equal protection, the first inquiry is whether the statute discriminates among those who are similarly situated.
6. **Constitutional Law: Parental Rights: Mental Health.** The parental rights of a parent who is unable to discharge parental duties because of a mental illness or deficiency may be terminated under Neb. Rev. Stat. § 43-292(5) (Reissue 1984), while the parental rights of a parent who is unable to discharge parental duties because of a physical illness or deficiency may be terminated under § 43-292(2) or (6); thus, the statutory scheme for termination of parental rights does not unconstitutionally differentiate between a parent with a mental deficiency and one with a physical deficiency.

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

Tom Dawson for appellant L.P.

Michael J. Elsken for appellant B.P.

James Elworth, Deputy Lancaster County Attorney, for appellee.

Bruce A. Carpenter, guardian ad litem for S.L.P.

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

HASTINGS, C.J.

The parents of S.L.P., a minor child, have appealed from the adjudication of the juvenile court terminating their parental rights. The father assigns as error that the State failed to prove by clear and convincing evidence that his mental illness will continue for a prolonged, indeterminate time so as to justify a finding that it is in the best interests of the minor that his parental rights be terminated. The mother raises the same complaint, plus alleging that Neb. Rev. Stat. § 43-292 (Reissue 1984) unconstitutionally deprives her of equal protection of the law. Each parent is represented by a separate attorney and each has a separate guardian ad litem, as does the minor child.

In an appeal from a judgment terminating parental rights, the Supreme Court tries factual questions de novo on the record, and is thus required to reach a conclusion independent of the trial court. However, where the evidence is in conflict, this court may consider and give weight to the trial court's observation of the witnesses and acceptance of one version of the facts rather than another. *In re Interest of D.C.*, 229 Neb. 359, 426 N.W.2d 541 (1988).

The father's appeal may nearly be rejected out of hand. In January of 1986, 8 months before the birth of the minor child, he severely assaulted his wife, the mother, causing her a severe fracture-dislocation of the left wrist, left elbow, and left hip; cuts underneath her chin; and a very large bruise on her left underarm. It was necessary that she undergo surgery to replace her hip and to insert a partial prosthetic elbow. She remains permanently disabled.

The father has a long history of violent behavior and mental illness. He has been diagnosed as schizophrenic, paranoid type. He has been confined almost continuously in one of the state regional centers since 1975. One of his physicians stated that he

is probably the most difficult patient he had seen in years, and has "some of the most severe and intractable delusions" that he has ever seen. He said that the father is "extremely dangerous to himself" and is "a constant danger to other people." The father is presently confined in the most restrictive, most secure ward in the regional center. His physician stated that under the very best of circumstances, it would be a *minimum* of 5 to 10 years before he would be ready to even leave the security unit for a less restrictive area of the regional center.

Section 43-292(5) provides that parental rights may be terminated when "[t]he parents are unable to discharge parental responsibilities because of mental illness or mental deficiency and there are reasonable grounds to believe that such condition will continue for a prolonged indeterminate period." The father does not contest the allegation that he is presently unable to discharge his parental responsibilities because of mental illness. His argument is that the State did not prove the second element, that is, that his mental illness will continue for a prolonged, indeterminate period.

The only evidence concerning the likelihood of the father's recovery, or even *improvement*, was that his prognosis was "extremely poor" and that it would be a minimum of 5 to 10 years before he was even transferred to a less restrictive ward within the regional center. The evidence fully supports the finding made by the juvenile court.

As to the mother, the record also confirms the finding made by the trial court. She has been diagnosed as a paranoid schizophrenic. She has been mentally ill since at least 1978, when she was hospitalized at the Norfolk Regional Center. While her psychiatrist now entertains some doubts about the paranoid schizophrenic label, he nevertheless firmly believes that she has a mental illness, namely, a psychotic disorder. Her other doctors agree that she is a schizophrenic, paranoid type.

The mother occasionally suffers from delusions and was, at least in 1987, "clearly nonfunctional." She has a history of crises, suicide threats, poor judgment, social skills difficulties, and chaotic and unsatisfactory relationships. Her illness is a "major psychiatric disorder" which is "chronic" and "long term."

After being taken to the hospital, she was delusional, hearing voices, and having hallucinations, and had "markedly impaired reality testing." The mother was then transferred to the Madonna care facility. Seven months later she left that facility, but returned a short time later, and then in the latter part of October 1986, she again left against medical advice.

Some 3 months later, the mother was taken to the Community Mental Health Center because she was unable to care for herself. Following surgery on her hip, she was transferred to the Lincoln Regional Center. At that time she was extremely suspicious, had a distinct body odor, was disheveled, had neglected herself, and felt that people were taking money from her. She had gone off her medication, her thinking was unclear, she was "grossly disorganized," her sentences did not make sense, and her emotions were inappropriate.

After 4 days of "stormy" treatment, she signed herself out, against medical advice. She collapsed in the street, and was brought back to the hospital within 2 hours. She then was admitted to Milder Manor, from which she attempted to run away after 3 or 4 weeks. Civil commitment proceedings were then initiated because she was jeopardizing her health, and she was placed in the Lincoln Regional Center, where she remained until April of 1987.

The mother then lived in her own apartment from April until November, when she was transported back to the regional center. At the time she was recommitted, she had been evicted from her apartment, but had refused to leave. She was extremely angry, loud, and hostile. She was also somewhat out of touch with reality.

For the most part, the mother has been unwilling to cooperate with attempts to treat her mental and physical problems. Her caseworker stated that she had thrown away her medications and refused to take them most of the time. She refused to keep her appointments with her physician or psychiatrist. She refused to accept help that was offered to her, and although her apartment during the time she lived there was unclean, she would not allow "chore services" to assist her.

Additionally, she was unwilling to complete court-ordered parenting classes and parenting assessment. The caseworker

testified that she "would have much, much trouble living independently and would need an enormous amount of support on an ongoing basis," although *if* she were to maintain her medication program, she could possibly, with assistance, live on her own. Her physicians were not that optimistic. One testified that she refuses to properly take her medications, and without them, she "regularly and demonstrably has decompensated to the point where she cannot take care of herself." Even if she were completely cooperative, took her medicines faithfully, kept her appointments, etc., none of which she had ever done, her psychiatrist said her functioning would be "marginal," and she could not function without substantial support from outside agencies. Even with total cooperation by the mother, that doctor stated that he would "have difficulty believing that she'll ever get to a level of being able to function on her own."

The mother's psychiatrist from the regional center stated that because of her mental illness, the mother is not able to care for small children. Even with complete cooperation, gradual progression through the steps with increasing levels of autonomy, looking after things for herself without a lot of external help, and close ties with supportive, helping persons, etc., it is "*possible*" that she would someday be able to care for a child. However, he said that would take a "substantial period of time," probably "years." At least six medical-type witnesses indicated that this was a hopeless case.

The evidence is abundant that the mother is now, and will be indefinitely, unable to care for a child. Furthermore, the evidence is clear that this inability is the result of her mental illness, notwithstanding that some of her disability is physical in nature. This all has been established by clear and convincing evidence.

It is true that, fortunately, neither the father nor the mother has had an opportunity to have this child in his or her care. Therefore, there is no evidence of any harm having as yet befallen the minor. However, a 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, 375 N.W.2d 616 (1985). In termination of

parental rights cases, the primary consideration is the best interests of the juvenile. *In re Interest of J.S., S.C., and L.S.*, 224 Neb. 234, 397 N.W.2d 621 (1986).

The mother's final argument is that the statutory scheme under which her parental rights were terminated violates her constitutionally guaranteed right to equal protection. She contends that since the State has not shown a compelling, nor even a legitimate, reason for differentiating between a parent with a mental deficiency and one with a physical deficiency, the statutes must be struck down.

The equal protection clause provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. In explaining the meaning of the clause, this court has stated, "Equal protection guarantees that similar persons will be dealt with similarly by the government." *State v. Michalski*, 221 Neb. 380, 384, 377 N.W.2d 510, 514 (1985). When examining a claim of deprivation of equal protection, then, the first inquiry is whether the statute discriminates among those who are similarly situated. See, e.g., *In re Interest of M.B., R.P., and J.P.*, 222 Neb. 757, 386 N.W.2d 877 (1986).

It seems to be the mother's claim that because § 43-292(5) provides for termination of parental rights when the parents are unable to discharge parental responsibilities because of mental illness, and there is no corresponding specific provision whereby those rights may be terminated because of physical illness, there is disparate treatment. However, under the statutory scheme, there is no prohibition to terminating those rights because of physical illness. As a matter of fact, § 43-292(6) provides that parental rights may be terminated following a determination that the juvenile is as described in Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1984) (a juvenile "who is homeless or destitute, or without proper support through no fault of his or her parent . . ."), and reasonable efforts have failed to correct the conditions leading to the determination. It may also be argued that § 43-292(2) applies to physically ill parents; i.e., a termination may be had where the parents have substantially and continuously or repeatedly neglected the juvenile and refused to give the juvenile necessary parental care

and protection.

There is no merit to the mother's claim of deprivation of equal protection.

The adjudication of the trial court is affirmed.

AFFIRMED.

ELDON GRAUERHOLZ, APPELLANT, V. CORNHUSKER PACKING CO., APPELLEE.

432 N.W.2d 831

Filed December 16, 1988. No. 88-322.

1. **Workers' Compensation: Proof.** Pursuant to Neb. Rev. Stat. § 48-141 (Cum. Supp. 1986), before an employee may obtain a modification of an agreement or award for periodic payment of compensation, increasing the compensation periodically paid on account of the employee's previous compensable injury, the employee must prove, by a preponderance of evidence, an increase in the incapacity due solely to the previous compensable injury.
2. _____: _____. An employee has the burden to show the cause-and-effect relationship involving employment, an industrial injury, and disability.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Debra R. Nickels and James R. Welsh, of Welsh & Sibbernsen, for appellant.

Melvin C. Hansen and Allen J. Potts, of Hansen, Engles & Locher, P.C., for appellee.

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

SHANAHAN, J.

On March 30, 1984, Eldon Grauerholz suffered partial amputation of his left foot as the result of an industrial accident during his employment with Cornhusker Packing Co. and, on January 27, 1986, received an award in the Nebraska Workers' Compensation Court for benefits and compensation based on a 35-percent disability concerning his left foot. See Neb. Rev.

Stat. § 48-121(3) (Cum. Supp. 1986).

Grauerholz filed a petition on March 11, 1987, to modify the 1986 award as the result of an increase in his incapacity from the 1984 injury. Grauerholz sought the modification because, as he alleged, he had "suffered an unusual and extraordinary condition to his body as a whole," which was attributable to the 1984 injury. Neb. Rev. Stat. § 48-141 (Cum. Supp. 1986) in part provides:

> [T]he amount of any agreement or award payable periodically for six months or more may be modified as follows: (1) At any time by agreement of the parties with the approval of the Nebraska Workers' Compensation Court; or (2) if the parties cannot agree, then at any time after six months from the date of the agreement or award, an application may be made by either party on the ground of increase or decrease of incapacity due solely to the injury or that the condition of a dependent has changed as to age or marriage, or by reason of the death of the dependent. . . .

Pursuant to § 48-141, before an employee may obtain a modification of an agreement or award for periodic payment of compensation, increasing the compensation periodically paid on account of the employee's previous compensable injury, the employee must prove, by a preponderance of evidence, an increase in the incapacity due solely to the previous compensable injury. See *Wilson Concrete Co. v. Rork*, 216 Neb. 447, 343 N.W.2d 764 (1984).

"An employee has the burden to show the cause-and-effect relationship involving employment, an industrial injury, and disability." *Fees v. Rivett Lumber Co.*, 228 Neb. 617, 621, 423 N.W.2d 483, 486 (1988).

> Findings of fact made by the Nebraska Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case. [Citations omitted.] In testing the sufficiency of evidence to support findings of fact made by the Nebraska Workers' Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. [Citations omitted.] Factual determinations by the

> Workers' Compensation Court will not be set aside on appeal unless such determinations are clearly erroneous. Regarding facts determined and findings made after rehearing in the Workers' Compensation Court, § 48-185 precludes the Supreme Court's substitution of its view of facts for that of the Workers' Compensation Court . . . . [Citations omitted.] As the trier of fact, the Nebraska Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given testimony.

Fees v. Rivett Lumber Co., supra at 620, 423 N.W.2d at 486. See, also, *Norris v. Iowa Beef Processors*, 224 Neb. 867, 402 N.W.2d 658 (1987); Neb. Rev. Stat. § 48-185 (Cum. Supp. 1986).

On March 30, 1984, Dr. Oscar Jardon, an orthopedic surgeon, performed a transmetatarsal amputation of Grauerholz' left foot, a surgical procedure necessitated by Grauerholz' injury, and continued to treat Grauerholz on an outpatient basis until October 11, 1984, when Grauerholz, in Dr. Jardon's opinion, reached "maximal improvement." At that point, Grauerholz had no complaints regarding back or shoulder pain. Dr. Jardon evaluated Grauerholz' disability at 35 percent of the left foot. Dr. Jardon treated Grauerholz on January 24, 1985, when Grauerholz mentioned that he was experiencing "a sense of pressure on the heel" of his left foot. Dr. Jardon described Grauerholz' ambulation:

> He was getting around. To be brutally frank, it was very difficult to get the man going and he was very hard to rehabilitate. He would not push himself. I've had a lot of people with various and sundry degrees of amputations and I had the feeling that his sense of disability was greater than in truth it should be based upon experience with other people with the same kind of amputations, and that's the feeling I got all the way through this.

Dr. Jardon again examined and treated Grauerholz in January of 1986 because Grauerholz complained about pain in his lower back and shoulder. Notwithstanding a number of tests, Dr. Jardon was unable to ascertain a reason for the pain mentioned by Grauerholz. Nevertheless, Dr. Jardon prescribed

anti-inflammatory medication to treat Grauerholz' back and shoulder pain.

On May 14, 1986, Grauerholz consulted Dr. Louis Tribulato, an orthopedic surgeon, who detected a heel spur in Grauerholz' left foot. According to Dr. Tribulato's diagnosis, Grauerholz' condition was a "painful heel spur and degenerative arthritis and strain of the lumbar area aggravated by his abnormal gait." Dr. Tribulato treated the heel spur with repeated injections of steroid, and, when the injections failed to provide adequate relief, Dr. Tribulato surgically removed the heel spur on July 7, 1986. In Dr. Tribulato's opinion, Grauerholz' heel spur was partially due to "abnormal weight bearing" as the result of the transmetatarsal amputation and Grauerholz' back pain was the result of an abnormal gait caused by the amputation. Dr. Tribulato concluded that, as the result of the amputation, Grauerholz suffered a 15-percent disability to his body as a whole.

On December 23, 1986, Dr. Jardon treated Grauerholz for the final time and concluded that there were no "organic reasons" for the "quote, unquote, persistent pain" described in Grauerholz' complaints. Because no organic reasons could be isolated as the cause of the pain, Dr. Jardon suggested that Grauerholz be examined by a neurologist to see if the problem was psychological. In Dr. Jardon's opinion, any abnormality in Grauerholz' gait was attributable to "[e]xcessive fixation on his disability" and Grauerholz' heel spur was completely unrelated to the amputation.

A January 20, 1987, letter from a Dr. Fred Pettid, who had examined Grauerholz, contained the conclusion that Grauerholz "should be given 15-20% total body disability based upon his history and the physical findings."

On rehearing, the Workers' Compensation Court found:

> The principal issue which the Court must resolve is whether plaintiff's 35 per cent permanent loss of use of the left foot caused an unusual and extraordinary condition to his body as a whole. The evidence on this point is conflicting. . . .
>
> . . . .
>
> The Court concludes that plaintiff has failed to prove

> that his injury on March 30, 1984, to his left foot caused an unusual and extraordinary condition to his body as a whole which would entitle him to any further and additional relief....

On appeal to this court, Grauerholz contends: "The Nebraska Workers' Compensation Court erred in concluding that the appellant has not suffered an unusual or extraordinary injury to the body as a whole which would entitle him to further relief." Grauerholz also contends that Dr. Jardon's testimony is insufficient to support the decision of the Workers' Compensation Court because "Dr. Jardon has had only limited contact with Eldon [Grauerholz] in recent years . . . and also because his testimony is equivocal." Brief for appellant at 11.

The Workers' Compensation Court apparently accepted the diagnosis by Dr. Jardon rather than Dr. Tribulato's diagnosis of Grauerholz' condition.

As we noted in *Gibson v. City of Lincoln*, 221 Neb. 304, 313, 376 N.W.2d 785, 791 (1985): "In the absence of discredit as a matter of law, the 'trier of fact' remains the sole judge of a witness' credibility and the testimony's weight."

Grauerholz' assault on Dr. Jardon's testimony is aimed directly at the physician's credibility as a witness and the weight to be accorded his testimony. Those matters were resolved adversely to Grauerholz by the Workers' Compensation Court. Given the burden of proof placed on Grauerholz, and considering our statutorily limited review, it cannot be said that the Workers' Compensation Court's decision was clearly erroneous. The decision of the Workers' Compensation Court is evidentially justifiable and is, therefore, affirmed.

AFFIRMED.

IN RE INTEREST OF E.R., J.R., AND A.R., CHILDREN UNDER THE AGE OF 18 YEARS.
STATE OF NEBRASKA, APPELLEE, V. E.R. AND B.R., APPELLANTS.

432 N.W.2d 834

Filed December 16, 1988. Nos. 88-374, 88-375.

1. **Parental Rights: Appeal and Error.** In an appeal from a judgment terminating parental rights, the Nebraska Supreme Court tries the factual questions de novo on the record, which requires the court to reach a conclusion independent of the trial court. However, where the evidence is in conflict, the Supreme Court considers and may give weight to the trial court's observation of the witnesses and acceptance of one version of the facts rather than another.
2. **Expert Witnesses: Evidence.** The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.
3. **Parental Rights: Evidence: Appeal and Error.** The trial court's consideration of improper evidence does not, by itself, require reversal of a judgment terminating parental rights under the Nebraska Juvenile Code. Because factual questions concerning a judgment or order terminating parental rights are tried by the Supreme Court de novo on the record, impermissible or improper evidence is not considered by the Supreme Court.
4. **Parental Rights.** An order terminating parental rights must be based on clear and convincing evidence.
5. _____. Poor housekeeping, alone, is not a sufficient basis for terminating parental rights.
6. _____. Where poor housekeeping degenerates into a continuing health hazard, the best interests of the children require termination of parental rights.

Appeal from the County Court for Hall County: RICHARD E. WEAVER, Judge. Affirmed.

James H. Truell for appellants.

Mark J. Young, Deputy Hall County Attorney, for appellee.

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

FAHRNBRUCH, J.

This is an appeal from two juvenile court orders terminating parental rights to three small children because of substantial, continuous, or repeated neglect or refusal by the parents to give the children necessary care and protection, as required by Neb.

Rev. Stat. § 43-292(2) (Reissue 1984).

The termination orders were entered only after extensive attempts at rehabilitation of the parents by the Department of Social Services (DSS). We affirm the juvenile court's orders.

In an appeal from a judgment terminating parental rights, the Nebraska Supreme Court tries the factual questions de novo on the record, which requires the court to reach a conclusion independent of the trial court. However, where the evidence is in conflict, the Supreme Court considers and may give weight to the trial court's observation of the witnesses and acceptance of one version of the facts rather than another. *In re Interest of A.Z., B.Z., and R.Z., ante* p. 291, 430 N.W.2d 901 (1988); *In re Interest of D.C.*, 229 Neb. 359, 426 N.W.2d 541 (1988).

The children, E.R., J.R., and A.R., originally came under the jurisdiction of the juvenile court because they lacked proper parental care by reason of the fault or habits of their parents, who neglected or refused to provide proper care necessary for the children's health, morals, and well-being, in violation of Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 1986).

E.R., born September 20, 1984, and J.R., born March 15, 1986, were first removed from their parents' home on June 2, 1986. On that date, two Child Protective Services workers responding to a complaint "found the house to be in a very filthy condition." Large quantities of dirt and garbage were found in every room. Dog feces were found on the floor in various parts of the house, along with used feminine sanitary pads dragged from the bathroom by one of the parents' three dogs. Assorted kittens and a large number of flies also occupied the home. Dirty pots and pans cluttered the kitchen, including the floor, and there was virtually no food in the home.

At a hearing on June 24, 1986, the parents admitted that their home was not suitable when E.R. and J.R. were removed. Evidence at the hearing showed that the condition of the home had substantially improved between June 2 and 24, 1986. The children were returned to their parents, with DSS retaining legal custody.

Conditions in the home deteriorated, and the children were again removed, in August of 1986. A report prepared by the DSS family support provider in September of 1986 reflects that

both parents exhibited poor hygiene. Both wore dirty clothing, at times for several days. The worker found the children dirty. They were wearing soiled diapers, which appeared to have not been changed for several hours. In the home, dried food was on the stove, sink, counters, table, and high chair. Liquid was found oozing from a box of rotting vegetables on the floor. The children were sitting near the vegetables.

Between August of 1986 and September of 1987, the parents received services from an independent living specialist, vocational rehabilitation services, marital counseling, and parenting classes. In addition, the parents received the services of a caseworker and family support worker as part of a rehabilitation agreement with DSS. The parents substantially complied with the terms of the agreement.

On September 17, 1987, A.R. was born. The condition of the home improved substantially, and E.R. and J.R. were returned to their parents on October 29, 1987. At this time, the caseworker offered additional services to ease the transition. This offer was refused. The caseworker made five home visits between October 29 and December 29, 1987. The conditions of the home worsened after October 29, and the parents were warned that their home was reaching an unacceptable condition. Additional services were again offered and refused.

On December 24, 1987, the home was very dirty. Dirty laundry covered the hallway, master bedroom, bathroom, and baby's room. The smell of animal urine was overpowering, and a rotting potato was found under the Christmas tree. The mother was told that she must "correct this situation."

The caseworker again went to the home, on December 29, 1987, in response to an anonymous report that the house was very dirty. The caseworker described the condition of the house as "deplorable." The kitchen contained dirty dishes and counters. Food was sitting out. The refrigerator smelled of rotten food but actually had no food inside it. Soiled underwear lay over a toothbrush in the bathroom sink, and tools littered the bathroom floor.

The children's beds had food on them, and an open bottle of aspirin lay on their bedroom floor. E.R. was on the floor eating the aspirin. When the caseworker pointed to this dangerous

situation, the mother's response was inaction. The caseworker took the aspirin from the 3-year-old.

The caseworker returned to the home later in the day and photographed the above-described conditions. A court order was obtained, and all three children were removed on December 30, 1987.

Subsequently, a motion was filed requesting the termination of the parents' rights in E.R. and J.R. A supplemental petition was filed at the same time, seeking termination of parental rights in A.R.

At the termination hearing, the State provided testimony from four individuals who had worked with the parents in attempting to reunite the family. The caseworker, family support provider, and independent living specialist testified that all of the knowledge they had to offer the parents had been provided. All had seen improvement and then deterioration in the condition of the home. These three witnesses each stated that the parents had the skills and understanding to keep their home clean. The parents' problems stemmed from procrastination, lack of motivation, and lack of self-discipline.

A marriage counselor testified that the dominant issues he discussed with the parents were those regarding the children. The couple disagreed on who was responsible for caring for the children. The father believed his wife was responsible for the housekeeping and childrearing. The mother wanted her husband's help. This problem was never resolved. The counselor did not know whether the parents had benefited from their sessions with him.

The only witness for the parents was the mother. She agreed that her home was in an unacceptable condition at the times the children were removed. The mother testified that she understood and could apply all that DSS had taught her. In order to keep her house in an acceptable condition, the mother would need 2 hours without the children each day. DSS is not able to provide that type of service, particularly on a long-term basis.

The juvenile court found that "the conditions [of the home] at the time of each removal were so substantial as to endanger the health and safety of each of the minors, as well as the health

of any person residing on the premises." The parents' rights to their three children were terminated.

On appeal, the parents assign three errors, which may be stated as follows: (1) The trial court erred in permitting the caseworker to testify regarding a medical doctor's report on E.R. and J.R.; (2) the court erred in admitting psychiatric and psychological reports on the parents; and (3) there is insufficient evidence to sustain the court's finding that the best interests of the children required termination of their parental rights.

The appellants' first two assignments of error are well taken. At the termination hearing, the caseworker testified, over objection, that he recommended parenting classes, in part, because of a medical doctor's report. The report indicated that E.R. and J.R. suffered from "environmental deprivation." The doctor who prepared the report was not called to testify, leaving the appellants with no opportunity to cross-examine him. Testimony regarding the doctor's report was clearly inadmissible hearsay, and appellants' objection should have been sustained.

The psychiatric and psychological reports were offered into evidence during the marriage counselor's testimony. The reports were admitted, over objection; however, it is not clear whether they were received for a limited purpose or for the court's full consideration. Again, the authors of the reports were not called to testify, and the appellants had no cross-examination opportunity. The State argues that the reports are admissible under Neb. Rev. Stat. § 27-703 (Reissue 1985), which states:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Even if § 27-703 applies to this situation, an issue we do not decide, the State failed to lay the proper foundation for admission of the reports. The counselor was asked whether the

reports were of a type he would rely upon in his counseling sessions. However, the counselor was not asked whether the reports were of a type experts in his particular field would reasonably rely upon.

Clearly, the testimony regarding the medical doctor's report and the psychiatric and psychological reports were inadmissible hearsay. However, the erroneous admission of this evidence does not require reversal of the case.

> "The trial court's consideration of improper evidence does not, by itself, require reversal of the judgment terminating parental rights under the Nebraska Juvenile Code. Because factual questions concerning a judgment or order terminating parental rights are tried by the Supreme Court de novo on the record, impermissible or improper evidence is not considered by the Supreme Court."

In re Interest of A.Z., B.Z., and R.Z., ante p. 291, 293, 430 N.W.2d 901, 904 (1988); *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 417 N.W.2d 147 (1987).

In determining whether there is sufficient evidence to sustain the trial court's termination of the parents' rights, we will not consider the medical, psychiatric, and psychological reports or the improper testimony of the caseworker.

An order terminating parental rights must be based on clear and convincing evidence. *In re Interest of M.W.M.*, 221 Neb. 829, 381 N.W.2d 134 (1986); *In re Interest of M.L.B.*, 221 Neb. 396, 377 N.W.2d 521 (1985). Past decisions of this court make it clear that poor housekeeping, alone, is not a sufficient basis for terminating parental rights. *In re Interest of M.W.M., supra*; *In re Interest of D.*, 209 Neb. 529, 308 N.W.2d 729 (1981). However, a primary consideration in a case involving termination of parental rights is the best interests of the children. *In re Interest of M.W.M., supra*; *In re Interest of M.L.B., supra*. Where, as here, "poor housekeeping" degenerates into a continuing health hazard, the best interests of the children require termination of parental rights.

Appellants assert that the children were removed from their home in August of 1986 solely because the mother had filed for divorce from her husband. The father had taken E.R. with him

and had threatened to commit suicide or to remove E.R. from the state. As stated earlier, testimony showed that when the children were removed for the second time, the house had deteriorated to prior conditions. The uncleanliness of the house was discussed with the mother. It was the caseworker's testimony that the condition of the house, along with the father's threats, was the basis for removal. It was not the divorce action but the father's reaction to it and the unsanitary conditions of the house that required removal of the children from the home. The unsanitary conditions of the house and the health hazard to the children by themselves justified the removal.

The testimony and exhibits presented provide clear and convincing evidence that the best interests of these children require termination of their parents' rights. The photographs of the house taken on December 29, 1987, are particularly graphic evidence of the unhealthy condition in which these children were forced to live. By that date, DSS had provided extensive training to the parents. The lessons were learned, and, from time to time, the skills were exhibited by the parents. The condition of the home on December 29, 1987, shows the parents' total lack of motivation to change their living patterns in order to protect the health and safety of their children.

The parents also argue that their rights in A.R. should not be terminated because there is no evidence that his health was endangered. This home is clearly an unsuitable place to raise children. For us to hold that it presents a hazard to the health of the older children, but not to that of the baby, would be absurd. " ' " '[W]e will not gamble with the child's future.' " ' " *In re Interest of D.*, 218 Neb. 23, 29, 352 N.W.2d 566, 570 (1984) (quoting *In re Interest of R.D.J. and K.S.J.*, 215 Neb. 724, 340 N.W.2d 415 (1983)).

We find that the State has proved by clear and convincing evidence that the parents have substantially, continually, or repeatedly neglected all three children or refused to provide them with necessary parental care and protection. The orders of the trial court are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LLOYD W. MCARTHUR, APPELLANT.

432 N.W.2d 839

Filed December 16, 1988. No. 88-540.

1. **Constitutional Law: New Trial: Sentences: Records: Appeal and Error.** Whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. The factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal.
2. **Supreme Court: Sentences: Appeal and Error.** The Nebraska Supreme Court has the duty to render such reduced sentence against the accused as in our opinion may be warranted.

Appeal from the District Court for York County: BRYCE BARTU, Judge. Affirmed as modified, and cause remanded with directions.

Kent F. Jacobs, of Blevens & Jacobs, for appellant.

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

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

FAHRNBRUCH, J.

The defendant, Lloyd W. McArthur, was originally charged in York County with eight separate crimes occurring on two separate dates. Pursuant to a plea agreement, the defendant entered pleas of nolo contendere to three felonies: (1) assault in the second degree, a Class IV felony, in violation of Neb. Rev. Stat. § 28-309 (Reissue 1985); (2) felon in possession of a firearm, a Class IV felony, in violation of Neb. Rev. Stat. § 28-1206 (Reissue 1985); and (3) using a deadly weapon to commit a felony, a Class III felony, in violation of Neb. Rev. Stat. § 28-1205 (Reissue 1985).

The trial court, after accepting the defendant's pleas of nolo contendere and finding him guilty as a matter of law, sentenced McArthur to 1 to 5 years' imprisonment on each of the Class IV

convictions and to 6 to 20 years on the Class III conviction. The sentences were ordered to be served consecutively.

A Class IV felony carries a possible penalty of up to 5 years' imprisonment and/or up to a $10,000 fine. A Class III felony carries a possible penalty of not less than 1 nor more than 20 years' imprisonment and/or up to a $25,000 fine. Neb. Rev. Stat. § 28-105 (Reissue 1985).

Upon an initial appeal, this court found that prior to accepting the pleas and finding the defendant guilty as a matter of law on each count, it was explained to the defendant that sentences on each count "can be ordered to be served consecutively, that is to say, one after the other." However, it was not explained to the defendant that, pursuant to § 28-1205, the sentence on the charge of using a deadly weapon to commit a felony is *required* to be served consecutively to the underlying charge. Therefore, the defendant was not fully advised of the consequences of his pleas at the time of his arraignment. See *State v. Golden*, 226 Neb. 863, 415 N.W.2d 469 (1987).

This court vacated the judgment and sentences and remanded the cause to the district court for further proceedings.

On remand, at rearraignment in the York County District Court, the defendant pleaded nolo contendere to assault in the second degree and to the use of a deadly weapon in commission of a felony. The possession of a firearm charge was dismissed.

The defendant was sentenced to imprisonment for a period of 20 months to 5 years on the assault conviction and 80 months to 20 years on the weapons conviction. The weapons sentence was ordered to be served consecutively to the assault sentence.

In his second appeal, McArthur only assigns as error that the trial court increased the minimum sentence on each of the two charges. Thus, the assigned error is one of excessiveness of sentence. Upon resentencing, the combined minimum sentence on these two charges was increased by 16 months. In its brief, the State concedes that the prior minimum sentences should be reinstated.

> [W]henever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based

> upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal.

North Carolina v. Pearce, 395 U.S. 711, 726, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969). See, also, *State v. Golden, ante* p. 284, 430 N.W.2d 900 (1988).

As stated in *Pearce,* 395 U.S. at 724, "[T]he imposition of a penalty upon the defendant for having successfully pursued a statutory right of appeal . . . would be . . . a violation of due process of law." See, also, *Nichols v. United States*, 106 F. 672 (1901).

In McArthur's case, the record is devoid of any explanation for the increase in the minimum sentences. Therefore, the increased minimum sentences cannot withstand constitutional due process scrutiny and must be modified.

Under Neb. Rev. Stat. § 29-2308 (Reissue 1985), the Nebraska Supreme Court has the duty to render such reduced sentence against the accused as in our opinion may be warranted.

We find that on the assault in the second degree charge, McArthur's sentence should be and hereby is modified from not less than 20 months' nor more than 5 years' imprisonment to not less than 1 nor more than 5 years' imprisonment.

We find that on the charge of using a deadly weapon in the commission of a felony, McArthur's sentence should be and hereby is modified from not less than 80 months' nor more than 20 years' imprisonment to not less than 6 nor more than 20 years' imprisonment. The sentence on the use of a deadly weapon charge shall be served consecutively to the sentence on the assault in the second degree charge. The sentences shall be served in the facilities provided by the state Department of Correctional Services.

We agree with the trial judge, and hereby order that McArthur be given credit on his sentences for time spent in jail and the facilities of the state Department of Correctional

Services regarding these charges. The trial court is ordered to determine the number of days to be credited on the sentences.

AFFIRMED AS MODIFIED, AND CAUSE REMANDED WITH DIRECTIONS.

GRANT G. GARD, DOING BUSINESS AS GARD & COMPANY, APPELLEE, V. PELICAN PUBLISHING COMPANY, APPELLANT.

433 N.W.2d 175

Filed December 23, 1988. No. 86-587.

1. **Declaratory Judgments.** Whether a declaratory judgment action is treated as an action at law or one in equity is to be determined by the nature of the dispute.
2. _____. The determination of factual issues in a declaratory judgment action which would otherwise be an action at law is treated in the same manner as if a jury had been waived. The findings of the trial court have the effect of a verdict and will not be set aside unless clearly wrong.
3. **Contracts.** As a general rule, ambiguous terms in a contract are construed against the party who drafted the contract.

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

John H. Cotton, of Gaines, Otis, Mullen & Carta, for appellant.

James Martin Davis for appellee.

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

RILEY, D.J.

Grant G. Gard filed a declaratory judgment action against Pelican Publishing Company for a determination that Pelican had failed to perform its publication agreement with Gard and that Pelican's nonperformance terminated all rights and obligations based on the publication agreement. The district court for Douglas County entered judgment that Pelican's interest in the publication agreement was terminated when Pelican failed to publish Gard's book, "Don't Talk About

It—Do It."

"Whether a declaratory judgment action is treated as an action at law or one in equity is to be determined by the nature of the dispute." *Boren v. State Farm Mut. Auto. Ins. Co.*, 225 Neb. 503, 505, 406 N.W.2d 640, 643 (1987). See, also, *Caeli Assoc. v. Firestone Tire & Rubber Co.*, 226 Neb. 752, 415 N.W.2d 116 (1987).

Gard's action for a declaratory judgment was a law action to determine whether a contract continued to exist when Pelican did not publish Gard's book.

> In a declaratory judgment action, issues of fact "may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending." [See Neb. Rev. Stat. § 25-21,157 (Reissue 1985).] This court has treated the determination of factual issues in a declaratory judgment action which would otherwise be an action at law in the same manner as if a jury had been waived. The findings of the trial court therefore have the effect of the verdict of a jury and will not be set aside unless clearly wrong. [Citation omitted.]

Larutan Corp. v. Magnolia Homes Manuf. Co., 190 Neb. 425, 433, 209 N.W.2d 177, 182 (1973).

Gard is a full-time motivational speaker, conducting seminars in sales and management training. As part of his business and to promote speaking engagements, Gard wrote a book entitled "Don't Talk About It—Do It" in approximately 1974. Gard had copies of the book printed and sold them at his speaking engagements. He also gave complimentary copies of the book to people inquiring about his speaking services. A few books were sold to people in the retail business, such as Amway distributors, who in turn resold the books to their customers. In 1977 and 1980, Gard briefly negotiated with Pelican concerning the possibility of having Pelican publish "Don't Talk About It—Do It," but no agreement was reached.

In 1982, Gard wrote a second book, "Championship Selling." He contacted several publishers, including Pelican, about having it published. Pelican asked Gard to submit the manuscript, which he did on about November 17, 1982.

Pelican and Gard also reopened negotiations on publication of "Don't Talk About It—Do It." The negotiations proceeded rapidly because Pelican expressed a wish to complete the contract in time to include "Don't Talk About It—Do It" in its spring catalog. It appears the deadline was missed, because the book was not included in the spring catalog.

Pelican drafted a contract, which was signed by Milburn Calhoun, the president of Pelican, and forwarded to Gard on December 6, 1982. After reading the contract, Gard had reservations about two provisions. The first provision which he questioned was the provision on future works. Gard drafted a change in the contract to which Pelican consented, as expressed by Calhoun's signature beneath the change.

The second provision stated that Pelican would "[p]ublish ["Don't Talk About It—Do It"] within 3 months of the date it goes out of print." Gard never discussed this provision with anyone at Pelican. Instead, Gard researched the meaning of the term for himself. Based on his research, Gard determined that his book was already out of print, thereby requiring Pelican to publish his book within the next 3 months, and on December 11, 1982, signed the publication agreement submitted by Pelican.

Under the signed contract, Pelican agreed to sell Gard copies of the book at "cost plus 50¢." Gard was strictly forbidden from offering any copies for resale in any market, limiting his sales to his seminars and speaking engagements and to mail orders. Gard agreed to cooperate with Pelican in expediting the production and publication of the book. Gard also agreed to give Pelican "an option on all future works. If the PUBLISHER does not execute a publishing agreement satisfactory to both parties within ninety (90) days of the receipt of the completed manuscript, the AUTHOR is under no further obligation." Lastly, the parties agreed the publishing rights automatically returned to Gard if Pelican failed to publish the book within 18 months after receiving the completed manuscript.

In December 1982, Pelican asked Gard to maintain a record of the number of books he had on hand and to supply the figures to Pelican monthly. These figures were supplied orally

in December 1982, and in writing in January 1983. No other inventory figures were ever supplied by Gard.

In February 1983, the focus shifted to the publication of "Championship Selling." A misunderstanding between Pelican and Gard arose concerning when an agreement for the book's publication had to be completed. Gard understood the deadline was February 18, which was 3 months from submission of the manuscript; Pelican operated under the assumption that the deadline for agreement was March 11, or 3 months after the date the agreement was signed. Through a series of letters in February, the parties agreed Pelican had until March 11 to evaluate "Championship Selling."

Following its evaluation of "Championship Selling," Pelican submitted a proposed contract to Gard on March 10. Gard refused to sign the contract because it contained a clause allowing him to purchase copies of the book at 40 percent off the suggested retail price, rather than the "cost plus 50¢" clause in the "Don't Talk About It—Do It" contract. According to Gard, this clause would make it too costly for him to give away copies to people inquiring about his speaking services or to sell copies at his seminars. Gard informed Pelican that the contract was unacceptable, by a letter dated April 2, 1983. In the letter, Gard stated, "I have made other arrangements to have this book published." The "other arrangements" consisted of a publishing contract with Prentice-Hall entered into in late March of 1983. In May of 1983, Gard determined Pelican was not interested in publishing "Don't Talk About It—Do It." Negotiations for the return of the publishing rights failed to resolve the dispute.

In addition to the declaratory judgment sought in Gard's first cause of action, Gard's second amended petition included a second cause of action, which sought damages for Pelican's breach of the publication contract. Pelican counterclaimed for specific performance on the contract and for damages resulting from the seventh printing of "Don't Talk About It—Do It" and the publication by Prentice-Hall of "Championship Selling" and a third book, entitled, "How to be a Confident and Effective Speaker."

During a bench trial, Pelican's president, Calhoun, testified

that it was important for a publisher to have the existing stocks of an earlier publication removed from the marketplace, such as in bookstores, because "it is confusing to the marketplace if you should have two publishers. . . . They wouldn't know who to order from." Calhoun described "the marketplace" as "[a]nybody who is going to buy a book." Calhoun then testified that, since books are distributed through regular retail markets, publishers want to avoid confusion about the identity of the publisher from which a publication might be obtained.

Other testimony indicated that a book was out of print when a book is unavailable from a publisher.

The district court found that Gard was not a publisher of the book, "Don't Talk About It—Do It," and, therefore, the book was out of print when the contract was signed on December 11, 1982, requiring Pelican, under its agreement with Gard, to publish Gard's book by March 11, 1983. When Pelican failed to publish the book by that date, Pelican breached its agreement with Gard, and Pelican's nonperformance of the publication agreement, under the circumstances, terminated the agreement between the parties. In view of its declaratory judgment regarding Pelican's nonperformance, the district court denied Gard any damages and also denied relief to Pelican on its counterclaim.

On appeal, Pelican's central assignment of error is that the district court erred in finding that Pelican's failure to publish Gard's book was nonperformance which terminated the publication agreement with Gard. All other assignments of error by Pelican hinge upon the correctness of the district court's finding and declaratory judgment that Gard's publication agreement with Pelican had been terminated by Pelican's nonperformance.

The questions before the district court were whether Gard's book, "Don't Talk About It—Do It," was out of print, and, if so, when did the book become "out of print" as such phrase is used in the publication agreement between the parties?

The parties do not dispute that a book is out of print when the book is unavailable from the publisher. If Gard was not a publisher, then his book, "Don't Talk About It—Do It," was unavailable from a publisher and was, therefore, "out of print"

on December 11, 1982, when Gard signed the agreement requiring Pelican to publish his book "within 3 months of the date it goes out of print." However, if Gard was a "publisher" when he signed the agreement on December 11, 1982, then Gard's inventory of his book, "Don't Talk About It—Do It," would have to be exhausted and become unavailable through him in order to start the 3-month period for publication required under Gard's agreement with Pelican. Pelican's president testified that, as far as a "publisher" is concerned, a publication involves distribution "through the regular retail markets [where] somebody goes into a book store . . . ." The record reflects that Gard did not distribute his book through the "regular retail markets," but either gave complimentary copies of his book to people who inquired about his speaking services or sold his book at seminars he conducted. In this manner, Gard used his book, "Don't Talk About It—Do It," solely to enhance his credentials as a speaker. Gard became involved in printing his book as an auxiliary to his main profession—motivational speaking. Gard's books were never sold to bookstores, which were the customers for publishers such as Pelican. It is unlikely Pelican's customers would be confused concerning whether to order from Pelican or from Gard if they had never dealt with Gard before. Further, Pelican understood Gard wished to continue his giveaways and sales at seminars and agreed to allow this practice to continue. By agreeing to allow Gard to continue his personal sales of books purchased from Pelican, Pelican indicated it did not view these sales as creating confusion for its customers.

As a general rule, ambiguous terms in a contract are construed against the party who drafted the contract, *Schmidt v. J. C. Robinson Seed Co.*, 220 Neb. 344, 370 N.W.2d 103 (1985), and are given a construction which the nondrafting party would be fairly justified in giving the term. *Bishop Buffets, Inc. v. Westroads, Inc.*, 202 Neb. 171, 274 N.W.2d 530 (1979).

Pelican drafted the contract in question. While Gard could easily have clarified the matter by asking Pelican to explain what "out of print" meant, Gard was justified in the construction he gave the term. The term should be construed

against Pelican.

The evidence supports the district court's finding that Gard's book, "Don't Talk About It—Do It," was out of print when Gard signed the publication agreement on December 11, 1982. Pelican failed to publish "Don't Talk About It—Do It" by March 11, 1983, 3 months after the contract was signed. By the terms of the contract, the publication rights reverted to Gard when the publication agreement with Pelican was terminated. Pelican has failed to establish that the district court was clearly wrong in its finding of Pelican's nonperformance, resulting in termination with respect to its publication agreement with Gard. The district court's findings and judgment automatically dispose of the other errors assigned by Pelican, since the other assigned errors all presuppose existence of an enforceable contract.

The judgment of the district court is affirmed.

AFFIRMED.

PETER DELGADO, APPELLANT, V. INRYCO, INC., ET AL., APPELLEES.

433 N.W.2d 179

Filed December 23, 1988. No. 87-024.

1. **Directed Verdict: Appeal and Error.** In reviewing a directed verdict, the Supreme Court assumes the truth of material and relevant evidence presented by the nonmoving party.
2. **Motions to Dismiss.** In sustaining a motion to dismiss, the trial court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion. If there is any evidence in favor of the party against whom the motion is made, the case may not be decided as a matter of law.
3. **Breach of Warranty: Proof: Products Liability.** In order for a plaintiff to recover on a breach of express warranty, he must show that the goods did not comply with the warranty, that is, that they were defective, and that his injury was caused by the defective nature of the goods.
4. **Products Liability: Expert Witnesses: Proof.** When standards of performance of a product are not generally known, other evidence, usually expert testimony, is necessary to prove proper or acceptable standards of performance.
5. **Breach of Warranty: Proof.** In order to recover damages for breach of an

implied warranty of merchantability, there must be proof that there was a deviation from the standard of merchantability at the time of sale and that such deviation caused the plaintiff's injury both proximately and in fact.

6. _____: _____. In order to show a breach of an implied warranty of fitness for a particular purpose, the plaintiff must prove that the product was unfit.
7. **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.
8. **Products Liability: Proof.** To recover on a claim of strict liability in tort for a defectively designed product, a plaintiff must prove by a preponderance of the evidence: (1) The product was in a defective condition when it was placed on the market and left the defendant's possession; (2) the defect was the proximate or a proximately contributing cause of plaintiff's injury sustained while the product was being used in the way and for the general purpose for which it was designed and intended; (3) the defect, if existent, rendered the product unreasonably dangerous and unsafe for its intended use; and (4) plaintiff's damages were a direct and proximate result of the alleged defect.

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

Richard J. Dinsmore, of Dowd, Fahey, Dinsmore & Hasiak, for appellant.

Michael G. Helms, of Schmid, Mooney & Frederick, P.C., for appellee Inryco, Inc.

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

BOSLAUGH, J.

The plaintiff, Peter Delgado, was injured on July 25, 1979, while employed as an ironworker by Hawkins Construction Company on the Northwestern Bell parking structure project. The plaintiff and another employee, Reuben Rocha, were engaged in "post-tensioning" a concrete floor when, apparently, a hydraulic jack used in the process slipped, resulting in the traumatic amputation of the plaintiff's left thumb and a part of his left ring finger. This action was brought against the defendant Inryco, Inc., to recover damages the plaintiff sustained as a result of the accident and injury.

The defendant Inryco was a subcontractor employed by Hawkins to furnish the materials and equipment necessary to perform the posttensioning, or stressing, of the concrete.

When the concrete floor was poured, steel cables covered with a plastic sheath were imbedded in the concrete. The cables inside the plastic sheath were covered with grease. The cables were permanently anchored at one end of the floor. At the other end the cables extended through a hole in a metal anchor that was cast in the concrete. The cables were stretched or stressed by fastening a hydraulic jack to the free end of the cable and pulling it out through the hole in the anchor. When the proper tension had been achieved, cone-shaped wedges or clips were placed around the cable and into the hole in the anchor. The wedges or clips had teeth which would grip the cable so that it would remain stretched or stressed after the hydraulic jack was removed.

On occasion the wedges or clips would not grip the cable sufficiently to maintain the desired amount of tension. In that event it was necessary to place a device known as a destressing stool between the anchor and hydraulic jack so that when tension was again applied to the cable with the jack, the wedges or clips would be loosened and could be removed from the anchor.

The plaintiff was injured while he and Rocha were attempting to destress a cable so that the clips or wedges could be removed and the cable could be restressed. The destressing stool was a heavy bar of metal with two legs and a horseshoe-shaped notch in the center of the bar to accommodate the cable. The stool was placed against the concrete and the jack then placed against the stool. The jack was used to stretch the cable enough to loosen the wedges or clips, which the plaintiff was to remove using a 16-inch welding rod. Hands were not to be used to remove the wedges because of the amount of pressure which was on the cable. Unlike the anchor, the stool did not have a hole for the nose of the jack to fit into. Paul Steinauer, the construction superintendent for Hawkins, testified that the destressing stool was used a total of about 15 times on the job.

Rocha had instructed Delgado on the use of the equipment. At the time the accident happened the plaintiff had placed the destressing stool against the concrete and the jack had been placed against the stool. The jack had been attached to the cable

and was stretching or stressing the cable. The plaintiff testified that he always stepped away from the jack when it was operating because he knew that it had a tendency to "kick up" in the air and he knew that it was dangerous because of the pressure being applied by the jack.

The plaintiff testified that the accident happened so fast, he only remembered something hitting his hand. He testified that he was not reaching in to remove the clips when the accident happened and that he was about 2 feet away, with his left hand up on the concrete wall. The parties stipulated that the plaintiff's amputated thumb was found in the nose of the jack.

Steinauer inspected the area after the accident and found the jack still attached to the cable and the destressing stool below the scaffolding on which the plaintiff had been working. Steinauer tested the jack and pump and found that they were still working. He did not inspect the clips or the hole in the anchor to see if grout was present. The witness testified that from the appearance of the stool, it looked as if the jack had slipped.

There was no evidence to explain why the jack slipped, if it did, and no evidence that the jack or destressing stool was defective in any way. In short, there was no evidence that the accident was caused by any defect in the equipment supplied by the defendant.

In his petition, the plaintiff alleged three theories of recovery: (1) breach of an express warranty that the stressing machine was fit for the use intended and was merchantable, and breach of implied warranties of merchantability and fitness for a particular use; (2) negligence in supplying a defective stressing machine without proper instruction for its use, failing to warn of the dangerousness of the machine, and failing to check the safety of the machine; and (3) strict liability in tort for supplying a defective stressing machine, failing to warn, and failing to instruct on the proper use of the machine.

The defendant's answer denied the material allegations of plaintiff's petition and alleged several affirmative defenses, including contributory negligence and assumption of risk.

At the close of the plaintiff's evidence, the trial court sustained the defendant Inryco's motion for a directed verdict.

The trial court found that the plaintiff had failed to show any defect in the equipment provided. The plaintiff has appealed.

"In reviewing a directed verdict the Supreme Court assumes the truth of material and relevant evidence presented by the nonmoving party." *Greening v. School Dist. of Millard*, 223 Neb. 729, 731, 393 N.W.2d 51, 54 (1986). In considering a directed verdict or motion to dismiss at trial, this court has held:

> "[I]n sustaining a motion to dismiss, the trial court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion. . . . Moreover, in considering the evidence for the purpose of ruling on such a motion, the party against whom the motion is made is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can be reasonably drawn from the evidence; if there is any evidence in favor of the party against whom the motion is made, the case may not be decided as a matter of law."

Topil v. Hub Hall Co., ante p. 151, 154, 430 N.W.2d 306, 309 (1988), quoting *Tiede v. Loup Power Dist.*, 226 Neb. 295, 411 N.W.2d 312 (1987).

The plaintiff contends that the contract between the defendant Inryco and Hawkins established an express warranty. The warranty provision in the contract provided:

> The Seller [Inryco] expressly warrants and guarantees the merchantability, fitness for use and compliance with the specifications or samples of all the goods, wares and merchandise covered by this Agreement and shall make good at its own expense not only any defect that may occur or develop prior to the Contractor's release from responsibility to the Owner therefor, but also any defect that might occur for a period of one (1) year after completion of the work, or for such time as may be specified in the Contract for which the Contractor is required to furnish and perform maintenance. Payment may be withheld pending compliance of this Article.

In order for a plaintiff to recover on a breach of express warranty, he must show, among other things, that "the goods did not comply with the warranty, that is, that they were

defective, and that his injury was caused by the defective nature of the goods." *Durrett v. Baxter Chrysler-Plymouth, Inc.*, 198 Neb. 392, 395-96, 253 N.W.2d 37, 39 (1977). In *Durrett*, the plaintiff alleged that the steering column in his car was defective when it failed to collapse in an accident. Expert testimony indicated that the steering column was built in conformity with U.S. Government standards and that it had functioned according to those standards in the accident. The plaintiff's only testimony concerning the defectiveness of the steering column was the observation that the steering column did not collapse. The plaintiff argued that was sufficient to create a jury issue. This court held:

> The reliance on eyewitnesses alone is not fatal when a defect is obvious to a layman, but when standards of performance of the product are not generally known, other evidence, usually expert testimony, is necessary to prove proper or acceptable standards of performance. That evidence may be by evidence as to usages in the trade, the characteristics exhibited by similar goods manufactured by other sellers, or by government standards and regulations in the area.

Id. at 396, 253 N.W.2d at 39-40. See, also, *Hawkins Constr. Co. v. Matthews Co., Inc.*, 190 Neb. 546, 209 N.W.2d 643 (1973), *disapproved on other grounds National Crane Corp. v. Ohio Steel Tube Co.*, 213 Neb. 782, 332 N.W.2d 39 (1983); *Moore v. Puget Sound Plywood*, 214 Neb. 14, 332 N.W.2d 212 (1983); *Peterson v. North American Plant Breeders*, 218 Neb. 258, 354 N.W.2d 625 (1984).

The plaintiff argues that the fact the stressing equipment sometimes failed to hold the cables at the proper tension was proof that it was defective and the express warranty had been breached. This was the only evidence presented concerning a defect. No expert or engineer in the field of construction testified.

The plaintiff presented no testimony as to the precise cause of the accident. Testimony by the project superintendent showed that a failure to clean out grout around the steel cables could cause the wedges or clips to slip.

The plaintiff's evidence merely showed that the wedges or

clips did not hold every time. There was no testimony as to the stressing equipment's merchantability or quality at the time Inryco delivered the stressing equipment to Hawkins. No expert testimony was presented concerning stressing equipment in general or concerning this stressing equipment specifically.

In order to recover damages for breach of an implied warranty of merchantability, this court has held:

> [T]here must be proof that there was a deviation from the standard of merchantability at the time of sale and that such deviation caused the plaintiff's injury both proximately and in fact. Thus, a breach of the warranty has been found to exist where the item sold failed to perform adequately because of a lack of quality inherent within the item itself.

O'Keefe Elevator v. Second Ave. Properties, 216 Neb. 170, 174, 343 N.W.2d 54, 56-57 (1984). In proving a deviation from the standard of merchantability, some proof of noncompliance with the warranty must be presented. The plaintiff did not present any such evidence. The plaintiff relied only on the fact that the accident occurred as proof that the stressing equipment was not merchantable.

The purpose of the stressing equipment was to stretch the steel cables. Steinauer testified as to how the equipment was used. The equipment worked on hundreds of occasions without incident. Steinauer testified that prior to the accident, 300 to 350 cables of the same type as the plaintiff had been working on at the time of the accident had been stressed, using the same equipment. After the accident, the construction crew used the same equipment to stress approximately 400 to 500 more cables.

To recover on a theory of breach of warranty, the plaintiff was required to establish a standard of merchantability and prove that it was breached. This the plaintiff failed to do. *Peterson v. North American Plant Breeders, supra.*

In order to recover for breach of an implied warranty of fitness for a particular use, this court has held:

> The following conditions, not required by the implied warranty of merchantability, must be present if a plaintiff is to recover on the implied warranty of fitness for a

> particular purpose: (1) The seller must have reason to know of the buyer's particular purpose; (2) The seller must have reason to know that the buyer is relying on the seller's skill or judgment to furnish appropriate goods; and (3) The buyer must, in fact, rely upon the seller's skill or judgment.

O'Keefe Elevator, supra at 174-75, 343 N.W.2d at 57.

In order to show a breach of an implied warranty of fitness for a particular purpose, the plaintiff must prove that the product was unfit. There was no evidence that the stressing equipment if properly used was defective or unfit for its purpose.

In *O'Keefe Elevator, supra*, the appellee failed to show that the elevator did not conform to any of the warranties and, therefore, failed on all of its warranty theories of recovery.

With respect to the plaintiff's theory of negligence, the plaintiff alleged that the defendant was negligent in supplying a defective product, in failing to instruct Hawkins properly on its use, in failing to warn the plaintiff of the dangerous characteristics and nature of the stressing machine, and in failing to check the safety of the product periodically. The plaintiff alleged that this negligence was the proximate cause of the plaintiff's injury.

" '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.' " *Topil v. Hub Hall Co., ante* p. 151, 154, 430 N.W.2d 306, 309 (1988), quoting *Tiede v. Loup Power Dist.*, 226 Neb. 295, 411 N.W.2d 312 (1987).

There was no evidence presented at trial of a defect in the equipment. It was uncontroverted that the defendant Inryco instructed Hawkins' employees about the use of the stressing equipment and that Rocha instructed the plaintiff on the use of the equipment. There was no evidence of any warning being given to the plaintiff, but the plaintiff recognized the danger of the operation and testified that he realized that he had to stand back from the jack when it was in use because it had a tendency to "kick up." During the destressing operation, the plaintiff

knew that he should not use his fingers to remove the wedges or clips and, in fact, used a 16-inch welding rod. There was no evidence of any duty of the defendant, by contract or in law, to periodically inspect the safety of the stressing equipment.

The plaintiff failed to establish that there was any defect in the equipment supplied by the defendant. Evidence that an accident occurred was insufficient to establish a defect. The evidence did not establish why the accident occurred but, in fact, suggested several possible causes of the accident.

With respect to strict liability, in *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 412 N.W.2d 56 (1987), we held that to recover on a claim of strict liability in tort for a defectively designed product, a plaintiff must prove by a preponderance of evidence: (1) The product was in a defective condition when it was placed on the market and left the defendant's possession; (2) the defect was the proximate or a proximately contributing cause of plaintiff's injury sustained while the product was being used in the way and for the general purpose for which it was designed and intended; (3) the defect, if existent, rendered the product unreasonably dangerous and unsafe for its intended use; and (4) plaintiff's damages were a direct and proximate result of the alleged defect.

The plaintiff did not allege or prove that the stressing equipment had been defectively manufactured. There was no evidence of a defect, beyond the fact that an accident occurred while using the stressing equipment.

The judgment is affirmed.

AFFIRMED.

BEATRICE NATIONAL BANK AND TRUST COMPANY, A NATIONAL BANKING CORPORATION, APPELLEE, V. SOUTHEAST NEBRASKA COOPERATIVE CO., A NEBRASKA CORPORATION, APPELLANT.

432 N.W.2d 842

Filed December 23, 1988. No. 87-081.

1. **Declaratory Judgments: Appeal and Error.** Determinations of factual issues in a declaratory judgment action will not be disturbed on appeal unless they are clearly wrong.
2. **Proof: Words and Phrases.** The burden of establishing a fact means the burden of persuading the trier of fact that the existence of the fact is more probable than its nonexistence.

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

Robert C. Guenzel, of Crosby, Guenzel, Davis, Kessner & Kuester, for appellant.

James G. Sharp, of Everson, Wullschleger, Sutter, Sharp, Korslund & Willet, for appellee.

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

GRANT, J.

This is an appeal from a declaratory judgment entered by the Gage County District Court. Plaintiff-appellee, Beatrice National Bank and Trust Company (Bank), filed a petition for a declaratory judgment against defendant-appellant, Southeast Nebraska Cooperative Co. (Co-op). In its petition, the Bank prayed for a judgment fixing the rights of the parties to the proceeds of the sale of certain livestock owned by John D. and Robert D. Claassen, doing business as Claassen's Linc-Side Farms (Claassens). The Bank claims an interest in these proceeds pursuant to a perfected security interest in the livestock. The Co-op, in its answer, alleged that it had an interest in the proceeds pursuant to a purchase money security interest in certain feed sold by the Co-op to the Claassens and allegedly fed to the livestock.

Trial was held before the Gage County District Court. The court entered judgment for the Bank. The Co-op timely

appealed to this court, alleging that the trial court erred "in its failure to allow the purchase money security interest of Appellant Cooperative to follow its feed into the product of the dairy herd, milk, and the product of the pig operation, hogs sold." We affirm.

The record shows that sometime in 1979 the Bank arranged to provide farm financing to the Claassens. Pursuant to this arrangement, the Claassens executed a security agreement and financing statement on March 22, 1979. The collateral was described as "[a]ll equipment, and trators [sic], all farm products including but not limited to crops, livestock, supplies used or produced in farming operations, contract rights and accounts, now owned or after acquired." This financing statement was filed with the Gage County clerk on March 27, 1979.

On April 6, 1981, the Claassens executed and delivered to the Bank an installment note for $355,000. On November 16, 1983, the effective period of the 1979 financing statement was extended by the filing of a continuation statement. In 1986, the Claassens executed two additional notes, totaling over $59,000.

Between June 7 and December 28, 1985, the Co-op sold, on account, animal feed and related products to the Claassen farm operation. These products had an approximate value of $20,000. The Co-op took as security a purchase money interest in these products and their proceeds. Between June 27, 1985, and January 3, 1986, six financing statements were filed with the Gage County clerk as notice of Co-op's purchase money interest.

Sometime in 1986, the Claassens failed to make payments on the obligations to both the Bank and the Co-op. Pursuant to the security agreement the Bank had with the Claassens, the Linc-Side Farms' swine and dairy herds were liquidated. The proceeds of these sales totaled $21,601.51.

On May 12, 1986, the Bank filed this action seeking an order determining the rights of the Bank and the Co-op to these proceeds. In a judgment entered on December 31, 1986, the Gage County District Court found that the Co-op had failed to prove that the feed it had provided to the Claassens had been fed to the livestock sold. The district court also held that the

Bank's security interest was prior to any interest claimed by the Co-op.

A suit for declaratory judgment is an action sui generis and may involve questions of both law and equity. *Hemenway v. MFA Life Ins. Co.*, 211 Neb. 193, 318 N.W.2d 70 (1982). 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. *County of York v. Johnson, ante* p. 403, 432 N.W.2d 215 (1988); *Cornhusker Christian Ch. Home v. Dept. of Soc. Servs.*, 227 Neb. 94, 416 N.W.2d 551 (1987). Determinations of factual issues in a declaratory judgment action will not be disturbed on appeal unless they are clearly wrong. Neb. Rev. Stat. § 25-21,157 (Reissue 1985); *Havelock Bank v. Western Surety Co.*, 217 Neb. 560, 352 N.W.2d 855 (1984).

The Co-op claims a perfected purchase money security interest in the proceeds pursuant to Neb. U.C.C. § 9-315 (Reissue 1980) and contends that where two security interests, such as those held by the Bank and by the Co-op, apply to products that are commingled, § 9-315(2) applies and the holders of such security interests share proportionally in the proceeds. We do not reach this issue.

The burden of establishing a fact means the burden of persuading the trier of fact that the existence of the fact is more probable than its nonexistence. *First Nat. Bank & Trust Co. v. Cutright*, 189 Neb. 805, 205 N.W.2d 542 (1973), construing Neb. U.C.C. § 1-201(8) (Reissue 1980).

The record does not show that the livestock sold were fed any of the feed provided to the Claassens by the Co-op. Since the Co-op's claim of an interest in the proceeds of the livestock sold rests on the premise that the feed was eaten by the animals and thus became "incorporated" in them, and the Co-op has not adduced evidence to prove that fact, the Co-op's claim fails.

The finding of the trial court that the Co-op failed to prove that the feed it sold to the Claassens had been fed to the livestock sold is supported by the record. The trial court's decision is affirmed.

AFFIRMED.

JEANINE F. SCHREINER, APPELLEE, V. RONALD R. SCHREINER, APPELLANT.

432 N.W.2d 844

Filed December 23, 1988. No. 87-141.

Appeal from the District Court for Otoe County: RAYMOND J. CASE, Judge. Affirmed.

John F. Steinheider, of Hoch & Steinheider, for appellant.

Alan M. Wood for appellee.

HASTINGS, C.J., GRANT, and FAHRNBRUCH, JJ., and HENDRIX and OLBERDING, D. JJ.

PER CURIAM.

The respondent, Ronald R. Schreiner, appeals the division of property in this dissolution proceeding and the requirement that he pay his wife, Jeanine F. Schreiner, $1,000 toward her attorney fees.

As required in cases of this nature, we have reviewed the record de novo to determine whether the district court abused its discretion in dividing the property of the parties and in allowing attorney fees. See, *Fox v. Fox, ante* p. 218, 430 N.W.2d 542 (1988); *Griffith v. Griffith, ante* p. 314, 431 N.W.2d 609 (1988).

Upon de novo review of this case, we find no patent unfairness in the distribution of property and debts of the parties nor in the award of an attorney fee to the wife. See, *Rezac v. Rezac*, 221 Neb. 516, 378 N.W.2d 196 (1985); *Black v. Black*, 221 Neb. 533, 378 N.W.2d 849 (1985). Therefore, there was no abuse of discretion by the trial court, and its decree should be affirmed.

Each party shall pay his or her own costs and attorney fees in this court.

AFFIRMED.

BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA, APPELLANT, V. WILSCAM MULLINS BIRGE, INC., DEFENDANT AND THIRD-PARTY PLAINTIFF, AND WALTER D. RUDEEN AND ASSOCIATES, INC., THIRD-PARTY DEFENDANT, APPELLEES.

433 N.W.2d 478

Filed December 23, 1988. No. 87-370.

1. **Limitations of Actions: Words and Phrases.** Architects and engineers are professionals for the purposes of Neb. Rev. Stat. § 25-222 (Reissue 1985).
2. **Words and Phrases.** A professional act or service is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual.
3. **Limitations of Actions: Construction Contracts.** The 2-year statute of limitations in Neb. Rev. Stat. § 25-222 (Reissue 1985), applicable to an architect who has the responsibility to design a building and a duty to inspect throughout construction, begins to run when the construction is completed.
4. **Limitations of Actions: Words and Phrases.** Discovery, as applied to statutes of limitations, refers to the fact that one knows or should know of an injury or damage and not that he or she has a legal right to seek redress in court.
5. **Limitations of Actions: Time.** Under the discovery principle, a cause of action accrues and the 1-year discovery provision of Neb. Rev. Stat. § 25-222 (Reissue 1985) begins to run, when there has been discovery of facts constituting the basis of the cause of action or the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery. It is not necessary that the plaintiff have knowledge of the exact nature or source of the problem, but only knowledge that the problem existed.
6. **Limitations of Actions: Appeal and Error.** The point at which a statute of limitations commences to run must be determined from the facts of each case, and the decision of the district court on the issue of statute of limitations will not be set aside by the Supreme Court unless it is clearly wrong.

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

Gerald P. Laughlin and Jill Robb Ackerman, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for appellant.

Steven J. Riekes, of Richards, Riekes, Brown & Zabin, P.C., for appellee Wilscam Mullins Birge.

BOSLAUGH, SHANAHAN, and GRANT, JJ., and ENDACOTT and QUIST, D. JJ.

GRANT, J.

On April 13, 1984, the Board of Regents of the University of Nebraska (University) filed this action against architects Wilscam Mullins Birge, Inc. (Wilscam), for damages suffered due to alleged design deficiencies and negligent supervision and inspection of construction of the college of pharmacy building at the University of Nebraska Medical Center (UNMC) in Omaha. The petition alleged Wilscam negligently designed the building by failing to allow for deflection of the floor slabs, negligently inspected the contractor's work by failing to detect deviations from the plans and specifications during construction, negligently approved defective shop drawings and allowed the contractor to construct the floor slabs according to the erroneous shop drawings, and negligently failed to design floor slabs that would meet design loading criteria. Wilscam filed a third-party action against Walter D. Rudeen and Associates, Inc. (Rudeen), in connection with the preparation or approval of the allegedly defective shop drawings. The district court held that Wilscam's cause of action against Rudeen did not accrue until Wilscam's liability to the University became fixed. No appeal has been taken on this issue.

The trial was bifurcated, pursuant to Neb. Rev. Stat. § 25-221 (Reissue 1985), to determine the issues related to Wilscam's statute of limitations defense, and all the parties agreed that the matter should be tried to the court without a jury. The district court for Douglas County held that the action was one for professional negligence and was barred by Neb. Rev. Stat. § 25-222 (Reissue 1985).

The University timely appealed and, in this court, sets out four assignments of error, alleging the district court erred in holding (1) that § 25-222 was the applicable statute of limitations; (2) that the statute of limitations for all causes of action began to run no later than December 1, 1982; (3) that the second cause of action was barred because the brick tie, angle iron attachment, and brick placement on the support shelf problems were problems distinct from the cracking brick problem and its causes; and (4) that the third and fourth causes of action were barred by the statute of limitations because the

structural weight-bearing defect was separate and distinct from the cracking brick problem and its causes. We affirm.

On the same date of April 13, 1984, the University filed a separate action against Lueder Construction Company (Lueder), general contractor for the project. That action is the subject of the succeeding opinion, *Board of Regents v. Lueder Constr. Co., post* p. 686, 433 N.W.2d 485 (1988). Much of the evidence in the two cases was the same or similar (indeed, the testimony in this case was incorporated in the *Lueder* case), but different statutes are involved and separate trials were held, so the two actions will be considered separately.

The record shows that on May 6, 1974, the University and Wilscam entered into a contract in connection with the construction of a new college of pharmacy building at UNMC. The contract required Wilscam to provide design services and, during the construction of the building, to perform periodic site inspections to determine whether the work was proceeding in accordance with the contract documents. The contract also required Wilscam to review and approve shop drawings for conformance with Wilscam's design concept and for compliance with the contract documents. In 1975, Wilscam hired Rudeen to perform the structural engineering design work for the project. The University retained Lueder as general contractor.

The college of pharmacy building consists of east and west "pods" separated by an atrium. The structural system consists of reinforced concrete floor slabs and structural steel columns. The floor slabs are reinforced with posttension strands and support a brick masonry veneer wall. The building was substantially completed on October 11, 1976, and accepted by the University on that date.

During the year following that completion, University personnel monitored the new building for deficiencies. George Money, director of planning and construction at UNMC, prepared a "punch list" of these items thought to be deficient to be reviewed by Wilscam and Lueder. Money's department was responsible for the building during 1977 because the building was still subject to Lueder's 1-year construction warranty. The punch list, dated September 27, 1977, refers to several instances

of brick cracking in the south wall, a missing mortar joint on the east wall, bricks "broken out" on the north side, and cracking of brick in the west end of the atrium. The deficiencies were set out in the punch list as follows:

> 24. South wall has a crack at the east end of the west window, starting at the window sill and going up about half the window height, coming up about seven blocks (about half way up).
>
> 25. The overhang at the south wall west end. There is a crack that starts in the corner third brick up and then goes to the west up to the eighth brick.
>
> 26. Another crack on the south wall west side of the attrium [sic] that is up 18 blocks above the start of square block and over six blocks. Mortar joint missing on the east wall fifth course above the dock head about two blocks west of the television camera.
>
> . . . .
>
> 28. On the north side the brick is broken out the fourth row down from the square brick course on the west end of the atrium. The west end of the atrium up five of the square brick crack starts and goes over half brick and then up the tile over the next joint. Goes on up about eight or nine courses.

Representatives of Wilscam, Lueder, and the University met on the UNMC campus to conduct a 1-year review of the building. They discussed unresolved punch list items, including those listed above. In October 1977, structural engineer Walter Rudeen and Wilscam's field architect, Frederick Fast, reviewed the brick cracking referred to in the punch list. Rudeen determined that a horizontal crack on the north side had been caused by the deflection of an angle bracket. Neither Wilscam nor Rudeen reported to the University about the several instances of diagonal "stairstep" mortar cracking which had been drawn to Wilscam's attention during the 1-year review meeting. Wilscam and Rudeen discovered no structural defects in 1977. Wilscam reported the results of Rudeen's investigation to Money and recommended only that the cracks be patched or caulked to prevent further damage to the walls. Money directed Wilscam to have Lueder examine and repair the cracks.

Although Lueder caulked some of the more accessible cracks (those which did not require scaffolding), it did not complete the building repairs noted in the punch list.

Ralph Yarbrough was director of plant operations from July 1977 to July 1982. That department was in charge of maintenance of UNMC buildings. Yarbrough hesitated to direct his staff to repair the cracks because he considered them to be punch list deficiencies covered by Lueder's 1-year warranty on the building, and were Money's responsibility. Dave Wallace, a staff architect in Yarbrough's department, testified that there was "friction" between Yarbrough and Money over Yarbrough's reluctance to assume maintenance responsibility for the college of pharmacy building. During 1978, however, it became apparent that Lueder would not repair the cracks, and Yarbrough's department gradually assumed full responsibility for patching the cracks in the college of pharmacy building. Yarbrough testified that these cracks lengthened, widened, and increased in number to such an extent that the building required caulking quarterly or semiannually over a 5-year period, from 1978 to 1982. By 1982, neither Lueder nor the University had caulked any of the cracks that required scaffolding.

University staff architect Wallace mapped the cracks in the walls on several occasions between March 28, 1977, and April 24, 1979. Wallace first observed cracks on the north side of the building early in 1977. Later that year, he noticed similar cracks on the south side and marked all the cracks he saw in the plan book for the building. During 1977, Wallace also noticed deflection or sagging on the north side of the west block of the building and recorded it in the plan book. He associated this deflection with a horizontal crack. The rest of the cracks were "stairstep" and located in mortar joints.

Wallace mapped the cracks again in 1979 because he was curious to see if they had stabilized or if they were "still relieving stresses in the walls." One crack he had first noted on May 2, 1977, had extended 8 feet by April 24, 1979. Wallace observed several new stairstep cracks ranging in size from several inches to approximately 8 feet long. Because the cracks had lengthened between 1977 and 1979 and because Wallace found

new cracks in 1979, he concluded that the cracking had not stabilized and that the conditions which originally caused the cracking were still present. Wallace testified that, as an architect, he did not believe the condition of the college of pharmacy building was "an acceptable situation." He never expressed this concern to his superior, Yarbrough, because he was not asked.

Yarbrough himself testified that he felt the extent of cracking of the building was "an unusual situation" and that it was the "[f]irst and only building I've seen do it." Nevertheless, between 1977 and 1982, he never inquired as to the cause of cracking or expressed any concern about it because Money had told him in 1977 that Wilscam had investigated the problem and determined that the cracks were superficial.

John Colby joined the UNMC staff in June 1982 as a design engineer under Wallace. On June 7 or 8, 1982, Wallace pointed out to Colby the cracking problem at the college of pharmacy. In July 1982, Colby was promoted to manager of architecture and engineering, reporting to Yarbrough. Colby regarded the cracking as a serious problem and soon recommended to Yarbrough that the cause of cracking be investigated by professional engineers.

Pursuant to Colby's recommendation, the University hired a consulting structural engineering firm, Shive-Hattery & Associates (Shive), to determine the cause of cracking. Shive's engineers performed a field investigation in October 1982, which entailed crack location identification, a visual examination of cracks, relative elevation measurements, and examination of steel lintels and steel stud backup walls. Shive's December 1, 1982, report to the University concluded that certain diagonal cracks were "primarily due to deflections of the post tensioned concrete floor slabs" and that horizontal cracks in the south wall of the fifth level "may be due, in part, to the lack of lateral load resistant capabilities of the structural frame . . . ." The report further concluded that cracking in the east elevation had developed due to thermal and moisture movements, aggravated by a lack of expansion joints. Shive also concluded that certain other cracks would have been significantly reduced had additional control or expansion joints

been installed during construction. Shive's engineer, Dale Moore, testified that Shive did not attempt at that time to determine the cause of the floor slab deflection, but only the cause of cracking.

Shive expected the floor slab deflection to continue and anticipated further cracking due to thermal and moisture conditions. It recommended that repair procedures include tuck-pointing the cracks in the mortar joints and constructing vertical control joints and horizontal expansion joints to absorb thermal and moisture movements and possible minor structural movements. In the concluding paragraph of the report, Shive offered to provide further assistance in assessing "the question of responsibility or liability for the cracked conditions of the brick."

After receiving the Shive report, the University determined to do the repairs recommended by Shive. After competitive bidding, the University contracted with Western Waterproofing to make the repairs. Repairs commenced in the summer of 1983. At this time, portions of the brick veneer were removed, and the University discovered the exterior brick walls and supporting structure had not been installed according to plans and specifications. Specifically, metal ties were improperly installed; supporting angle irons were not attached to the building; and the brick veneer was not properly set on the supporting angle irons. The University contacted both Wilscam and Lueder about these construction defects.

In the fall of 1983, Lueder hired consulting engineers Wiss, Janney, Elstner Associates, Inc. (Wiss), to determine the cause of cracking. Wiss concluded that "neither the problems with the installation of the shelf angle [nor] the misalignment of the metal ties contributed to the observed brickwork cracking." Rather, the cracks were caused by extensive floor slab deflections and a lack of vertical control and horizontal expansion joints. The Wiss report dated February 17, 1984, further alerted the University to the fact that the floor slabs of the building had not been built according to plans and specifications and had a live load bearing capacity of only 20 to 25 pounds per square foot. The building had been designed with a live load bearing capacity of 100 pounds per square foot. Wiss

recommended that its findings be confirmed, and on April 27, 1984, Shive confirmed the Wiss analysis.

Ian Chin, an architect and structural engineer employed by Wiss, testified that the building design itself, together with the diagonal pattern of cracking in the walls, strongly suggested the cracks were caused by floor slab deflection. Chin stated that checking the floor strength was not part of his initial assignment, but was an "evolution" of his initial assignment to determine the cause of cracking. He further testified that a strength analysis could have been done in 1977.

Structural engineer Eugene Holland, who was retained by counsel for Wilscam to assist in defending this action, also testified that to investigate a building, the engineer should make a visual inspection and map any cracks. The engineer should then determine the material strengths of brick, mortar, floor slabs, and steel, and connections of masonry. It also is necessary to review the construction drawings, architectural structural drawings and specifications, and shop drawings to see how the building was put together. In particular, the investigating engineer should examine the floor to investigate wall cracks because "[t]he two elements are inter-related. The wall is supported by the floor. . . . And therefore, anything that is distressed in the wall would be projected to the floor possibly."

The University first contends that the district court erred as a matter of law in applying § 25-222, containing a 2-year statute of limitations for professional negligence, rather than Neb. Rev. Stat. § 25-223 (Reissue 1985), which sets out a 4-year limitation period, to the facts of this case. Our decisions in *Witherspoon v. Sides Constr. Co.*, 219 Neb. 117, 362 N.W.2d 35 (1985), and *Williams v. Kingery Constr. Co.*, 225 Neb. 235, 404 N.W.2d 32 (1987), are dispositive of this issue. Section 25-222 specifically pertains to "actions on professional negligence." Both *Witherspoon* and *Williams* hold that architects and engineers are professionals for the purposes of § 25-222. Furthermore, "A professional act or service is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than

physical or manual." *Witherspoon v. Sides Constr. Co., supra* at 125, 362 N.W.2d at 42. The allegations stated in the petition clearly involve professional acts contemplated by § 25-222, see *Williams v. Kingery Constr. Co., supra*, and the district court acted properly in applying that section.

Section 25-222 provides:

> Any action to recover damages based on alleged professional negligence or upon alleged breach of warranty in rendering or failure to render professional services shall be commenced within two years next after the alleged act or omission in rendering or failure to render professional services providing the basis for such action; *Provided*, if the cause of action is not discovered and could not be reasonably discovered within such two-year period, then the action may be commenced within one year from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier. . . .

Section 25-222 also sets forth a 10-year period of repose for actions involving professional negligence. The period of repose applicable to an architect who has a duty to inspect throughout construction under the provisions of § 25-222 begins to run when the construction is completed. *Williams v. Kingery Constr. Co., supra*; *Witherspoon v. Sides Constr. Co., supra.* Similarly, the 2-year statute of limitations under § 25-222, applicable to an architect who has the responsibility to design a building and a duty to inspect throughout construction, begins to run when the construction is completed. If a plaintiff, however, proves by a preponderance of the evidence that the cause of action was not discovered and could not reasonably have been discovered within such a 2-year period, then an action may be commenced "within one year from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier . . . ." § 25-222.

Since this action was filed on April 13, 1984, more than 2 years after the date of substantial completion of the building on October 11, 1976, the determinative issue is whether the University discovered or could reasonably have discovered it

had a cause of action, or could reasonably have discovered facts which would have led to such discovery, on or before April 13, 1983. The trial court held that the University "knew or reasonably should have known of facts which would have led to the discovery of the alleged negligence of the defendant by December 1, 1982 at the latest."

Discovery, as applied to statutes of limitations, refers to the fact that one knows of the existence of an injury or damage and not that he or she has a legal right to seek redress in court. *Georgetowne Ltd. Part. v. Geotechnical Servs., ante* p. 22, 430 N.W.2d 34 (1988). Under the discovery principle, a cause of action accrues and the 1-year discovery provision of § 25-222 begins to run, when there has been discovery of facts constituting the basis of the cause of action or the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery. *Georgetowne, supra.* It is not necessary that the plaintiff have knowledge of the exact nature or source of the problem, but only knowledge that the problem existed. *Kearney Clinic Bldg. Corp. v. Weaver*, 211 Neb. 499, 319 N.W.2d 95 (1982); *Grand Island School Dist. #2 v. Celotex Corp.*, 203 Neb. 559, 279 N.W.2d 603 (1979). The point at which a statute of limitations commences to run must be determined from the facts of each case, and the decision of the district court on the issue of statute of limitations will not be set aside by the Supreme Court unless it is clearly wrong. *Georgetowne, supra*; *Suzuki v. Holthaus*, 221 Neb. 72, 375 N.W.2d 126 (1985); *Interholzinger v. Estate of Dent*, 214 Neb. 264, 333 N.W.2d 895 (1983).

The record shows that cracks were discovered in the walls of the college of pharmacy building as early as April 1977. University personnel observed and monitored the cracks as they increased in length, width, and number between 1977 and 1982. In the summer of 1982, Colby, a new University employee, was sufficiently concerned about the cracking that he recommended hiring Shive to investigate the problem. On December 1, 1982, Shive reported to the University that the cracks were caused by deflection of the floor slabs and made its recommendations for repairs. Shive's structural engineer

testified that if the University had asked him in 1982 to inspect the building as to its structural strength, he could have done so and would have reached the same conclusions reached by Wiss on February 17, 1984. In fact, the University declined Shive's offer to assess "the question of responsibility or liability for the cracked conditions of the brick."

Both Wiss engineer Chin and structural engineer Holland testified that as early as 1979, if called upon to determine the cause of cracking, they would have conducted a more extensive investigation than did Shive and would have discovered the defects now complained of. Even assuming that the cracking problem was not caused by deviations from plans and specifications in the construction of the brick walls and that the cracking problem was not caused by any structural weight-bearing defect, a thorough and timely investigation of the cracking problem should have led to the discovery of all the building defects complained of here before April 13, 1983. A thorough investigation of the cracking would have revealed the many construction defects which allegedly slipped through Wilscam's fingers during construction and would have required a review of the building plans and the shop drawings in conjunction with a strength analysis.

We agree with the district court that, in addition to the early appearance of the cracks with 5 months of the completion of the building and the unusual magnitude, persistence, and enlarging of the cracks, the report by Shive on December 1, 1982, should have alerted the University to the fact it had serious problems with the college of pharmacy building.

While we determine there was more than sufficient evidence to support the trial court's finding that the University "knew or reasonably should have known of facts which would have led to the discovery of the alleged negligence of the defendant by December 1, 1982 at the latest," we note that there was other extremely strong evidence showing that the University was aware, more than 1 year before the filing of the petition in this case on April 13, 1984, that it had a potential claim against Wilscam.

There is evidence that the University considered filing suit against Wilscam and Lueder early in April 1983. Colby testified

that notes of his April 12, 1983, telephone conversation with Robert Pazderka, a civil engineer who was assistant vice president and director of facilities, indicate that Pazderka met with counsel for the University (not present counsel) on Monday, April 11, 1983, to discuss the college of pharmacy building. Colby's notes specifically refer to Pazderka's discussion with counsel on April 11, 1983, of statutes of limitations, concerning, in part, "2 year professional liability," "4 year contractor liability," and "1 year after discovery." The University was clearly aware of facts which might lead to a lawsuit at the absolute latest on April 11, 1983, and, indeed, was apparently considering the filing of a lawsuit on that date.

The district court was not clearly wrong in finding that the University knew, or reasonably should have known, by December 1, 1982, of facts which would lead to the discovery of the alleged negligence of Wilscam, and the University's assignments of error are without merit. Since this action was not filed until April 13, 1984, it is barred by the applicable statute of limitations, § 25-222. The decision of the district court is affirmed.

AFFIRMED.

BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA, APPELLANT, V. LUEDER CONSTRUCTION COMPANY, DEFENDANT AND THIRD-PARTY PLAINTIFF, AND THE PRESCON CORPORATION, THIRD-PARTY DEFENDANT, APPELLEES.

433 N.W.2d 485

Filed December 23, 1988. No. 87-955.

1. **Limitations of Actions: Words and Phrases.** Discovery, as applied to statutes of limitations, refers to the fact that one knows of the existence of an injury or damage and not that he or she has a legal right to seek redress in court.
2. **Limitations of Actions: Time.** Under the discovery principle, a cause of action accrues and the 2-year discovery provision of Neb. Rev. Stat. § 25-223 (Reissue 1985) begins to run, when there has been discovery of facts constituting the basis of the cause of action or the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to

the discovery. It is not necessary that the plaintiff have knowledge of the exact nature or source of the problem, but only knowledge that the problem existed.

3. **Limitations of Actions: Appeal and Error.** The point at which a statute of limitations commences to run must be determined from the facts of each case, and the decision of the district court on the issue of statute of limitations will not be set aside by the Supreme Court unless it is clearly wrong.

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

Gerald P. Laughlin and Jill Robb Ackerman, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for appellant.

Waldine H. Olson and Kathleen C. Smith, of Schmid, Mooney & Frederick, P.C., and W.C. Nelson, of Nelson, Morrow, Waldron & Kivett, for appellee Lueder Construction.

Robert T. Grimit, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellee Prescon Corp.

BOSLAUGH, SHANAHAN, and GRANT, JJ., and ENDACOTT and QUIST, D. JJ.

GRANT, J.

On April 13, 1984, the appellant, Board of Regents of the University of Nebraska (University), filed this action against Lueder Construction Company (Lueder) for damages premised on breaches of contract and warranty in the construction of the college of pharmacy building at the University of Nebraska Medical Center (UNMC) in Omaha. Lueder acted as general contractor on the project. Insurance Company of North America (INA), Lueder's performance bond surety for the project, was also named as a defendant. The district court granted INA's motion for summary judgment, and the University has not appealed that ruling.

The University's petition alleged two causes of action: (1) that Lueder breached its contract in that the exterior brick walls and the brick supporting structure had not been installed according to plans and specifications; and (2) that Lueder breached its contract in failing to install the number of steel reinforcing bars required in the floor slabs and in failing to posttension the tendons in both the floor slabs and spandrel

sections to specification force. Lueder's answer admitted and denied various factual allegations of the petition and pled that any claim which the University might have against Lueder was "specifically barred by the applicable statutes and periods of limitation for commencement of actions under the laws of the State of Nebraska."

The trial was bifurcated pursuant to Neb. Rev. Stat. § 25-221 (Reissue 1985) to determine the issues related to Lueder's statute of limitations defense. After a trial to the court on that issue, the district court for Douglas County held that the "action was brought more than two years after the existence of facts which would have, if pursued, led to the discovery of [the University's] causes of action" and was, therefore, barred by the applicable statute of limitations, Neb. Rev. Stat. § 25-223 (Reissue 1985). The district court further ordered that Lueder's third-party action against The Prescon Corporation (Prescon), seeking indemnification for all sums adjudged against Lueder, be dismissed.

The University timely appealed and in this court claims the district court erred (1) in finding that the action was barred by the statute of limitations, when the University, exercising reasonable diligence under the circumstances, did not discover facts which reasonably led to the discovery of the breach giving rise to its first cause of action until summer 1983, nor did it discover facts which reasonably led to the discovery of the breach giving rise to the second cause of action until February 20, 1984; (2) in not finding that the University exercised reasonable diligence to discover the defects, when there was sufficient evidence presented at trial to support such finding; and (3) in holding that a reasonable investigation in 1980 or 1981 should have led to the discovery of the defects set out in the plaintiff's two causes of action. We affirm.

The record shows that on May 6, 1974, the University contracted with architects Wilscam Mullins Birge, Inc. (Wilscam), for the design and continued inspection of construction of the college of pharmacy building. Wilscam hired Walter D. Rudeen and Associates, Inc. (Rudeen), to perform the structural engineering design work for the building. See *Board of Regents v. Wilscam Mullins Birge, ante*

p. 675, 433 N.W.2d 478 (1988). On May 19, 1975, the University entered into a written owner-contractor agreement with Lueder for Lueder to construct the building. Lueder contracted with Prescon to prepare shop drawings for the project.

The project was substantially completed on October 11, 1976, and the building was accepted by the University on that date. During the following year, University personnel monitored the new building for deficiencies. In March 1977, University personnel observed cracks beginning to form in the north and south exterior brick walls of the west section of the building. In preparation for a 1-year review of the building, George Money, director of planning and construction at UNMC, prepared a "punch list" of deficiencies to be reviewed by Wilscam and Lueder. The punch list, dated September 27, 1977, refers to several instances of brick cracking:

> 24. South wall has a crack at the east end of the west window, starting at the window sill and going up about half the window height, coming up about seven blocks (about half way up).
>
> 25. The overhang at the south wall west end. There is a crack that starts in the corner third brick up and then goes to the west up to the eighth brick.
>
> 26. Another crack on the south wall west side of the attrium [sic] that is up 18 blocks above the start of square block and over six blocks. Mortar joint missing on the east wall fifth course above the dock head about two blocks west of the television camera.
>
> . . . .
>
> 28. On the north side the brick is broken out the fourth row down from the square brick course on the west end of the atrium. The west end of the atrium up five of the square brick crack starts and goes over half brick and then up the tile over the next joint. Goes on up about eight or nine courses.

On September 27, 1977, representatives of the University, Lueder, and Wilscam met to conduct the 1-year review of the building. The punch list items related to cracking were discussed, and it was agreed that Wilscam would perform a

further investigation of the cracks. The University asked Wilscam to provide a written report on the matter.

Structural engineer Walter Rudeen and Wilscam's field architect, Frederick Fast, visited the site in October 1977. During this visit, Rudeen investigated only one horizontal crack in the north wall and did not examine several diagonal "stairstep" cracks in the mortar, which had been brought to Wilscam's attention at the September 27, 1977, meeting. Walter Rudeen determined that the horizontal crack was caused by downward movement of a brick support angle, which had resulted from construction error. The Wilscam firm, in turn, orally reported to the University about the cause of the horizontal crack. Wilscam never provided the University with a written report on the causes of cracking and never provided any explanation as to the cause of the stairstep diagonal cracks. As architect Donald Mullins testified, "[T]he university did not make a big deal of the cracks in the walls." Wilscam orally advised the University in 1977 that the cracks were superficial and that they should be monitored and caulked to prevent further damage to the building.

Between 1977 and 1982, various University personnel monitored the cracks. Ralph Yarbrough was director of UNMC plant operations from July 1977 to May 1982. His department was responsible for the repair and maintenance of existing buildings on the UNMC campus. Yarbrough testified that he was concerned about the cracks when he first saw them in 1977, and he expressed his concern to Money, whose department was responsible for buildings under construction.

Money testified that while it was not unusual for brick buildings to crack, certain cracks in the college of pharmacy building were different than he had seen in other buildings, in that the location of the cracks at the lower corners of window openings was unusual. Money further testified that in 1977 the cracks were "not very large." They were 8 to 10 feet long, 16 or 18 in number, and about 1/8 inch thick. His department was unable to repair the cracks in 1977 because he did not have the authority to order caulking done. He asked that Yarbrough's department do the caulking, but Yarbrough felt the cracks were punch list deficiencies subject to Lueder's 1-year warranty on

the building.

Although Money requested Wilscam to direct Lueder to repair the punch list cracks, the work was not completed. Yarbrough's department assumed the responsibility for repairing the cracks early in 1978 when it became apparent Lueder would not do so. Thus, Money testified, "[N]othing was done for a couple years' time."

Yarbrough did not make special trips to the building to see the cracks, but during casual observations of the building in 1978 and 1979, he noticed that more cracks appeared and that the existing cracks lengthened and widened. Yarbrough testified that the cracking continued and grew more extensive during 1980. The cracks were vertical, stairstep, and horizontal. To the best of Yarbrough's recollection, when a crack appeared, it did not stop, but kept on growing.

Yarbrough testified that from 1978 to 1982 the cracks were caulked quarterly or semiannually by physical plant maintenance people, but that caulking did not stop the cracking problem. No other buildings on the UNMC campus required annual caulking. Yarbrough felt the cracked condition of the college of pharmacy building was unusual because it was the "[f]irst and only building I've seen do it." Out of the approximately 300 brick buildings Yarbrough had been responsible for, he had never seen a brick building behave in this manner.

Dave Wallace, a staff architect in Yarbrough's department, mapped the cracks on a set of building plans on several occasions between March 28, 1977, and April 24, 1979. He first observed cracks on the north side of the building early in 1977. Later that year, he noticed similar cracks on the south side and marked all the cracks he saw in the plan book for the building. During 1977, Wallace also noticed deflection or sagging on the north side of the west block of the building and recorded it in the plan book. He associated this deflection with a horizontal crack; the rest of the cracks were "stairstep" and located in mortar joints.

Wallace mapped the cracks again in 1979 because he was curious to see if they had stabilized or if they were "still relieving stresses in the walls." One crack he had first noted on May 2,

1977, had extended 8 feet by April 24, 1979. Wallace observed several new stairstep cracks ranging in size from several inches to approximately 8 feet long. Because the cracks had lengthened between 1977 and 1979 and because Wallace found new cracks in 1979, he concluded that the cracking had not stabilized and that the conditions which originally caused the cracking were still present.

Yarbrough testified that Wallace had the right and authority to inspect the conditions in the college of pharmacy building and that if Wallace was concerned about the condition of the building, it was his responsibility to report that concern to Yarbrough. Wallace testified that, as an architect, he did not believe the condition of the college of pharmacy building was "an acceptable situation." He never expressed this concern to his superior, Yarbrough, because he was not asked. In any event, Yarbrough had been told by Money that Wilscam and Rudeen had determined that the cracks were superficial, and Yarbrough did not believe he had the authority to pursue a further investigation.

Erwin Welch, a UNMC construction coordinator, reviewed Wallace's map sometime prior to his deposition on May 6, 1986. He testified that he had seen the cracks in the building and thought it was unusual to find so many cracks in a new building in just 3 years.

As of September 15, 1980, UNMC had already spent $24,339 on general renovation or repairs on the building. In September 1980, the University requested $20,000 in special funding, with a priority rating of 27 out of 28 projects, for wall repairs of the college of pharmacy building. By September 1981, the cost of wall repairs was estimated at $25,000 and the request for special funding had advanced to priority 5 out of 21 projects. By March 1982, the University estimated it needed $30,000 from the University budget to repair the walls.

Yarbrough testified that he would not reasonably expect a building such as the college of pharmacy building to require $20,000 worth of raking and tuck-pointing within 4 years after it was completed and that in his experience the amount of repair costs was "very extraordinary."

Architect Charles Wilscam testified that, assuming the

building had been reasonably maintained, $20,000 in repair costs, which was the amount requested in 1980, would cause him to be concerned about defects or deficiencies in the building and would lead him to believe that there should be some investigation to determine the cause of cracking.

On June 7, 1982, John Colby joined the UNMC staff as a design engineer. On July 1, 1982, he was promoted to manager of architecture and engineering and became responsible for new construction and the renovation of existing buildings. Colby first observed the cracks in the college of pharmacy building on June 7 or 8, 1982, and subsequently reviewed Wallace's map. He considered the cracks to be serious and testified that had he seen the cracks in April 1979, he would have investigated the cause of cracking. Colby recommended, in August 1982, that a consultant be hired to determine the cause of cracking.

The University retained consulting engineers Shive-Hattery & Associates (Shive) in the fall of 1982 to determine the cause of cracking in the exterior walls of the building. Shive's structural engineer, Dale Moore, performed a site inspection on October 13 to 15, 1982. Shive's December 1, 1982, report concluded that the primary cause of the diagonal stairstep cracks was floor slab deflection. Shive recommended tuck-pointing all cracks in the existing masonry and installing vertical control joints and horizontal expansion joints to accommodate further movements in the structure. Shive did not attempt at that time to determine the cause of the floor slab deflection, but offered to provide further assistance in assessing "the question of responsibility or liability for the cracked conditions of the brick."

The University contracted with Western Waterproofing to do the repairs recommended by Shive, and repair work commenced in approximately August 1983. When Western Waterproofing removed portions of the brick facing, it discovered many construction defects in the brick walls. In one instance, a piece of the shelf angle fell out of the masonry and onto the scaffolding when Western Waterproofing attempted to install a horizontal control joint. The shelf angle had been cut with an acetylene torch and was not anchored to the building. Shive engineer Moore returned to the site in October 1983 and

observed several other construction defects. Moore recommended making more test openings and completing the initial repairs as soon as possible. As the repairs progressed, it became apparent that in many instances the veneer brick was not properly placed on the shelf angle; that some shelf angles had been put in upside down; and that in many places the brick ties had been attached in the wrong location. In other words, the brick veneer was not firmly attached to the building.

The University contacted Lueder about these problems, and in October 1983, Lueder hired Wiss, Janney, Elstner Associates, Inc. (Wiss), a Chicago engineering firm, to investigate the building. Wiss performed a thorough investigation and reported to the University at a meeting on February 20, 1984, that the cracks in the walls were caused by extensive floor slab deflections. The Wiss report also alerted the University to the fact that the floor slabs had not been built according to plans and specifications and that the floors had a live load bearing capacity of only 25 to 30 pounds per square foot. The building had been designed with a live load bearing capacity of 100 pounds per square foot.

All of the consulting engineers who testified at trial had access to the building plans and specifications and Wallace's map of the cracking as it appeared in 1977 and 1979. Moore testified that in his opinion the cracks that existed in 1979 would warrant a measurement to determine whether floor slab deflection was the cause of the cracks.

Ian Chin, an engineer employed by Wiss, testified that there were clear signals back in 1977 as well as in 1979 that a thorough investigation of the cracking should have been performed. According to Chin, "[P]roperly designed and constructed masonry walls are not expected to develop these type of cracks." Chin testified that the pattern of cracking itself strongly indicated floor slab deflection and prompted him to analyze the drawings and discover the construction defects in the floor slabs. Chin further testified that a proper investigation also would have entailed making test openings in the walls to observe how the walls were constructed.

Structural engineer Eugene Holland testified that if he had been hired in 1979 to investigate, he would have suspected the

cracks were caused by defective design, lack of control joints, and/or improper construction by the contractor. Holland also testified that a comprehensive investigation was not warranted in 1977, but at that point, the University should have repaired the existing cracks and monitored the building for further cracking. By 1979, however, Holland would have suspected a strength problem and would have recommended a full investigation because of the appearance and number of cracks.

The applicable statute of limitations in this case is § 25-223, which provides in part:

> Any action to recover damages based on any alleged breach of warranty on improvements to real property or based on any alleged deficiency in the design, planning, supervision, or observation of construction, or construction of an improvement to real property shall be commenced within four years after any alleged act or omission constituting such breach of warranty or deficiency. If such cause of action is not discovered and could not be reasonably discovered within such four-year period, or within one year preceding the expiration of such four-year period, then the cause of action may be commenced within two years from the date of such discovery or from the date of discovery of facts which would reasonably lead to discovery, whichever is earlier.

Applying § 25-223, the district court determined that the act or omission in this case would date from October 11, 1976, the date of substantial completion. Since this action was not filed until more than 4 years after the date of substantial completion, the reasonable discovery provisions of § 25-223 apply, and the issue is whether the University could have discovered its cause of action before April 13, 1982, if it acted reasonably.

The district court found that from 1977 through 1980, the University was aware that the cracks in the college of pharmacy building were unusual in their number, size, and continued growth and that the investigation ordered by Colby in 1982 should have been done well before Colby was hired and decidedly before April 1982. The court specifically found that the condition of the building was such that a thorough investigation should have been initiated as early as 1980 and not later than 1981 and that a reasonable investigation at that time

should have included such examination and analysis so as to allow discovery of all of the University's causes of action.

Discovery, as applied to statutes of limitations, refers to the fact that one knows of the existence of an injury or damage and not that he or she has a legal right to seek redress in court. *Georgetowne Ltd. Part. v. Geotechnical Servs., ante* p. 22, 430 N.W.2d 34 (1988). Under the discovery principle, a cause of action accrues and the 2-year discovery provision of § 25-223 begins to run, when there has been discovery of facts constituting the basis of the cause of action or the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery. *Georgetowne, supra.* It is not necessary that the plaintiff have knowledge of the exact nature or source of the problem, but only knowledge that the problem existed. *Kearney Clinic Bldg. Corp. v. Weaver*, 211 Neb. 499, 319 N.W.2d 95 (1982); *Grand Island School Dist. #2 v. Celotex Corp.*, 203 Neb. 559, 279 N.W.2d 603 (1979). The point at which a statute of limitations commences to run must be determined from the facts of each case, and the decision of the district court on the issue of statute of limitations will not be set aside by the Supreme Court unless it is clearly wrong. *Georgetowne, supra*; *Suzuki v. Holthaus*, 221 Neb. 72, 375 N.W.2d 126 (1985); *Interholzinger v. Estate of Dent*, 214 Neb. 264, 333 N.W.2d 895 (1983).

At this stage of the litigation, the issues tried to the district court pertained only to the statute of limitations, and not to the causes of the cracking itself. Although evidence presented by Lueder indicates that the cracking of the exterior brick walls of the college of pharmacy building may have been caused by design error, it is clear that the University employees responsible for maintaining the building were concerned about the cracking less than 1 year after the building had been completed. Adequate checking into the cracking problem would have led to the discovery of structural deficiencies. While the University may have been diligent in asking architects Wilscam and Rudeen to review the cracks at that time, the cracks continued to lengthen, widen, and increase in number. Walter Rudeen determined, in October 1977, that the large horizontal crack he investigated was caused by construction error. The building

required caulking quarterly or semiannually over a 5-year period. Money, Yarbrough, Welch, and Wallace all regarded the magnitude and pattern of cracking as unusual, yet none of them recommended that the cause of cracking be investigated by a disinterested party. Not until August 1982 did a new University employee, Colby, recommend that the building be investigated by Shive. Colby testified he would have called for investigation as early as 1979. It is clear that the diffusion of responsibility and the blurring of the lines of authority led to such inertia that no one in the University pushed a thorough investigation of these early problems in a brandnew, $2,800,000 building. Nonetheless, University personnel knew of the problem, and such knowledge becomes knowledge of the University. *City of Gering v. Smith Co.*, 215 Neb. 174, 337 N.W.2d 747 (1983).

Structural engineers Ian Chin and Eugene Holland testified that they too would have investigated the cracking problem as early as 1979. A competent investigation would have included making test openings in the walls and a structural analysis of the building. In any event, in 1980 the University requested $20,000 to repair the exterior walls of the college of pharmacy building, an amount Yarbrough described as "extraordinary." By 1981, this amount had risen to $25,000 and the wall repair project had risen from priority 27 to priority 5 on the funding request list. The University knew or should have known by that time that there was a problem with the building.

The district court was not clearly wrong in finding that the University should have investigated the cracking problem no later than sometime in 1981 and that a reasonable investigation at that time should have included such examination and analysis so as to have led to a discovery of all of the University's causes of action. This suit was filed on April 13, 1984, more than 2 years after the existence of facts which would have, if pursued, led to the discovery of the University's causes of action, and is barred by the applicable statute of limitations.

The decision of the district court is affirmed.

AFFIRMED.

BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA, APPELLEE, V. LUEDER CONSTRUCTION COMPANY, DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLANT, INSURANCE COMPANY OF NORTH AMERICA, APPELLEE, AND WILSCAM MULLINS BIRGE, INC., ET AL., THIRD-PARTY DEFENDANTS, APPELLEES.

433 N.W.2d 492

Filed December 23, 1988. No. 86-257.

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

Kathleen C. Smith, of Schmid, Mooney & Frederick, P.C., for appellant.

Steven J. Riekes, of Richards, Riekes, Brown & Zabin, P.C., for appellee Wilscam Mullins Birge.

Larry E. Welch, of Gross, Welch, Vinardi, Kaufmann & Day, P.C., for appellee Walter D. Rudeen and Associates, Inc.

BOSLAUGH, SHANAHAN, and GRANT, JJ., and ENDACOTT and QUIST, D. JJ.

GRANT, J.

On April 13, 1984, the Board of Regents of the University of Nebraska filed this action against Lueder Construction Company (Lueder) and Insurance Company of North America, Lueder's performance bond surety for the project, for damages premised on breaches of contract and warranty in the construction of the college of pharmacy building at the University of Nebraska Medical Center in Omaha. Lueder subsequently filed third-party petitions seeking contribution and indemnity from The Prescon Corporation and appellees Walter D. Rudeen and Associates, Inc. (Rudeen), and Wilscam Mullins Birge, Inc. (Wilscam).

On February 21, 1986, the district court for Douglas County sustained the demurrers of Rudeen and Wilscam and ordered that Lueder's third-party petitions against them be dismissed. Lueder timely appealed. This appeal is disposed of by the case of *Board of Regents v. Lueder Constr. Co., ante* p. 686, 433 N.W.2d 485 (1988). In light of our decision in that case, the

issues presented in this appeal are moot, and the appeal is dismissed.

APPEAL DISMISSED.

SCOTTSBLUFF TYPEWRITER LEASING CO., APPELLEE, V. BEVERLY ENTERPRISES-NEBRASKA, INC., APPELLANT.

432 N.W.2d 844

Filed December 23, 1988. No. 87-462.

1. **Records: Appeal and Error.** In the absence of a complete bill of exceptions, the only issue on the appeal is the sufficiency of the pleadings to support the judgment.
2. **Pleadings: Parties: Names.** The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding, by adding or striking out the name of any party or by correcting a mistake in the name of the party.
3. _____: _____: _____. A defendant may be designated in any pleading or proceeding by any name, followed by the words, "real name unknown." The person intended shall thereupon be regarded as a defendant in such action or proceeding and as sufficiently identified therein for all purposes.
4. **Pleadings: Parties.** There is no vested right in a technical error or defect in the pleadings or the parties to the action. No error or defect can be regarded which does not affect the substantial rights of the adverse party.
5. **Pleadings: Parties: Names: Intent.** The ultimate test of whether an error in the pleadings is misnomer or a material change in parties is most equitably the understanding and intent of the parties. If the error is such as to mislead the parties into thinking that another entity was meant to be served, then the mistake is material and should not be amended following final judgment.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Affirmed.

John F. Simmons, of Simmons, Raymond, Olsen, Ediger, Selzer & Ballew, P.C., for appellant.

William E. Lindgren, pro se.

BOSLAUGH, SHANAHAN, and GRANT, JJ., and REAGAN and ENDACOTT, D. JJ.

BOSLAUGH, J.

The plaintiff, Scottsbluff Typewriter Leasing Co., a trade name for William E. Lindgren, commenced this action in small claims court to recover $700 in lease payments due from the defendant. Service was made by the sheriff on Ralph Anderson, administrator of Scottsbluff Villa, a nursing home with which the plaintiff had been doing business. No question is raised regarding the regularity or validity of the service. The plaintiff named Beverly Enterprises Inc. as the defendant. No appearance was made on behalf of the defendant, and the plaintiff recovered a default judgment on July 17, 1986.

On August 27, 1986, the plaintiff filed a praecipe for an execution, which was issued that day. Beverly Enterprises, Inc., then filed a motion to quash the execution, alleging that Scottsbluff Villa was owned by Beverly Enterprises - Nebraska, Inc., not the corporation of Beverly Enterprises, Inc. The true name of the corporation is Beverly Enterprises (no "Inc." according to exhibit 5, the incorporation certificate from the State of California). The motion to quash incorrectly names the corporation as Beverly Enterprises, Inc. The motion to quash was heard on October 17, 1986, and sustained.

On October 29, 1986, the plaintiff filed a motion to amend the judgment, alleging that the liability to the plaintiff had been incurred by Scottsbluff Villa, that Beverly Enterprises - Nebraska, Inc., had done business under the name of "Beverly Enterprises," and that Beverly Enterprises, Inc., was in fact the same entity as Beverly Enterprises - Nebraska, Inc. This motion was heard and sustained on January 12, 1987. The order authorized the pleadings to be amended to show the correct name of the defendant corporation, Beverly Enterprises - Nebraska, Inc., the judgment to be amended to show the correct corporate name, and the execution to be issued against Beverly Enterprises - Nebraska, Inc. From this order the defendant appealed to the district court, where the judgment was affirmed. The defendant has now appealed to this court.

The defendant's sole assignment of error is that the district court erred in affirming the order sustaining the plaintiff's motion to amend the judgment.

The bill of exceptions which has been filed in this court

contains only the evidence which was introduced at the hearing on the motion to quash. Since no bill of exceptions has been filed in this court concerning the hearing which resulted in the order from which the appeal has been taken, the only issue before this court is whether the pleadings support the judgment.

In the absence of a complete bill of exceptions, the only issue on the appeal is the sufficiency of the pleadings to support the judgment. *Nimmer v. Nimmer*, 203 Neb. 503, 279 N.W.2d 156 (1979).

The defendant argues that the order was erroneous because Beverly Enterprises, Inc., and Beverly Enterprises - Nebraska, Inc., are separate and distinct corporations and that a judgment may not be amended to make it effective against a party which was not originally served with process. This argument ignores the fact that the original service was upon Ralph Anderson, administrator of Scottsbluff Villa, which is owned and operated by Beverly Enterprises - Nebraska, Inc., and no issue has been raised concerning the regularity and validity of the service.

There are several statutes which bear upon the issues in this case.

Neb. Rev. Stat. § 24-526 (Reissue 1985) provides that the pleadings in small claims court are to be informal. Neb. Rev. Stat. § 25-852 (Reissue 1985) provides:

> The court may, *either before or after judgment*, in furtherance of justice, and on such terms as may be proper, *amend any pleading, process or proceeding*, by adding or striking out the name of any party or *by correcting a mistake in the name of the party*, or a mistake in any other respect, or by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved. Whenever any proceeding taken by a party fails to conform, in any respect, to the provisions of this code, the court may permit the same to be made conformable thereto by amendment.

(Emphasis supplied.)

Neb. Rev. Stat. § 25-321 (Reissue 1985) permits a defendant to be designated in any pleading or proceeding by any name, followed by the words, "real name unknown." Under this section, "the person intended shall thereupon be regarded as a defendant in such action or proceeding and as sufficiently identified therein for all purposes . . . ." In *Krotter & Co. v. Norton*, 84 Neb. 137, 120 N.W. 923 (1909), we held that the court obtains jurisdiction over a defendant by personal service of process, even though the defendant is defectively described. In the *Krotter* case, the defendant Sarah E. Norton had been sued as "Mrs. G. W. Norton," and the plaintiff had failed to allege that he could not discover her true name and that her real name was unknown. We held that the failure to comply strictly with the requirements of the statute was a mere irregularity, the failure to directly attack the service waived the irregularity, and the defendant could not "assail the process because of the misnomer" after judgment. *Id.* at 140, 120 N.W. at 925.

In *Davis v. Jennings*, 78 Neb. 462, 111 N.W. 128 (1907), this court reversed the lower court's order quashing the summons served on the defendants. The defendant husband was named as "Christ" Jennings, when his true name was "Christian" Jennings. The defendant wife was simply named as "Mrs. Christ Jennings," without her first name, Louise. This court held: "[I]t was the duty of the court to require the complaint and summons to be corrected or amended so as to state their true names, and such an order would have been no ground for a reversal of a judgment against them." *Id.* at 464, 111 N.W. at 129.

> In the case at bar service was made upon the proper parties, its effect was to bring them into court, and there can be no doubt that, if they had failed to appear, judgment could have been taken against them by default, and a decree foreclosing the mortgage would have been binding upon them.

Id. This court characterized the mistake in the *Jennings* case as clerical in nature.

In *Omaha Furniture & Carpet Co. v. Meyer*, 80 Neb. 769, 115 N.W. 310 (1908), this court allowed the plaintiff's substitution of his individual name for that of his business

name. The plaintiff requested the substitution at trial, stating that the business plaintiff was not the real party in interest and had no legal capacity to sue. This court held:

> The amendment allowed simply permitted the correction of the name of the plaintiff; the name "Omaha Furniture & Carpet Company," under which Abrahams did business, having been used as the name of the plaintiff instead of Mr. Abrahams' individual name. This was not permitting the substitution of a stranger, but was simply permitting the correction of the name.

Id. at 772, 115 N.W. at 311-12.

Citing *M'Donald v. State of Nebraska*, 101 F. 171 (8th Cir. 1900), the *Omaha Furniture* court noted:

> "There is no such thing as a vested right in a technical error or defect in the pleadings or the parties to the action. No error or defect can be regarded which does not affect the substantial rights of the adverse party. . . . At this day the party who seeks to profit by an error or mistake in pleading must be able to invoke the principle upon which the law of estoppel is founded."

80 Neb. at 773, 115 N.W. at 312.

In *Cigan v. St. Regis House Hotel*, 72 Ill. App. 3d 884, 887, 391 N.E.2d 197, 200 (1979), the Illinois appellate court held:

> The ultimate test of whether the error is misnomer or a material change in parties is most equitably the understanding and intent of the parties. If the error is such as to mislead the parties into thinking that another entity was meant to be served, then the mistake is material and should not be amended following final judgment. Notice sent to the St. Regis House Hotel should have alerted the St. Regis Hotel to the claim being presented before the Illinois Industrial Commission. A technical misnomer is not grounds to ignore even quasijudicial proceedings.

The Court of Civil Appeals of Alabama affirmed an amended default judgment in which the name of the defendant was changed from Wood and Mitchell Real Estate Company to Mitchell Brothers Contractors, Inc. The plaintiff alleged and the defendant admitted that the two names referred to one and the same entity. The court held: "In view of the instant facts in

this case, specifically the same entity doing business under different names, no prejudice occurred in allowing the judgment to be amended to reflect the correct name of the defendant." *Mitchell Bros. Contractors v. Benson*, 450 So. 2d 138, 140 (Ala. App. 1984).

In *Thomson v. L. C. Roney & Co.*, 112 Cal. App. 2d 420, 246 P.2d 1017 (1952), the California Court of Appeal held that the trial court properly amended a judgment to add Southwest Development Company to a final judgment against the initial defendant, L. C. Roney, Inc. The California court reasoned: "Since the court had jurisdiction over the defendant, it had jurisdiction to make its judgment reflect the defendant's true name." *Id.* at 427, 246 P.2d at 1021. The court went on to state: "Where injustice would result from a strict adherence to the doctrine of separate corporate existence, a court will look behind the corporate structure to determine the identity of the party who should be charged with a corporation's liability." *Id.* In this California case, the original defendant was wholly owned by Southwest Development Company, later added as a judgment debtor. Southwest Development had also participated in the defense of the case against its subsidiary. Evidence of using the corporate entity to avoid creditors supported the "injustice" test described in *Thomson*.

The Supreme Court of Wisconsin held a similar view in *R. B. General Trucking v. Auto Parts & Service*, 3 Wis. 2d 91, 87 N.W.2d 863 (1958). In that case, Auto Parts had obtained a judgment against Roman Barutha, doing business as R. B. General Trucking, Inc. The plaintiff attempted to execute on the judgment, seeking to place liability on the corporation. R. B. General Trucking sought to enjoin the enforcement of the judgment. The court held that the corporation should appeal from the judgment, rather than seek to enjoin its execution, but also noted that it would disregard corporate entities when the purpose of the corporation was to defraud creditors.

All these holdings are particularly applicable in a small claims court action. In *Harris v. Eberhardt*, 215 Neb. 240, 241, 338 N.W.2d 53, 54 (1983), we stated, "The entire matter in small claims court is on a very informal basis, with a minimum of procedural requirements." That concept, coupled with the

requirements of § 25-852, which sets out that proper amendments may be made "in furtherance of justice," leads to the conclusion that the amendments in the instant case were proper.

In this case, the defendant, Beverly Enterprises - Nebraska, Inc., which owned and operated Scottsbluff Villa, did business under the name "Beverly Enterprises." Beverly Enterprises - Nebraska, Inc., paid for its typewriter lease with checks printed "Beverly Enterprises." The plaintiff used this information in submitting his claim to the small claims court. Knowing that Beverly Enterprises was a corporation, the plaintiff added the "Inc." to the end of the name. Although Beverly Enterprises - Nebraska, Inc., was not named in the pleadings and summons, the process was served on the administrator of the nursing home operated by the defendant, which had leased the typewriters and from which the plaintiff was demanding payment. No one for Beverly Enterprises or Beverly Enterprises - Nebraska, Inc., appeared at the small claims trial on July 17, 1986. The responsible agent of Beverly Enterprises - Nebraska, Inc., was served and had notice of the suit. The defendant failed to appear, choosing to ignore the summons.

Service on the defendant's agent, the administrator of the nursing home, should have alerted Beverly Enterprises - Nebraska, Inc., that a claim against it was pending in small claims court. The agent of Beverly Enterprises - Nebraska, Inc., knowing that Beverly Enterprises did no business in Nebraska, would not be misled by the plaintiff's designation of the defendant as Beverly Enterprises Inc., so as to prejudice its rights.

The pleadings support the judgment, and it is affirmed.

AFFIRMED.

SHANAHAN, J., concurring.

The majority opinion apparently accepts the premise urged by the defendant, namely, "Beverly Enterprises Inc." and "Beverly Enterprises - Nebraska, Inc.," are separate and distinct corporate entities. The defendant's premise is incorrect. There is no corporate entity "Beverly Enterprises Inc." If there were, I would be compelled to dissent from the majority opinion because changing the name of the judgment debtor

would constitute a substantive rather than merely a technical change. As observed in *Critz Buick, Inc. v. Aliotta*, 145 Ga. App. 805, 806, 245 S.E.2d 56, 57 (1978):

> In its order denying the motion to set aside, the trial court amended the original judgment entered against "Critz Buick, Inc." nunc pro tunc to change the name of the defendant to "Dale Critz, Inc." Consequently, by amending the judgment in this manner, the trial court in effect substituted another party as the defendant over which it obviously had never acquired any jurisdiction. . . . It was error to amend the judgment in this respect . . . .

The statute which the majority employs to validate the amendment in the present case, Neb. Rev. Stat. § 25-852 (Reissue 1985), has long been held inapplicable to amendments which would substantially change a claim or defense. See, *West Town Homeowners Assn. v. Schneider*, 215 Neb. 905, 341 N.W.2d 588 (1983); *Meyer v. Sandhills Beef, Inc.*, 211 Neb. 388, 318 N.W.2d 863 (1982); *Stungis v. Union Packing Co. of Omaha, Inc.*, 196 Neb. 126, 241 N.W.2d 660 (1976). An amendment which purports to substitute one named corporate defendant for another would substantially change the claim and, thus, would not be permitted under § 25-852. Such amendatory substitution, especially when accomplished after judgment has been rendered, would also deprive the newly named corporate defendant of an opportunity to defend the suit and would constitute a denial of the due process accorded by the U.S. and Nebraska Constitutions. See, U.S. Const. amends. V and XIV; Neb. Const. art. I, § 3.

The amendment in the present case does not substitute one legal entity for another. Rather, it merely clarifies the name of the corporate defendant. Because "Beverly Enterprises Inc." is not a legal entity, the agent for Beverly Enterprises - Nebraska, Inc., could not have been misled into believing that "another entity was meant to be served." *Cigan v. St. Regis House Hotel*, 72 Ill. App. 3d 884, 887, 391 N.E.2d 197, 200 (1979). Upon receiving notice of the claim, Anderson, as agent for Beverly Enterprises - Nebraska, Inc., could not have reasonably believed that the claim was directed to Beverly Enterprises, as "Beverly Enterprises" was not named as defendant in the claim.

Therefore, the error was merely a misnomer rather than a material error in the identity of the party-defendant. The decision of the district court should be affirmed for that reason.

IN RE INTEREST OF A.G.G., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. B.K.S., APPELLANT.

433 N.W.2d 185

Filed December 23, 1988. No. 87-985.

1. **Parental Rights: Appeal and Error.** 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 trial court; nevertheless, where the evidence is in conflict, the Supreme Court considers and may give weight to the trial court's observation of the witnesses and acceptance of one version of the facts rather than another.
2. _____: _____. On a de novo review of a judgment terminating parental rights, this court may make the appropriate and necessary findings if in fact they are supported by the record.
3. **Parental Rights: Due Process.** Proceedings to terminate parental rights must employ fundamentally fair procedures satisfying the requirements of due process.
4. **Due Process: Notice: Jurisdiction.** Once the court acquires jurisdiction over the person, due process still requires that such person be afforded reasonable notice of further proceedings.
5. **Trial: Attorney and Client.** Once having appeared, and having the benefit of counsel, a person has some obligation to keep counsel and the court informed of his or her whereabouts.
6. _____: _____. Counsel, making an authorized appearance on behalf of his or her client and moving the court for specific relief, normally would be held to have entered a general appearance.
7. **Attorney and Client: Waiver.** An attorney appointed on the initiative of the court, which attorney has had no contact with or authorization by the client, generally cannot be said to possess authority to waive any of the client's rights.
8. **Parental Rights: Abandonment.** Abandonment is not an ambulatory thing the legal effects of which a parent may dissipate at will by token efforts at reclaiming a discarded child.
9. **Parental Rights.** A child cannot, and should not, be suspended in foster care, nor be made to await uncertain parental maturity.
10. _____. Where parents are unable or unwilling to rehabilitate themselves within a reasonable time, the best interests of the child require that parental rights be terminated.

11. **Parental Rights: Abandonment: Words and Phrases.** Willful abandonment has been defined as the intentional withholding from the child, without just cause or excuse, by the parent, of his or her presence, care, love, protection, maintenance, and the opportunity for the display of filial affection.
12. **Parental Rights: Abandonment.** A voluntary departure from the state may be viewed as an abandonment of one's children and cannot be used as an excuse for the impossibility of compliance with a court-ordered plan of rehabilitation.
13. **Abandonment: Intent.** The question of abandonment is largely one of intent, to be determined in each case from all the facts and circumstances.

Appeal from the County Court for Lincoln County: EARL E. MORGAN, Judge. Affirmed.

George E. Clough for appellant.

John H. Marsh, Deputy Lincoln County Attorney, for appellee.

Patrick B. Hays, guardian ad litem.

HASTINGS, C.J., WHITE, CAPORALE, and FAHRNBRUCH, JJ., and REAGAN, D.J.

HASTINGS, C.J.

The mother appeals from the judgment of the county court for Lincoln County, sitting as a juvenile court, which terminated the parental rights to her son. Her assignments of error include lack of proper notice, lack of jurisdiction in the court, and insufficiency of the evidence to sustain the judgment. We affirm.

The minor child was born on April 29, 1981. The mother was unmarried at that time. Prior to marrying the mother, the putative father legally acknowledged paternity, but at the termination hearing, he denied such paternity.

When the son was approximately 3 months old, he was removed from the mother's custody. In September of 1981, the trial court placed custody of the child with the county welfare department for placement in a suitable foster home. The mother was allowed supervised visitation.

In December of 1981, pursuant to stipulations agreed to by the county attorney, the mother, and the guardian ad litem for the child, the court retained legal custody and control in county welfare, but gave physical custody of the child to the mother.

The stipulations included a rehabilitative plan for appellant, which the court also accepted. The mother was unsuccessful in completing the rehabilitative plan.

Between June of 1982 and December of 1983, the child was removed from the mother's custody, placed again with the county welfare department, and then eventually returned to the custody of the mother, under the supervision of the Nebraska Department of Social Services.

In the spring of 1984, the mother, living with, but not married to, the child's acknowledged father, became concerned that the father was sexually abusing the 3-year-old child. After the mother was informed that the father was sexually abusing the child and performing "golden showers" with him, the mother, the father, the child, and the mother's other children (not involved in the termination proceedings) moved to California. In July of 1984, trial was set in a California court relating to alleged sexual incidents occurring between the father and the child. The mother and the father then disappeared from California, and it was suspected that they had returned to North Platte. The child and his mother's other children did return to North Platte and were known to be living with the mother's mother.

Based on the foregoing information, the county attorney obtained an order of detention on July 13, 1984, and the child was detained in the temporary custody of the Nebraska Department of Social Services. After a hearing in August of 1984, the child was placed in the custody of the Department of Social Services for placement in a suitable foster home.

The mother and the acknowledged father were married on September 30, 1984. A second rehabilitative plan was developed for the mother and her newly acquired husband. The mother was no more successful in completing the second plan than she was in completing the first.

For Easter of 1985, the mother was allowed to take the child for an overnight visitation in North Platte. However, she took him to Kansas City, where he remained with her for several months. The mother was arrested in Missouri, apparently on a warrant issued in Nebraska. The child was returned to Nebraska and placed in foster care once again. The mother

failed to appear for arraignment in the district court for Lincoln County on charges of child abduction. She has left the state and refuses to return.

On June 9, 1987, the county attorney filed a motion to terminate the parental rights of the mother on the basis of abandonment and neglect. See Neb. Rev. Stat. § 43-292(1) and (2) (Reissue 1988). Personal service on the mother was attempted at her last known addresses in Nebraska, California, and Tennessee, to no avail. Finally, pursuant to Neb. Rev. Stat. § 43-268(2) (Reissue 1988), service was accomplished through publication in the North Platte Telegraph. Notice was published on August 12, 19, and 26.

The attorney appointed to represent the mother's interests in her absence moved to dismiss the termination proceedings for lack of jurisdiction due to the absence of proper notice. At the termination hearing held on September 1, 1987, the trial court heard evidence on the issue of notice. Becky Ridenour, a Department of Social Services Child Protective Services worker assigned to the child's case, testified that she spoke with the mother over the phone during August. Although the mother informed Ridenour that she was aware of the termination proceedings, they did not discuss the grounds upon which termination was being sought. The trial court overruled the motion to dismiss.

In an order filed on October 19, 1987, the trial court terminated the mother's parental rights. The order contained no specific finding that there was clear and convincing evidence to establish grounds for the termination, or a finding that it would be in the child's best interests to terminate the mother's parental rights.

However, 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 trial court; nevertheless, where the evidence is in conflict, the Supreme Court considers and may give weight to the trial court's observation of the witnesses and acceptance of one version of the facts rather than another. *In re Interest of D.C.*, 229 Neb. 359, 426 N.W.2d 541 (1988); *In re Interest of M.R., J.R., and N.R.*, 228 Neb. 47, 420 N.W.2d 924 (1988).

Therefore, on a de novo review, this court may make the appropriate and necessary findings if in fact they are supported by the record.

We deal first with the issue of notice. The record discloses that the mother has been present personally and by counsel at most, if not all, of the various hearings held in this matter, commencing with the adjudication hearing held on September 8, 1981, and continuing through a review hearing of April 21, 1986. Therefore, there is no question as to the court's jurisdiction over the mother. However, Neb. Rev. Stat. § 43-267(2) (Reissue 1988) requires

> Notice of the time, date, place, and purpose of any juvenile court hearing subsequent to the initial hearing, for which a summons or notice has been served or waived, shall be given to all parties either in court, by mail, or in such other manner as the court may direct.

The mother had been represented by the public defender until July 22, 1982, when he was allowed by order of the court to withdraw because she refused to continue being represented by that office. Sometime after that, but at least by August 9, 1982, the mother was represented by what we will in this opinion refer to as first appointed counsel. He continued in that capacity until June 16, 1987, when he filed a motion to withdraw because "he received a phone call from [the mother] within the last 90 days but he is totally unaware of her current whereabouts and has no ability to communicate with her concerning Motion to Terminate Parental Rights filed herein." That motion was granted as of July 14, 1987. Present counsel was appointed sometime before July 6, 1987. On that date, present counsel appeared by motion as "attorney appointed to represent [the mother]" and moved to dismiss the June 9, 1987, filed motion of the county attorney to terminate parental rights. By court order filed July 16, 1987, the motion to dismiss was overruled, "except as to paragraphs 7 and 8, which it sustains."

Paragraph 7 of the motion to dismiss alleges "no proper and sufficient showing has been made for the order for publication entered by the Court on June 9, 1987," and paragraph 8 provides in part that "no proper and sufficient order for

publication exists within the record of the Court concerning the motion to terminate parental rights." In spite of her continuous representation by one court-appointed attorney or the other, the record does not disclose that following the April 21, 1986, hearing the mother was ever again personally present in court.

The order for publication referred to in the mother's motion is a document entitled "Order for Publication." However, the body of that order simply appears as follows:

> You are hereby notified that a hearing to terminate the parental rights of [the mother] and adoptive father [name of father] will be held in this Court commencing at 9:00 o'clock a.m. on the 14th day of July, 1987.
>
> Dated this 9th day of June, 1987.
>
> BY THE COURT:
>
> /s/ _____
>
> County Judge

There then appear in the record copies of envelopes and receipts for certified mail addressed to the mother at addresses in Compton and Anaheim, California, and Bartlett, Tennessee, all returned unsigned and unclaimed.

The day after the partial sustaining of the motion to dismiss, July 17, 1987, a summons was issued to the sheriff of Shelby County, Tennessee, for service on the mother to inform her that a hearing would be had on a motion to terminate parental rights on September 1, 1987. Instructions written on the summons were to serve the mother at an address in Memphis, Tennessee. That summons was returned by the sheriff on August 21, 1987, unserved because "AFTER diligent search and inquiry [the mother] is Not to be found in my County."

An affidavit of the county attorney for Lincoln County was filed on August 6, 1987, which recited the fact that a summons had been issued and service attempted at the last known address of the mother in Bartlett, Tennessee, but that it was returned unserved and that after diligent investigation and inquiry the affiant did not know the address or whereabouts of the mother. There then appears an "Order for Publication" dated August 6, 1987, in the same form as the previously described order of June 9.

There is a proof of publication with a copy of the published

notice which appears to be in proper form. There is a receipt for certified mail addressed to the mother at the same Bartlett, Tennessee, address previously used, marked "Restricted Delivery," but signed for on August 13, 1987, by Tracy Bryant. A similar receipt with the same address and same restriction was returned to the court receipted for by Sandra Bryant. Nowhere in the record does the identity of Tracy or Sandra Bryant or their relationship, if any, to the mother appear. Neither is there any indication by affidavit or otherwise what was mailed and obviously received by someone. There is no affidavit of mailing, or not mailing, of the copy of the published notice.

Proceedings to terminate parental rights must employ fundamentally fair procedures satisfying the requirements of due process. *In re Interest of J.K.B. and C.R.B.*, 226 Neb. 701, 414 N.W.2d 266 (1987). This would apply to notice requirements. Once the court acquires jurisdiction over the person, as it did in this case, due process still requires that such person be afforded reasonable notice of further proceedings. However, once having appeared, and having the benefit of counsel, that person has some obligation to keep counsel and the court informed of his or her whereabouts. This the mother failed to do. Her first appointed counsel, in his June 16, 1987, motion to withdraw, recited that "he received a phone call from [the mother] within the last 90 days but he is totally unaware of her current whereabouts and has no ability to communicate with her concerning Motion to Terminate Parental Rights filed herein." The mother mailed a signed document relinquishing her son for adoption by the son's great-uncle. That document was enclosed in an envelope postmarked from Denver August 5, 1987, with copies mailed to, among others, the deputy county attorney and the mother's present appointed counsel. However, again she failed to furnish these people with an address. At a hearing held on September 1, 1987, on the mother's motion to dismiss filed by her present counsel, the Child Protective Services worker, Becky Ridenour, testified that she had last visited with the mother in person on April 6, 1986. Further, she said that she had had many telephone conversations with the mother during 1987, the most recent of which was in August. In response to a question as to whether the mother had at that time

given her an address at which she could be reached, she answered in the affirmative and that she had two addresses, the one in Bartlett, Tennessee, and the one in Compton, California, both previously mentioned. However, she testified that she had no idea whether the mother was residing in either California or Tennessee at the time of the August telephone conversation. In addition, Ridenour testified that the mother had indicated to her over the telephone that she was aware of the proceedings to terminate her parental rights to be held that day—September 1, 1987.

Later on in that same hearing, Ridenour testified that she was the case management worker for the child involved here and that she worked on visitations by the parents and with the reunification planning. She also testified that her first personal contact with the mother was March 19, 1986, and that the mother left no forwarding address nor telephone number, although one was requested of her.

From April of 1986, Ridenour had no contact with the mother until April 14, 1987, which contact was by telephone. The mother requested pictures and information about her son, but this information was not forwarded because the mother refused to give an address. There were telephone conversations on April 28, 1987, when the mother discussed the possibility of relinquishing her parental rights; on July 13, 1987, when the mother said she would not be attending the termination hearing that was set for July, although she was aware of it; on August 3, 1987, when the mother requested information about her son; on August 7, 1987, in which the conversation was generally about her son's welfare and the termination hearing that was being scheduled; and finally on August 19, 1987, in which the mother stated that she understood the termination hearing would take place, and she inquired as to whether her signed relinquishment to the great-uncle had been received. During none of those conversations, according to Ridenour, did the mother ever indicate any desire to personally visit with her son, to speak to him over the phone, or to write him any letters. Nonetheless, Ridenour on numerous occasions requested the mother to come and meet with her son, but she always stated that she could not return to the State of Nebraska.

Although the record, with little effort, could have been made more understandable and unequivocal by the presence of a specific order of the court "permitting" service by publication, it can fairly and reasonably be inferred from the facts set forth above that such authorization was actually given. The showings made demonstrating the inability to find the mother's whereabouts were adequate.

We also do not overlook the fact that the mother's counsel, by appearing on her behalf and moving the court for specific relief, normally would be held to have entered a general appearance and waiver of notice. *Eliason v. Devaney*, 228 Neb. 331, 422 N.W.2d 356 (1988); *State v. Wedige*, 205 Neb. 687, 289 N.W.2d 538 (1980). However, this must assume authority of counsel to undertake such action. We are not prepared to say that an attorney appointed on the initiative of the court, which attorney has had no contact with the client, could be said to possess authority to waive any of the client's rights.

Nevertheless, in this instance there are in the record return receipts for certified mail, acknowledging receipt of something. We have testimony relating to statements of the mother that whether she in fact received notice of the hearing through that method, she was in fact aware of the time and place of the hearing.

We believe that from a totality of the circumstances the record discloses proper publication of notice as well as actual notice of the final hearing.

The basis of the court's termination order was two-fold: abandonment and neglect. In the case of *In re Interest of Z.D.D. and N.J.D., ante* p. 236, 241, 430 N.W.2d 552, 555 (1988), we said: "Abandonment is not an ambulatory thing the legal effects of which a parent may dissipate at will by token efforts at reclaiming a discarded child." We continued on, with the following language:

> "A child cannot, and should not, be suspended in foster care, nor be made to await uncertain parental maturity." . . .
>
> . . . "[W]here parents are unable or unwilling to rehabilitate themselves within a reasonable time, the best interests of the child require that parental rights be terminated."

Id. at 243, 430 N.W.2d at 556.

We have defined willful abandonment as the intentional withholding from the child, without just cause or excuse, by the parent, of his or her presence, care, love, protection, maintenance, and the opportunity for the display of filial affection. *In re Interest of R.A.*, 226 Neb. 160, 170, 410 N.W.2d 110, 117 (1987), contains this language: "*A voluntary departure from the state may be viewed as an abandonment of one's children* and cannot be used as an excuse for the impossibility of compliance with a court-ordered plan of rehabilitation." (Emphasis supplied.) The question of abandonment is largely one of intent, to be determined in each case from all the facts and circumstances. *In re Guardianship of Sain*, 217 Neb. 96, 348 N.W.2d 435 (1984).

As previously stated, around Easter of 1985, the mother, after obtaining permission for an overnight visitation, took her son without authorization to Kansas City, Missouri, where he remained for several months. She was arrested in Missouri, returned to Nebraska, and arraigned in the district court for Lincoln County on charges of child abduction. The mother failed to appear for arraignment. The child was also returned to Nebraska.

The mother left the State of Nebraska and has refused to return, claiming she is in fear of being arrested. Although it is unclear from the record just when she left the state, there is some evidence that she attended a review hearing on April 21, 1986. The last personal contact with anyone in the State of Nebraska documented by the record was in April of 1986. After that, in spite of telephone calls originated by the mother from outside the state, during which authorities urged her to come visit her son and to attend the hearing on the motion to terminate her parental rights, she refused to do so.

In those various telephone conversations with Ridenour, the mother never said that she wanted to personally visit with her son, never said she wanted to call him, never said she wanted to write to him, and never stated a desire to contact her son. She insisted that she could not return when specifically asked to meet with her son, but did say if she could return, she would like to do so to say goodbye to him.

The mother has both abandoned and neglected her son. She has continuously failed to discharge the duties of parental care and protection. She has denied her son her care, protection, affection, love, guidance, and the opportunity to display filial affection. Any kind of family relationship between appellant and her son is totally absent. All of this has been established by clear and convincing evidence. The best interests of the child will be served by termination of parental rights.

The adjudication of the juvenile court is affirmed.

AFFIRMED.

IN RE INTEREST OF N.B., A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. R.B., APPELLANT.
432 N.W.2d 850

Filed December 23, 1988. No. 87-1074.

Parental Rights: Appeal and Error. In an appeal from a judgment terminating parental rights, the Supreme Court tries factual questions de novo on the record, and we are thus required to reach a conclusion independent of the trial court; however, where the evidence is in conflict, we consider and may give weight to the trial court's observations of the witnesses and acceptance of one version of the facts rather than another. Where parents are unable or unwilling to rehabilitate themselves within a reasonable time, the best interests of the child require that parental rights be terminated.

Appeal from the Separate Juvenile Court of Douglas County: SAMUEL P. CANIGLIA, Judge. Affirmed.

Fred J. Ferraro, of Smith, Trustin & Schweer, for appellant.

Ronald L. Staskiewicz, Douglas County Attorney, and Elizabeth G. Crnkovich for appellee.

HASTINGS, C.J., WHITE, and CAPORALE, JJ., and REAGAN, D.J., and COLWELL, D.J., Retired.

PER CURIAM.

This appeal is from the separate juvenile court of Douglas County, Nebraska. The court ordered termination of R.B.'s

parental rights in N.B. We affirm.

N.B. was born March 5, 1983, and is the child of R.B. and D.K. N.B.'s parents have never married. The parental rights of D.K. were also terminated but are not a subject of this appeal.

> In an appeal from a judgment terminating parental rights, the Supreme Court tries factual questions de novo on the record, and we are thus required to reach a conclusion independent of the trial court; however, where the evidence is in conflict, we consider and may give weight to the trial court's observation of the witnesses and acceptance of one version of the facts rather than another.
>
> . . . .
>
> . . . [W]here parents are unable or unwilling to rehabilitate themselves within a reasonable time, the best interests of the child require that parental rights be terminated.

In re Interest of D.C., 229 Neb. 359, 360, 366, 426 N.W.2d 541, 542, 545 (1988).

Appellant's sole assignment of error is that the termination order is not supported by clear and convincing evidence.

N.B. was removed from his parents in July of 1985, after being found alone and unattended in a locked residence. The child was 2 years old at that time.

At an adjudication hearing held on November 27, 1985, R.B. admitted that he had no permanent address, was unemployed, and was unable to contribute to the financial support of his child. N.B. was found to be a child within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1984).

R.B. was ordered to comply with a plan of rehabilitation at a disposition hearing held on March 20, 1986. The plan included requirements that R.B. obtain full-time employment and suitable housing. R.B. was also required to complete a parenting class, to maintain regular visits with his son, and to establish a savings account. The plan was continued to subsequent hearings until July 24, 1987, when the motion to terminate parental rights was filed by the county attorney.

The termination hearing took place on September 15 and November 9, 1987. The evidence showed that R.B. had not successfully completed many of the requirements of his

rehabilitation plan. Although weekly visits were scheduled, R.B. had visited his son only 13 times in a 2-year period. He had found neither full-time employment nor a different residence, and had attended only two parenting classes. R.B. admitted his residence was unsuitable and too small for a child; he was unable to give any reason for failure to find employment. Although he was unable to establish a savings account, R.B. had acquired antique furniture, a color television, and a king-size bed. R.B. admitted he is not certain he is the father of N.B., apparently due to the mother's prostitution, of which R.B. approves. R.B. does not want N.B. if the child is found not to be his son.

At the November 9, 1987, hearing continuation, R.B. testified that he had obtained suitable housing and employment since September 15. He had also attended one of three scheduled parenting classes. R.B. quit his job when general assistance refused to pay for his housing because he was working.

Upon completion of all testimony, the court terminated the parental rights of R.B. in N.B.

On appeal, R.B. argues that the court should not have terminated his parental rights because he made "significant progress" toward compliance with the court-ordered rehabilitation plan. This argument is primarily based upon the efforts made between the two termination hearing dates.

The only progress R.B. can claim is his move into a two-bedroom apartment. R.B. had lived in the apartment for only 1 month, which, in view of his housing history, is not enough to convince the court of R.B.'s ability to maintain suitable housing for his son.

R.B. also claims to have worked periodically during the 2 years prior to the termination hearing. However, R.B. never verified this employment to his caseworker, even though required to do so by the rehabilitation plan. Further, R.B. has shown that he is unwilling to work if it interferes with his ability to obtain general assistance.

R.B.'s efforts, however well intended, cannot be considered significant. The State presented clear and convincing evidence of R.B.'s failure to parent N.B. and of his inability or

unwillingness to rehabilitate himself. The juvenile court's order terminating R.B.'s parental rights in N.B. was correct and is affirmed.

AFFIRMED.

DAVID ENSRUD, APPELLEE AND CROSS-APPELLANT, V. ALICIA ANN ENSRUD, APPELLANT AND CROSS-APPELLEE.

433 N.W.2d 192

Filed December 23, 1988. No. 88-192.

1. **Divorce: Appeal and Error.** In an appeal involving actions for dissolution of marriage, the Supreme Court's review of a trial court's judgment is de novo on the record to determine whether there has been an abuse of discretion by the trial judge, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, the Supreme Court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Divorce: Child Custody.** In a dissolution proceeding, custody of a minor child is determined by the child's best interests and due regard for the superior right of a parent fit to have custody of the child.
3. **Divorce: Child Custody: Courts.** Pursuant to Neb. Rev. Stat. § 42-364 (Reissue 1988), a district court may obtain and retain legal custody of a minor child, in proceedings to dissolve a marriage, and grant a parent physical custody of the child.
4. _____: _____: _____. If a parent is fit to have custody of a child involved in a dissolution proceeding, a court's acquired and retained legal custody of such child should be a rare disposition warranted only in the extraordinary situation where the court lacks adequate information concerning the best interests of the child in relation to the custody question.
5. **Divorce: Child Custody.** Parental agreement is a prerequisite for joint custody pursuant to Neb. Rev. Stat. § 42-364(3) (Reissue 1988).

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Reversed and remanded with direction.

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

Thomas W. Tye II, of Tye, Hopkins & Tye, for appellee.

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

SHANAHAN, J.

On September 1, 1987, David Ensrud, 21 years of age, commenced an action to dissolve his marriage with Alicia Ann Ensrud, 20 years of age, and obtain custody of their child, Sara Marie, who was nearly 16 months old. David also requested that Alicia pay child support and that the court divide and distribute marital property. In her cross-petition, Alicia reciprocated, seeking custody of Sara Marie, child support, and a property division.

Although David and Alicia had been living in Gering, Scotts Bluff County, and were married there, the two moved to Kearney, where David attended college as a full-time student planning a career in business management. Contemporaneously, Alicia attended classes at a business college in Grand Island. Since David's residence was in Buffalo County, the dissolution action was maintained in the district court for that county.

At the time of trial on January 7, 1988, David was an unemployed student and expected to be graduated in May of 1988, but was uncertain about prospective employment. In the fall of 1987, Alicia received an associate degree in business administration and finance and moved to Rapid City, South Dakota, where, in Alicia's situation, better employment prospects existed. Alicia's sister also lived in Rapid City. Alicia went to work for a bank in Rapid City and, on the Monday after the trial, was supposed to enter new employment with a credit union at a pay rate of $5.17 per hour. According to Alicia, David was a "very good father" to Sara Marie. David voiced little complaint concerning Alicia's fitness as Sara Marie's mother.

Alana Anderson testified for David. Anderson, who had a bachelor's degree in speech pathology and some "graduate hours in psychology," had been an employee in the Child Protective Services of the Department of Social Services for the State of Nebraska and, for a little over a year before the trial, was working as the "Child Custody Officer for the Buffalo County District Court." As child custody officer, Anderson met

with parents involved in dissolution proceedings, who "are having problems with custody or visitation." After commencement of the Ensrud dissolution proceedings, Anderson, as the child custody officer, but without a directive order from the court, met about six times with David and Alicia on account of their disagreements regarding temporary custody of Sara Marie. Throughout their intermittent pretrial differences on the custody of Sara Marie, David and Alicia made some custody arrangements concerning Sara Marie, but, as Anderson recounted: "We continually had to make changes" with adoption of a new plan for temporary custody. Realizing that the distance between Rapid City and Kearney was between "400 and 500 miles," Anderson expressed her opinion that "shared custody" was in Sara Marie's best interest. To buttress her opinion, Anderson testified that Sara Marie should be "accessible to both parents" and that it would be "damaging for Sara to be with just one of her parents." Consequently, Anderson recommended that

> [s]hared Custody of Sara Ensrud be granted to her parents . . . with her physical possession changing on the last Saturday of each month commencing on [January 30, 1988]. It should be understood that this arrangement may require change when Sara enrolls in school or if the permanent residence of either parent prohibits monthly travel.

Alicia Ensrud testified that her employment did not provide income sufficient to defray the cost of travel from Rapid City to Kearney, a drive consuming at least 8 hours, for shared custody on the alternate monthly basis recommended by Anderson.

Dr. Jerry Denton, a clinical psychologist, also testified for David Ensrud. Although Alicia's living in Rapid City had prevented her interview by Dr. Denton, Sara Marie and David visited with Dr. Denton, who found a sound relationship, a "deep bonding relationship," between the daughter and father. Dr. Denton characterized David as a "nurturing parent," which includes "a certain amount of other-ness in terms of center-ness." (We assume the foregoing and unclarified characterization means that David was not self-centered and was unselfish with respect to Sara Marie and that *otherness*

does not mean "the quality or state of being different." Webster's Third New International Dictionary, Unabridged 1598 (1981).) Because he had not interviewed Alicia, Dr. Denton recommended that custody of Sara Marie be shared equally by Alicia and David, or, as explained by Dr. Denton:

> Because I had not seen the mother, I felt that any kind of decision that would be an unequal kind of sharing, knowing that what I knew about Dave would be unfair to the mother. So my recommendation stopped with the 50/50 sharing. I was not willing to go beyond that. Had I interviewed the mother and seen her and questioned her and also had her demonstrate the nurturing might be there, might not be there, my recommendation might have been different. My recommendation in this case be [sic] shared custody. I think that this daughter needs both her mother's love which I assume to be every bit as deep and meaningful as her father's love. And my recommendation in no way is intended to penalize either parent but rather to have both parents remain significant others in her life.

Having taken the case under advisement, the court later entered a "Decree of Dissolution," which contained a division and distribution of property (action about which neither party complains) and provisions concerning child custody and support for Sara Marie, namely:

> IT IS FURTHER ORDERED that custody of the minor child is retained by the Court with physical possession of the child to be shared equally between the parents as provided from time to time by the District Court Child Custody Officer and until further Order.
>
> IT IS FURTHER ORDERED that the Petitioner will maintain the current medical insurance on the minor child until further Order and that each of the parents will share the cost of transportation to change possession of the child between the parents. The change of possession shall be as mutually agreed by the parties and approved by the Custody Officer or in the absence of agreement by the parties and approval by the Custody Officer, as the Custody Officer may from time to time direct. Each of the parties [is] to assume the expense and cost of care of the

> child while the child is in each party's possession and no child support is ordered at this time.

Alicia contends that the court erred in retaining legal custody of Sara Marie, in authorizing the child custody officer to determine the schedule of visitation and "physical possession" of the child, in not granting Alicia the legal and physical custody of Sara Marie, and in failing to order child support payable to Alicia for Sara Marie. In his cross-appeal, David claims the court erred by failure to grant Sara Marie's custody to David.

In an appeal involving actions for dissolution of marriage, the Supreme Court's review of a trial court's judgment is de novo on the record to determine whether there has been an abuse of discretion by the trial judge, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, the Supreme Court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Christen v. Christen*, 228 Neb. 268, 422 N.W.2d 92 (1988).

Neb. Rev. Stat. § 42-364 (Reissue 1988) in pertinent part provides:

> When dissolution of a marriage or legal separation is decreed, the court may include such orders in relation to any minor children and their maintenance as shall be justified, including placing the minor children in the custody of the court or third parties . . . . Custody and visitation of minor children shall be determined on the basis of their best interests.

In a dissolution proceeding, custody of a minor child is determined by the child's best interests and due regard for the superior right of a parent fit to have custody of the child. *Nielsen v. Nielsen*, 207 Neb. 141, 296 N.W.2d 483 (1980).

Pursuant to § 42-364, a district court may obtain and retain legal custody of a minor child, in proceedings to dissolve a marriage, and grant a parent physical custody of the child. *Christen v. Christen, supra.*

In *Bartlett v. Bartlett*, 193 Neb. 76, 78-79, 225 N.W.2d 413, 415-16 (1975), we stated:

> Section 42-364, R.R.S. 1943, authorizes the court to place the custody of minor children in the court, to determine custody on the basis of the best interests of the children, and to make subsequent changes when required. When the best interests of the children, in regard to custody, is not clear, the court may, and should, place custody in the court. In regard to such disposition we have stated that: "Its purpose is to 'facilitate judicial supervision and summary power to act swiftly in their (the childrens' [sic]) best interests.' . . . The parent having possession where the court has retained custody is in effect an agent of the court." Benson v. Benson, 190 Neb. 87, 206 N.W.2d 51 [1973].
>
> It is evident that when a court finds it necessary to place custody of minor children in the court, it does so because it is doubtful that it is cognizant of the full story relating to the best interests of the children and of the propriety of awarding custody to one of the parties. Such an order is ordinarily temporary and probationary in nature and reserves in the court the power to make further summary disposition of minor children when it becomes apparent that their best interests require it. There has not been a final determination of fitness in regard to either party. That question remains open and subject to determination after further notice and hearing.

See, also, *Clark v. Clark*, 228 Neb. 440, 422 N.W.2d 793 (1988); *Grindle v. Grindle*, 226 Neb. 807, 415 N.W.2d 150 (1987); *Peterson v. Peterson*, 224 Neb. 557, 399 N.W.2d 792 (1987).

Our review of the record, which reflects the extant situation at the time of trial, does not disclose anything which then disqualified Alicia or David as a parent fit to have custody of Sara Marie. As indicated in *Christen v. Christen, supra*, and *Bartlett v. Bartlett, supra,* if a parent is fit to have custody of a child involved in a dissolution proceeding, a court's acquired and retained legal custody of such child should be a rare disposition warranted only in the extraordinary situation where the court lacks adequate information concerning the best interests of the child in relation to the custody question.

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.

Bump v. Firemens Ins. Co., 221 Neb. 678, 689, 380 N.W.2d 268, 276 (1986). See, also, *Newton v. Brown*, 222 Neb. 605, 386 N.W.2d 424 (1986).

We find that the record contains information sufficient to determine whether Alicia or David should have legal custody of Sara Marie. We do not believe that the circumstances warranted a district court's acquisition and retention of Sara Marie's legal custody. The district court's acquisition and retention of legal custody, under the circumstances, constituted a judicial abuse of discretion inasmuch as an ostensibly fit parent's right to legal custody was disregarded in the proceedings. Consequently, the district court's order of judicially acquired and retained legal custody is reversed. Because almost a year has elapsed since the dissolution trial in this case, Sara Marie's best interests require a remand of the proceedings for a current consideration and determination of the custody question and matters related to custody, such as child support and visitation. Further, temporary custody of Sara Marie is granted to Alicia Ann Ensrud, pending a hearing in the district court to determine who shall have custody of Sara Marie. Therefore, on remand, the district court shall enter its order granting Alicia Ann Ensrud the temporary legal and physical custody of Sara Marie Ensrud, in conformity with our decision and opinion issued today in this case.

In view of the remand to the district court, we are obliged to make still further comment in view of the custodial question which was previously presented to the district court and will be presented again to the district court.

Regarding shared or joint custody, § 42-364(3) provides:

> The court may place the custody of a child with both parents on a shared or joint-custody basis when both parents agree to such an arrangement. In that event, the parents shall have equal rights to make decisions in the best interests of the child in their custody. The court shall not place a child in joint custody without conducting a

hearing in open court and specifically finding that joint custody is in the best interest of the child regardless of any parental agreement or consent.

This court has frequently and consistently expressed disapproval of joint custody as a purported solution for the difficulty confronted by a court in determining a question concerning child custody.

In *Wilson v. Wilson*, 224 Neb. 589, 590-91, 399 N.W.2d 802, 803-04 (1987), we stated:

> We have, in our previous opinions on the issue of joint custody, stated explicitly that joint custody is not favored and must be reserved for only the rarest of cases. [Citations omitted.] Although each parent has shown only love and affection for the children, our review of the record makes apparent that the Wilsons' inability to agree on custody arrangements has disrupted the children's home life and caused much unneeded stress. Although each parent is capable of providing a secure and happy home for the children, it is in the best interests of the children that there be only one custodial parent.

As expressed in *Korf v. Korf*, 221 Neb. 484, 486, 378 N.W.2d 173, 174-75 (1985):

> An award of joint custody of minor children is not favored. Such an award must be reserved for the most rare of cases. [Citation omitted.]
>
> In citing this rule with approval, we are not unmindful of Neb. Rev. Stat. § 42-364(3) (Supp. 1985), which *permits* shared or joint custody only when both parents agree to such arrangements. We hasten to point out that the Legislature has provided that even in those cases where parental agreement or consent exists, the court must still conduct a public hearing on that issue. It must then find that joint custody is in the best interests of the child, *regardless* of agreement or consent by the parents. This is not one of the rare cases where the best interests of the child would be served by shared custody.

(Emphasis in original.)

In a similar vein, this court, in *Trimble v. Trimble*, 218 Neb. 118, 120, 352 N.W.2d 599, 601 (1984), commented:

> We believe, however, that [joint custody] must be reserved for the most rare of cases, i.e., where in the judgment of the trial court the parents are of such maturity that the arrangement will not operate to allow the child to manipulate the parents or confuse the child's sense of direction.

As the court observed in *Moninger v. Moninger*, 202 Neb. 494, 498-99, 276 N.W.2d 100, 103 (1979):

> In the instant case the court determined both parties were fit parents and that custody of the minor children should be alternated between the petitioner and respondent for various periods of time. . . . One of the primary objectives after the dissolution of a marriage where young children are involved is to create a stable atmosphere for the children to adjust. We are not prepared to say that this type of alternating custody is never suitable. There may be instances where the parties themselves agree that it would be in the best interests of the children. However, where there has been such turmoil and such a strenuous tug of war for custody of the children, we feel that it would not be in their best interests. We feel the trial court should hold a hearing as soon as possible to determine in whose custody the children should be placed.

For additional cases illustrating this court's disapproval of joint custody arrangements, see, *Mettenbrink v. Mettenbrink*, 220 Neb. 650, 371 N.W.2d 310 (1985), and *Krueger v. Krueger*, 211 Neb. 568, 319 N.W.2d 445 (1982). Further analysis and discussion of the pitfalls and shortcomings inherent in joint child custody are found in an extensive article by Singer & Reynolds, *A Dissent on Joint Custody*, 47 Md. L. Rev. 497 (1988).

As approved by the district court in this case, the shared or joint physical custody relates to the right and duty of Alicia and David to provide a home for Sara Marie and make the daily child-rearing decisions required when Sara Marie resides with the particular parent exercising custody. Such a situation necessarily involves Alicia's and David's equally sharing custodial responsibilities regarding physical care and time with respect to Sara Marie. We will not reiterate our concern that

joint custody may likely produce detrimental shuttling of a child from one parental residence to another and a lack of stability or continuity in a child's environment as the result of the child's becoming, as it were, a bird batted back and forth in a custodial badminton match. We need not express additional concern, arising from the distance and expense inextricably involved in the alternate periods of custody in Ensruds' case. We need not further descriptively detail our concerns relative to joint physical custody in the present case because the requirements for joint custody under § 42-364(3) have not been satisfied. Parental agreement is a prerequisite for joint custody pursuant to § 42-364(3). The record does not contain any agreement between Alicia and David, stating or otherwise indicating that Sara Marie's custody shall be shared or joint. Quite to the contrary, the attempts by Alicia and David to achieve a pretrial joint custody arrangement can only be characterized as temporary truces in continuing combat for custody of Sara Marie. Also, under § 42-364(3), the trial court must specifically find that joint custody is in the best interests of the child regardless of parental agreement or consent for joint custody. The record does not contain an express finding by the district court that joint custody was in the best interests of Sara Marie. Hence, any order by the district court relative to joint custody in Ensruds' case is an abuse of discretion as the result of noncompliance with the requirements prescribed in § 42-364(3) and is, therefore, reversed.

Although we have somewhat restricted our comments about shared or joint custody, other aspects of the present proceedings are truly troubling, namely, the manner in which the child custody officer is involved in this case and the authority exercised and exercisable by that child custody officer. According to the dissolution decree, physical custody was exercisable as directed by the child custody officer. Subject to the child custody officer's approval, modification of custody provisions could be accomplished by agreement of the parties or, in the absence of the parties' agreement, modification of custody could be achieved "as the Custody Officer may from time to time direct." Conspicuously absent from any modification or alteration of joint custody or "change of

possession" is the district court, which has the duty to determine the best interests of a child involved in a dissolution proceedings, including the child's best interests in reference to custody. As directed by § 42-364 concerning dissolution proceedings, "Custody and visitation of minor children shall be determined on the basis of their best interests." Specifically, in reference to joint custody, "The court shall not place a child in joint custody without conducting a hearing in open court and specifically finding that joint custody is in the best interest of the child . . . ." § 42-364(3). Determination of best interests is a judicial duty and function, not the responsibility of administrative staff assisting a court in dissolution proceedings.

Recently, in *Drennen v. Drennen*, 229 Neb. 204, 426 N.W.2d 252 (1988), this court held that a statute, which gave authority to a child support referee to establish, modify, enforce, and collect child and spousal support, unconstitutionally denied to persons who were chargeable with potential or delinquent child support obligations access to the district court as a trier of fact concerning claims for child or spousal support. See Neb. Const. art. I, § 13 (access to courts).

While the present case does not involve a legislative attempt to confer judicial authority on a grantee outside the judiciary, contrary to the Nebraska Constitution, nevertheless, judicially authorizing a child custody officer to control custody of Sara Marie and, correspondingly, the visitation rights of Alicia and David, is a delegation of judicial authority unauthorized in Nebraska law.

In *Deacon v. Deacon*, 207 Neb. 193, 297 N.W.2d 757 (1980), this court considered and reversed a "trial court's order placing in a psychologist the authority to effectively determine visitation, and to control the extent and time of such visitation." *Id.* at 200, 297 N.W.2d at 762. In disapproving the judicially conferred authority for the psychologist's determination of visitation rights, this court stated:

> Such delegation could result in the denial of proper visitation rights of the noncustodial parent.
>
> . . . The responsibility of the trial court to determine questions of custody and visitation of minor children according to their best interests is an independent

> responsibility and cannot be controlled by the agreement or stipulation of the parties. [Citation omitted.]

Id. at 200-01, 297 N.W.2d at 762.

As this court observed in *Lautenschlager v. Lautenschlager*, 201 Neb. 741, 743-44, 272 N.W.2d 40, 42 (1978):

> The rule that custody and visitation of minor children shall be determined on the basis of their best interests, long established in case law and now specified by statute, clearly envisions an independent inquiry by the court. The duty to exercise this responsibility cannot be superseded or forestalled by any agreements or stipulations by the parties.

A decision concerning physical custody of Sara Marie, which necessarily involves ascertaining the best interests of the child, is a matter for constitutionally authorized judicial determination. Such judicial authority cannot and shall not be delegated to administrative personnel, who assist a court charged with the responsibility of determining the best interests of a child involved in a dissolution proceeding. While we have set aside the district court's judgment concerning legal custody retained by the court, which ordinarily would dispose of the custody question in the present case, we are, nevertheless, compelled to express disapproval of the attempted delegation of judicial authority.

The district court's judgment pertaining to a division and distribution of marital property is affirmed. Our disposition of Alicia's appeal eliminates the necessity to resolve David's cross-appeal.

However, having reversed the district court's judgment regarding custody of Sara Marie, we remand these proceedings to the district court with direction that the district court, after immediate entry of the order granting Alicia Ann Ensrud the temporary custody of Sara Marie Ensrud, shall, as soon as practicable, hold a hearing to determine the question of child custody and related matters in the best interests of Sara Marie Ensrud.

REVERSED AND REMANDED WITH DIRECTION.

IN RE INTEREST OF A.L.G., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. S.G., APPELLANT.

432 N.W.2d 852

Filed December 23, 1988. No. 88-321.

1. **Juvenile Courts: Appeal and Error.** An appeal to the Supreme Court from the separate juvenile court is heard de novo on the record. In that review, findings of fact made by the juvenile court may be accorded weight by this court because the trial court observed the parties and the witnesses and made findings as a result thereof.
2. **Juvenile Courts.** Uncontradicted evidence establishing that a child sustained injuries of a nature not likely to occur in the normal course of the child's movements and which would have some physical manifestations associated with them, and that the child's parent failed to seek medical treatment for the injuries for a period of between 2 and 4 weeks, is sufficient to support a finding that the child is a neglected child within the Nebraska Juvenile Code.

Appeal from the Separate Juvenile Court of Douglas County: SAMUEL P. CANIGLIA, Judge. Affirmed.

Sarah R. Allen for appellant.

Ronald L. Staskiewicz, Douglas County Attorney, and Elizabeth G. Crnkovich for appellee.

BOSLAUGH, SHANAHAN, and GRANT, JJ., and ENDACOTT and QUIST, D. JJ.

QUIST, D.J.

This is an appeal from the Separate Juvenile Court of Douglas County, Nebraska. The juvenile court found A.L.G. to be a neglected child under the Nebraska Juvenile Code, Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988), due to a lack of proper parental care by reason of the faults and habits of the natural mother. We affirm.

An appeal to the Supreme Court from the separate juvenile court is heard de novo on the record. In that review, findings of fact made by the juvenile court may be accorded weight by this court because the trial court observed the parties and the witnesses and made findings as a result thereof. *In re Interest of K.L.C. and K.C.*, 227 Neb. 76, 416 N.W.2d 18 (1987).

On December 11, 1987, A.L.G., the 8-month-old minor child of S.G., was brought to Childrens Hospital in Omaha,

Nebraska, by her mother for treatment of possible pneumonia. A chest x ray revealed three healing fractures of the left ribs. A skeletal survey was then conducted and revealed additional fractures of the sixth, seventh, eighth, ninth, and tenth posterior ribs along the spine and a fracture to the lower shaft of the left leg. All the fractures were between 2 and 4 weeks old.

Due to the nature and extent of the injuries, the Omaha Police Department was asked to investigate the matter. During the course of the investigation, the mother offered several explanations for the injuries, none of which were consistent with the medical evidence. In addition, the mother commented to an investigator that she wanted to stop hurting the child. Following that investigation, a petition was filed in the Separate Juvenile Court of Douglas County.

Testimony given at the hearing showed A.L.G. sustained the injuries while in the care and custody of her mother and that the injuries were between 2 and 4 weeks old. The medical testimony also established that these types of injuries were most commonly the result of direct blows. The doctors explained that the type of force necessary to fracture the ribs of an 8-month-old child would be a sudden impact or impression of the chest against a hard object; the type of force necessary to fracture the leg would be a blow directly against the bone. The medical testimony also showed that while broken ribs *might not* be outwardly obvious, there would likely be some tenderness over the area of the fractures and almost certainly some discomfort, swelling, or discoloration of the broken leg. The expert testimony ruled out the possibility of an 8-month-old child's sustaining injuries of this nature in the normal course of her movements.

The mother presented no evidence in her own behalf.

After a trial, the juvenile court found the child was a neglected child as described by statute because the injuries were inflicted at a time and place when the mother either caused the injuries or knew they existed and neglected to get treatment for the child. The court ordered the child to remain in the temporary custody of the Nebraska Department of Social Services for foster care placement.

The mother appeals, assigning as error that (1) the decision

of the trial court is not supported by the evidence and is contrary to law and that (2) the court erred in basing its decision on evidence of a matter not alleged in the amended petition.

The uncontradicted evidence adduced at the hearing clearly and convincingly established (1) the child sustained injuries of a nature not likely to occur in the normal course of her movements, (2) such injuries would have some physical manifestations associated with them, and (3) the mother failed to seek medical treatment for the injuries for a period of between 2 and 4 weeks. Such evidence is sufficient to support a finding that the child is a neglected child within the Nebraska Juvenile Code.

The judgment of the Separate Juvenile Court of Douglas County is affirmed.

AFFIRMED.

GARY SMITH, APPELLANT, V. BUTLER MANUFACTURING COMPANY, AND RANCH & FARM AGRICULTURAL SYSTEMS, INC., APPELLEES.

433 N.W.2d 493

Filed December 30, 1988. No. 87-142.

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. _____. The party against whom a verdict is directed is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can reasonably be drawn from the evidence.
3. **Limitations of Actions: Time.** A cause of action accrues, and the statute of limitations begins to run, when there has been discovery of facts constituting the basis of the cause of action or the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery.
4. **Independent Contractor: Agents.** The factors to be considered in determining whether one acting for another is an agent or independent contractor are, among other things, (1) the extent of control which, by the agreement, the employer may exercise over the details of the work, (2) whether the one employed is engaged in a distinct occupation or business, (3) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction

of the employer or by a specialist without supervision, (4) the skill required in the particular occupation, (5) whether the employer or the one employed supplies the instrumentalities, tools, and the place of work for the person doing the work, (6) the length of time for which the one employed is engaged, (7) the method of payment, whether by the time or by the job, (8) whether the work is a part of the regular business of the employer, (9) whether the parties believe they are creating an agency relationship, and (10) whether the employer is or is not in business. Although the control or right of control is the chief factor to be considered, no one factor is conclusive.

5. **Agents: Sales.** One who receives goods from another for resale to a third person is not thereby the other's agent unless his or her duty is to act primarily for the benefit of the one delivering the goods to him or her.

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

William A. Francis, of Cunningham, Blackburn, Livingston, Francis, Cote, Brock & Cunningham, and O. William VonSeggern, of Grimminger & VonSeggern, for appellant.

Roger G. Steele, of Luebs, Dowding, Beltzer, Leininger, Smith & Busick, for appellee Butler Manufacturing.

George H. Moyer, Jr., of Moyer, Moyer, Egley & Fullner, for appellee Ranch & Farm.

BOSLAUGH, WHITE, CAPORALE, and SHANAHAN, JJ., and JAMES MURPHY, D.J.

WHITE, J.

This is an appeal from a decision of the district court for Howard County, granting the defendants' motion for a directed verdict. The motion was made at the close of the plaintiff's case.

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. *Sundeen v. Lehenbauer*, 229 Neb. 727, 428 N.W.2d 629 (1988). The party against whom the verdict is directed is entitled to have every controverted fact resolved in his or her 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 party against whom the motion is made, the case may not be decided as a matter of law. *Carnes v. Weesner*, 229

Neb. 641, 428 N.W.2d 493 (1988).

There are two defendants involved in this action: Ranch & Farm Agricultural Systems, Inc. (Ranch & Farm), and Butler Manufacturing Company (Butler). Ranch & Farm sold a metal hog confinement building to the appellant, Gary Smith. This building was manufactured by Butler. The building was erected on Smith's farm by Ranch & Farm in December of 1976. Smith began to use this building in December of 1976, and by May of 1977 the building was being fully utilized.

The appellant began to experience problems with drafts inside the building and scours in his pigs in 1977. In February of 1977, Eldon Breiner, who used to be a Butler dealer, came out to the Smith farm to consult with the appellant regarding a liquid manure spreader. While he was at the farm Breiner mentioned that it did not look as if the hog confinement building had been sprayed with Gilsonite, a rust inhibitor. Breiner then suggested that Smith paint the red iron portion of the building with Gilsonite. Smith never used Gilsonite, and the building soon began to show significant rust and deterioration.

Butler published a policy guide stating recommendations to be followed in the construction of hog confinement buildings. The guide stated that the insulation was to be installed inside the structural steel as a barrier between the steel and the air inside the hog building to prevent rusting of the structural steel. The guide also said that the exposed metal should be painted with Gilsonite to inhibit rust. The evidence shows that Ranch & Farm did not install the insulation as recommended and did not paint the exposed metal with Gilsonite.

The hog building was ventilated by a system of fans, shutters, and heaters which were thermostatically controlled. This system was manufactured by Jamesway Ventilation Systems, a division of Butler. Jamesway gave Smith instructions regarding the thermostat temperature settings to be used in operating the ventilation system. During the first winter of full operation, in December of 1977, the appellant began to experience problems with the ventilation system. The appellant tried to combat his problems with the heating and ventilation system by making the recommended adjustments for seasonal changes. After making the changes, however, the problems of

moisture and difficulty in heating persisted.

Finally, after consulting with his veterinarian but not with Ranch & Farm or Butler, the appellant installed larger heaters and used temperature settings that were not recommended by Jamesway. The problems of moisture, drafts, and rust continued through 1981. Finally, the appellant abandoned the hog building in November of 1981.

The appellant alleges two causes of action. First, he contends that the appellees breached express warranties made to him when he contracted for the construction of the hog confinement building. Second, the appellant alleges that both Butler and Ranch & Farm are liable in negligence for their design and construction of the building.

As to the cause of action based on breach of warranty, we hold the claim is barred by the statute of limitations. Neb. Rev. Stat. § 25-223 (Reissue 1985) provides the applicable statute of limitations for actions on breach of warranty on improvements to real property. Section 25-223 provides in part:

> Any action to recover damages based on any alleged breach of warranty on improvements to real property or based on any alleged deficiency in the design, planning, supervision, or observation of construction, or construction of an improvement to real property shall be commenced within four years after any alleged act or omission constituting such breach of warranty or deficiency.

In February of 1977, Breiner came to the Smith farm, told the appellant that the exposed metal had not been painted with Gilsonite, and suggested that the appellant do so to prevent severe rusting. No suit was instituted until April of 1981. The appellant was aware of a defect in February of 1977. A cause of action accrues, and the statute of limitations begins to run, when there has been discovery of facts constituting the basis of the cause of action or the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery. *Georgetowne Ltd. Part. v. Geotechnical Servs., ante* p. 22, 430 N.W.2d 34 (1988); *Grand Island School Dist. #2 v. Celotex Corp.*, 203 Neb. 559, 279 N.W.2d 603 (1979). Here, the appellant knew in February

of 1977 that there were defects in the construction of the building; therefore, the statute of limitations began to run in February of 1977, and, as no action was filed until April of 1981, the appellant's cause of action for a breach of warranty is barred by § 25-223. Accordingly, the district court was correct in directing a verdict on the breach of warranty cause of action.

The appellant next contends that both Ranch & Farm and Butler were negligent. Specifically, the appellant argues that Ranch & Farm was negligent in its construction of the building, and the improper construction caused damage to the structure and the resultant demise of a number of appellant's hogs. The appellant argues that Butler is vicariously liable for the negligent construction of the hog building, as Ranch & Farm was a "duly authorized agent" of Butler.

The appellant's claim against Butler is without merit. In *Herman v. Bonanza Bldgs., Inc.*, 223 Neb. 474, 390 N.W.2d 536 (1986), we held on very similar facts that a manufacturer was not liable as principal for any negligence for which the contractor may have been liable. In *Herman*, we reiterated:

> The factors to be considered in determining whether one acting for another is an agent or independent contractor are, among other things, (1) the extent of control which, by the agreement, the employer may exercise over the details of the work, (2) whether the one employed is engaged in a distinct occupation or business, (3) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision, (4) the skill required in the particular occupation, (5) whether the employer or the one employed supplies the instrumentalities, tools, and the place of work for the person doing the work, (6) the length of time for which the one employed is engaged, (7) the method of payment, whether by the time or by the job, (8) whether the work is a part of the regular business of the employer, (9) whether the parties believe they are creating an agency relationship, and (10) whether the employer is or is not in business. *Erspamer Advertising Co. v. Dept. of Labor*, 214 Neb. 68, 333 N.W.2d 646 (1983). Although the control

> or right of control is the chief factor to be considered, *Maricle v. Spiegel*, 213 Neb. 223, 329 N.W.2d 80 (1983), no one factor is conclusive, *Eden v. Spaulding*, 218 Neb. 799, 359 N.W.2d 758 (1984).

223 Neb. at 479-80, 390 N.W.2d at 541.

An examination of some of these factors shows that Ranch & Farm was not an agent of Butler. Butler exercised virtually no control over details in the construction of the hog confinement structure; Ranch & Farm is engaged in the business of contracting and constructing farm buildings, a business distinct from Butler's, which is that of manufacturing and designing the buildings; construction is an activity requiring special skill, and Butler did not attempt to exert direction or supervision over Ranch & Farm, other than issuing recommendations to be followed when constructing a building manufactured by Butler; and, finally, Ranch & Farm negotiated the contract, set its terms, and handled the billing of Smith.

In *Herman v. Bonanza Bldgs., Inc., supra* at 481, 390 N.W.2d at 542, we stated that "one who receives goods from another for resale to a third person is not thereby the other's agent unless his or her duty is to act primarily for the benefit of the one delivering the goods to him or her." *Reeves v. Associates Financial Services Co., Inc.*, 197 Neb. 107, 247 N.W.2d 434 (1976). In the present action, no evidence supports an assertion that Ranch & Farm acted primarily for the benefit of Butler. In fact, the evidence clearly establishes that Ranch & Farm was acting primarily for its own benefit. As in *Herman*, Ranch & Farm undertook to buy components from which to erect a building and sell an erected building for a set price. Merely because Ranch & Farm used a Butler brochure to make the sale does not alter the fact that the agreement from which this suit arose was between Ranch & Farm and Smith only. Because no agency relationship can be established, Butler is not liable for any alleged negligence of Ranch & Farm.

Only the claim of negligent construction on the part of Ranch & Farm remains. We must note that this would appear to be an action based on breach of a construction contract rather than an action in tort. However, whether pled in tort or contract, once again the applicable limitations period is found

in § 25-223. The statute states in relevant part, "Any action to recover damages . . . based on any alleged deficiency in . . . construction of an improvement to real property shall be commenced within four years . . . ." As discussed above under the breach of warranty theory, the appellant failed to file this action until 2 months after the limitations period expired. Since this action was not filed within the statutory time, it is barred by application of the statute of limitations.

The trial court correctly granted the appellees' motion for a directed verdict at the close of the appellant's case. We accordingly affirm.

AFFIRMED.

MARVIN KEMPER, APPELLANT, V. STATE OF NEBRASKA, DEPARTMENT OF CORRECTIONAL SERVICES, APPELLEE.

433 N.W.2d 497

Filed December 30, 1988. No. 87-183.

Administrative Law: Appeal and Error. The review of an administrative agency's decision by the Supreme Court is de novo on the record.

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

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

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

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

BOSLAUGH, J.

The plaintiff, Marvin Kemper, has appealed from the order of the district court reversing the order of the State Personnel Board, which remanded the cause to the Department of Correctional Services, and affirming the termination of his

employment by the department.

On February 25, 1986, the plaintiff was notified by the superintendent of the Community Corrections Center in Lincoln, Nebraska (Center), that his employment as assistant superintendent of the Center had been terminated effective February 12, 1986, for violation of the following Nebraska personnel rules and regulations: "001.03. Inefficiency, incompetence or negligence in the performance of duties. 001.01. Violation of, or failure to comply with a published rule, regulation, policy or procedure of the Department of Correctional Services."

The termination followed an investigation into reports of misconduct by the plaintiff, concerning gambling at the Center and borrowing money from an inmate. As a result of the investigation, it was concluded that there was cause to believe that the plaintiff knew of gambling activity at the Center between inmates and employees and that the plaintiff had borrowed money from an inmate on one or more occasions.

The following formal statement of charges was served on the plaintiff on February 18, 1986:

> Violation #1: Chapter 16, rule 001.03. Inefficiency, incompetence or negligence in the performance of duties. Specifically, evidence indicates that you knowingly allowed gambling to take place in the facility under your supervision. That you openly discussed gambling and participated in its activity with a legal offender under your supervision. That you exchanged money between yourself and Doug Conroy for the purpose of settling gambling winnings.
>
> Violation #2: Chapter 16, rule 001.01. Violation of, or failure to comply with a published rule, regulation, policy or procedure of the Department of Correctional Services. Specifically, evidence indicates that you borrowed money from an inmate in violation of existing regulations and operational memorandum.

Following the investigation, the assistant director of the Center recommended that the employment of the plaintiff be terminated. This recommendation was approved by the director of the Department of Correctional Services. The

plaintiff then appealed to the State Personnel Board.

After a hearing, the State Personnel Board found that the charge relating to the plaintiff's knowledge of or involvement in gambling at the Center was not sustained by the evidence, but that "there is substantial, competent and material evidence that the Appellant borrowed money from an inmate in violation of Agency regulations. Indeed, the Appellant admits having done so. Nevertheless, the Board finds that evidence, in the light of the mitigating circumstances, does not support the termination of Mr. Kemper." The board concluded that the agency was in violation of §§ 16.001 and 16.002 of the state personnel rules and regulations and remanded the matter to the department for "determination of an appropriate, but less severe form of discipline which is consistent with the current State Rules and Regulations." From that order, the plaintiff appealed to the district court.

The district court affirmed the order of the board as to the charges against the plaintiff, reversed the order of the board as to the finding that the department had violated §§ 16.001 and 16.002 and the remand to the department, and affirmed the termination of the plaintiff's employment. The plaintiff has now appealed to this court.

Our review is de novo on the record, as prescribed in Neb. Rev. Stat. § 84-918 (Reissue 1987), which provides:

> An aggrieved party may secure a review of any final judgment of the district court under the Administrative Procedure Act by appeal to the Supreme Court. Such appeal shall be taken in the manner provided by law for appeals to the Supreme Court in civil cases and shall be heard de novo on the record.

As noted by the personnel board in its decision,

> "The authority of the State Personnel Board is to assure that the decision of the agency head was made in good faith and for cause, and to assure that the agency head followed proper procedures under State Personnel and/or agency rules and regulations, labor agreements, or relevant statutes."

Although there is substantial evidence concerning gambling activities at the Center and the failure of the plaintiff to take

appropriate action in regard to such activities, it is unnecessary that we make a new finding in that regard, because the other charge was clearly established. In addition to being a violation of the regulations, the second charge was a violation of Neb. Rev. Stat. § 83-417 (Reissue 1987), which provides that it is a Class IV felony to convey to or from any committed offender any article without the approval of the chief executive officer of the facility.

The appropriate discipline was a matter within the discretion of the director.

The director testified that he decided termination was the appropriate disciplinary action for these reasons:

> A. Due to the fact that, by his own admission, that Mr. Kemper had borrowed money from an inmate, and that's in violation of the Code of Ethics and Conduct of the Department. And the fact that he had not — he elected not to enforce the rules that govern the behavior of inmates, rules 5 and 6 of the Department of Correctional Services.
>
> Q. Why did you consider those things to be serious matters?
>
> A. Well, they're rules that have to be followed to maintain discipline and integrity in a correctional facility. The integrity of the facility breaks down when staff elects to have a relationship which deals in any commodities with particular inmates.
>
> And my experience has shown that, once that relationship changes from a supervisor to a person being supervised, that the supervisor tends not to be the type of supervisor that we expect them to be, and treats inmates with preferential treatment, those that they have some type of relationship with; and are, as it's called, dealing with inmates.

The situation was well summarized by the assistant director in his letter of February 25, 1986, to the director, where he stated:

> In analyzing the total picture of Mr. Kemper's employment, including his some eleven years in corrections, particularly his several years as an Assistant Superintendent (previously titled Assistant Center

Manager), it was incumbent upon him to exercise leadership and the level of authority of a responsible manager in his personal and employment dealings with staff and inmates; to take all actions necessary to ensure to the best of his professional ability that the rules and regulations of the Department, as they applied to both staff and inmates, were enforced. Mr. Kemper failed to do that.

The judgment of the district court is affirmed.

AFFIRMED.

IN RE ESTATE OF EUGENIA A. PETERSON, DECEASED. RONDA K. PETERSON, PERSONAL REPRESENTATIVE OF THE ESTATE OF CARL PETERSON, DECEASED, APPELLANT, V. JAMES E. ABBOTT AND LEROY ABBOTT II, COPERSONAL REPRESENTATIVES OF THE ESTATE OF EUGENIA A. PETERSON, DECEASED, APPELLEES.

433 N.W.2d 500

Filed December 30, 1988. No. 87-266.

1. **Appeal and Error.** Regarding a question of law, the Supreme Court has an obligation to reach its conclusion independent from the conclusion reached by a court whose judgment is the subject of review.
2. **Wills: Interest.** A will is an instrument in writing. Therefore, when interest is required to be paid on a pecuniary devise pursuant to Neb. Rev. Stat. § 30-24,102 (Reissue 1985), the legal rate of interest called for is 12 percent per annum, as required by Neb. Rev. Stat. § 45-104 (Reissue 1984).

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Reversed and remanded with directions.

Clark G. Nichols, of Winner, Nichols, Douglas, Kelly and Arfmann, P.C., for appellant.

William F. Hargens, of McGrath, North, O'Malley & Kratz, P.C., for appellees.

HASTINGS, C.J., GRANT, and FAHRNBRUCH, JJ., and HENDRIX and OLBERDING, D. JJ.

FAHRNBRUCH, J.

The only question this case presents is what rate of interest accrues on a pecuniary devise paid more than 1 year after the appointment of a personal representative.

The county court for Scotts Bluff County found the proper rate of interest to be 12 percent per annum, pursuant to Neb. Rev. Stat. § 45-104 (Reissue 1984). On appeal, the district court reversed, holding that 6 percent per annum interest, as called for by Neb. Rev. Stat. § 45-102 (Reissue 1984), is the applicable rate.

We reverse the district court and reinstate the judgment of the county court.

Neb. Rev. Stat. § 30-24,102 (Reissue 1985) states: "General pecuniary devises bear interest at the legal rate beginning one year after the first appointment of a personal representative until payment, unless a contrary intent is indicated by the will."

Under the Nebraska Probate Code, Neb. Rev. Stat. § 30-2209(7) (Reissue 1985), "Devise, when used as a noun, means a testamentary disposition of real or *personal* property and, when used as a verb, means to dispose of real or personal property by will." (Emphasis supplied.)

We must determine what legal rate of interest was intended by the Legislature. This is purely a question of law. Regarding a question of law, the Supreme Court has an obligation to reach its conclusion independent from the conclusion reached by a court whose judgment is the subject of review. *In re Estate of Ritter*, 227 Neb. 641, 419 N.W.2d 521 (1988).

The facts of this case are not in dispute. Eugenia A. Peterson died February 5, 1983, and her sons were appointed copersonal representatives of her estate on March 22, 1983. Mrs. Peterson's husband, Carl Peterson, was prevented from receiving an elective share of his wife's estate by a valid antenuptial agreement. See *In re Estate of Peterson*, 221 Neb. 792, 381 N.W.2d 109 (1986). The first codicil to Mrs. Peterson's will devised $200,000 to her husband. On April 3, 1986, Mr. Peterson demanded his devise of the copersonal representatives.

On June 10, 1986, following the death of Mr. Peterson, an application demanding distribution of the devise was filed with

the county court by the personal representative of Mr. Peterson's estate. The application also requested interest on the $200,000 at the rate of 12 percent per annum from March 22, 1984, the date 1 year after the copersonal representatives were appointed. The county court directed that the devise be paid. The court also found that interest on the devise accrued at 12 percent per annum, pursuant to § 45-104.

Pending appeal to the district court, the devise was paid, together with 6 percent interest from March 22, 1984. The only issue presented to the district court was the applicable rate of interest. The district court reversed the county court after finding that the 6 percent interest rate called for in § 45-102 applied.

Section 45-102 states:

> Interest upon the loan or forbearance of money, goods or things in action, shall be at the rate of twelve per cent per annum for the period commencing on March 19, 1980, through August 31, 1983, and at the rate of six per cent per annum commencing on September 1, 1983, on the unpaid principal balance, unless a greater rate, not exceeding the rate of interest provided in § 45-101.03, be contracted for by the parties.

Appellees argue that this section applies because of its title, "Interest; legal rate; except when otherwise contracted." Section titles are not part of the law and have no bearing on the statute's application. Neb. Rev. Stat. § 49-802 (Reissue 1984). By its terms, § 45-102 applies only to the "loan or forbearance of money, goods or things in action." A devise under a will is neither a loan nor a forbearance. Therefore, § 45-102 does not apply, any inference in *In re Estate of Kierstead*, 128 Neb. 654, 259 N.W. 740 (1935), to the contrary notwithstanding. Section 45-104 states: "Unless otherwise agreed, interest shall be allowed at the rate of twelve per cent per annum on money due on any instrument in writing . . . ."

A will is clearly an instrument in writing. Section 30-2209(53) defines a will as "any instrument, including any codicil or other testamentary instrument complying with Sections 30-2326 to 30-2338, which disposes of personal or real property, appoints a personal representative . . . or revises an earlier executed

testamentary instrument, or encompasses any one or more of such objects or purposes." Neb. Rev. Stat. §§ 30-2326 to 30-2338 (Reissue 1985) require that the will be in writing and that the maker be of legal age, and involve other requirements not here applicable. Mrs. Peterson's will meets all of these requirements.

By statutory definition a will is an instrument in writing. Therefore, we hold that when interest is required to be paid on a pecuniary devise pursuant to § 30-24,102, the legal rate of interest called for is 12 percent per annum, as required by § 45-104.

Accordingly, we reverse the judgment of the district court and remand the cause with directions that the judgment of the county court be reinstated.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE APPLICATION OF UNITED TELEPHONE COMPANY OF THE WEST.
UNITED TELEPHONE COMPANY OF THE WEST, APPELLEE, V. CITY OF KIMBALL, APPELLANT, ALVA PIETSCH, APPELLEE.

433 N.W.2d 502

Filed December 30, 1988. No. 87-307.

1. **Public Service Commission.** Neb. Rev. Stat. § 75-129 (Reissue 1986) vests broad authority and discretion in the Public Service Commission to determine where its hearings should be held.
2. **Administrative Law: Presumptions: Proof.** A presumption of validity attaches to the actions of administrative agencies. While the presumption is rebuttable, the burden of proof rests with the party challenging the agency's action.

Appeal from the Nebraska Public Service Commission. Affirmed.

Darrel J. Huenergardt, of O'Brien, Huenergardt & Cook, for appellant.

John F. Wright, of Wright & Sorensen, for appellee United Telephone.

BOSLAUGH, WHITE, CAPORALE, and SHANAHAN, JJ., and JAMES MURPHY, D.J.

PER CURIAM.

The City of Kimball, Nebraska, has appealed from the March 17, 1987, order of the Nebraska Public Service Commission (PSC) approving the schedule of rates and charges filed by the applicant, United Telephone Company of the West.

On December 27, 1982, United Telephone Company filed an application with the PSC, requesting an increase in rates to produce additional revenues of $2,227,330. On August 23, 1983, following a public hearing on July 19 and 20, 1983, in Gering, Nebraska, the PSC approved the application in part and ordered the applicant to file a schedule of proposed rate increases to raise an additional $650,149, but not the requested amount of $2,227,330. Prior to September 6, 1983, the applicant prepared and filed a new rate schedule, which was approved by the PSC on September 6, but without notice or a public hearing. The rates were put into effect by the applicant on the following day, September 7.

Michael J. Tracy, Tracy Corporation II, and the City of Kimball then filed motions for rehearing and reconsideration of the order of September 6, which were overruled by the commission on October 25, 1983. On October 17, 1983, the applicant filed a supersedeas bond with the PSC, which was approved on October 18.

Michael Tracy filed suit against the applicant in the Scotts Bluff County District Court on October 17, 1983. Before resolution of the case in the district court, Tracys appealed to this court from the order of the commission. In the district court, Michael Tracy alleged that the applicant had not immediately filed a supersedeas bond and that a refund was due Tracy from the time the new rates went into effect until the approval of the supersedeas bond, September 7 to October 18, 1983.

The district court, after a hearing on Tracy's petition, found that it had no jurisdiction. Tracy then appealed to this court. The judgment was affirmed in *Tracy v. United Telephone Co.*, 218 Neb. 331, 353 N.W.2d 273 (1984). See, also, *Tracy Corp. II*

v. Nebraska Pub. Serv. Comm., 218 Neb. 900, 360 N.W.2d 485 (1984).

On February 15, 1984, Tracy, Tracy Corporation II, the city, the applicant, and the PSC entered into a stipulation in this court, agreeing:

> 1. The . . . order of . . . September 6, 1983, is void under the Public Meetings Law, Sec. 84-1409, et seq., and should be set aside. . . .
>
> 2. The matters involving the schedule of rates and charges by [the applicant], approved by the Commission in its Order of September 6, 1983, may be remanded to the Nebraska Public Service Commission for reconsideration . . . along with any other matters properly before the Commission.
>
> 3. The Nebraska Public Service Commission upon reconsideration of the schedule of rates and charges may make all necessary orders . . . .
>
> . . . .

This court, on February 23, 1984, approved the stipulation and remanded the cause to the commission for reconsideration of the rates, as well as consideration of all other matters properly before the commission, "*at a public hearing with Notice to all interested parties* as provided by law." (Emphasis supplied.)

The commission disregarded the order of this court, held there was no requirement "either in law or our rules that would require further public hearings in this matter," held another hearing on January 29, 1985, and approved the applicant's schedule of rates and charges on March 19, 1985. Upon appeal, we held that our order remanding the cause to the commission for reconsideration at a "public hearing" was the law of the case. The cause was again remanded to the commission for further proceedings. *City of Kimball v. United Telephone Co.*, 223 Neb. 549, 391 N.W.2d 135 (1986).

On September 19, 1986, the commission issued a "Notice of Public Hearing" that the schedule of rates and charges would be reconsidered at a public hearing in Lincoln, Nebraska, on October 31. Copies of this notice were published in newspapers throughout the applicant's service area.

On March 17, 1987, following the public hearing on October

31, 1986, the commission again approved the schedule of rates and charges filed by the applicant. It is from that order the city has appealed. Only the city appears as appellant in this present appeal.

The city has assigned as error the holding of the public hearing in Lincoln, Nebraska, and the finding that there were no refunds due customers of the applicant.

With respect to the matter of the location of the October 31, 1986, hearing, the city relies upon *Brotherhood of Railroad Train. v. Chicago, M., St. P. & P. R. Co.*, 237 F. Supp. 404 (D.C. Cir. 1964), in which the court stated at 422-23:

> It is well settled that adjudicatory bodies possess a broad discretion in fixing the place for hearings. This discretion, of course, is not unlimited, and in a proper case may be overruled. The matter remains, however, one of discretion unless and until the proceeding is robbed of an element essential to its fairness.

Neb. Rev. Stat. § 75-129 (Reissue 1986) provides:

> The commission may hold sessions at any place in the state when deemed necessary to facilitate the discharge of its duties, and may conduct the hearing and other proceedings provided for in sections 75-101 to 75-801, or under any other law of this state, at such place or places in the state as may, in the judgment of the commission, be the most convenient and practicable for determining the particular matter before the commission.

Section 75-129 vests broad authority and discretion in the commission to determine where its hearings should be held.

In *Haven Home, Inc. v. Department of Pub. Welfare*, 216 Neb. 731, 736, 346 N.W.2d 225, 229 (1984), we said: "A presumption of validity attaches to the actions of administrative agencies. While the presumption is rebuttable, the burden of proof rests with the party challenging the agency's action."

In a similar matter, the Arizona Supreme Court, in *Burri v. Campbell*, 102 Ariz. 541, 434 P.2d 627 (1967), considered whether it was a violation of due process for all administrative hearings of the Motor Vehicle Division to be held in Phoenix. The petitioners had requested their hearing be held in Tucson

despite the following statute and regulation of the division: " 'The superintendent shall administer and enforce the provisions of this chapter and may make rules and regulations necessary for its administration . . .' " and " 'All hearings requested shall be held in the office of the Superintendent, Motor Vehicle Division, Financial Responsibility Section, Phoenix, Arizona. . . .' " *Id.* at 542, 434 P.2d at 628. In denying the petitioners' request, the court held:

> It is a settled principle of law that official acts of public officers are presumed to be correct and legal, in the absence of clear and convincing evidence to the contrary. [Citations omitted.] The weight of authority would seem to be that wide discretion is given administrative officials in determining matters such as the place for conducting hearings within a state. [Citations omitted.] We are of the opinion that the setting of the date and place for hearings by the Superintendent was a proper exercise of his administrative discretion.
>
> . . . .
>
> It is not difficult to conceive of a situation whereby it could be a violation of procedural due process to require that a financial responsibility hearing be held in Phoenix. We are not convinced, however, that that situation is now before us. It is clear that petitioners have failed to show that the superintendent acted without his power or that he acted unreasonably, capriciously or arbitrarily in setting the hearing in Phoenix, Arizona. The fact that the legislature chose to leave the setting of the time and place of the hearing to the discretion of the superintendent precludes us from considering anything but the instant case. Under the present state of facts, if a comprehensive scheme is to be set up to provide for hearings in other locations, the responsibility to do so rests with the legislature and not with this Court.

Id. at 543-44, 434 P.2d at 629-30.

In *National Labor R. Bd. v. Southwestern Greyhound Lines*, 126 F.2d 883 (8th Cir. 1942), the NLRB transferred proceedings from Fort Worth, Texas, the respondent's home office, to Kansas City, Missouri, headquarters for the NLRB's 17th

region. The respondent claimed this transfer by the NLRB was arbitrary and oppressive. The court upheld the hearing situs of Kansas City and stated:

> Respondent does not allege that it was unable to produce all of its desired witnesses or records at the Kansas City hearing, and so was denied the opportunity for a full, fair hearing. Nor does it show that it was unduly burdensome to it, financially or otherwise, to attend the hearing and have its evidence available at Kansas City. The most that the record can be said to establish is some lack of convenience and some increase of expense—neither of which can be said to have been oppressive. The Board in fixing a place for a hearing, should, of course, give due consideration to the situation of the respondent, but it is also entitled to exercise its sound discretion in the interest and convenience of all the parties involved or affected by the proceeding. We do not believe that in the present situation the Board has abused its discretion or has in any material way prejudiced or placed any unwarranted burden upon respondent.

Id. at 887-88.

While there might be instances in which the commission's choice of a hearing site is violative of fundamental fairness, the record in this case does not compel such a finding. The commission acted within its discretion in determining that the hearing should be held in Lincoln, Nebraska.

The matter has been pending since 1982. All that remained to be done was to approve the schedule of rates and charges which have been in effect since 1983. Despite the extensive notice of the October 31, 1986, hearing, only one party other than the city was sufficiently interested to file a protest. We find there was no abuse of discretion in holding the public hearing in Lincoln, Nebraska.

The order of March 17, 1987, also found that there could be no refund due in the absence of a finding that the applicant's schedule of rates and charges did not comply with the August 23, 1983, order of the commission. Since the commission had approved the applicant's schedule of rates and charges, the issue regarding possible refunds was moot.

There being no error, the order of the commission is affirmed.

AFFIRMED.

FLEMING CO. OF NEBRASKA, INC., APPELLANT, V. FORREST R. MICHALS, SR., APPELLEE.

433 N.W.2d 505

Filed December 30, 1988. No. 87-333.

1. **Appeal and Error.** In a bench trial of a law action, factual findings by a trial court have the effect of a verdict and will not be set aside unless clearly erroneous.
2. **Contracts: Compromise and Settlement.** A settlement agreement is subject to the general principles of contract law.
3. _____: _____. To have a settlement agreement, there must be a definite offer and an unconditional acceptance.
4. _____: _____. An invitation to submit an offer is not itself an offer; the submission of an offer, pursuant to the invitation, is not an acceptance.

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

Terry R. Wittler, of Cline, Williams, Wright, Johnson & Oldfather, for appellant.

Gary L. Dolan, of Knudsen, Berkheimer, Richardson & Endacott, for appellee.

BOSLAUGH, WHITE, CAPORALE, and SHANAHAN, JJ., and JAMES MURPHY, D.J.

SHANAHAN, J.

The Fleming Co. of Nebraska, Inc., appeals from the judgment of the district court for Lancaster County, which, in a bifurcated bench trial on the question of a settlement, found that Fleming had a settlement agreement with Forrest R. Michals, Sr., precluding Fleming's action based on a claim disposed by the settlement agreement, and dismissed Fleming's

action.

"In a bench trial of a law action, factual findings by a trial court have the effect of a verdict and will not be set aside unless clearly erroneous." *Alliance Nat. Bank v. State Surety Co.*, 223 Neb. 403, 404, 390 N.W.2d 487, 489 (1986).

Michals was the president of two Nebraska corporations, Beer Mart, Inc., and Mike's IGA, Inc., which operated a grocery and liquor store under the name "Mr. 'B' IGA." Michals was a guarantor of the corporations' indebtedness to Fleming.

In March of 1984, Mr. "B" IGA closed on account of lack of business. On September 6, 1984, Michals' attorney wrote Fleming's attorney:

> I am enclosing a copy of a Complaint that our office will file on behalf of Mike's IGA, Beer Mart, Inc., Forrest R. Michals, Sr., and Forrest R. Michals, Jr., against The Fleming Company of Nebraska, Inc. Our clients would consider not filing this action and giving release of the claims noted therein if they, in return, are given a complete release of all claims of The Fleming Company of Nebraska, or any related companies, who may have a claim against them.

The "Complaint" mentioned in the foregoing letter apparently related to Michals' prospective antitrust suit against Fleming.

On September 27, Fleming's lawyer stated in a letter to Michals' attorney:

> This will respond to your letter of September 6, 1984 regarding the above matter. Fleming Companies, Inc. and the Fleming Co. of Nebraska, Inc. hereby accept the settlement proposal set forth in your letter. It is my understanding that the mutual releases will also release any interest or claim that your clients may have in the leased premises and trade fixtures.
>
> Although your letter does not mention Mr. George Christatos, since he was involved with Mike's IGA, Inc. it seems to me that it would be in both of our clients' interests to have Mr. Christatos be a part of the settlement. Please advise if your office represents Mr. Christatos, or if your clients can obtain Mr. Christatos' cooperation.

> I will contact you early next week so that we can begin to prepare releases and any other documentation necessary to formalize the settlement.

George Christatos was involved in the Michals corporations at their inception but had since been bought out by Michals. There was no further correspondence between the parties until October 17, when Fleming's attorney wrote Michals' lawyer:

> Fleming Companies, Inc. and the Fleming Co. of Nebraska, Inc., hereby withdraw their counterproposal set forth in my letter to you of September 27, 1984, to settle the disputes between the parties with regard to the above matter. I have been directed by my clients to proceed to file an action against Mr. Michals on his Guaranty as soon as possible, and you should proceed accordingly.

On October 29, 1984, Fleming filed this suit against Michals to recover on the guaranties. In his answer, Michals denied any default in the corporate debts owed Fleming and alleged Fleming's antitrust violations, misrepresentation, and a settlement agreement embodied in the letters of September 6 and 27.

A settlement agreement is subject to the general principles of contract law. *Omaha Nat. Bank v. Mullenax*, 211 Neb. 830, 320 N.W.2d 755 (1982). To have a settlement agreement, there must be a definite offer and an unconditional acceptance. *Zimmerman v. Martindale*, 221 Neb. 344, 377 N.W.2d 94 (1985).

Disposition of this appeal, we believe, is controlled by the not-so-recent decision *Nebraska Seed Co. v. Harsh*, 98 Neb. 89, 152 N.W. 310 (1915). In *Nebraska Seed*, the syllabus by the court includes: "A valid contract of sale may be made by correspondence, but courts will not construe as a binding agreement letters which the parties intended only as a preliminary negotiation." Harsh wrote to Nebraska Seed: " ' "I have about 1,800 bu. or thereabouts of millet seed of which I am mailing you a sample. This millet is recleaned and was grown on sod and is good seed. I want $2.25 per cwt. for this seed f. o. b. Lowell." ' " *Id.* at 89, 152 N.W. at 310. Nebraska Seed responded by telegram to Harsh: " ' "Sample and letter received. Accept your offer. Millet like sample two

twenty-five per hundred. Wire how soon can load." ' " *Id.* at 90, 152 N.W.at 310. When Harsh did not deliver the millet, Nebraska Seed sued Harsh and obtained a verdict on account of Harsh's breach of contract for sale of the millet. However, this court reversed the judgment for Nebraska Seed and stated:

> In our opinion, the letter of defendant cannot be fairly construed into an offer to sell to the plaintiff. After describing the seed, the writer says: "I want $2.25 per cwt. for this seed f. o. b. Lowell." He does not say I offer to sell to you. The language used is general. . . .
>
> "If a proposal is nothing more than an invitation to the person to whom it is made to make an offer to the proposer, it is not such an offer as can be turned into an agreement by acceptance. Proposals of this kind, although made to definite persons and not to the public generally, are merely invitations to trade; they go no further than what occurs when one asks another what he will give or take for certain goods. Such inquiries may lead to bargains, but do not make them. They ask for offers which the proposer has a right to accept or reject as he pleases." [Citation omitted.]
>
> The letter as a whole shows that it was not intended as a final proposition, but as a request for bids. . . .
>
> . . . .
>
> . . . In *Lyman v. Robinson*, 14 Allen (Mass.) 242, 254, the supreme court of Massachusetts has sounded the warning: "Care should always be taken not to construe as an agreement letters which the parties intended only as a preliminary negotiation."

98 Neb. at 90-92, 152 N.W. at 311. See, also, *Rhen Marshall, Inc. v. Purolator Filter Div.*, 211 Neb. 306, 318 N.W.2d 284 (1982); *Neff v. World Publishing Company*, 349 F.2d 235 (8th Cir. 1965).

In *Ferrero Constr. v. Dennis Rourke Corp.*, 311 Md. 560, 536 A.2d 1137 (1988), Ferrero Construction sent a letter on March 12, 1984, to Dennis Rourke Corp. (Rourke), requiring that Rourke submit an offer by March 21, 1984, " 'in order to be considered,' " and detailed the contents of the offer to be submitted. 311 Md. at 577, 356 A.2d at 1145. Rourke submitted

the designated proposal within the allotted time. When Ferrero refused to carry out the transaction, Rourke filed an action seeking specific performance of the "contract" which resulted from Rourke's timely response to Ferrero's letter. In holding that there was no contract between the parties as the result of Ferrero's letter and Rourke's response, the court stated:

> [T]he language of the March 12, 1984, letter represents only an effort to solicit an offer from Rourke. The letter requests information as to whether Rourke "intend[ed] to submit a contract." In addition, the March 12th letter states that Rourke's contract had to be in Ferrero's hands by March 21, 1984, "in order to be *considered*." The letter thus suggests that Ferrero intended only to learn whether Rourke would "submit" an offer/"contract" which Ferrero might "consider" accepting. An invitation to submit an offer is not itself an offer; the submission of an offer, pursuant to the invitation, is not an acceptance.

311 Md. at 577-78, 536 A.2d at 1145. See, also, Restatement (Second) of Contracts § 26, comment *d.* at 77 (1981); illustration:

> 4. A writes B, "I am eager to sell my house. I would consider $20,000 for it." B promptly answers, "I will buy your house for $20,000 cash." There is no contract. A's letter is a request or suggestion that an offer be made to him. B has made an offer.

See, further, *Harvey v. Facey*, [1893] App. Cas. 552 (P.C.), which is the basis for the preceding illustration.

Michals made no definite offer in the September 6 letter. The letter stated that Michals "would consider" forbearance of an antitrust suit and a release of claims against Fleming in return for Fleming's release of claims against Michals. To paraphrase Michals' September 6 communication to Fleming, Michals would think about or reflect on forbearance of an antitrust action and a release of claims against Fleming in exchange for Fleming's release of claims against Michals. Michals' overture in the September 6 letter lacks an actual and definitive promise or obligation imposed on Michals. Fleming could not accept a nonexistent offer. If Michals' September 6 letter were an offer, then the proverb related by Heywood, "A penny for your

thought," becomes a standard applicable in contract cases, even in these inflationary times, but that is another consideration. The September 6 letter did not constitute an offer, but was Michals' invitation for Fleming's submission of an offer. Although Fleming's response may have been an offer, and for our purposes we assume that Fleming's response was an offer, Fleming's offer was withdrawn before Michals' acceptance. Without an offer and acceptance there was no settlement agreement precluding prosecution of Fleming's action.

The district court's finding that a preclusive settlement agreement existed is incorrect as a matter of law and, therefore, clearly erroneous. The district court's judgment is reversed, and this matter is remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

MCCOOK EQUITY EXCHANGE, A COOPERATIVE, APPELLANT, V. COOPERATIVE SERVICE COMPANY, A NEBRASKA CORPORATION, APPELLEE.

433 N.W.2d 509

Filed December 30, 1988. No. 87-450.

1. **Limitations of Actions: Appeal and Error.** The point at which a statute of limitations begins to run must be determined from the facts of each case, and the decision of the district court on the issue of statute of limitations will not be set aside by the Supreme Court unless it is clearly wrong.
2. **Limitations of Actions: Negligence.** In order for a continuous relationship to toll the statute of limitations regarding a claim for malpractice, there must be a continuity of the relationship and services for the same or related subject matter after the alleged professional negligence.

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

Larry R. Baumann, of Kelley, Scritsmier, Moore & Byrne, P.C., for appellant.

Robert C. Guenzel, of Crosby, Guenzel, Davis, Kessner & Kuester, for appellee.

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

GRANT, J.

Plaintiff-appellant, McCook Equity Exchange (McCook), filed this action on August 19, 1982, seeking damages caused by the alleged failure of appellee, Cooperative Service Company (CSC), to discover, during its audits of McCook, a McCook employee's embezzlement of approximately $514,000 during the period from June 1974 through August 1980. McCook proceeded on theories of breach of contract, negligence, and misrepresentation. The trial was bifurcated, pursuant to Neb. Rev. Stat. § 25-221 (Reissue 1985), to determine the issues related to CSC's statute of limitations affirmative defense, and the parties agreed to try the matter to the court without a jury. On April 13, 1987, the district court for Red Willow County held that, regardless of McCook's theory of recovery, the action was one for professional malpractice and was barred by the statute of limitations, Neb. Rev. Stat. § 25-222 (Reissue 1985). McCook timely appealed to this court and contends the district court erred in ruling that the statute of limitations began to run as of the last audit report delivered to McCook on May 2, 1980, and not on August 28, 1980, when the board of directors of McCook voted to terminate CSC as its auditor. We affirm.

The record shows that McCook and CSC stipulated to the following facts. CSC originally was the auditing department of Farmland Industries (Farmland). In June 1967, CSC was set up as a separate Nebraska corporation for the purposes of providing business services for members of Farmland, as well as providing public accounting, customer insurance, and life insurance services to customers outside the Farmland membership. CSC performed audits and auditing services for McCook approximately twice per year since its inception.

During 1974, LeRoy B. Fortner, the manager of McCook, began a systematic scheme of embezzling money from the business. McCook's board of directors became aware of Fortner's activities on August 26, 1980, and on August 27

accepted Fortner's resignation. On August 28, the board voted to "change auditors from Cooperative Service Company to Kennedy and Coe," certified public accountants. McCook subsequently engaged Kennedy and Coe to examine McCook's financial statements for the year ending September 30, 1980.

The parties further stipulated that CSC began its last audit of McCook on or about February 4, 1980. CSC delivered its report of that audit to McCook on May 2, 1980, and all audits performed by CSC and its predecessor department of Farmland were done under generally accepted auditing standards.

George Jackley, who was audit manager for CSC from 1974 to 1980, testified at trial that CSC operated as a licensed public accounting firm, specializing in "agricultural cooperatives to provide auditing services and taxing services to cooperatives within the State of Nebraska." Jackley further testified that CSC maintained files on its existing clients. Two months prior to each client's annual closing date, CSC would send a "letter of inquiry" asking whether the client required an audit for the coming period and whether the client expected CSC to perform the audit.

The letters of inquiry were, Jackley testified, "signed letters stipulating that an audit would be performed, and stipulating the closing dates so that work could be performed." CSC would not perform an audit if the client did not return a signed letter of inquiry requesting an audit. If the client indicated it wanted CSC to perform an audit, CSC would schedule the audit and assign an auditor to coordinate that engagement. The individual auditor would contact the client and make arrangements as to when the work could be performed.

Jackley further testified that although CSC performed audits for McCook on an uninterrupted basis between 1974 and 1980, CSC did not have an agreement to audit McCook on a continuing basis. Rather, the audits were performed under separate and distinct contracts, and CSC was paid separately for each audit. Fortner's uncontroverted testimony was that whenever he received a letter of inquiry from CSC, the matter of retaining CSC as auditor was placed on the agenda of the board of directors meeting immediately following the receipt of

the letter of inquiry. Fortner was instructed by the board, in each instance, to return the letter of inquiry and retain CSC to perform the audit services.

The allegations set forth in McCook's petition state a cause of action for professional negligence, and the applicable statute of limitations is § 25-222. That section provides:

> Any action to recover damages based on alleged professional negligence or upon alleged breach of warranty in rendering or failure to render professional services shall be commenced within two years next after the alleged act or omission in rendering or failure to render professional services providing the basis for such action . . .

The point at which a statute of limitations begins to run must be determined from the facts of each case, and the decision of the district court on the issue of statute of limitations will not be set aside by the Supreme Court unless it is clearly wrong. *Board of Regents v. Wilscam Mullins Birge, ante* p. 675, 433 N.W.2d 478 (1988); *Suzuki v. Holthaus,* 221 Neb. 72, 375 N.W.2d 126 (1985); *League v. Vanice*, 221 Neb. 34, 374 N.W.2d 849 (1985).

McCook contends the statute of limitations in this case began to run on August 28, 1980, the date its board of directors voted to terminate CSC as its auditor, rather than on May 2, 1980, the date CSC delivered its last audit report to McCook, because McCook had a "continuous relationship" with CSC. Brief for appellant at 13. In other words, McCook claims the audits performed by CSC were not separate and distinct transactions, but were performed pursuant to some continuing obligation on the part of CSC to audit McCook. The record does not support such a conclusion. In order for a continuous relationship to toll the statute of limitations regarding a claim for malpractice, there must be a continuity of the relationship and services for the same or related subject matter after the alleged professional negligence. *Lincoln Grain v. Coopers & Lybrand*, 215 Neb. 289, 338 N.W.2d 594 (1983).

While the terms of the "letters of inquiry" sent to clients of CSC were different from those of the "engagement letters" we considered in *Lincoln Grain, supra*, that difference is of little consequence. The significant factor in this case is that CSC

would not perform an audit of McCook unless its letter of inquiry was returned, requesting CSC to perform the audit. Each letter of inquiry pertained to a separate audit and was approved separately by McCook's board of directors. Similarly, in *Lincoln Grain*, we noted that "[Coopers & Lybrand] rendered services only after Lincoln [Grain] accepted the terms of the engagement letter. An engagement letter was indispensable for each of the audits rendered by C & L." *Id.* at 294-95, 338 N.W.2d at 597.

Furthermore, the record establishes that each audit ended upon CSC's delivery to McCook of an audit report, and McCook paid CSC a separate fee for each audit. CSC was not performing, and had not been asked to perform, any auditing services for McCook during the period from May 2 through August 28, 1980. Although McCook did business with CSC over a period of many years, McCook has demonstrated a mere continuity of its professional relationship with CSC in the specialized field of periodic, requested auditing. The parties did not have a "continuous relationship," such as continuing accounting services in all areas, sufficient to toll the statute of limitations for professional negligence. See *Lincoln Grain, supra*. Under the circumstances of this case, the audits performed by CSC at McCook's request were separate and distinct transactions.

Section 25-222 clearly requires that actions for professional negligence be commenced within 2 years after the alleged act or omission in rendering or failure to render professional services providing the basis for such actions. Here, the statute of limitations began to run on May 2, 1980, when CSC rendered its last professional services to McCook.

The evidence is overwhelming that McCook was aware of its injury, and aware that it had a cause of action against CSC, within the 2 years following May 2, 1980. Problems concerning Fortner's activities were discovered by McCook's office manager and two other employees before June or July 1980. At that time, the employees were taking a "second look" at transactions involving Fortner. At a special meeting of the board of directors of McCook, held August 27, 1980, Fortner's resignation was accepted. Negotiations for settlement of the

amount embezzled were held between McCook and Fortner's attorney after August 27, 1980, when McCook's office manager discovered he could verify a "$50,000 defalcation." Fortner offered to settle for $50,000 some 4 days after that discovery, but by then McCook's office manager could "verify that he [Fortner] had mishandled $110,000." McCook turned down that settlement offer.

McCook's office manager testified that Fortner made two other offers to settle, the second of which was "an offer after we had come up with the amount of $515,000; with accrued interest that we had computed it was over six hundred thousand, and he offered to turn over six hundred thousand dollars worth of his property . . . ."

McCook wanted to investigate the value of the property offered by Fortner in settlement, and did not accept the offer. Then, on September 14, 1981, Fortner removed certain trophies from the premises offered in settlement. McCook's office manager testified, "Up until that time we were still working on the premise that he [Fortner] was in good faith going to make us well." These definitive acts of September 14, 1981, occurred more than 1 year after the formal discovery of the defalcation by the McCook board of directors on August 27, 1980, and the discovery of defalcations by McCook employees in June or July of 1980. No legal action was filed until August 19, 1982.

This action was filed on August 19, 1982, more than 2 years after CSC rendered its last professional services to McCook. McCook was aware of the defalcation early in that 2-year period. McCook's action was barred by the applicable statute of limitations, § 25-222.

The decision of the district court is affirmed.

AFFIRMED.

JOAN IRENE SNELL, APPELLANT, V. LINN RAY SNELL, APPELLEE.
433 N.W.2d 200

Filed December 30, 1988. No. 87-486.

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

Andrew W. Hoffmeister, Deputy Buffalo County Attorney, for appellant.

No appearance for appellee.

BOSLAUGH, WHITE, CAPORALE, and SHANAHAN, JJ., and JAMES MURPHY, D.J.

PER CURIAM.

This appeal arises out of the registration of a foreign support order under the provisions of the Revised Uniform Reciprocal Enforcement of Support Act, Neb. Rev. Stat. §§ 42-796 to 42-7,104 (Reissue 1988).

The transcript reveals that the documents set forth in § 42-7,100 were received by the clerk of the district court for Buffalo County and filed therein. The statute provides that the "filing" constitutes registration. These documents consisted of three certified copies of the Kansas support order, one copy of the Kansas reciprocal enforcement of support act, and a signed statement of the petitioner containing the information required by § 42-7,100(a)(3).

The informational statement was erroneously captioned "Petition" rather than "Statement."

The respondent filed a demurrer to this petition or informational statement. The district court sustained the demurrer and gave the petitioner 20 days to file an amended petition.

Section 42-7,101(b) provides: "Within twenty days after the mailing of notice of the registration the obligor may petition the court to vacate the registration or for other relief. If the obligor does not so petition, the registered support order shall be confirmed."

The transcript shows that no such petition was filed by the respondent. The registration has not been vacated, and the

county attorney is free to proceed with confirmation and enforcement.

Although it appears that the district court may have been in error in sustaining respondent's demurrer, there is clearly no final order which is appealable.

This issue was resolved in *Federal Land Bank of Omaha v. Johnson*, 226 Neb. 877, 415 N.W.2d 478 (1987). It was held that an order sustaining a demurrer and granting the plaintiff 10 days to amend its petition (with provision for an automatic dismissal if petition was not amended) was not a final appealable order.

The order of the district court sustaining the demurrer and granting petitioner 20 days to amend was not a final order or judgment, and an appeal cannot be taken therefrom.

APPEAL DISMISSED.

STATE OF NEBRASKA, APPELLEE, V. REBECCA L. FRIEND, APPELLANT.

433 N.W.2d 512

Filed December 30, 1988. No. 87-1049.

1. **Trial: Rules of Evidence: Other Acts.** Evidence of other crimes may be admissible for the purpose of proving motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. However, such evidence is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith.
2. **Trial: Juries: Appeal and Error: Words and Phrases.** Harmless error exists when there is some incorrect conduct by the trial court, which, on review of the entire record, did not materially influence the jury in a verdict adverse to a substantial right of the defendant.
3. **Motor Vehicles: Controlled Substances: Evidence: Convictions.** When illegal materials are found in an automobile possessed and operated by the defendant, the evidence of unlawful possession is deemed sufficient to sustain a conviction, in the absence of any other reasonable explanation for their presence.
4. **Trial: Prosecuting Attorneys: Prior Convictions.** A prosecutor's further inquiry as to the nature of the offense after a defendant has admitted his or her conviction of a felony is improper.
5. **Trial: Prosecuting Attorneys: Appeal and Error.** Defendants must be given fair

trials, and it is the responsibility of the prosecution to see that each defendant receives one. Harmless error should never be applied in those instances where the prosecution deliberately, or because of very careless procedures, injects prejudicial error into the proceedings.

6. **Appeal and Error.** An error assigned but not discussed will not be considered by this court on appeal.
7. **Jury Instructions.** As a general rule, in giving instructions to the jury, it is proper for the court to describe the offense in the language of the statute.
8. **Jury Instructions: Appeal and Error: Words and Phrases.** If a word used in an instruction does not have a generally understood and accepted meaning, the failure of a trial court to define such word, especially upon a request by a party, may constitute reversible error.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Reversed and remanded for a new trial.

James D. Smith, of Brock, Seiler & Smith, for appellant.

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

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

HASTINGS, C.J.

Defendant was convicted by a jury of possession of cocaine and methamphetamine. She has appealed to this court, assigning generally as error the reception of certain evidence, prosecutorial misconduct, and the refusal to give a proffered instruction.

While driving her automobile on February 22, 1987, in Buffalo County, defendant was stopped and arrested for driving while intoxicated by Trooper Naber of the Nebraska State Patrol. There is no question as to the justification for the trooper's action. While being booked at the county jail, a marijuana pipe was discovered in her possession.

In the meantime, Trooper Karschner had arrived at the scene of the arrest to assist and arranged for a tow truck to tow away defendant's automobile. The passenger in defendant's car, Beth Mooney, was told to wait with Trooper Karschner in his automobile. When Mooney got out of the defendant's car, the trooper discovered a marijuana pipe, which Mooney admitted was hers.

When the tow truck arrived, Trooper Karschner inventoried the defendant's vehicle before allowing it to be towed away. He found 2 marijuana pipes with residue and a pack of cigarette papers on the dash shelf, a film canister containing leafy marijuana and the remainder of marijuana cigarettes in the passenger door pouch, a 12-pack of beer and 2 open bottles of beer, and a plastic sandwich container on the floor in front of the driver's seat. (Although Trooper Naber, the arresting officer, had seen an open beer container on the floor, he did not see the sandwich container.) The sandwich container had in it a brown vial with white powder, a "pharmaceutical fold" with white powder, a clear plastic bag with white powder, and a self-rolled cigarette. These substances were later identified as cocaine, methamphetamine, amphetamine, and marijuana. The defendant denied any knowledge of these items.

ADMISSION OF EVIDENCE

The defendant argues that the court erred in admitting evidence that she had previously used cocaine and that she had previously sold marijuana, and in admitting testimony by one of the troopers that suspects in drug possession cases generally deny such possession.

On direct examination, defendant was asked by her counsel a series of question about whether she recognized some of the above-listed items found in her car. She denied that she had ever seen them before, other than the canister, or that she was aware that they were present in her car. She did admit that the canister was hers, however. During that questioning, defense counsel asked her if she had been smoking marijuana the day before her arrest (February 21), to which she answered in the affirmative.

Thereafter, on cross-examination, the following occurred:

> [Prosecutor:] And you smoke marijuana?
> [Defendant:] I don't know.
> [Prosecutor:] You did?
> [Defendant:] I did.
> [Prosecutor:] Did you ever sell marijuana?
> [Defendant:] Yes, I did.
> [Prosecutor:] Did you ever do any other drugs?
> [Defense counsel]: Your Honor, I'll object, irrelevant; also on the basis of 27-404.

[The court]: Overruled.

[Defendant]: Would you repeat the question?

[Prosecutor:] Did you ever do any other drugs?

[Defense counsel]: I want further objections as far as being remote.

. . . .

[Prosecutor:] Do you ever use controlled substances, drugs?

[Defendant:] Do I? No.

[Prosecutor:] Have you ever?

[Defendant:] Yes.

[Prosecutor:] Have you ever used cocaine?

[Defense counsel]: Your Honor, if I could have a continuing objection on the basis of relevancy on the basis of remoteness. Also on the basis of section 27-404.

[The court]: . . . Overruled . . . .

[Prosecutor:] Have you used cocaine?

[Defendant:] Yes, I have.

Although defendant now complains of the admission of testimony regarding her sale of marijuana and use of cocaine, she objected at trial only to the latter.

Evidence of other crimes, i.e., the prior use of cocaine, may be admissible for the purpose of proving motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Neb. Rev. Stat. § 27-404 (Reissue 1985). However, such evidence is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. § 27-404.

Generally, the admission or exclusion of evidence is a matter within the discretion of the trial court, which ruling is not to be disturbed on appeal absent an abuse of that discretion. *State v. Wells*, 229 Neb. 89, 425 N.W.2d 338 (1988).

However, in this case, the probative force of the evidence of defendant's prior use of cocaine was minimal. As in *State v. Oliva*, 228 Neb. 185, 190, 422 N.W.2d 53, 55 (1988), "The evidence of prior [acts] was, however, extremely probative on the one issue for which it may not be offered: character of the accused."

Of course, regardless of whether the admission of the

evidence was an abuse of discretion, the admission is not prejudicial if it can be said that the error was harmless beyond a reasonable doubt. *State v. Oliva, supra.* Harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in a verdict adverse to a substantial right of the defendant. *State v. Watkins*, 227 Neb. 677, 419 N.W.2d 660 (1988).

The critical issue in defendant's trial was her possession of cocaine and methamphetamine. In *State v. Harris*, 218 Neb. 75, 352 N.W.2d 581 (1984), this court recited the rule that when illegal materials are found in an automobile possessed and operated by the defendant, the evidence of unlawful possession is deemed sufficient to sustain a conviction, "*in the absence of any other reasonable explanation for its presence.*" (Emphasis supplied.) *Id.* at 77, 352 N.W.2d at 582; *State v. Masur, ante* p. 620, 432 N.W.2d 815 (1988). A believable statement that the defendant did not place the contraband in the automobile or that its presence was not known to such defendant might seem to qualify under the exception factor of that rule.

The defendant's defense in this case was that she had no knowledge of the items found in her car and that various other people had had access to it that evening and could have placed the items in her car. Thus, the effectiveness of her defense hinged on whether the jury believed that she was not aware that the drugs were in her car. If the jury so believed, the possession could not be "knowing and intentional," as required by the prohibitory statute, and the defendant could not be convicted.

No claim was ever made that defendant did not know what cocaine looked like, so the evidence was not relevant, or at least not necessary, to prove her knowledge of the identity of that drug. However, the defendant's credibility in general, and on the specific issue of intentional possession, was crucial. The evidence of the defendant's prior use of cocaine served to destroy that credibility by suggesting that if she had previously used cocaine, it was likely that she had knowingly possessed the illegal drugs on the night in question.

Such reasoning was expressly disapproved in *State v. Coca*, 216 Neb. 76, 341 N.W.2d 606 (1983). In *Coca*, police stopped the defendant and searched his car, finding drug paraphernalia

and more than a pound of marijuana. The defendant was subsequently charged and convicted for knowingly possessing marijuana which weighed more than 1 pound. At trial, the State introduced evidence of the defendant's conviction 2 months earlier for harvesting marijuana. Based on the admission of that evidence, this court reversed the conviction.

The court first found that there was no doubt that the marijuana was found in the defendant's car. Thus, the court stated, the inquiry was whether the evidence of the harvesting conviction so bore upon the elements of intent and possession as to justify its admission. Further, explained the court, "The task further resolves itself into an analysis of whether the evidence was properly received as tending to establish any one or more of those remaining elements by proving motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. § 27-404(2)." 216 Neb. at 82, 341 N.W.2d at 610. The court applied each of these acceptable uses for the admission of prior acts to the facts and found that the defendant's previous harvesting activities had no bearing on his motive, opportunity, intent, preparation, plan, identity, or absence of mistake or accident. More importantly for our purposes, the court concluded that the prior harvesting had no value as to establishing the defendant's knowledge.

> Does the fact that he was involved in a prior harvesting scheme [in September] make it more likely he knew that the marijuana was behind the seat of the vehicle in November? It does not; the important question . . . is whether Coca knew the marijuana was in the car, not whether he knew what marijuana was.

Id. Based on this analysis, the court decided:

> We must therefore conclude that the evidence of the September crime has no relevancy to the question of whether Coca knowingly or intentionally possessed more than 1 pound of marijuana in November. The jury was asked to infer from the evidence that since Coca was involved with marijuana previously, he criminally possessed it at a later time. Evidence of a prior crime cannot be used for such a purpose.

Id. at 83, 341 N.W.2d at 611. (The court also commented in

dicta that the nonmarijuana-related physical evidence seized from the car was irrelevant and should not have been received. By the same token, it is arguable that the marijuana pipes and rolling papers in the present case were not relevant to the offenses of possession of cocaine and methamphetamine and should have been excluded.)

Under the reasoning of *Coca*, the defendant is correct in her contention that the evidence of her prior use of cocaine went only to show the jury that she was the type of person to knowingly possess cocaine and methamphetamine—a clearly improper purpose. For that reason, the conviction must be reversed and the cause remanded for a new trial.

However, we do deal with two of the defendant's other claims of error under the assumption that the same situations may again arise on that occasion.

PROSECUTORIAL MISCONDUCT

On cross-examination, the prosecutor asked the defendant whether she had had a felony conviction within the last 3 years. The defendant agreed that she had. The prosecutor then asked, "What kind of conviction was that?" The defendant objected, and after the court heard further evidence outside of the presence of the jury, the court sustained the objection, and correctly so.

Although the question was never answered in the presence of the jury, the defendant argues that, when taken together with the prosecutor's earlier questions about the defendant's selling marijuana and using cocaine, the question about the nature of the felony conviction could lead the jury to surmise that the defendant had a prior drug-related conviction. In other words, although the judge sustained the objection, the prosecutor nevertheless was guilty of misconduct by "suggesting" the improper evidence.

In light of the evidence of the defendant's previous sale of marijuana and the fact that the court gave the usual instruction restricting the jury's consideration of the prior felony to defendant's credibility, it perhaps can be argued that the prosecutor's action was harmless error. However, instructions to prosecutors on the proper use of prior felony convictions apparently bear repeating.

There is no question but that a prosecutor's further inquiry as to the nature of the offense after a defendant has admitted his or her conviction of a felony is improper. Once the defendant answers in the affirmative a question as to a prior conviction, further inquiry is not permitted. *State v. Daugherty*, 215 Neb. 45, 337 N.W.2d 128 (1983).

The situation in this case is strikingly similar to that found in *State v. Johnson*, 226 Neb. 618, 413 N.W.2d 897 (1987). Despite the measures taken by the trial court in that case to rid the case of the State-injected prejudice, this court found it necessary to order a costly and time-consuming new trial, and added this "advice" to the State:

> [T]he credibility of the defendant as a witness was the correct issue in this case. The so-called "poison" having been injected into the case by the prosecutor, either deliberately or because of a lack of knowledge of the rules of evidence, it is problematical whether the defendant could have received a fair trial.
>
> *It must be impressed upon the State that this court will not continually search for ways to extricate the prosecution from the results of its own misconduct by labeling such action "harmless error."*

(Emphasis supplied.) *Id.* at 621-22, 413 N.W.2d at 899.

And, in an earlier case, *State v. Atwater*, 193 Neb. 563, 565-66, 228 N.W.2d 274, 275 (1975), we said:

> While the evidence of defendant's guilt herein is conclusive, this is a transgression which cannot be condoned. . . . Defendants must be given fair trials, and it is the responsibility of the prosecution to see that each defendant receives one. . . . Harmless error should never be applied in those instances where the prosecution deliberately, or because of very careless procedures, injects prejudicial error into the proceedings.

JURY INSTRUCTION

Defendant asserts that the court erred in refusing to give her proposed instruction defining intentional possession or to give its own definition of "intentionally" and "possess." Additionally, the defendant assigns as error that the court gave an instruction which stated the material elements of the crime

charged as "1. The defendant knowingly or intentionally possessed controlled substance. 2. The possession of the controlled substance occurred in Buffalo County . . . ," without restating, in element (2), that the possession was knowing or intentional. For a reason which must be apparent to everyone, this latter assigned error is not discussed in the defendant's brief and, thus, will not be considered by this court on appeal. See, *State v. Greeno, ante* p. 568, 432 N.W.2d 547 (1988); *Nuttelman v. Julch,* 228 Neb. 750, 424 N.W.2d 333 (1988).

As previously stated, the court instructed the jury on the elements of the crime, including the statutorily defined words, "knowingly or intentionally" possessed a controlled substance. As a general rule, in giving instructions to the jury, it is proper for the court to describe the offense in the language of the statute. Of course, if a word used in an instruction does not have a generally understood and accepted meaning, the failure of a trial court to define such word, especially upon request by a party, may constitute reversible error. The same may be said for a definition contained in the Nebraska Jury Instructions.

In this case, the defendant proposed by a tendered instruction that the court define "intentionally possessed." The form of that request was as follows:

> For the defendant to have intentionally possessed a controlled substance as required by Instruction Number ____, she must have "willfully" or "purposely", and not accidentally or involuntarily, had actual control, care and management of the controlled substance and not a passing control, fleeting and shadowy in nature.

Defendant argues on the strength of our opinion in *State v. Bridger*, 223 Neb. 250, 388 N.W.2d 831 (1986), that because in that case we condemned the failure of the trial court to define the word "steal," perhaps a word with a generally understood and accepted meaning, the same reasoning applies to the word "intentionally" under consideration here.

In *Bridger*, the following language appears: "It might be argued that the word 'steal' has such a generally understood and accepted meaning that no instruction was necessary. However, the same could be said for the words 'willfully,' 'purposely' . . . all of which definitions were included in the

court-given instruction." *Id.* at 255, 388 N.W.2d at 835. Furthermore, in *Bridger*, the trial court was criticized for failure to use the defendant's tendered instruction for the definition of "breaking and entering," which patterned NJI 14.10, rather than the court's own description of "breaking."

However, defendant overlooks the underlying rationale of *Bridger*. In the first place, defendant's requested instruction involved in *Bridger* tracked the exact language of NJI 14.10.

> The rules by which this court adopted the Nebraska Jury Instructions state: "(a) Whenever Nebraska Jury Instructions (NJI) contains an instruction applicable in a Civil or Criminal Case, and the Court, giving due consideration to the facts and the prevailing law, determines that the jury should be instructed on the subject, the Nebraska Jury Instruction *shall be used*."

223 Neb. at 254, 388 N.W.2d at 834-35.

Secondly, the words "willfully" and "purposely" referred to in *Bridger* are also definitions contained in NJI 14.10, and the same rule applies in that instance. Strangely enough, both words as contained in NJI 14.10 are "defined as meaning intentionally." Similarly, the Random House Dictionary, Unabridged (2d ed. 1987) lists as a synonym for "intentional" the word "deliberate," and "purposeful," "willful," and "intentional" are set forth as synonyms for "deliberate"; "willful" is defined as "deliberate" and "intentional." To require of the trial court to engage in such a circuitry of definitional acrobatics would seem to be an exercise in futility.

However, for the reasons previously given, the judgment of the district court is reversed, and the cause is remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

STATE OF NEBRASKA, APPELLEE, V. KENNETH W. BLAIR, APPELLANT.

433 N.W.2d 518

Filed December 30, 1988. No. 88-061.

1. **Prosecuting Attorneys: Complaints.** It is the clear responsibility of prosecutors to examine the evidence, the statutes, and the cases to make a proper determination of the charge which the evidence will support.
2. **Prosecuting Attorneys: Complaints: Appeal and Error.** The city attorney, as prosecutor for the city, has discretion in determining what charges are to be formally filed for crimes committed within the city limits, and his or her decision will not be reversed on appeal absent an abuse of discretion.
3. **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. **Jury Trials: Ordinances.** There is no right to a jury trial for violations of municipal ordinances.
5. **Constitutional Law: Criminal Law: Pretrial Procedure.** A defendant has no general constitutional right to discovery.
6. **Criminal Law: Pretrial Procedure: Appeal and Error.** In a criminal case, the trial court is vested with broad discretion in considering discovery requests of defense counsel, and error can be predicated only upon an abuse of such discretion.
7. **Motions for Continuance: Appeal and Error.** A motion for a continuance in a criminal case is addressed to the sound discretion of the trial court, and that court's ruling will not be disturbed on appeal absent a showing of abuse of discretion.
8. **Trial: Evidence: Appeal and Error.** It is within the trial court's discretion to admit or exclude evidence, and such rulings will be upheld on appeal absent an abuse of discretion.
9. **Trial: Appeal and Error.** In the absence of an abuse of discretion, a trial court's ruling regarding the extent, scope, and course of cross-examination will be upheld on appeal.
10. **Convictions: Presumptions: Appeal and Error.** In resolving a challenge to the sufficiency of the evidence to sustain a conviction, the Supreme Court does not resolve conflicts in evidence, pass on credibility of witnesses, determine plausibility of explanations, or weigh evidence. The State is entitled to have all its relevant evidence accepted or treated as true, every controverted fact as favorably resolved for the State, and every beneficial inference reasonably deducible from the evidence. In a case tried to the court without a jury, there is a presumption that the trial court, in reaching its decision, considered only evidence that is competent and relevant. This court will not overturn such a decision where there is sufficient material, competent, and relevant evidence to sustain the judgment.
11. **Appeal and Error.** Assigned errors not discussed are not considered by this court.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed.

James L. Rold, of Rold, Peppard & Piccolo, for appellant.

Herbert M. Fitle, Omaha City Attorney, Gary P. Bucchino, Omaha City Prosecutor, and J. Michael Tesar for appellee.

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

WHITE, J.

Defendant, Kenneth W. Blair, appeals from the district court's affirmance of his conviction in the county court for Douglas County for violation of Omaha Mun. Code, ch. 20, art. II, § 20-22 (1982), resisting arrest. We affirm.

Taking a view of the facts most favorable to the State, on July 15, 1987, at approximately 3 p.m., Sgt. Jamie Leavitt of the Omaha police force was called to the vicinity of 5300 North 52d Street to investigate a complaint about a prowler. Using a description of the prowler given by the caller, Sergeant Leavitt made an investigation of the surrounding area. Within 20 minutes after the incident, he located a person matching the description approximately two blocks from where the incident was reported to have occurred. Sergeant Leavitt approached the party, who was later determined to be the defendant, Kenneth Blair, for questioning. When asked by Sergeant Leavitt whether he lived in the area, the defendant responded, "Go fuck yourself." Further attempts by Sergeant Leavitt to gather information from the defendant were met by repeated, loud, verbal abuse and obscenities, such as calling the sergeant a "muthafucker." Sergeant Leavitt told the defendant he was under arrest for disorderly conduct. Then, Sergeant Leavitt and another Omaha police officer who had also arrived at the scene attempted to handcuff the defendant. According to Sergeant Leavitt's testimony, the defendant struggled and resisted handcuffing, and it took approximately 10 to 15 minutes to subdue and arrest him.

The defendant was charged with violating Omaha Mun. Code § 20-22, resisting arrest, and Omaha Mun. Code, ch. 20, art. III, § 20-42 (1982), disorderly conduct. The county court

for Douglas County, denying defendant's motion for a jury trial, heard and tried the charges. Though finding that probable cause existed for the arrest, the court found the defendant not guilty of disorderly conduct but guilty of resisting arrest. The defendant was sentenced to pay a fine of $300 and ordered to pay the costs of prosecution. On appeal to the district court for Douglas County, the court affirmed the defendant's conviction for resisting arrest.

Defendant appeals to this court, assigning several errors which are summarized as follows. The county court for Douglas County erred in (1) denying the defendant a jury trial; (2) denying defendant's request for discovery prior to trial; (3) denying defendant's motion for a continuance; (4) failing to admit an exhibit, which was medical records detailing the extent of injuries suffered by the defendant in the course of being subdued by the arresting officers; (5) permitting a hostile witness to testify beyond the scope of adverse direct examination; (6) finding sufficient evidence to convict the defendant of the crime charged; and (7) not finding that the defense of justification and consciousness barred conviction of the offense charged.

In support of his first assignment of error, that the trial court erred in failing to grant defendant's request for jury trial, defendant makes two arguments. His first argument relates to the charge filed against him. An examination of the defendant's county court docket record has the following entries listed: "07-15-87 ARRESTED CHARGE . . . RESIST ARRST - 28-904" and "07-27-87 FILED CHARGE . . . RESIST ARRST - 20-22." Based on the above docket entries, defendant argues that he was originally charged with resisting arrest under state statute, Neb. Rev. Stat. § 28-904 (Reissue 1985), and that on July 27, 1987, "without notice to the Appellant, the City of Omaha prosecutor filed a charge of violating Omaha Municipal Code Section 20-22, Resisting Arrest," thereby depriving the defendant the right to make a selection of a jury or nonjury trial. Brief for appellant at 9. "Appellant is . . . aggrieved because the [city] prosecutor . . . consistently convert[s] all statutory charges to ordinance violations with the express purpose of avoiding jury trials." *Id.* at 19.

Defendant's first argument attacks the discretion the city attorney, as prosecutor for the city, has in determining what charges are to be formally filed for crimes committed within city limits that are addressed by both municipal ordinance and state statute. In *State v. Belitz*, 203 Neb. 375, 278 N.W.2d 769 (1979), *cert. denied* 444 U.S. 933, 100 S. Ct 278, 62 L. Ed. 2d 191, this court held that the Omaha city prosecutor did not abuse his discretion in filing a misdemeanor charge under city ordinance rather than a felony under the sexual assault statutes, even though there was sufficient evidence to file the greater charge.

> There are many offenses which contain elements, common to both misdemeanors and felonies, and which might legitimately be filed either as a misdemeanor or a felony. It is necessary then that some discretion lie with the prosecutor and the court. . . . "It is the clear responsibility of prosecutors to examine the evidence, the statutes, and the cases to make a proper determination of the charge which the evidence will support." . . . "The prosecutor is not obliged to present all charges which the evidence might support. . . ." . . . "Nor is it desirable that he prosecute all crimes at the highest degree available. . . . In exercising discretion in this way, the prosecutor is not neglecting his public duty or discriminating among offenders. The public interest is best served and even-handed justice best dispensed not by a mechanical application of the 'letter of the law' but by a flexible and individualized application of its norms through the exercise of the trained discretion of the prosecutor as an administrator of justice."

(Citations omitted.) 203 Neb. at 381-83, 278 N.W.2d at 774. The record reveals no abuse of discretion on the part of the Omaha city prosecutor.

We do not address whether the equal protection clause of the U.S. Constitution is violated by permitting an offender who could be charged with either a municipal ordinance violation or statutory violation to be prosecuted for violation of a municipal ordinance, thereby denying the offender the opportunity to request a jury trial, rather than prosecuting under the state statute. This issue was not raised at trial below, and "[a]n issue

not presented to or passed upon by the trial court is not an appropriate issue for consideration on appeal." *First Nat. Bank v. Rickel, Inc.*, 229 Neb. 478, 481, 427 N.W.2d 777, 779 (1988).

Defendant's second argument in support of his first assignment of error is that even when offenders are charged with violations of municipal ordinances, the county court never exercises its discretion but "arbitrarily" denies requests for jury trials "as a matter of habit and routine" without a hearing, and, as such, this practice constitutes an abuse of discretion. The defendant is incorrect in presuming the county court has the discretion to grant jury trials in criminal cases for violations of municipal ordinances. Neb. Rev. Stat. § 24-536 (Reissue 1985) states that "[e]ither party to any case in county court, *except criminal cases arising under city or village ordinances* . . . may demand a trial by jury." (Emphasis supplied.) As the State correctly pointed out in oral argument to this court, the county court judge had no discretion to grant a jury trial in this case. Based on the foregoing, defendant's first assignment of error lacks merit.

Defendant's second and third assignments of error center on the trial court's denial of his "Motion for Discovery and Production or Alternatively for a Continuance." Apparently, the discovery the defendant wished to conduct involved deposing an alleged witness who had denied any knowledge of the incident to him, but gave an hour-long interview to police. The discovery included the names and addresses of two postal workers who had supposedly observed the incident and were also interviewed by the police. His request for a continuance was so that he could complete discovery of the witnesses mentioned. The U.S. Supreme Court has held that a defendant has no general constitutional right to discovery. *Weatherford v. Bursey*, 429 U.S. 545, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977). "[I]n a criminal case, the trial court is vested with broad discretion in considering discovery requests of defense counsel and error can be predicated only upon an abuse of such discretion." *State v. Isley*, 195 Neb. 539, 544, 239 N.W.2d 262, 266 (1976). "A motion for a continuance in a criminal case is addressed to the sound discretion of the trial court, and that court's ruling will not be disturbed on appeal absent a showing

of abuse of discretion." *State v. Eichelberger*, 227 Neb. 545, 556, 418 N.W.2d 580, 588 (1988).

We note that defendant concedes in his brief that none of these alleged witnesses were called by the prosecution at trial, and nothing in the record supports the assertion that such witnesses exist. More importantly, defendant's assignments are irrelevant, since the defendant had no justification to resist arrest. Without going into further speculation, it appears from the argument in defendant's brief that the alleged witnesses were to be used to rebut the charge of disorderly conduct which was dismissed by the county court. Assignments Nos. 2 and 3 are without merit, since the record discloses no abuse of discretion on the part of the trial court in overruling defendant's motion for discovery and continuance.

The fourth assignment of error, exclusion of the exhibit containing medical records of injuries suffered by the defendant during the arrest, is also without merit. "It is within the trial court's discretion to admit or exclude evidence, and such rulings will be upheld on appeal absent an abuse of discretion." *State v. Methe*, 228 Neb. 468, 471, 422 N.W.2d 803, 806 (1988). Evidence as to the extent of injuries in this case is irrelevant, since injuries can be inflicted in effecting an arrest during the justified use of force in overcoming resistance.

Defendant's fifth assignment of error focuses on his claim that the court permitted a hostile witness to testify beyond the scope of adverse direct examination, on cross-examination by the prosecutor. "In the absence of an abuse of discretion, a trial court's ruling regarding the extent, scope, and course of cross-examination will be upheld on appeal." *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 453, 412 N.W.2d 56, 76 (1987). An examination of the record shows that no new matters were introduced in answer to any questions complained of on cross-examination that had not been introduced in answer to questions by the defendant on direct examination; therefore, no prejudice occurred such as to constitute an abuse of discretion by the trial court.

The sixth assignment of error is that the evidence was insufficient as a matter of law to sustain the conviction.

In resolving a challenge to the sufficiency of the evidence

> to sustain a conviction, the Supreme Court does not resolve conflicts in evidence, pass on credibility of witnesses, determine plausibility of explanations, or weigh evidence. . . .
>
> . . . [T]he State is entitled to have all its relevant evidence accepted or treated as true, every controverted fact as favorably resolved for the State, and every beneficial inference reasonably deducible from the evidence. . . .
>
> . . . .
>
> . . . . In a case tried to the court without a jury, there is a presumption that the trial court, in reaching its decision, considered only evidence that is competent and relevant. This court will not overturn such a decision where there is sufficient material, competent, and relevant evidence to sustain the judgment.

(Citations omitted.) *State v. Methe, supra* at 471-72, 422 N.W.2d at 806-07. In this case there is sufficient material, competent, and relevant evidence to sustain the defendant's conviction.

The last assignment of error relating to the defense of justification and consciousness is mentioned by defendant in his brief in passing and is not argued to this court. Assignments of error not discussed are not considered by this court. *State v. Lynch*, 223 Neb. 849, 394 N.W.2d 651 (1986).

The conviction and sentence of the trial court and the affirmance thereof by the district court are affirmed.

AFFIRMED.

MARY K. SANCHEZ, APPELLANT, V. FRANK N. DERBY AND BLANCHE CONRAD, APPELLEES.

433 N.W.2d 523

Filed January 6, 1989. No. 86-360.

Expert Witnesses: Appeal and Error. The admission or exclusion of expert testimony is within the discretion of the trial court. To obtain reversal on the grounds of the exclusion of evidence, an abuse of discretion must be shown.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Reversed and remanded for a new trial on the issue of damages.

Daniel B. Cullan and Virginia L. Cullan, of Cullan & Cullan, for appellant.

Daniel P. Chesire and James L. Schneider, of Kennedy, Holland, DeLacy & Svoboda, for appellee Conrad.

Edward G. Warin and Lynn A. Mitchell, of Gross, Welch, Vinardi, Kauffman & Day, P.C., for appellee Derby.

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

PER CURIAM.

Upon rehearing and reargument, we find that the trial court abused its discretion when it limited the testimony of a board-certified neuropsychologist regarding brain damage allegedly suffered by the plaintiff, Mary K. Sanchez, in an automobile accident.

This court, sitting in division, originally held in a majority opinion that the trial court had not abused its discretion when it limited the neuropsychologist's testimony regarding plaintiff's alleged brain damage. *Sanchez v. Derby*, 228 Neb. 497, 423 N.W.2d 420 (1988). The majority of the panel held that the neuropsychologist's opinion, as stated in the offer of proof, was couched in alternatives, one of which was no more than a "possibility" and did not meet the certainty requirements espoused in *Hare v. Watts Trucking Service*, 220 Neb. 403, 370 N.W.2d 143 (1985); *Scott v. State*, 218 Neb. 195, 352 N.W.2d 890 (1984); and *Lane v. State Farm Mut. Automobile Ins. Co.*,

209 Neb. 396, 308 N.W.2d 503 (1981).

We vacate the majority holding of the division panel of this court, find the trial court abused its discretion in failing to admit the neuropsychologist's expert opinion, reverse the trial court's ruling thereon, and remand the cause for a new trial.

Sanchez sued Frank N. Derby and Blanche Conrad, defendants, for injuries Sanchez allegedly sustained as a result of a rear end automobile collision on Interstate 680 in Omaha on April 21, 1982. Following trial, the jury awarded Sanchez $4,808.20, to be paid by both defendants.

At trial, Sanchez called Charles J. Golden, Ph.D., a board-certified neuropsychologist, as an expert witness. Sanchez had been referred to Dr. Golden by her attorney and by Dr. Harold Ladwig, her neurologist. Dr. Golden, a licensed psychologist, first evaluated Sanchez in November 1984. He interviewed and tested Sanchez. Dr. Golden reviewed plaintiff's medical records, which included the history of care and treatment at Bergan Mercy Hospital, Immanuel Medical Center, and Omaha Neurological Clinic, as well as records from Sanchez' mental health counselor, a psychiatrist, and her obstetrician-gynecologist. Dr. Golden determined that Sanchez was suffering from a chronic pain syndrome. That means she had a pain problem for more than 6 months which had not responded to medical treatment, and that it "was not going away."

In ruling upon an objection to the neuropsychologist's opinion, the trial judge held that Dr. Golden would only be permitted to testify that the pain plaintiff was experiencing was tied to a soft-tissue injury received in the accident.

Plaintiff claims that Dr. Golden should have been permitted to testify to his opinion as it is contained in the following offer of proof.

> [T]he client [Sanchez] presents a clinical picture of a somewhat histrionic individual whose premorbid status was that of an individual with marginal coping skills and resources. Since the accident of April 1982 there has been a significant decline in level of function as well as an exacerbation of her histrionic tendencies. The most probable causes [sic] of this behavioral change is either (1)

> a combination of a post traumatic stress disorder and a reaction to chronic pain in a previously marginal personality or (2) an organic affective disorder secondary to mild subcortical brain injury (around the orbital frontal areas) which can occur in accidents such as this.
>
> While it is possible at this time to state firmly that one of these causes is indeed the most probable cause of her problems as the problems clearly date from the time of the accident as well as follow the pattern expected in such disorders, it is not possible to choose between them at present. The type of mild subcortical brain dysfunction which could cause this type of injury cannot [by] itself be easily identified by objective tests which are currently clinically available. Although the pattern of the disorder (especially the denial, the inability to recognize the nature of her problems, and the somewhat primitive thought patterns associated with her analysis of emotion) is consistent with such a diagnosis, it can also represent in this woman an intensification because of a post traumatic stress disorder related to the accident itself and the chronic physical pain which ensued from the accident.

The narrow question on appeal is not whether Dr. Golden is qualified as an expert regarding brain damage, but whether the trial judge abused his discretion in excluding the testimony of Dr. Golden on the particular issue in question.

Dispositive of that question is whether Dr. Golden's excluded testimony would supply specialized knowledge which would aid the jury in understanding the evidence or in determining a fact in issue. Neb. Rev. Stat. § 27-702 (Reissue 1985).

The admission or exclusion of expert testimony is within the discretion of the trial court. To obtain reversal on the grounds of the exclusion of evidence, an abuse of discretion must be shown. See, *Lincoln East Bancshares v. Rierden*, 225 Neb. 440, 406 N.W.2d 337 (1987); *Bay v. House*, 226 Neb. 521, 412 N.W.2d 466 (1987); *Johannes v. McNeil Real Estate Fund VIII*, 225 Neb. 283, 404 N.W.2d 424 (1987); *Aetna Cas. & Surety Co. v. Nielsen*, 222 Neb. 92, 382 N.W.2d 328 (1986); *State v. Schenck*, 222 Neb. 523, 384 N.W.2d 642 (1986).

The trial judge found that to allow Dr. Golden's opinion

testimony with respect to the cause of Sanchez' behavioral change would be to invite a jury to speculate on the testimony of an expert.

Dr. Golden was prepared to testify that one of only two probable causes existed to explain plaintiff's behavior changes. Both of these causes related to a traumatic brain injury, and both would be compensable. This court noted in *Marion v. American Smelting & Refining Co.*, 192 Neb. 457, 460, 222 N.W.2d 366, 368-69 (1974), that "it is impossible for a reputable doctor to testify with absolute certainty that one cause and one cause alone is the reason for [a] disability. Absolute certainty is not required. Medical diagnosis is not that exact a science."

Dr. Golden's opinion was based on facts ascertained from interviews, tests, and a medical history review, which ultimately resulted in a diagnosis based on the expertise of this witness. Any questioning of the basis for Dr. Golden's opinion should go to its weight and credibility, not to its admissibility.

The trial court abused its discretion when it ruled against receiving Dr. Golden's opinion testimony.

REVERSED AND REMANDED FOR A NEW TRIAL ON THE ISSUE OF DAMAGES.

FAHRNBRUCH, J., dissenting.

I must respectfully dissent from the majority opinion on rehearing. As pointed out in the original majority opinion and in my concurrence in *Sanchez v. Derby*, 228 Neb. 497, 423 N.W.2d 420 (1988), Dr. Golden was prepared to testify

> The most probable causes [sic] of [the plaintiff's] behavioral change is either (1) a combination of a post traumatic stress disorder and a reaction to chronic pain in a previously marginal personality *or* (2) an organic affective disorder secondary to mild subcortical brain injury (around the orbital frontal areas) which *can* occur in accidents

such as that in which the plaintiff was involved. (Emphasis supplied.)

Dr. Golden's testimony would have also been

> While it is possible at this time to state firmly that one of these causes is indeed the most probable cause of her [plaintiff's] problems as the problems clearly date from

the time of the accident as well as follow the pattern expected in such disorders, it is not possible to choose between them at present.

Under Dr. Golden's second "probable cause" of plaintiff's problems (mild subcortical brain injury), he only theorizes that the brain injury *can* occur in accidents, not that there was a reasonable degree of certainty that it did occur in the accident in which the plaintiff was involved.

The trial court was correct in finding that to allow Dr. Golden's opinion testimony with respect to the cause of Sanchez' behavioral change would be to invite a jury to speculate on the proximate cause of Sanchez' behavioral problems.

The ruling of the trial court should be affirmed.

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

SELECTION RESEARCH, INC., A NEBRASKA CORPORATION, APPELLANT AND CROSS-APPELLEE, V. MICHAEL MURMAN ET AL., APPELLEES AND CROSS-APPELLANTS.

433 N.W.2d 526

Filed January 6, 1989. No. 87-169.

1. **Injunction: Equity.** An action for injunction sounds in equity.
2. **Equity: Appeal and Error.** In an appeal of an equity action, the Nebraska Supreme Court tries the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court; provided, where the credible evidence is in conflict on a material issue of fact, it 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.
3. **Injunction: Proof.** A party seeking injunction must establish by a preponderance of the evidence every controverted fact necessary to entitle the claimant to relief.
4. **Trade Secrets: Actions.** The elements of a cause of action for misappropriation of a trade secret are: (1) the existence of a trade secret or secret manufacturing process; (2) the value and importance of the trade secret to the employer in the conduct of his business; (3) the employer's right by reason of discovery or ownership to the use and enjoyment of the secret; and (4) the communication of the secret to the employee while he was employed in a position of trust and

confidence and under circumstances making it inequitable and unjust for him to disclose it to others or to use it himself to the employer's prejudice.

5. **Trade Secrets: Words and Phrases.** The subject matter of a trade secret must be secret; matters of public knowledge or of general knowledge in an industry cannot be appropriated by one as its secret.
6. _____: _____. A trade secret must be a particular secret of the complaining employer and not the general secrets of the trade in which the employer is engaged.
7. _____: _____. A trade secret is something known to only one or a few, kept from the general public, and not susceptible of general knowledge.
8. _____: _____. If the principles incorporated in a device are known to the industry, there is no trade secret which can be disclosed.
9. _____: _____. The nature of a trade secret is such that so long as it remains a secret, it is valuable property to its possessor; a public sale of the article or description of the article in literature available to the public destroys the secret.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Reversed, injunction vacated, and dismissed.

Michael O. Johanns, of Peterson Nelson Johanns Morris & Holdeman, for appellant.

Paul M. Schudel, of Woods, Aitken, Smith, Greer, Overcash & Spangler, for appellees.

BOSLAUGH, WHITE, CAPORALE, and SHANAHAN, JJ., and JAMES MURPHY, D.J.

CAPORALE, J.

Plaintiff-appellant and cross-appellee, Selection Research, Inc., a Nebraska corporation, seeks to enjoin defendants-appellees and cross-appellants, Measurement Systems Corporation, a Nebraska corporation, and its organizer and operator, Michael Murman, from using alleged trade secrets assertedly belonging to Selection Research and from engaging in allegedly deceptive trade practices, and to recover damages. In a bifurcated trial, the district court found in favor of Selection Research and permanently enjoined defendants from, in summary, using or disclosing certain interview procedures, scoring methods, and techniques of analysis, and from designing, developing, or marketing certain personnel selection processes. The injunction also ordered defendants to return certain documents to Selection Research.

At the subsequent phase of the trial, the district court determined Selection Research had failed to prove damages and, on its own motion, narrowed its prior injunction by striking that portion which related to future development of personnel selection processes. Selection Research's assignments of error on appeal to this court combine to complain of the district court's (1) determination as to damages and (2) narrowing of its earlier injunction. The defendants' assignments of error on their cross-appeal meld to assert that the district court erred in (1) finding generally in favor of Selection Research and enjoining defendants as aforesaid and (2) purportedly reinstating a certain "Trade Secret Agreement" between Murman and Selection Research. For the reasons hereinafter stated, we determine the trial court erred in finding in favor of Selection Research, and therefore reverse its decree, vacate its injunction, and dismiss the action.

I. METHOD OF REVIEW

Defendants' cross-appeal questions the sufficiency of the evidence to support the district court's injunction, a contention which presents issues logically prior to the question of damages. Thus, we shall first review the salient facts of record, touching upon defendants' alleged misappropriation of Selection Research's purported trade secrets and their alleged deceptive trade practices.

II. EVIDENCE

Selection Research engages, among other things, in the business of assisting employers in making hiring judgments, work which is referred to as personnel selection. In Selection Research's lexicon, an "indepth interview," or "indepth," is a structured interview composed of questions developed by studying a "focus group" of successful persons. These questions are posed to a job candidate in a certain order, hence the term "structured interview," and are intended to tap "themes" common to the successful persons studied. Job candidates' responses to these questions are evaluated based on the presence of certain answers, called "listen fors," which have been statistically correlated with success in a given endeavor, such as sales. Selection Research maintained at trial that consistency in the order of question presentation and in the

wording of individual questions is vital; without this consistency, an instrument, that is, the interviewing process, cannot be said to perform its task.

The method of "instrument" development is widely known among practitioners in the field, having been described in several magazine articles and a master's thesis publicly available at the University of Nebraska library. Murman testified that he referred to these published articles in developing the "Miller instrument" interview process, which is the focus of contention in this case and about which more is written later.

Dr. Donald Clifton, chief executive officer and one of the founders of Selection Research, testified that prior to the incorporation of Selection Research, he had, for 20 years, while employed at the University of Nebraska, engaged in psychological research contributing to the development of his indepths. During these development years, he shared information on his work with colleagues and students. Clifton's research was influenced by the published works of Carl Rogers, Gordon Allport, Gallup, Leighton, Bruner, Murphy, and Hunt. By the time Clifton started Selection Research in 1969, he had already developed the sales and management indepths and had made progress on the teacher indepth.

Around 1970, Selection Research started to develop another class of instruments, called "perceivers." Although both indepths and perceivers are based on the same questions and listen fors, indepths are administered by Selection Research personnel, whereas perceivers are administered by Selection Research clients. Perceivers are scored somewhat differently than indepths. There is essentially only one perceiver form, which Selection Research repackages for each client. While perceiver forms contain a listing of listen fors, only trained Selection Research personnel have access to indepth listen fors, which have never, except as involved in this lawsuit, been put in writing but which are taught to Selection Research personnel in the course of training. In Clifton's words, "so you can put your name on a report at [Selection Research] you have to do a minimum of 500 analyses under supervision and it's at that time that all the subtleties of the indepth are learned. That's why the indepth is a more powerful instrument."

In addition to indepths and perceivers, Selection Research has also developed for limited use a class of instruments called "screeners," which are essentially abbreviated perceivers intended to be administered and interpreted by Selection Research clients themselves. At least one Selection Research client developed a screener for itself. Selection Research has also composed questions for print advertisements soliciting job applicants for its employer clients. Questions used for this purpose are similar, but not identical, to questions used in indepths and perceivers.

According to various Selection Research witnesses, if the specific questions or the associated listen fors of a Selection Research instrument become public knowledge, the instrument is rendered valueless, causing economic loss to Selection Research. However, Dr. Douglas Rath, a member of the board of directors of Selection Research, testified that Selection Research's instruments had not been compromised in this way by defendants.

Since August 1969, Selection Research has sought to maintain the confidentiality of its work through the use of trade secret agreements. Murman, as a former employee of Selection Research, signed such an agreement on December 18, 1981. That agreement professes, in summary, to forever bar Murman from using or disclosing anywhere or to anyone any information concerning Selection Research's system, clients, prospective clients, prices, or any other information concerning its business, manner of operation, plans, processes, procedures, or techniques. In this connection, it is interesting to note that Clifton testified as follows:

> Q. And do you have an opportunity to visit from time to time with your competitors about instruments that they might be using?
>
> [Clifton] I don't see competitors that often or at least I don't see them as competitors from what I can think. I was at a meeting and we shared a meeting with the person who developed or worked on developmental dimensions and that was one where we shared some ideas.

Linda Naticchioni, a former employee of Measurement Systems and one-time defendant in this action, had access to

Selection Research materials while employed at Selection Research, as did Murman. Murman removed no documents from Selection Research when he left its employ; Naticchioni, however, removed a "co-worker perceiver manual" pursuant to Clifton's permission. Neither Murman nor Naticchioni has acquired any Selection Research materials since leaving its employ. Dr. Gary Hoeltke, Selection Research's supervisor of security and coordinator of legal matters, testified, however, that by "the very nature of the position [Murman and Naticchioni] were in, they learned a great deal from [Selection Research]. Now, everything they learned virtually from definition would have been taken with them when they left. Now, tangible, no. But learning, definitely, yes."

While employed at Selection Research, Murman was trained in the use and interpretation of indepths, learning the methods of both administration and analysis, including listen fors. Murman was also trained in the use of Selection Research perceivers. In fact, Naticchioni herself appears to have trained Murman in the use of the sales perceiver. Rath testified:

> The training is [Selection Research's] product in terms of how [one in the possession of Selection Research's questions] could make the interpretation, in terms of the validity of the process.
>
> . . . .
>
> . . . The learning of the listen fors of either the perceiver or the indepth is the product that we offer to our clients and [Murman] worked with some of the largest clients that we have and people that we've worked with the longest that are most important to us in terms of our revenue. . . .
>
> . . . .
>
> He was skilled in the analysis. . . .

As a Selection Research employee, Naticchioni trained her employer's clients in the use of perceivers; however, she was never involved in developing or customizing a perceiver. During her first year at Selection Research, Naticchioni occasionally administered indepths. At such times, she was allowed to do so outside the presence of a supervisor. She never participated in the analysis or construction of an indepth, nor has she used one

since leaving Selection Research.

J.R. Miller Co., Inc., had been a Selection Research client whose employees Naticchioni had trained in the use of the Selection Research perceiver. Because of a dispute between Miller Co. officials and Selection Research officers, but not involving defendants, Miller Co. determined to terminate its relationship with Selection Research. Naticchioni left Selection Research to pursue other interests in March 1982; this venture ended in May 1983. Shortly thereafter, in the summer of 1983, Miller Co. asked Naticchioni, individually, for her help in recruiting managers for its franchise restaurants. Naticchioni agreed, and at the time of trial was still involved in recruiting management prospects for Miller Co. In this capacity, and as an employee of Measurement Systems, Naticchioni used interview and teaching skills she learned at Selection Research.

Murman formed Measurement Systems in August 1983, several weeks after he left Selection Research. From August to December 1983, Measurement Systems' income was derived principally from personnel selection work on behalf of its employer clients. In accomplishing this activity, Murman struck an agreement with one Ed Ryan, a Selection Research competitor based in Chicago, for licensed use of Ryan's selection instruments. Rath testified that many of Ryan's "items are exact or similar [to Selection Research questions] as well as are the listen fors, the questions and the listen fors."

In the fall of 1983, Miller Co. expressed to Naticchioni a desire to develop its own in-house personnel selection instrument. Later, when Naticchioni joined Measurement Systems, she and Murman proposed assisting Miller Co. in this endeavor. Miller Co. accepted Measurement Systems' proposal, and development work commenced, during the course of which Measurement Systems studied a "focus group" of eight persons. Over several months of research, Murman and his associates gathered materials in addition to those obtained from Ryan and used these resources, as well as information gleaned from Miller Co. itself, in developing for Miller Co. a personnel selection interview process which became known as the Miller instrument.

The first draft of the Miller instrument contained 107

questions, with listen fors associated with each question. The questions of which this draft of the Miller instrument was composed are similar to questions found on various Selection Research instruments which predate the Miller instrument. The listen fors associated with Measurement Systems' Miller instrument resemble certain Selection Research indepth listen fors in various Selection Research instruments. Certain items of Measurement Systems' promotional and interpretative literature also resemble analogous Selection Research documents. Hoeltke engaged in the following colloquy with defendants' counsel:

> Q. Dr. Hoeltke, do you know of any instances that have occurred where either Measurement Systems or Mrs. Naticchioni or Mr. Murman have tried to or have actually represented they or Measurement Systems to be a part of or in some way affiliated with Selection Research?
>
> [Hoeltke] I have been informed by colleagues at [Selection Research] that we have received calls from clients asking what is going on because they have received sales calls from others that were marketing materials extremely similar to us, to [Selection Research] but that would be to the extent to which I would be aware of that.

According to Naticchioni, she and Murman wrote the final 39 questions of the Miller instrument draft; the first 68 questions were "pre-existing." Murman testified that 10 to 15 of the preexisting questions were taken, with permission, from the Ryan materials, and several more were slightly modified versions of Ryan questions.

Following completion of the draft Miller instrument, Murman and Naticchioni administered the resulting 107-question interview to 12 selected Miller Co. managers by phone, and submitted the results, together with performance data on each of the 12 subjects, to Dr. David Johnson, who performed statistical analyses of the data. Johnson then conferred with Murman regarding the validity of the instrument and of the various questions, and a 73-question revised instrument was prepared. This 73-question version constitutes the final draft form of the Miller instrument.

Dr. Gene Glass, Selection Research's expert on psychological

test construction and statistics, testified that the process Murman said he used to create the Miller instrument "is common in the field," being described in articles or textbooks. According to Glass, it is "the product of the process, the instrument created that has the unique features." Rath admitted that the process whereby Selection Research derives questions and listen fors is not a trade secret; he asserted, instead, that the questions and listen fors themselves comprise Selection Research's trade secrets. According to Rath, Murman's experience at Selection Research "helped him understand the whole analysis process in terms of how we analyze people."

Glass stated that the development of instruments like Selection Research's indepths and perceivers would take "five years minimum, very likely, and hundreds of thousands of dollars"; in Glass' opinion it is highly unlikely that research on as few as eight people could produce a valid personnel selection instrument.

Unlike Selection Research's indepth and perceiver materials, Measurement Systems' Miller instrument incorporates computer diskettes containing training and scoring software developed by Measurement Systems. As Naticchioni explained it, "We have a real sophisticated program that's been written specifically for the [Miller] company and there are specific adaptations that have been made for them that help them to learn along the way."

According to Murman, Measurement Systems' selection work is similar to Selection Research's in that "[b]oth processes are a patterned interview using structured questions that are open ended. There is a guideline for listen fors and they both use the same method of keeping the data which is transcribing tape recordings." Nevertheless, Naticchioni maintained at trial that "[w]e weren't you know, trying to do anything that was copying anybody else. We were interested in building our own interviews and using the knowledge that we had obtained through our experience in working with the JR Miller Company so we did what we did."

III. SCOPE OF REVIEW AND QUANTUM OF EVIDENCE

We begin our analysis of the legal issues presented by the

summarized assignments of error by recalling that an action for injunction sounds in equity. See, e.g., *Johnson v. NM Farms Bartlett*, 226 Neb. 680, 414 N.W.2d 256 (1987); *Hughes v. Enterprise Irrigation Dist.*, 226 Neb. 230, 410 N.W.2d 494 (1987); *Garner Tool & Die v. Laux*, 204 Neb. 717, 285 N.W.2d 219 (1979). In an appeal of such an action, this court tries the 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. *First Fed. Sav. & Loan Assn. v. Thomas, ante* p. 465, 432 N.W.2d 222 (1988); *Fisbeck v. Scherbarth, Inc.*, 229 Neb. 453, 428 N.W.2d 141 (1988); *Johnson v. NM Farms Bartlett, supra.* In its de novo review of the record of this case, this court is guided by the rule that a party seeking injunction must establish by a preponderance of the evidence every controverted fact necessary to entitle the claimant to relief. *Hughes v. Enterprise Irrigation Dist., supra.*

IV. ANALYSIS

1. Trade Secret Claim

With those rules in mind, we move on to a consideration of the elements of a cause of action for misappropriation of a trade secret, which are: (1) the existence of a trade secret or secret manufacturing process; (2) the value and importance of the trade secret to the employer in the conduct of his business; (3) the employer's right by reason of discovery or ownership to the use and enjoyment of the secret; and (4) the communication of the secret to the employee while he was employed in a position of trust and confidence and under circumstances making it inequitable and unjust for him to disclose it to others or to use it himself to the employer's prejudice. *Garner Tool & Die v. Laux, supra.*

As the recitation of the evidence in part II above demonstrates, Selection Research does not make clear exactly what it asserts in satisfaction of the first element of this tort. The parties are in apparent agreement that the process whereby a selection instrument is developed is widely known. As this

court observed in *Garner Tool & Die v. Laux, supra*, the subject matter of a trade secret must be secret. Matters of public knowledge or of general knowledge in an industry cannot be appropriated by one as its secret. A trade secret must be a particular secret of the complaining employer and not the general secrets of the trade in which the employer is engaged. A trade secret is something known to only one or a few, kept from the general public, and not susceptible of general knowledge. If the principles incorporated in a device are known to the industry, there is no trade secret which can be disclosed. The nature of a trade secret is such that so long as it remains a secret, it is valuable property to its possessor; a public sale of the article or description of the article in literature available to the public destroys the secret. *Garner Tool & Die v. Laux, supra*. Clearly, the widely known, publicly documented process whereby a personnel selection instrument is constructed and validated cannot be Selection Research's trade secret, and Selection Research apparently claims no such proprietary interest in this process.

Yet, precisely what Selection Research claims as a proprietary interest remains unclear. The evidence suggests that Selection Research's claim of trade secret extends to each of its completed instruments qua instrument; or individually to each of the many questions and listen fors it has developed over the years; or to each question and listen for pair, as both are required for interpretation of a job candidate's responses; or, finally, to the system resulting from the combination of some or all of the foregoing three components.

If Selection Research is indeed claiming a trade secret interest in each of its instruments qua instrument, its claim must fail for the simple reason that a comparison of its instruments with the Miller instrument discloses only superficial similarities insufficient to support Selection Research's implicit allegation that the Miller instrument is a copy of one or more of Selection Research's instruments. Certainly, if Selection Research's and defendants' products differed from one another only in a few words, or by a mere rearrangement of nonfunctional aspects of appearance, this court might well conclude that Selection Research's instruments had been misappropriated, or, more

tersely stated in this instance, copied. However, in light of Selection Research's uncontroverted evidence that the order in which questions are presented and the precise wording of those questions are the backbone of its instruments' value, this court cannot conclude that the Miller instrument, differing markedly as it does in language, organization, and even in question subject matter, is a literal or functional copy of any Selection Research instrument in evidence or discussed in the record. Rather, the Miller instrument seems to bear only a family resemblance to Selection Research's instruments; hardly surprising, given that both Measurement Systems and Selection Research used essentially the same well-known process to develop interviews to perform essentially similar tasks.

If Selection Research is understood to claim a trade secret interest in the various questions and listen fors that make up its instruments, this claim, too, must fail. While a few of Measurement Systems' questions are verbatim or very nearly verbatim duplicates of Selection Research's questions, the latter's contention that Measurement Systems copied Selection Research's questions and listen fors is rebutted by the defendants' contention, supported by the testimony of a member of Selection Research's board of directors, that many of the identical or very similar items were culled from non-Selection Research materials, and Selection Research has not proven itself to have been the source of Measurement Systems' language by the requisite preponderance. Furthermore, none of these questions inquire about any matter so removed in commonsense from the task at hand, that of selecting persons likely to make good franchise restaurant managers, that the resemblance proves anything more than the family resemblance mentioned earlier, albeit made the more suspicious, and perhaps the more likely, by Naticchioni's and Murman's prior acquaintance with Selection Research's uses of language. Nevertheless, without distressing the parties further by disclosing, against their wishes as expressed in repeated joint stipulations both in the district court and in this court, the phrasing of particular questions and listen fors, let us merely point out, by analogy and not by quoting or paraphrasing any question, that the inquiry, "Do you like to work with people?"

may be expressed in few ways more direct, nor should such pointless exercises in variation on a theme be forced upon commercial competitors by the courts of this state. As this court stated in *Garner Tool & Die v. Laux*, 204 Neb. 717, 724, 285 N.W.2d 219, 223 (1979), citing Annot., 43 A.L.R.2d 94 (1955):

> Any form of postemployment restraint reduces the economic mobility of employees and limits their personal freedom to pursue a preferred course of livelihood. The employee's bargaining position is weakened because he is potentially shackled by the acquisition of alleged trade secrets; and thus, paradoxically, he is restrained, because of his increased expertise, from advancing further in the industry in which he is most productive. Moreover, society suffers because competition is diminished by slackening the dissemination of ideas, processes, and methods.

If Selection Research is understood to argue that its trade secret interest resides in associated pairs of questions and listen fors, this claim must also fail for the reason that no such pair of items in the Miller instrument duplicates any pair of such items found in Selection Research items with the precision which Selection Research insists must be present to render such pairs the functional equivalent of one another.

Finally, if Selection Research is understood to claim a trade secret interest in the product or process which results from combining any two, or all, of the discrete parts described earlier, this claim, too, must fail, for the evidence fails to demonstrate how the resulting product or process is unique to Selection Research. In short, the evidence fails to establish that Measurement Systems misappropriated anything that is unique to Selection Research.

2. Deceptive Trade Practice Claim

Selection Research also argues, in the language of its operative petition, that "the service presently being provided by the Defendants to its customers is significantly identical to the service provided by [Selection Research] and the Defendants are therefore, in the course of their business, causing likelihood of confusion and misunderstanding . . . ."

Nebraska's Uniform Deceptive Trade Practices Act is found

at Neb. Rev. Stat. §§ 87-301 et seq. (Reissue 1987 & Cum. Supp. 1988). Section 87-302 (Reissue 1987) of that act provides in relevant part,

> (a) A person engages in a deceptive trade practice when, in the course of his business, vocation, or occupation, he:
>
> . . . .
>
> (2) Causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;
>
> (3) Causes likelihood of confusion or of misunderstanding as to affiliation, connection, or association with, or certification by, another.

Section 87-303(a) (Reissue 1987) of the act provides, among other things, that one likely to be damaged by a deceptive trade practice may be granted an injunction notwithstanding the absence of proof of monetary damage or intent to deceive.

To resolve this case it is sufficient to note that Selection Research's deceptive trade practice action clearly is not supported in the record. The only assertion of record directed to "confusion" in the marketplace between Selection Research's products and Measurement Systems' products is Hoeltke's compound hearsay statement that he has heard that others at Selection Research have heard that unnamed entities in the marketplace have called "asking what is going on."

3. Resolution of Controlling Issues

Thus, our de novo review of defendants' first summarized assignment of error on cross-appeal leads to the conclusion that Selection Research has failed to prove either a misappropriation of its trade secret or a deceptive trade practice. Nor does the record support that portion of the injunction which requires defendants to return documents to Selection Research. So far as the record shows, Murman took no document from Selection Research, and Selection Research, through Clifton, gave Naticchioni the only document she removed from her former employer's premises. The foregoing determinations render unnecessary any consideration of the issues raised by the summarized errors assigned in Selection Research's appeal.

4. Trade Secret Agreement

Left for comment, then, is defendants' second summarized

assignment of error, the district court's treatment of the trade secret agreement between Murman and Selection Research described in part II above. Prior to the commencement of the case now before us, and in the course of prior litigation between Selection Research and Murman, those parties, on July 9, 1984, entered into a stipulation reciting that Murman had not to that date violated the terms of the subject document and agreeing that upon order of the district court, the trade secret agreement "shall become void and of no effect between the parties[,] it being the intention of the parties to substitute this stipulation therefor." At trial of the present case, testimony was adduced indicating that during the meeting at which the aforedescribed stipulation was made, Hoeltke was told

> the stipulation applied to Mr. Murman selling computer software materials and that further as a part of that . . . there was a very long list of [Selection Research] clients that were discussed and that that was part of the agreement that those clients would not be contacted and that Mr. Murman would be selling computer software material.
>
> There was at no point reference to [Selection Research] perceivers or indepths or that type of material.

Selection Research relied on Murman's statement that he would not engage in the business of personnel selection in entering into the above stipulation. However, when this stipulation was signed, Murman had already commenced selection work for the Miller Co., a fact which Murman did not disclose to Selection Research at the time.

Noting that the stipulation recited that Murman has not violated the terms of the trade secret agreement, the district court concluded "that the Stipulation, taken together with the statements by Murman, is sufficient to establish fraudulent misrepresentations by Murman by clear and convincing evidence." The district court thus entered an order reciting that the stipulation was set aside and the agreement reinstated.

We observe, however, that Selection Research's operative petition in this case does not allege a breach of the agreement between it and Murman, to which Measurement Systems is not a party. Rather, Selection Research's petition relies upon the common-law tort of misappropriation of trade secrets and the

statutory tort of deceptive trade practices. The only role the agreement plays in this case is evidential in the sense that its existence bears on the care Selection Research affords what it perceives as its trade secrets.

Thus, whatever may be the ultimate import of the district court's treatment of the stipulation and agreement, that treatment has no bearing on the resolution of this present case. Accordingly, we concern ourselves with the matter no further.

V. DECISION

For the foregoing reasons, the decree of the district court is hereby reversed, its injunction vacated, and the action dismissed.

REVERSED, INJUNCTION VACATED, AND DISMISSED.

MARY K. STROTHER, BY HER PARENT AND NEXT FRIEND, S. W. STROTHER, APPELLANT, V. PAUL C. HEROLD ET AL., APPELLEES.
433 N.W.2d 535

Filed January 6, 1989. No. 87-298.

1. **Summary Judgment: Appeal and Error.** A motion for summary judgment shall be granted if the pleadings, depositions, and admissions on file, together with the affidavits, if any, and any inferences to be drawn therefrom, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. In reviewing a summary judgment, this court must take the view of the evidence most favorable to the party against whom the motion is directed and give that party the benefit of all favorable inferences which may be drawn from the evidence. Summary judgment is an extreme remedy to be awarded only when the issue is clear beyond all doubt.
2. **Joint Ventures: Motor Vehicles.** To constitute joint enterprise, there must be an agreement to enter into an undertaking. The parties must have a community of interest in the object of the undertaking and a common purpose in performance. Each of the parties must have equal voice in the manner of performance and control over the agencies used. In order for automobile occupants to constitute joint adventurers, there must be not only joint interest in the objects and purposes of the enterprise, but also an equal right to direct and control the conduct of each other in the operation of the automobile.

3. _____: _____. The question of whether a person riding in a motor vehicle is a guest, or engaged in a joint enterprise or other relationship, is generally one for determination in the individual case. It must be ascertained from facts establishing the identity of the persons advantaged by the carriage, the relationship between the parties, and the purposes to which the transportation is incident. A person riding in a motor vehicle is a guest if his carriage confers only a benefit upon himself and no benefit upon the owner or operator except such as is incidental to hospitality, social relations, companionship, or the like, as a mere gratuity. A benefit to the owner or operator of a motor vehicle sufficient to remove an occupant riding in it from the provisions of the guest statute must be a tangible and substantial one and a motivating influence for his furnishing the transportation.
4. _____: _____. A passenger's giving general directions to a driver does not rise to the level of control necessary to form a joint enterprise between driver and passenger.

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

Edward D. Hotz, of Hotz, Kizer & Wintz, P.C., for appellant.

Thomas A. Otepka, of Gross, Welch, Vinardi, Kauffman & Day, P.C., for appellee Monie.

HASTINGS, C.J., GRANT, and FAHRNBRUCH, JJ., and HENDRIX and OLBERDING, D. JJ.

FAHRNBRUCH, J.

Claiming Paul C. Herold and Kevin J. Monie were involved in a joint enterprise in the operation of a motor vehicle in which she was a passenger, Mary K. Strother sued them both for injuries she suffered when the vehicle hit a mailbox post and a tree.

The Douglas County District Court dismissed the case as to Monie on his motion for summary judgment. We affirm.

A motion for summary judgment shall be granted if the pleadings, depositions, and admissions on file, together with the affidavits, if any, and any inferences to be drawn therefrom, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. In reviewing a summary judgment, this court must take the view of the evidence most favorable to the party against whom the motion is directed and give that party the benefit of all

favorable inferences which may be drawn from the evidence. Summary judgment is an extreme remedy to be awarded only when the issue is clear beyond all doubt. *Muller v. Thaut, ante* p. 244, 430 N.W.2d 884 (1988).

Sometime prior to the evening of the accident, Herold and Monie arranged to attend a dance at the University of Nebraska at Omaha. Monie procured beer for the evening. Each of the boys paid, or was to pay, for that portion of the beer he, or friends selected by him, would consume. At the time of the accident, Herold was driving his parents' 1977 Ford Granada. Strother was riding in the front passenger seat, and Monie was riding behind her in the back seat.

Herold and Monie, both high school students, met socially nearly every weekend. Sometimes, Herold would drive one of his parents' cars, and sometimes Monie would drive when he had a car at his disposal. These social outings often included drinking beer.

Before the accident, Herold and his date, Strother, arrived at Monie's home early in the evening. All three parties drank some beer. The trio left Monie's home in the Ford Granada. The vehicle, driven by Herold, proceeded toward the Creighton Prep school area to pick up a friend of Monie's. A short time after leaving Monie's home, Herold lost control of the car. The vehicle hit a mailbox post and a large tree, injuring Strother.

Strother sued both boys, claiming that they were involved in a joint enterprise and were therefore equally liable for her injuries. Herold's parents were also made defendants, but they are not involved in this appeal.

To constitute joint enterprise, there must be an agreement to enter into an undertaking. The parties must have a community of interest in the object of the undertaking and a common purpose in performance. Each of the parties must have equal voice in the manner of performance and control over the agencies used. In order for automobile occupants to constitute joint adventurers, there must be not only joint interest in the objects and purposes of the enterprise, but also an equal right to direct and control the conduct of each other in the operation of the automobile. See, *Kremlacek v. Sedlacek*, 190 Neb. 460, 209 N.W.2d 149 (1973); *Kleinknecht v. McNulty*, 169 Neb. 470, 100

N.W.2d 77 (1959); *Bartek v. Glasers Provisions Co., Inc.*, 160 Neb. 794, 71 N.W.2d 466 (1955).

If Herold and Monie were involved in a joint enterprise at the time of the accident, Herold's negligence, if any, may be imputed to Monie, making Monie equally responsible. However, if Monie was merely a guest in the car, he is not responsible for Strother's injuries unless he, too, was negligent. See *Bartek, supra*. There is no allegation that Strother's injuries were proximately caused by negligence on the part of Monie except as a joint adventurer with Herold.

> " 'The question of whether a person riding in a motor vehicle is a guest, or engaged in a joint enterprise, or other relationship, is generally one for determination in the individual case. It must be ascertained from facts establishing the identity of the persons advantaged by the carriage, the relationship between the parties, and the purposes to which the transportation is incident.' . . . 'A person riding in a motor vehicle is a guest if his carriage confers only a benefit upon himself and no benefit upon the owner or operator except such as is incidental to hospitality, social relations, companionship, or the like, as a mere gratuity.' . . . 'A benefit to the owner or operator of a motor vehicle sufficient to remove an occupant riding in it from the provisions of the guest statute must be a tangible and substantial one and a motivating influence for his furnishing the transportation.' "

Luther v. Pawling, 195 Neb. 679, 682-83, 240 N.W.2d 42, 44 (1976), quoting *Carter v. Chicago, B. & Q. R.R. Co.*, 170 Neb. 438, 103 N.W.2d 152 (1960).

Monie claims that he was merely a guest in Herold's car, because he did not have an equal right to control the vehicle. Strother contends that reasonable people could infer Monie's right to control the vehicle from certain facts in the record. Specifically, Strother points to Monie's testimony that he had previously driven Herold's car with Herold's consent. Strother also relies on Monie's testimony that he told Herold that his friend lived in the Creighton Prep area and that Monie was to give Herold specific directions on how to reach the home of Monie's friend when they were in the Creighton Prep area.

During his deposition, Monie testified:

Q. Did you ever drive a car that Paul had that was made available to Paul?

A. Yes.

Q. Which car? The Granada or the station wagon or the Buick?

A. I don't really remember. I remember I had but I don't remember which one and when. We were in both of them a bunch of times.

When asked if he had ever allowed Monie to drive his car, Herold responded, "Not that I know of." Taking the view most favorable to Strother, we must assume that Monie had driven at least one of Herold's cars at some time, though not on a consistent basis or even often enough for Herold to remember. It is difficult to see how a reasonable person could infer from this evidence that Monie had an equal right to drive or control Herold's vehicle the evening of the accident.

Regarding Monie's giving Herold directions, both boys testified that Herold did not know where Monie's friend lived. Monie told Herold to drive to the Creighton Prep area. At the time of the accident, Herold was driving toward the area without direction from Monie. Monie was to give Herold specific directions when they neared the friend's home.

We have previously decided that a passenger's giving general directions to a driver does not rise to the level of control necessary to form a joint enterprise between driver and passenger. See *Bartek, supra*. In that case, Mrs. Bartek, who owned the vehicle, directed her husband to pick up her sister on the way to their ultimate destination. Were we to adopt the appellant's theory, we would, in effect, be ruling that any time a passenger directs a driver to a destination, the passenger and driver are in equal control of the vehicle. We decline to adopt such a rule.

Viewing the evidence in the light most favorable to Strother, we cannot infer, as a matter of law, that Monie was anything other than a guest in Herold's car on the evening of April 4, 1986. There was no evidence at the summary judgment hearing to justify submitting the case against Monie on the theory of joint enterprise. The trial court was correct in granting Monie's

motion for summary judgment.

The judgment of the trial court is affirmed.

AFFIRMED.

DIANE ROLFSMEYER THIEL, APPELLANT, V. MICHAEL DEAN THIEL, APPELLEE.

433 N.W.2d 539

Filed January 6, 1989. No. 87-433.

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

Dorothy A. Walker, of Mowbray, Chapin & Walker, P.C., for appellant.

Con M. Keating, of Bruckner, O'Gara, Keating, Sievers & Hendry, P.C., for appellee.

BOSLAUGH, WHITE, CAPORALE, and SHANAHAN, JJ., and JAMES MURPHY, D.J.

PER CURIAM.

This is a dissolution action in which the petitioner wife has appealed.

She assigns as error the trial court's failure to award attorney fees and the court's failure to award her a monetary allowance for filing a joint tax return with her husband. She further assigns error in the trial court's failure to compensate her for paying more than 50 percent of family expenses.

The parties were married in February 1985, and separated 14 months later. No children were born of the marriage, but five children from the wife's former marriages resided with the parties. Two children from the husband's former marriage were frequent visitors.

In 1986, the husband's annual income was $26,000, and the wife earned $38,000. She claimed an oral agreement by which

each promised to pay one-half of the family expenses. The husband testified that no such agreement was made. He further asserted that his entire income, with the exception of $500 monthly child support payments, was contributed for family expenses. He further testified that during this short-term marriage his income was deposited in a joint checking account, from which his wife paid family expenses.

The standard for reviewing asserted error in the division of property and awarding of attorney fees in dissolution cases is set forth in *Guggenmos v. Guggenmos*, 218 Neb. 746, 359 N.W.2d 87 (1984):

> To remove any doubt as to the proper standard of review, we now state that the division of property and the awarding of attorney fees in marriage dissolution cases are matters initially entrusted to the sound discretion of the trial judge, which matters, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion. In our de novo review, where the evidence is in conflict, we will give weight to the fact that the trial judge observed and heard the witnesses and accepted one version of the facts rather than another.

Id. at 748-49, 359 N.W.2d at 90.

A review of the record indicates that the trial judge did not abuse his discretion in failing to provide a monetary allowance to the wife for her contribution to family expenses. Nor did he abuse his discretion in refusing to make an allowance for the wife's voluntary act in filing a joint tax return with her husband.

The refusal to allow attorney fees for the benefit of the wife, whose annual income exceeded her husband's by $12,000, was also within the sound discretion of the trial court.

Accordingly, the decree which was entered herein is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GABRIEL H. UWANAKA, APPELLANT.

433 N.W.2d 540

Filed January 6, 1989. No. 87-887.

Effectiveness of Counsel: Proof. To sustain a claim of ineffective assistance of counsel, the defendant has the burden to present a record which shows counsel's deficient performance in representing the defendant.

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

Alan H. Kirshen, of Kirshen & Kratville, for appellant.

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

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

SHANAHAN, J.

In its five-count complaint filed in the county court for Sarpy County, the State charged Gabriel H. Uwanaka with driving while intoxicated (DWI), see Neb. Rev. Stat. § 39-669.07 (Supp. 1987), driving under suspension, false reporting, speeding, and operating an improperly registered auto. Pursuant to a plea agreement, Uwanaka pled no contest to the DWI charge in exchange for the State's dismissal of the other four counts. The court sentenced Uwanaka to 30 days in jail, fined him $500, and suspended his driver's license for a period of 6 months. On appeal, the district court affirmed Uwanaka's conviction and sentence. Uwanaka claims that (1) he was denied effective assistance of counsel and (2) his plea of no contest was "fatally tainted."

Uwanaka asserts that his trial counsel simply "went through the motions" in handling the case in county court. The record shows that Uwanaka's lawyer secured dismissal of four counts of the complaint in exchange for a plea of no contest to the DWI charge. The factual basis, given and accepted in conjunction with Uwanaka's no-contest plea, discloses that Uwanaka failed a number of field sobriety tests administered by the arresting officer, exuded the odor of alcohol and displayed bloodshot

eyes at the time of his arrest, and had a blood alcohol level of .108 percent according to an Intoxilyzer test. Nevertheless, Uwanaka contends his lawyer failed to investigate circumstances surrounding Uwanaka's arrest, the blood alcohol test, and possible defenses, namely, "one of the three medications which Defendant was taking, Triavil, will potentiate the action of central nervous system depressants, enhancing the response to alcohol and barbituates [sic] and that another, Fiorinal, is a barbituate [sic]." We note that § 39-669.07 provides in part: "It shall be unlawful for any person to operate or be in the actual physical control of any motor vehicle: (1) While under the influence of alcoholic liquor or of any drug . . . ."

As this court expressed in *State v. Hawthorne, ante* p. 343, 347, 431 N.W.2d 630, 633 (1988):

> [A]ccording to the test adopted in *Strickland v. Washington,* [466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)], to sustain a claim of ineffective assistance of counsel as a violation of the sixth amendment to the U.S. Constitution and thereby obtain reversal of a defendant's conviction, the defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense, that is, a demonstration of reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.

In our review of the record, we have been unable to locate a factual basis even remotely related to Uwanaka's claim of ineffective assistance of counsel in relation to his lawyer's alleged lack of investigation or diligent presentation of an available defense. To sustain a claim of ineffective assistance of counsel, the defendant has the burden to present a record which shows counsel's deficient performance in representing the defendant. Uwanaka has failed to meet his burden to show that "counsel's performance was deficient." *State v. Hawthorne, supra* at 347, 431 N.W.2d at 633.

Uwanaka's claim that his plea was "fatally tainted" is meritless. The county court fully informed Uwanaka concerning an accused's rights and the consequences of a plea

of guilty or nolo contendere. See *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986). Uwanaka waived rights accorded under *Irish, supra*, and entered his valid nolo contendere plea. Therefore, we affirm the judgment of conviction.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DOUGLAS J. TEXEL, APPELLANT.

433 N.W.2d 541

Filed January 6, 1989. No. 87-977.

1. **Constitutional Law: Search and Seizure.** No reasonable expectation of privacy exists in garbage which has been made accessible to the public.
2. **Motions to Suppress: Appeal and Error.** A reviewing court is required to uphold the trial court's factual findings in ruling on a motion to suppress unless those findings are clearly wrong.
3. _____: _____. In determining whether a trial court's findings in ruling on a motion to suppress are clearly erroneous, the reviewing court recognizes the trial court as the trier of fact and takes into consideration that the trial court observed the witnesses.
4. **Sentences: Case Overruled.** That portion of *State v. Jurgens*, 187 Neb. 557, 192 N.W.2d 741 (1971), which holds an intermittent sentence is permitted if consented to by the defendant is rejected.
5. **Sentences.** A sentence is not in the nature of a quasi-contract which a defendant is free to accept or reject.
6. **Sentences: Appeal and Error.** An intermittent sentence of incarceration is erroneous.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Affirmed in part, and in part reversed and remanded with directions.

Anthony S. Troia for appellant.

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

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

CAPORALE, J.

Defendant-appellant, Douglas J. Texel, was charged in the county court with seven counts of promoting gambling in the first degree in violation of Neb. Rev. Stat. § 28-1102 (Reissue 1985), and with one count of possessing gambling records in violation of Neb. Rev. Stat. § 28-1105 (Cum. Supp. 1986). Following a bench trial, the county court found him guilty as charged and sentenced him to pay a fine of $1,000 on each of the eight counts and to consecutive 30-day terms of incarceration on each count, to be served intermittently during 20 days of each of the succeeding 12 months. Texel appealed to the district court, which affirmed the judgment of the county court. In his appeal to this court, Texel assigns as error the district court's failure to find error on the record made in the county court, claiming that the county court erred in (1) refusing to suppress certain evidence and (2) imposing excessive sentences. Pursuant to order of this court, the parties have additionally briefed and presented oral arguments concerning the propriety of the intermittent nature of the sentences, which Texel claims to be valid and which the State claims to be erroneous. We affirm in part and, in part, reverse and remand for further proceedings.

On the basis of information from a variety of sources, including from a law enforcement officer believed to have the reputation of telling the truth, Fremont Police Det. Greg Chamberlain came to suspect that Texel was engaged in bookmaking activities both at his Fremont residence and at the Dugout Bar, a Fremont saloon in which Texel has an ownership interest. Chamberlain thereupon undertook a series of warrantless searches of the trash placed behind the bar, as well as the trash located at Texel's residence. These searches, conducted at various times during the period from December 30, 1985, through November 11, 1986, produced evidence of gambling activities at both locations.

As a consequence, on November 17, 1986, warrants were issued permitting searches of the two locations and seizures of such described evidence of gambling activities as might be found. The items seized at Texel's residence included wagering records, racing forms, and other sports information, together

with a book entitled "Bet To Win." The items seized at the bar included betting forms and "odds sheets" cut into scrap.

Texel moved that all evidence obtained as the result of the November 17 search be suppressed. The county court suppressed the evidence obtained from the search of the bar, but refused to suppress the evidence obtained from the search of Texel's residence and, subsequently, received it in evidence at the trial.

In connection with the first error he assigns to the county court, Texel argues that the search of his residence pursuant to the warrant issued November 17, 1986, and seizure of the items discovered as a result thereof violated his rights "against unreasonable searches and seizures" provided by the fourth amendment to the U.S. Constitution and art. I, § 7, of the Nebraska Constitution, and must therefore be suppressed. He rests the argument on the premise that the warrant was the product of the prior illegal warrantless searches of his residential trash. See *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

The relevant evidence as to the constitutionality of the search and seizure in question is in conflict. According to Chamberlain, the residential trash bags had been positioned near the street curb for collection. However, one of Texel's friends testified that he drove past or visited Texel's residence once or twice weekly and had never seen trash bags placed near the curb, but had seen such in Texel's carport. The parties stipulated that if Texel's immediate neighbor were called as a witness, he would testify that he had never seen Texel place garbage near the curb, nor had he ever seen any garbage truck stop at Texel's property. Although the relevance is not clear to us, the parties further stipulated this witness would also testify that at some time between September and November of *1987*, he saw a man rummaging through two or three garbage bags under Texel's carport. It was additionally stipulated that a second neighbor would testify she had never seen Texel deposit garbage near the curb. Finally, Texel testified that he usually kept his residential garbage in trash bags in his basement, and remembered leaving one bag of trash in the carport. He stated that he never placed garbage near the curb, as he did not use a

trash removal service. He removed the trash from his residence himself in his own pickup truck.

Following the lead of the U.S. Supreme Court in *California v. Greenwood*, ____ U.S. ____, 108 S. Ct. 1625, 100 L. Ed. 2d 30 (1988), we recently observed in *State v. Trahan*, 229 Neb. 683, 428 N.W.2d 619 (1988), that one can have no reasonable expectation of privacy in the inculpatory items he or she discards. Thus, no reasonable expectation of privacy exists in garbage which has been made accessible to the public.

Obviously, then, the crucial question with respect to Texel's first assignment of error is whether Texel's residential garbage had in fact been made accessible to the public by being placed near the street curb for collection, as claimed by Chamberlain, or was kept in Texel's basement and carport, as claimed by Texel and corroborated by his friend and neighbors, and thus not made accessible to the public. The county court, as the trial court, elected to believe Chamberlain. Were we free to review this matter de novo on the record, we might conclude otherwise; however, we are required, as was the district court, to uphold the trial court's factual findings in ruling on a motion to suppress unless those findings are clearly wrong. *State v. Price*, 229 Neb. 448, 427 N.W.2d 81 (1988); *State v. Holman*, 229 Neb. 57, 424 N.W.2d 627 (1988). Moreover, in determining whether a trial court's findings in ruling on such a motion are clearly erroneous, the reviewing court recognizes the trial court as the trier of fact and takes into consideration that the trial court observed the witnesses. *State v. Price, supra*; *State v. Hayes*, 229 Neb. 53, 424 N.W.2d 624 (1988).

While it is true that the parties elected to present much of the evidence relevant to the issue by stipulation, there were witnesses who testified in person and whose credibility the trial court assessed. Under the circumstances, we cannot say the factual findings of the trial court are clearly wrong. That being so, the warrant cannot be said to have resulted from constitutionally impermissible prior warrantless searches. Texel's first assignment of error is therefore without merit.

This brings us to the sentences and, more particularly, to the intermittent manner in which they are to be served. In *State v. Jurgens*, 187 Neb. 557, 192 N.W.2d 741 (1971), this court, in the

course of determining that the sentence in question was otherwise erroneous because of ambiguity, nonetheless proclaimed that a sentence providing for intermittent incarceration could not be imposed in the absence of the defendant's consent. More recently, in *State v. Havorka*, 218 Neb. 367, 355 N.W.2d 343 (1984), we found the statutory language that the period of license suspension for a drunk driver be for a period of 6 months "from the date of the order" prohibited interruption of the period of suspension. That rule was followed in *State v. Ramirez*, 218 Neb. 899, 360 N.W.2d 484 (1984). Moreover, it has long been the settled law of this jurisdiction that when a person is convicted of several distinct offenses and a cumulative sentence is imposed, the judgment should not fix the day on which each successive term of imprisonment should commence, but should direct that each successive term begin immediately following cessation of the presiding term, as the prior term of imprisonment may be shortened by the good behavior of the defendant, by executive clemency, or by a reversal of the judgment. *Luke v. State*, 123 Neb. 101, 242 N.W. 265 (1932); *In re Walsh*, 37 Neb. 454, 55 N.W. 1075 (1893).

On further reflection, we reject that portion of *Jurgens* which holds that an intermittent sentence is permitted if consented to by the defendant. As observed in *State v. Kinney*, 217 Neb. 701, 350 N.W.2d 552 (1984), a sentence is not in the nature of a quasi-contract which a defendant is free to accept or reject. A sentence as imposed either is or is not within a court's authority and is either legally correct or erroneous.

As the State has observed, widely varying the method of serving periods of incarceration increases the likelihood of uneven application of the law to various individuals in our society. Not only is a prisoner entitled to pay his debt to society in one stretch, not in bits and pieces, see *Segal v. Wainwright*, 304 So. 2d 446 (Fla. 1974), but society also has the right to expect that once a defendant has been incarcerated, the time will not be served in bits and pieces.

It should also be noted that the intermittent nature of Texel's sentences thwarts the good-time scheme embodied in Neb. Rev. Stat. § 47-502 (Reissue 1988), which provides:

> Any person sentenced to a city or county jail shall have his or her term reduced seven days for each twenty-one consecutive days during which he or she has not committed any breach of discipline or other violation of jail regulations. The reductions authorized by this section shall be granted at the end of each period of twenty-one days, with such periods to run consecutively from the date of confinement following sentencing.

We thus determine the sentences imposed to be erroneous; each sentence is therefore vacated and set aside and the cause remanded for resentencing.

In view of that determination, we do not reach the question of whether sentences of 30 days' incarceration for each offense, to be served consecutively, were excessive.

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

HASTINGS, C.J., concurs.

GRANT, J., dissenting in part.

I agree with the court's disposition of all issues in this case, but I dissent from the court's determination that it is not necessary to reach the question of the excessiveness of the sentence imposed on defendant. I think the sentence is excessive and the trial court should be so advised before resentencing defendant.

The presentence investigation shows that this 32-year-old, married defendant with a child has never before been found guilty of any criminal or traffic charge (misdemeanor or felony) either as a juvenile or as an adult, nor has he ever been arrested for any offense. He operates his own bar business, and has no history of alcohol or drug abuse. To impose on a first-time offender a bizarre sentence stretching over a 1-year period (which this court has determined is an erroneous sentence) is an abuse of discretion, in my judgment, particularly when the sentencing judge relies, in part, on his belief that gambling "is not a victimless act." Whether that statement is true or not, I do not believe that such a personally held concept should be used as a reason for such a lengthy sentence for a first-offense, nonviolent crime. It is certainly within the knowledge of the

sentencing judge that the State has officially sanctioned many forms of gambling; that, among other things, pickle parlors proliferate, resulting in the filing of lawsuits to protect the business interests in operating such parlors; and that one of the statutes under which defendant was prosecuted provides for punishment only for enterprises "not conducted pursuant to . . . the Nebraska Bingo Act, the Nebraska Pickle Card Lottery Act, [or] the Nebraska Lottery and Raffle Act." The voters of this State have recently authorized a constitutional amendment permitting interstate wagering in certain places.

It is clear that defendant has deliberately violated the laws of this State, but in my judgment, there is no reason not to use the probation system, in a situation for which it was designed, to attempt to help this defendant straighten out his life, as was done in *State v. Trahan*, 229 Neb. 683, 428 N.W.2d 619 (1988). In that case, the defendant Trahan had an alcohol and drug problem and had two prior convictions for drunk driving. He was placed under an intelligently designed probation plan for 3 years, together with a 90-day sentence, in an effort to return that defendant to a productive life. Trahan had been found guilty of possession of cocaine, possession of gambling records, and promoting gambling.

If it were determined that probation was not appropriate, then 30-day concurrent sentences, together with the large fines imposed, are more than adequate to correct defendant's conduct to conform to legal standards. If such probation or imprisonment did not lead defendant to correct his ways, then the draconian measures imposed might have some merit. The sentencing judge and the probation officer who recommended incarceration should know the severe impact of a relatively short jail term on a person who has never been involved at all in the criminal justice system. Similarly, they should know the effect of a lengthy sentence on this defendant and his dependents.

I would affirm defendant's conviction, but remand the cause for resentencing on the grounds that the sentence, as imposed, is both erroneous and excessive.

STATE OF NEBRASKA, APPELLEE, V. MARY P. McKAIN, APPELLANT.
434 N.W.2d 10

Filed January 6, 1989. No. 88-498.

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

William G. Latka, of Kelley, Kelley & Lehan, P.C., for appellant.

Robert M. Spire, Attorney General, and David Edward Cygan for appellee.

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

PER CURIAM.

Defendant, Mary P. McKain, was charged in the county court for Sarpy County with refusal to submit to a chemical test, a violation of Neb. Rev. Stat. § 39-669.08 (Supp. 1987). McKain agreed to plead no contest to the charge in exchange for the State's dismissing other charges contained in the complaint. On November 18, 1987, McKain's plea of no contest was accepted by the county court, and McKain was found guilty. Sentencing, however, was postponed.

On February 12, 1988, McKain was sentenced for her violation of the implied consent law (refusal to submit to a chemical test). At the same hearing, but before sentence was handed down for the implied consent violation, McKain was sentenced for DWI arising out of a separate incident. The county court imposed the statutory maximum sentence on the DWI charge (which includes a 6-month license suspension) and then proceeded to sentence McKain for refusal to submit to a chemical test. The court sentenced McKain to pay a $500 fine and serve 30 days in jail, and ordered that her "motor vehicle operator's license and driving privileges are suspended for a period of six months to run consecutively to the suspension" imposed on the DWI conviction. McKain appeals, contending that the county court was without authority to order suspension of her driving privileges to run consecutively to the DWI suspension.

At the time of McKain's sentencing, the implied consent law provided that

> the court shall, as part of the judgment of conviction, order [persons convicted] not to drive any motor vehicle in the State of Nebraska for any purpose for a period of six months from the date of his or her conviction and shall order that the operator's license of such person be revoked for a like period.

§ 39-669.08. We note that, effective July 9, 1988, a court is empowered to order a license suspension to commence on any date named by the court. § 39-669.08 (Reissue 1988). McKain argues that, under § 39-669.08 as it existed when she was sentenced, her license suspension should have commenced on November 18, 1987, the date her no-contest plea was accepted.

The statutory language of § 39-669.08 clearly and unambiguously authorizes suspension of McKain's license for 6 months "from the date of . . . her conviction." " ' "A plea of guilty, accepted and entered by the court, is a conviction or the equivalent of a conviction of the highest order, the effect of which is to authorize the imposition of the sentence prescribed by law . . . ." ' " *Taylor v. State,* 159 Neb. 210, 213, 66 N.W.2d 514, 516 (1954). See, also, *Stewart v. Ress,* 164 Neb. 876, 83 N.W.2d 901 (1957). Equally, a plea of no contest, when voluntarily entered and accepted by the court, is a conviction, empowering the court to impose the sentence authorized by statute. In this case, the sentence authorized by § 39-669.08 was suspension of McKain's license for 6 months from November 18, 1987, the date of her conviction. Suspension of McKain's license for any period beyond the 6 months immediately following her conviction is unauthorized by statute and is, therefore, void.

Pursuant to Neb. Rev. Stat. § 29-2308 (Reissue 1985), we modify McKain's sentence to include a 6-month suspension running from November 18, 1987.

In all other respects, the sentence imposed by the county court is valid and is affirmed.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. LONNIE R. ARTHALONEY, APPELLANT.
433 N.W.2d 545

Filed January 6, 1989. No. 88-645.

1. **Lesser-Included Offenses: Proof: Words and Phrases.** The test for determining whether a lesser-included offense exists in this jurisdiction is that a lesser-included offense is one which is necessarily established by proof of the greater offense. To be a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time having committed the lesser.
2. **Robbery: Lesser-Included Offenses.** The crime of being an accessory to a felony, as defined in Neb. Rev. Stat. § 28-204 (Reissue 1985), is not a lesser-included offense of the crime of robbery.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Reversed and remanded with directions to dismiss.

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

No appearance for appellee.

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

PER CURIAM.

On March 14, 1988, defendant was charged by information in Douglas County, Nebraska, with two counts of robbery and two counts of using a firearm in the commission of a felony. The robberies allegedly took place on June 7 and 11, 1986, in Omaha. Defendant pled not guilty on March 24, 1988. On May 20, 1988, defendant filed a motion to dismiss on the grounds that defendant had not been brought to trial within 180 days after the prosecutor had received a certificate from the warden of the Iowa state penitentiary showing defendant was imprisoned there and that detainers from Nebraska were on file there against defendant, and after defendant requested disposition of all untried charges against him, pursuant to the provisions of Neb. Rev. Stat. § 29-3805 (Reissue 1985).

This motion was overruled. The State then dismissed the two charges against defendant for use of a firearm in the

commission of a felony, and defendant waived a jury trial on the two counts of robbery.

A trial was held to the court. At the conclusion of the trial, counsel argued the case. Defendant's counsel concluded his argument by stating,

> If they [the prosecutors] have proven something, it's that Mr. Arthaloney was an accessory and not an aider and an abettor, and I would ask you to find him not guilty of both of these counts of robbery, or, in the alternative, guilty of the lesser offense being an accessory to a felony.

The following colloquy occurred:

> THE COURT: Is the State agreed that being an accessory to a felony is a lesser included offense within the charge of robbery?
>
> MR. YOUNG: Yes, Your Honor.
>
> THE COURT: What's the statute number?
>
> MR. YOUNG: 28-204.

Following this ill-advised advice, the court found that "Mr. Arthaloney is not guilty as to Count I. It is the finding of the Court that the defendant is guilty of being an accessory to the felony of robbery under Count III pursuant to 28-204."

On July 8, 1988, the court sentenced defendant "to be confined in the Nebraska Penal and Correctional Complex for a term of 18 months. This sentence is to be served concurrently with any sentence you are presently serving." Later on the same day, the judgment and sentence were entered on the court's journal with the concluding sentence, "Sentence consecutive to any sentence presently being served." On July 21, 1988, with the defendant present in court, with counsel, the trial court held a conference. The court stated that it had mistakenly said in open court that the sentence was to be concurrent, when in actuality the court intended to make the sentence consecutive, and had so entered the sentencing order in the court's journal.

Defendant timely appealed to this court, assigning as error the actions of the trial court: (1) in not sustaining defendant's motion to dismiss because he was not brought to trial within 180 days under the interstate Agreement on Detainers, Neb. Rev. Stat. § 29-759 (Reissue 1985); (2) "in finding the Defendant guilty of being an accessory to a felony under Count III,

Robbery, of the information because being an accessory to a felony is not a lesser-included offense of robbery"; and (3) in changing defendant's sentence from concurrent to consecutive.

After the filing of defendant's brief in this court, the State filed a motion for this court "to enter an order sustaining appellant's Assignment of Error 2 and 3 as set forth in the Brief of the Appellant . . . and remand this case to the District Court for further proceedings."

We grant appellee's motion and dispose of this case as if submitted to the court on defendant's appeal and the State's confession of error.

Neb. Rev. Stat. § 28-324 (Reissue 1985) provides in part:

> A person commits robbery if, with the intent to steal, he forcibly and by violence, or by putting in fear, takes from the person of another any money or personal property of any value whatever.

Neb. Rev. Stat. § 28-204 (Reissue 1985) provides in part:

> (1) A person is guilty of being an accessory to felony if with intent to interfere with, hinder, delay, or prevent the discovery, apprehension, prosecution, conviction, or punishment of another for an offense, he:
>
> (a) Harbors or conceals the other; or
>
> (b) Provides or aids in providing a weapon, transportation, disguise, or other means of effecting escape or avoiding discovery or apprehension; or
>
> (c) Conceals or destroys evidence of the crime or tampers with a witness, informant, document, or other source of information, regardless of its admissibility in evidence; or
>
> (d) Warns the other of impending discovery or apprehension other than in connection with an effort to bring another into compliance with the law; or
>
> (e) Volunteers false information to a peace officer; or
>
> (f) By force, intimidation, or deception, obstructs anyone in the performance of any act which might aid in the discovery, detection, apprehension, prosecution, conviction, or punishment of such person.

We held in *State v. White*, 217 Neb. 783, 785-86, 351 N.W.2d 83, 85-86 (1984):

> The test for determining whether a lesser-included offense exists in this jurisdiction is that a lesser-included offense is one which is necessarily established by proof of the greater offense. To be a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time having committed the lesser. [Citations omitted.]
>
> . . . .
>
> As this court has said before, the fact that the elements of the lesser-included offense may be present in a case of the greater offense is not sufficient to invoke the lesser-included offense instruction if it is *possible* to commit the greater offense without at the same time committing the lesser offense.

(Emphasis in original.) See, also, *State v. Jackson*, 225 Neb. 843, 408 N.W.2d 720 (1987).

The crime of being an accessory to a felony, as defined in § 28-204, is not a lesser-included offense of the crime of robbery. The defendant's second assignment of error is upheld, and the judgment is reversed and the cause remanded with directions to dismiss. It is unnecessary to consider the other errors assigned.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

PETE RABEN, APPELLANT, V. HERMAN E. DITTENBER, APPELLEE.

434 N.W.2d 11

Filed January 13, 1989. No. 87-257.

1. **Directed Verdict: Negligence: Trial: Appeal and Error.** In reviewing a directed verdict, the party against whom a motion for a direction of liability is made is entitled to have every controverted fact resolved in his or her 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 party against whom the motion is made, the case may not be decided as a matter of law. A directed verdict is proper only where reasonable minds cannot differ and can only draw one conclusion from the evidence. Where reasonable minds may draw different

conclusions from the evidence, the question of negligence is for determination by the jury.

2. **Directed Verdict: Evidence: Negligence: Appeal and Error.** Violations of safety regulations, standing alone, are not sufficient to sustain a directed verdict. The violation is mere evidence of negligence, and the weight of that evidence is for consideration by the trier of fact.
3. **Juries: Evidence.** In our judicial system, it is entirely within the province of the jury to weigh the evidence and resolve the resulting conflicts.

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Reversed and remanded with directions.

Michael J. Javoronok, of Holtorf, Kovarik, Nuttleman, Ellison, Mathis & Javoronok, P.C., and R.M. Van Steenberg, of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, P.C., for appellant.

Clark G. Nichols, of Winner, Nichols, Douglas, Kelly & Arfmann, P.C., for appellee.

BOSLAUGH, WHITE, CAPORALE, and SHANAHAN, JJ., and JAMES MURPHY, D.J.

WHITE, J.

This appeal arises from a civil action in the district court for Scotts Bluff County for damages for property damage and personal injuries sustained by the plaintiff-appellant in a motor vehicle accident. On October 29, 1984, at approximately 5 p.m., the defendant, Herman E. Dittenber, was driving his Mercury Grand Marquis automobile south on Nebraska Highway 29 in Sioux County from Harrison toward Mitchell. His wife, Marcella, was in the car seat beside him and her mother, Margaret Sleager, was in the back seat. The plaintiff, Pete Raben, driving a White Freightliner cab-over-engine pulling a potbellied stock trailer filled with cattle, was also traveling south on Highway 29, some distance behind the defendant's car. Charles Quay was following directly behind the plaintiff in a similar truck also owned by Raben. About 7 miles north of Mitchell, the defendant slowed to make a left turn at the intersection of Highway 29 and a county road. Approximately 200 yards north of the intersection, the plaintiff pulled his truck into the left-hand lane to pass the defendant's

vehicle. The defendant turned left, and the two vehicles collided.

In February and March of 1987, the case was tried before a jury. At the close of all the evidence, the court directed a verdict in favor of the defendant, stating that "reasonable minds could not differ in that the negligence of the plaintiff was, if not the sole cause of this accident, was far and away a proximate cause, and that that negligence was the cause of the accident." This appeal followed.

Plaintiff assigns three errors, claiming that the trial court erred (1) in directing a verdict for the defendant at the close of all the evidence; (2) in limiting the plaintiff's evidence concerning the condition of the intersection; and (3) in refusing to excuse passing at an intersection, when the intersection was not marked and the roadway was marked with a dotted line indicating that passing was permitted.

> In reviewing a directed verdict, the party against whom a motion for a direction of liability is made is entitled to have every controverted fact resolved in his or her 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 party against whom the motion is made, the case may not be decided as a matter of law. . . .
>
> A directed verdict is proper only where reasonable minds cannot differ and can only draw one conclusion from the evidence. . . . Where reasonable minds may draw different conclusions from the evidence, the question of negligence is for determination by the jury.

(Citations omitted.) *Mantz v. Continental Western Ins. Co.*, 228 Neb. 447, 450-51, 422 N.W.2d 797, 801 (1988).

The evidence adduced at trial shows that the plaintiff was in violation of Neb. Rev. Stat. § 39-625(1)(b) (Reissue 1988) when he attempted to pass the defendant within 100 feet of the intersection at the scene of the accident. Section 39-625(1) states that "[n]o driver shall overtake and pass another vehicle or drive to the left of the center of the roadway whenever: . . . (b) He approaches within one hundred feet of or traverses any intersection or railroad grade crossing."

> It is the rule in Nebraska that the violation of a safety regulation, established by statute or ordinance, is not negligence as a matter of law, but is evidence of negligence which may be considered in connection with all the other evidence in the case in deciding that issue. Similarly, the violation of a statute is not negligence per se, but only evidence of negligence. . . . Therefore, violation of a statute or regulation . . . standing alone, is not sufficient to sustain a directed verdict . . . .

Clark Bilt, Inc. v. Wells Dairy Co., 200 Neb. 20, 24, 261 N.W.2d 772, 775 (1978).

In *Hegarty v. Campbell Soup Co.*, 214 Neb. 716, 335 N.W.2d 758 (1983), the trial court initially denied the admission into evidence of a safety ordinance which defendant contended the plaintiff had violated and was relevant on the issue of contributory negligence. Later, the trial court determined that the ordinance was relevant and sustained the defendants' motion for a new trial on the ground that the court had erred in failing to admit the ordinance. This court, finding that the negligence of the defendant's driver was the proximate cause of the accident, held that the failure to admit or instruct upon the ordinance was harmless error. In so holding, we stated: "Failure to comply with the directives of the ordinance could only be evidence of contributory negligence to be considered by the jury in connection with other evidence bearing upon the issue. A failure to comply with the ordinance would not constitute contributory negligence per se." *Hegarty, supra* at 721, 335 N.W.2d at 762, citing *Clark Bilt, Inc. v. Wells Dairy Co., supra*.

Piper v. Hill, 185 Neb. 568, 177 N.W.2d 509 (1970), involved the issue of whether the plaintiff was guilty of contributory negligence when he violated Neb. Rev. Stat. § 39-757 (Reissue 1968) when he left his vehicle on the improved or maintained travel portion of the highway. We held that the defendant was not entitled to summary judgment on the basis that the plaintiff was guilty of contributory negligence by violating the statute. This court observed:

> The substance of the defendant's argument is that our statute on parking or leaving standing any vehicle on the

> improved or maintained traveled portion of a highway (section 39-757, R.R.S. 1943) applies and it is argued that it is conclusively established that the decedent was violating this statute. This same statute, of course, specifically exempts a disabled vehicle. But, even if it did not, in Nebraska the violation of a statute is not negligence per se but is evidence for the jury to consider in the determination of the ultimate issue of negligence or contributory negligence.

Piper v. Hill, supra at 571-72, 177 N.W.2d at 512.

As the above principles of law enumerate, violations of safety regulations such as § 39-625(1)(b), standing alone, are not sufficient to sustain a directed verdict. The violation is mere evidence of negligence, and the weight of that evidence is for consideration by the trier of fact. Therefore, is there sufficient evidence as a matter of law showing that plaintiff's negligence was more than slight in comparison with the defendant's negligence and, as such, the proximate cause of the accident? See, *Lynn v. Metropolitan Utilities Dist.*, 225 Neb. 121, 403 N.W.2d 335 (1987); *Bonnes v. Olson*, 197 Neb. 309, 248 N.W.2d 756 (1976).

Giving the plaintiff the benefit of every inference, and resolving every controverted fact in his favor, the record shows the following. Though the trial court restricted evidence on the condition of the intersection, an issue which will be addressed below, there is evidence which shows that the plaintiff was unaware of the fact he was attempting to pass at an intersection. Trooper George Siders of the Nebraska State Patrol, the officer who investigated the accident, testified on behalf of the plaintiff that this was the first intersection in 16 miles to travelers coming from the north and that the centerline continued to be marked by a dotted line in the middle of the road, indicating freedom to pass as long as the road was clear ahead. He further stated that there were no signs to indicate the existence of an intersection in the area.

Plaintiff also argues that because the markings on the pavement indicated freedom to pass while the statute on passing at an intersection prohibited it, there is a conflict in the law and his action should therefore be excused. We note that the

plaintiff has not introduced evidence of a regulation explaining the significance of lane markings, nor is there statutory authority for specific lane markings. It is a well-settled rule in Nebraska that state courts can take judicial notice of general rules and regulations established and published by federal agencies under authority of law. *Bohy v. Abbott*, 154 Neb. 139, 47 N.W.2d 95 (1951); *Keyser v. Allen*, 149 Neb. 449, 31 N.W.2d 309 (1948); *Powell v. Anderson*, 147 Neb. 872, 25 N.W.2d 401 (1946). Neb. Rev. Stat. § 84-906.05 (Reissue 1987) states:

> The filing of any rule or regulation pursuant to the Administrative Procedure Act, if certified and filed with the Secretary of State, shall be received as prima facie evidence of the existence of such rule or regulation and that such rule or regulation is as described in the permanent file copy of the Secretary of State. Any rule or regulation so certified and filed shall be admitted into evidence without further foundation.

That section provides support for holding that this court will take judicial notice of general rules and regulations established and published by Nebraska state agencies under authority of law. Pursuant to Neb. Rev. Stat. § 39-698 (Reissue 1988), the Nebraska Department of Roads appears to have adopted the Manual on Uniform Traffic Control Devices (1978), published by the U.S. Department of Transportation. 411 Neb. Admin. Code § 001.01 (1986). The law governing lane markings and defining the significance of the markings is set forth in the manual. The Nebraska Department of Roads has failed to file a copy of the manual with the Secretary of State as required by Neb. Rev. Stat. § 84-902 (Reissue 1987), which provides in pertinent part, "Each agency shall file in the office of the Secretary of State a certified copy of the rules and regulations in force and effect in such agency."

Not only was the trial court not supplied with a certified copy of an original regulation on file with the Secretary of State, indeed, there appear to be no regulations on file for the secretary to certify.

Although this court cannot say as a matter of law that there was a conflict between a statute and an agency regulation because of the defect in the record, common sense dictates that

the issue of the markings at the intersection could have affected the plaintiff's awareness of whether he was approaching an intersection, and is a factor for consideration by the jury in determining the weight of the plaintiff's negligence.

The record also indicates there is considerable dispute on whether the defendant had operated his left turn indicator prior to making the left turn. The plaintiff contends that the defendant never turned on his left turn signal. On direct examination, he testified as follows:

> A. . . . [T]here was a car ahead of me that was slowing down and they looked like they were going to stop. And I — So I pulled over in the other lane and was going to go on down the road because it was clear and then as I got up alongside this car, then it — we — he turned and it hit, I hit him with the right corner of the bumper. And I was going to pull to the left ditch and my right wheel, front wheel locked, was evidently locked because I couldn't — it took both hands to pull and it kept going to the right with me and I tried to go to the left. And that — From there on I don't remember anything.
>
> Q. Okay. Pete, did you ever see a turn signal on the Dittenber car?
>
> A. No.

On cross-examination:

> Q. So you did see the brake lights go on as you came up behind the Dittenber car?
>
> A. Yes.
>
> Q. Did they go on and then go off again or did they remain on as long as you could remember?
>
> A. They went off.
>
> Q. Is that why you thought the car was stopped because the brake lights went off?
>
> A. Yes.
>
> Q. And you don't recall seeing any turn signals?
>
> A. No, sir.

In corroboration, Quay testified for the plaintiff that the defendant had failed to signal:

> Q. . . . [W]hat happened?
>
> A. Well, we followed him for a ways then Pete turned

on his turn signals and started to go around the man. And when he got down there by the intersection they collided.

Q. Okay. Now, you were in the lane behind the Dittenber vehicle; is that right?

A. Yes, sir.

Q. And you were still in that lane after Pete pulled around to pass. Okay. What did you see on the back of his vehicle?

A. I never seen any lights of any kind on it.

On cross-examination:

Q. Now, you said that you didn't see any lights of any kind, were you in a position to see the back end of the Dittenber vehicle? Wasn't Pete's truck in front of you?

A. Yes.

Q. And that's why you didn't see any lights because his truck was between you and the Dittenber vehicle?

. . . .

A. After Pete got over the passing lane I had a good view of the car.

Q. And you didn't see any lights?

A. No, sir.

Q. No brake lights?

A. No brake lights or no turn signals.

Q. How far were you behind the Dittenber vehicle at that point?

A. Oh, I was still the same distance behind. I hadn't started picking up any speed until after Pete got around him.

Both Marcella Dittenber and Margaret Sleager, passengers in the defendant's car, said "no" when asked if they recalled whether or not the defendant had any turn signals on.

In rebuttal, the defendant testified that he put on his signal 200 yards prior to the intersection and that he knew it was on because it was his habit to turn it on. Further, the defendant produced an expert who had examined the left and right rear taillights on the defendant's car. Based on his observation of the filaments in the bulbs, the witness concluded that the defendant's left turn indicator was on at the time of the impact. However, on cross-examination, defendant's expert admitted

that the deformities in the filaments, which were the bases for his conclusion that the left turn indicator was on, could have been created by residual heat from the brake lights left over after the bulb had been turned off, thereby leading to the inference that the left-hand turn signal had not been operating at the time of the impact.

There was also evidence in the record showing the defendant's negligence. Trooper Siders testified as to an admission made by the defendant at the time of the accident:

> I asked him if he had observed the semi trucks or this one that hit him and he said that he had looked in his rear view mirror and they were far enough down the road, which would be north of him, that he would be able to make the turn in safety.

Yet, the defendant stated on cross-examination that he never saw the trucks. Also, despite the fact that his car was equipped with three mirrors, defendant admitted that he only looked in the center rearview mirror and did not look in either the left or right rearview mirror or over his left shoulder to see if the way was clear.

The record indicates too many areas of factual conflict to say as a matter of law that the plaintiff's negligence was more than slight in comparison with the defendant's negligence or that the plaintiff's negligence was the proximate cause of the accident.

With regard to plaintiff's second and third assignments of error, they relate to a motion heard by the court on February 27, 1987, outside of the presence of the jury. The plaintiff made an offer of proof:

> Trooper Siders would have testified that there was no way anyone would have of knowing that this was an intersection. There were no signs indicating an intersection even beyond what his testimony was, and that it was clearly marked that passing was indicated. His testimony, his actual testimony was that the dotted line in the roads indicate[s] passing. And we would have additional testimony from Pete Raben that he was not aware that this was an intersection, that the dotted lines indicated passing. He relied on those and we believe that the action of the state in placing these down on the road

> has [led] Mr. Raben to be affirmatively [misled] as to what the rules of the road were at that particular location. We feel that Mr. Raben would also testify that he would not have passed if he knew it was an intersection and a violation of the rules of the road . . . .
>
> . . . [I]t [the foregoing testimony] should be [admissible] and should be allowed because it goes to the weight and credibility of the type of evidence that is considered as the result of the violation of a statute. *In other words, the reasons for passing or the justification for doing what he did, even though it may have violated a statute, is much weaker evidence and this testimony be allowed, [than] it is by showing that he violated a statute without any cause.*

(Emphasis supplied.) The court rejected the offer of proof and ruled that it would limit the argument and restrict the evidence on the issue of "whether passing at an intersection should be evidence of negligence when the intersection is not marked and a dotted line indicates passing is permitted."

We agree with plaintiff's characterization of the issue. As mentioned above, violation of § 39-625 is evidence of negligence, but that still leaves unanswered the question of how much negligence should be attributed to that violation. This question goes directly to the determination of what weight the evidence should receive. "In our judicial system, it is entirely within the province of the jury to weigh the evidence and resolve the resulting conflicts." *Brewer v. Case*, 192 Neb. 538, 543, 222 N.W.2d 823, 827 (1974). Clearly, from an evidentiary standpoint not all violations of a statute are negligent to the same degree. For example, suppose the plaintiff had attempted to pass the defendant at an intersection which had been preceded by a sign marking a no-passing zone or dangerous intersection, with a solid yellow line painted on the middle of the road and a flashing caution light. It is obvious that one who passed at the intersection under these conditions would be more negligent than the plaintiff in the case at bar. When the trial court directed a verdict for the defendant after allowing the admission into evidence of the violation of the statute and, at the same time, restricting the admission of evidence concerning the circumstances relating to that violation, it was tantamount

to saying that the plaintiff was negligent per se or, in other words, that the violation of a statute, standing alone, is sufficient to sustain a directed verdict. This is in direct contradiction with the authorities cited above and is not the law in Nebraska.

Accordingly, we reverse the trial court's decision sustaining defendant's motion for a directed verdict and overrule the objection on the offer of proof. This cause is to be remanded for retrial, and the court will allow argument and evidence on the condition of the intersection.

REVERSED AND REMANDED WITH DIRECTIONS.

FISHER CORPORATION, APPELLANT, V. CONSOLIDATED FREIGHTWAYS, INC., APPELLEE.

434 N.W.2d 17

Filed January 13, 1989. No. 87-289.

1. **Uniform Commercial Code: Liability: Negligence: Warehousers.** A warehouser, that is, one "engaged in the business of storing goods for hire," Neb. U.C.C. § 7-102(1)(h) (Reissue 1980), is, in the absence of a contrary agreement, liable for goods lost while in its possession only if the loss occurred through its negligence. Neb. U.C.C. § 7-204 (Reissue 1980).
2. **Uniform Commercial Code: Motor Carriers.** A common carrier is an insurer against loss from whatever cause, except an act of nature, of the public enemy, or of the owner of the goods.
3. **Uniform Commercial Code: Motor Carriers: Warehousers.** Once a common carrier tenders delivery of consigned goods to a consignee which refuses delivery, the carrier loses its status as a common carrier and becomes a warehouser.
4. _____: _____: _____. Where a common carrier turned warehouser, acting as a bailee, accepts instructions from the bailor to ship goods to a specified location, its status as a warehouser again changes to that of common carrier.
5. **Appeal and Error.** One cannot be heard to complain of an alleged error corrected in a manner to which the complaining party agreed.
6. **Verdicts: Appeal and Error.** One may not waive an error, gamble on a favorable verdict, and, upon receiving an unfavorable result, reassert the error.
7. **Jury Instructions: Appeal and Error.** Jury instructions must be read together, and if taken as a whole they 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.

8. _____: _____. It is not error to refuse to give a requested instruction if the substance of the request is in the instructions actually given.
9. _____: _____. Where the meaning of an instruction is clear and a correct statement of the law, error cannot be predicated on the selection of words.
10. **Directed Verdict.** A directed verdict is proper only where an issue should be decided as a matter of law; that is, where reasonable minds cannot differ and can draw but one conclusion from the evidence.
11. **Verdicts: Appeal and Error.** In determining the sufficiency of the evidence to sustain a verdict in a civil case, this court considers the evidence most favorably to the successful party and resolves evidential conflicts in favor of such party, which is entitled to every reasonable inference deducible from the evidence.
12. _____: _____. A civil jury verdict will not be disturbed on appeal unless clearly wrong.
13. _____: _____. A verdict is not to 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.
14. **Motions for New Trial.** A motion for new trial is addressed to the discretion of the trial court and is 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 its 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.
15. **Motions for New Trial: Evidence: Proof.** In order to make a sufficient showing for new trial upon the ground of newly discovered evidence, the proof in support thereof must show that such evidence is available which neither the litigant nor counsel could have discovered by the exercise of reasonable diligence and that it is not merely cumulative, but competent, relevant, and material, and of such character as to reasonably justify a belief that its admission would probably bring about a different result if a new trial were granted.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Affirmed.

Elizabeth Stuht Borchers, of Marks & Clare, for appellant.

Thomas D. Wulff, of Kennedy, Holland, DeLacy & Svoboda, for appellee.

BOSLAUGH, WHITE, CAPORALE, and SHANAHAN, JJ., and JAMES MURPHY, D.J.

CAPORALE, J.

Plaintiff-appellant, Fisher Corporation, a manufacturer of electronic equipment, seeks to recover the value of certain video cassette recorders stolen while in the possession of defendant-appellee, Consolidated Freightways, Inc., a

transporter of goods. The district court, in accordance with verdicts, dismissed Fisher's action. Fisher appeals, asserting, in summary, that the district court erred in (1) striking one of its two alternative theories of recovery, (2) instructing the jury, (3) ruling the evidence sufficient to support the verdicts, and (4) refusing to grant a new trial for newly discovered evidence. We affirm.

In its original petition, Fisher pled that it was entitled to recover on the theory that at the time of the theft, Consolidated was serving as a warehouser, or alternatively, on the theory that at the relevant time, Consolidated was serving as a common carrier. A warehouser, that is, one "engaged in the business of storing goods for hire," Neb. U.C.C. § 7-102(1)(h) (Reissue 1980), is, in the absence of a contrary agreement, liable for goods lost while in its possession only if, as detailed later in this opinion, the loss occurred through its negligence. See Neb. U.C.C. § 7-204 (Reissue 1980). A common carrier, on the other hand, is an insurer against loss from whatever cause, except an act of nature, of the public enemy, or of the owner of the goods. *Lincoln Drug Co. v. Harman*, 146 Neb. 354, 19 N.W.2d 566 (1945). Consolidated demurred generally to the entire petition. For some reason not apparent to us, the district court treated the demurrer as a motion to strike and ordered Fisher's common carrier theory of recovery stricken. Fisher then amended its petition so as to allege only its warehouser theory. Consolidated thereafter answered by admitting the loss but denying any negligence, attributing the loss to theft.

The record reveals that in June of 1984, Fisher, under a "standard bill of lading," delivered to Consolidated, at Fisher's warehouse in California, 132 recorders for shipment to World Radio, Inc., an electronics retailer, at Council Bluffs, Iowa. Consolidated divided the shipment into two parts, tendering delivery to World Radio of 60 recorders on June 29 and 72 recorders on July 6. World Radio rejected each tender as duplicative of earlier shipments.

In order to understand what follows, it is necessary to interrupt our recitation of the relevant events and review the legal significance of World Radio's rejection of the recorders. So far as we can determine from the record, the bill of lading

under which the recorders came into Consolidated's possession stated nothing about Consolidated's liability for loss should it find itself unable to deliver the recorders to World Radio as Fisher had directed. Under such a circumstance, once a common carrier tenders delivery of the consigned goods to a consignee which refuses delivery, the carrier loses its status as a common carrier and becomes a warehouser. *Rio Grande Motor Way v. Resort Graphics*, 740 P.2d 517 (Colo. 1987); *Barlow Upholstery & Furniture Co. v. Emmel*, 533 P.2d 900 (Utah 1975); *Chicago & North Western Ry. Co. v. Union Packing Co.*, 373 F. Supp. 734 (D. Neb. 1974), *aff'd* 514 F.2d 30 (8th Cir. 1975); *General American Tr. Corp. v. Indiana Harbor Belt R. Co.*, 191 F.2d 865 (7th Cir. 1951), *cert. denied* 343 U.S. 905, 72 S. Ct. 636, 96 L. Ed. 1324 (1952); *Railway Exp. Agency v. Kessler*, 189 Va. 301, 52 S.E.2d 102 (1949). Where a common carrier turned warehouser, acting as a bailee, accepts instructions from the bailor to ship goods to a specified location, its status as a warehouser again changes to that of common carrier. *Rohr v. Logan*, 206 Pa. Super. 232, 213 A.2d 166 (1965), citing *Lehigh Valley R. Co. v. John Lysaght, Limited*, 271 F. 906 (2d Cir. 1921).

Returning to the relevant events, the record discloses that after each rejected tender, Consolidated returned the recorders to its terminal at Sarpy County, Nebraska, for storage, pending receipt of Fisher's further instructions. On the day after the second rejection, Consolidated loaded all 132 recorders onto a trailer, sealed but did not padlock the trailer doors, and placed the trailer at the south end of its terminal yard. Padlocks were not used on any trailer doors so as not to call attention to a trailer containing expensive cargo; rather, all trailers were sealed. The doors of the trailer faced away from the terminal, toward the south end of a Cyclone fence which encircled the yard.

In accordance with its usual practice, Consolidated sent Fisher a form letter notifying it of World Radio's rejection of the shipments and indicating that after 3 days, Fisher would be charged for storage unless Consolidated received disposition instructions.

At 7 a.m. on July 17, a Tuesday, Consolidated's employees

discovered that 54 of the recorders were missing from the trailer. They also discovered that a large, 3-foot by 5-foot hole had been cut in the chain-link fence at the terminal's south end, and a smaller hole had been cut in the east fence. The recorders were never recovered.

The exact time the theft occurred is unknown, and witnesses' opinions vary as to when the theft took place. Maurice O'Toole, Consolidated's dock supervisor, testified that he checked the yard between 11:30 p.m. and midnight on Sunday, July 15, by walking behind all the trailers, and at that time he did not see any holes in the fence nor seals broken on the trailer containing the recorders. O'Toole claimed there was "no way [he] would have missed that hole."

O'Toole again checked the yard Monday night at 11:30 p.m. from his car but, because it was raining, did not check the back of the trailers or the fence. O'Toole's opinion was that the theft occurred late that Monday night or early the next Tuesday morning. O'Toole did not see any possibility the theft occurred over the weekend of July 14 and 15 because the trailer's seal and the fence were intact upon his inspection Sunday night.

On the other hand, Kenneth Benck, an investigator for the Sarpy County Sheriff's Department, was permitted to testify he had a "hunch" the theft occurred over the weekend preceding its discovery. Benck also testified that the security measures employed by Consolidated were equal to those employed by "other companies in the area" and were "reasonable."

The record reveals that at some point, Fisher notified Consolidated to return the rejected recorders to Fisher in California, but the record is not clear as to when that occurred. According to Fisher's evidence, it received notice from Consolidated of World Radio's rejection on Thursday, July 12, and presumably, on Friday, July 13, assigned and communicated to Consolidated a return authorization number.

Charlotte Moreland, a former traffic clerk at Consolidated, was called as a witness by Fisher and testified that she received verbal authorization for return of the recorders from Susi Murray, a Fisher employee, but was unable to remember the exact date Murray telephoned her. Murray herself was not a witness. Moreland recorded Fisher's return authorization

number on a document internal to Consolidated's operations. She then prepared a freight bill which reflected Fisher's return authorization number charging Fisher for returning the recorders. The copy of the internal document in the record contains no legible date; however, the freight bill is dated Monday, July 16. Moreland testified at one time that she prepared the internal document and the freight bill the same day she received the verbal authorization from Fisher, and at another time that a day or two could have intervened between the two events.

Fisher sent written instructions to return the rejected shipments by a letter dated July 12, but it is stamped as received by Consolidated on July 24.

The district court apparently concluded that, as Fisher claims in its first summarized assignment of error, it had erred in striking Fisher's common carrier theory, for during the course of the trial, the district court offered to declare a mistrial if the parties would agree or, in the alternative, again with the agreement of the parties, to submit to the jury, along with general verdict forms on the warehouser theory, a special verdict form asking the jury to determine whether the lost recorders were stolen before or after Consolidated received Fisher's oral return instruction. The trial judge said that if the jury were to determine that the theft occurred after Consolidated received such instruction, he would grant Fisher leave to amend the petition so as to conform with the proof and would enter judgment in its favor. Fisher replied it "would respectfully ask the Court not to declare a mistrial. The special verdict would definitely be the option that [it] would prefer." The district court did not declare a mistrial, and evidence was adduced concerning when the theft occurred and when Fisher instructed Consolidated to return the recorders.

Although the record does not contain the special verdict form itself, an entry made by the trial judge reflects that the jury found Consolidated " 'had received oral instructions from [Fisher] to ship the [recorders] after the theft or burglary occurred.' "

Thus, the situation presented is not unlike that in *Bailey v. Kling*, 88 Neb. 699, 130 N.W. 439 (1911). The trial court therein

struck portions of defendant's answer before trial, but nonetheless permitted defendant to adduce evidence relating to those portions. Regarding defendant's assignment of error to the *Bailey* trial court's order striking portions of defendant's answer, this court said,

> The contention scarcely merits consideration here, as the order appears to have been practically ignored during the progress of the trial. All that could reasonably have been shown under the averments as they stood before the order was made was presented by the evidence. . . . By the instructions of the court the subject of the [stricken portions were] submitted to the jury. The error, if any, was cured, and no prejudice resulted.

Id. at 700-01, 130 N.W. at 440.

It is a fundamental axiom of trial practice that one cannot be heard to complain of an alleged error corrected in a manner to which the complaining party agreed. *LeMieux v. Sanderson*, 180 Neb. 311, 142 N.W.2d 557 (1966). See, also, *Shadow Isle, Inc. v. Granada Feeding Co.*, 226 Neb. 325, 411 N.W.2d 331 (1987); *Langenheim v. City of Seward*, 200 Neb. 740, 265 N.W.2d 446 (1978). In other words, one may not waive an error, gamble on a favorable verdict, and, upon receiving an unfavorable result, reassert the error. *Pitt v. Checker Cab Co.*, 217 Neb. 600, 350 N.W.2d 507 (1984); *LeMieux v. Sanderson, supra*.

Thus, under the circumstances, there is no merit to Fisher's complaint concerning the trial court's treatment of the common carrier theory of liability.

The next summarized assignment of error complains that the district court refused to instruct the jury as Fisher requested, specifically, in the words of § 7-204(1), that a warehouser

> is liable for damages for loss of or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful man would exercise under like circumstances but unless otherwise agreed he is not liable for damages which could not have been avoided by the exercise of such care.

Instead, the trial judge apprised the jury in one instruction that the "issue in this case is whether [Consolidated] exercised

due care to prevent the loss of [Fisher's] property." Another instruction taught the jury:

> "Reasonable care" may be defined as that amount or degree of care which ordinary prudence and proper regard for one's property and the property of others would require under the circumstances. Because of [sic] the amount of care exercised by a reasonable prudent person varies under each set of circumstances, it follows that the amount of care required will vary with the nature of what is being done, and all of the surrounding circumstances shown by the evidence in this case.

The jury was also advised, " 'Like circumstances' is simply the conditions shown to exist by the evidence in this case." In still another instruction, the jury was informed that "[a] bailee is not an insurer of the property in its possession and is only liable for loss of the property due to its failure to exercise reasonable care under the circumstances."

While it would have been better had the district court used either the phrase "due care" or the phrase "reasonable care" throughout the instructions, no serious claim can be made that the jury was misled or confused by the use of the two phrases. What Fisher does claim is that the standard contained in § 7-204 is higher than the one contained in the instructions given the jury. We conclude otherwise.

It must be remembered that jury instructions must be read together, and if taken as a whole they 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. *Kearney State Bank & Trust v. Scheer-Williams*, 229 Neb. 705, 428 N.W.2d 888 (1988); *Carnes v. Weesner*, 229 Neb. 641, 428 N.W.2d 493 (1988). Furthermore, it is not error to refuse to give a requested instruction if the substance of the request is in the instructions actually given. *Carnes, supra.* " 'Where the meaning of an instruction is clear and a correct statement of the law, error cannot be predicated on the selection of words.' " *Hiner v. Nelson*, 174 Neb. 725, 731, 119 N.W.2d 288, 292 (1963), citing *Oliver v. Nelson*, 128 Neb. 160, 258 N.W. 69 (1934).

Although not worded identically to § 7-204, the gist of the

district court's instructions on the issue, when read together, is that a warehouser is liable for the failure to exercise the care "a reasonably careful" person "would exercise under like circumstances." That is, as provided by § 7-204, a warehouser is liable for the negligent loss of goods placed in its possession.

Accordingly, there is no merit to Fisher's complaint concerning the jury instructions.

The next, or third, summarized assignment of error asserts the evidence fails to support the verdict in favor of Consolidated, and, thus, the district court should have sustained the motion for directed verdict Fisher made at the close of all the evidence.

Our review is controlled by the rule that a directed verdict is proper only where an issue should be decided as a matter of law; that is, where reasonable minds cannot differ and can draw but one conclusion from the evidence. *Kearney State Bank & Trust v. Scheer-Williams, supra*; *Prime Inc. v. Younglove Constr. Co.*, 227 Neb. 423, 418 N.W.2d 539 (1988). Moreover, in determining the sufficiency of the evidence to sustain a verdict in a civil case, this court considers the evidence most favorably to the successful party and resolves evidential conflicts in favor of such party, which is entitled to every reasonable inference deducible from the evidence. *Auer v. Burlington Northern RR. Co.*, 229 Neb. 504, 428 N.W.2d 152 (1988). A civil jury verdict will not be disturbed on appeal unless clearly wrong. *Kearney State Bank & Trust, supra*. Further, a verdict is not to 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. *Woitalewicz v. Wyatt*, 229 Neb. 626, 428 N.W.2d 216 (1988).

All that was clear at the close of all the evidence was that at some point 54 of the recorders in Consolidated's possession were stolen and that at some point Fisher telephoned Consolidated with authorization to return all 132 recorders. However, the evidence is such that reasonable minds could reach different conclusions as to when the theft occurred and as to when Consolidated received Fisher's return instruction. Reasonable minds could conclude from the evidence that the theft occurred anytime after O'Toole's yard check on the night

of Sunday, July 15, and before the theft was reported the following Tuesday, July 17. In the same manner, reasonable minds could conclude Consolidated received Fisher's oral instruction to return the recorders to it anytime between July 13 and 16.

Consequently, the evidence is sufficient to sustain the jury's special finding that Consolidated did not receive Fisher's return authorization until after the theft had taken place, thereby making Consolidated a warehouser at the time of the loss rather than a common carrier. Moreover, the evidence concerning the manner in which Consolidated stored the recorders does not compel but does support the finding implicit in the general verdict that Consolidated had not been negligent.

Therefore, the district court did not err in refusing to direct a verdict in favor of Fisher.

Finally, in the fourth summarized assignment of error, Fisher complains that the district court erred in denying its motion for new trial based on newly discovered evidence. Fisher argues that Moreland had information material to Fisher which could not with reasonable diligence have been discovered and produced at trial, as her whereabouts were unknown until trial commenced, and, thus, Moreland's knowledge was "newly discovered," as contemplated by Neb. Rev. Stat. § 25-1142 (Reissue 1985).

Even assuming, but certainly not deciding, that Fisher's concept of what constitutes newly discovered evidence is correct, Moreland's testimony was produced at trial by Fisher itself. Fisher does not claim, nor provide affidavits as required by Neb. Rev. Stat. § 25-1144 (Reissue 1985) to show, that Moreland had further testimony beyond what was presented at trial or that any other previously undiscovered witness could provide material testimony. Nor did Fisher at trial claim Moreland's testimony was a surprise, entitling it to a continuance.

As noted in *Schmidt v. Schmidt,* 228 Neb. 758, 424 N.W.2d 339 (1988), a motion for new trial is addressed to the discretion of the trial court. Further, as noted in *Gruenewald v. Waara,* 229 Neb. 619, 428 N.W.2d 210 (1988), such a motion is 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 its 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. As observed in *Kocarnik v. Kocarnik*, 209 Neb. 454, 308 N.W.2d 352 (1981), in order to make a sufficient showing for new trial upon the ground of newly discovered evidence, the proof in support thereof must show that such evidence was then available which neither the litigant nor counsel could have discovered by the exercise of reasonable diligence and that it was not merely cumulative, but competent, relevant, and material, and of such character as to reasonably justify a belief that its admission would probably bring about a different result if a new trial were granted.

The district court did not err in failing to grant a new trial.

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

AFFIRMED.

SECURITY STATE BANK, A NEBRASKA BANKING CORPORATION, APPELLANT, V. RAYMOND L. GUGELMAN, APPELLEE.

434 N.W.2d 290

Filed January 13, 1989. No. 87-308.

1. **Res Judicata.** The doctrine of res judicata is founded on a public policy and necessity that litigation be terminated and a belief that a person should not be vexed more than once for the same cause.
2. _____. Any right, fact, or matter in issue and directly adjudicated in a prior proceeding, or necessarily involved in the determination of the action before a competent court in which the judgment or decree was rendered upon the merits, is conclusively settled by the judgment.
3. **Res Judicata: Appeal and Error.** The law of the case is restricted to questions presented to and decided by this court at the former hearing in the case and those questions necessarily involved in the decision.
4. _____: _____. A decision of this court upon a former appeal is controlling only as to the actual point determined in that appeal.

5. **Res Judicata.** The doctrine of res judicata does not apply where the court determines that the litigant has not fulfilled a condition precedent to the bringing of the suit and because of such failure is not entitled to the relief sought in the first action.
6. **Partnerships: Liability: Debtors and Creditors.** Ordinarily, general partners are jointly liable for the debts and obligations of the partnership.
7. **Partnerships.** General partners may place restrictions on the authority of other partners to bind them as to particular transactions.
8. **Partnerships: Debtors and Creditors.** A provision in a partnership agreement that the partners shall be general partners in the operation of the partnership, but no partner shall bind the other partner as to each partner's personal and real estate assets, is contrary to law and ineffective to avoid liability for a partnership debt incurred by the other partner within that partner's authority.

Appeal from the District Court for Furnas County: JACK H. HENDRIX, Judge. Reversed and remanded with directions.

James E. Doyle IV, of Cook & Doyle, P.C., for appellant.

Charles J. Cuypers, of Sherwood Law Office, for appellee.

BOSLAUGH, WHITE, CAPORALE, and SHANAHAN, JJ., and JAMES MURPHY, D.J.

PER CURIAM.

The plaintiff, Security State Bank, has appealed from the judgment of the district court sustaining the motion of the defendant, Raymond L. Gugelman, for summary judgment and dismissing the petition of the plaintiff for an order of execution against the property of the defendant to satisfy a judgment against the partnership in which the defendant was a partner.

In 1980, the defendant and Marian E. McCoy formed a general partnership known as Antiques Etc. The partnership agreement contained the following provision:

V.

> Each partner hereto shall be a general partner in the operation of the partnership only and may bind the other partner only as to the partnership business and assets. Neither partner shall bind the other partner as to each partners [sic] personal and real estate assets outside of the partnership.

Commencing in 1981, McCoy executed a number of

promissory notes to obtain funds which were used in the operation of the partnership. It is undisputed that the bank was furnished a copy of the partnership agreement and had notice of paragraph V of the agreement. In 1983, the bank, in separate actions, recovered judgments against the partnership for the amounts due on the notes, but each judgment provided the defendant Gugelman had no personal liability to the bank except under a separate personal guaranty agreement, in which he had personally guaranteed indebtedness of McCoy up to $25,000. The bank then perfected appeals to this court in each case.

In *Security State Bank v. McCoy*, 219 Neb. 132, 361 N.W.2d 514 (1985), we affirmed the judgments and held that under Neb. Rev. Stat. § 25-316 (Reissue 1985), the bank could not proceed against the individual partners until there was a showing that the property of the partnership had been exhausted.

Section 25-316 provides as follows:

> If the plaintiff, in any judgment so rendered against any company or partnership, shall seek to charge the individual property of the persons composing such company or firm, it shall be lawful for him to file a bill in equity against the several members thereof, setting forth his judgment and the insufficiency of the partnership property to satisfy the same, and to have a decree for the debt, and an award of execution against all such persons, or any of them as may appear to have been members of such company, association or firm.

On July 30, 1986, the bank filed its petition against the defendant Gugelman and McCoy, alleging that it had recovered judgments against the partnership on March 24, 1983, in the amount of $44,402.98; that an execution issued May 9, 1986, had been returned unsatisfied; and that the partnership had insufficient property to satisfy the judgments. The petition prayed for a decree charging the individual property of the partners with the amount of the debt and for an award of execution against the partners and their personal property. The plaintiff and the defendant Gugelman filed motions for summary judgment. The defendant's motion alleged that the

judgments in the prior actions were res judicata as to all of the issues.

The trial court found that the decisions in the prior actions were the law of the case, sustained the defendant's motion for summary judgment, and dismissed the plaintiff's petition. The plaintiff has appealed.

The assignments of error are that the trial court erred (1) in finding that the decision on the prior appeal was the law of the case and barred any recovery by the plaintiff against the defendant on the judgments against the partnership, and (2) in overruling the plaintiff's motion for summary judgment.

The doctrine of res judicata is founded on a public policy and necessity that litigation be terminated and a belief that a person should not be vexed more than once for the same cause. *DeCosta Sporting Goods, Inc. v. Kirkland*, 210 Neb. 815, 316 N.W.2d 772 (1982). The doctrine of res judicata encompasses not only issues actually litigated in a prior proceeding, but also issues which could have been raised. Any right, fact, or matter in issue and directly adjudicated in a prior proceeding, or necessarily involved in the determination of the action before a competent court in which the judgment or decree was rendered upon the merits, is conclusively settled by the judgment and may not be litigated again between the parties, whether the claim, demand, purpose, or subject matter of the suits would or would not be the same. *Pflasterer v. Koliopoulos*, 213 Neb. 330, 328 N.W.2d 789 (1983); *Graham v. Waggener*, 219 Neb. 907, 367 N.W.2d 707 (1985).

"The law of the case" is restricted to questions presented to and decided by this court at the former hearing in the case and those questions necessarily involved in the decision. *First Nat. Bank of Hastings v. Farmers & Merchants Bank*, 2 Neb. (Unoff.) 104, 95 N.W. 1062 (1901). A decision of this court upon a former appeal is controlling only as to the actual point determined in that appeal. *Schwanenfeldt v. Chicago, B. & Q. R. Co.*, 80 Neb. 790, 115 N.W. 285 (1908).

The doctrine of res judicata has no application where the court determines that the litigant has not fulfilled a condition precedent to the bringing of the suit and because of such failure is not entitled to the relief sought in the first action.

Restatement (Second) of Judgments § 20(2) (1982).

The issue upon the prior appeal in this case was whether the plaintiff could satisfy its judgments against the partnership out of the assets of the defendant Gugelman. The trial court held that it could not because of the restriction in the partnership agreement. This court did not decide whether the restriction in the partnership agreement was valid and controlling, but held that the plaintiff had failed to satisfy a condition precedent to its right to proceed directly against the partners. The effect of our decision was to declare that the plaintiff's attempt to proceed against the partners individually was premature.

Our decision in the prior appeal in this case did not determine the validity of the restriction in the partnership agreement, as that issue was not necessarily involved in the decision, and the decision in the prior appeal is not res judicata or the law of the case as to that issue.

The remaining question is whether the plaintiff was entitled to summary judgment.

There are no genuine issues of material fact undetermined at this time. The plaintiff's judgments against the partnership are unsatisfied, and the partnership has no property out of which the judgments could be satisfied. The issue is the validity and effect of the restrictive provision in the partnership agreement, an issue of law.

It is a familiar rule of partnership law that general partners are jointly liable for the debts and obligations of the partnership. Neb. Rev. Stat. § 67-315 (Reissue 1986). Paragraph V of the partnership agreement was an attempt to avoid this rule. The two partners were declared to be general partners "in the operation of the partnership," but each could bind the other partner "only as to the partnership business and assets." Neither partner could bind the other partner "as to each partners [sic] personal and real estate assets outside of the partnership." In effect, the partners were attempting to obtain one of the benefits of forming a corporation without complying with the statutory requirements for doing so. If the agreement is valid, there was no general partner because no partner was to be liable for all of the debts of the partnership.

In deciding the cases involved in the prior appeal, the trial

court relied upon the rule that general partners may place restrictions on the authority of other partners to bind them as to particular transactions.

Neb. Rev. Stat. § 67-309(1) (Reissue 1986) provides:

> Every partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority.

The restrictive provision in the partnership agreement in this case was not a restriction on the authority of a partner to bind the other partner as to a particular transaction. It was an attempt to negate the authority of a partner to bind the other partner in any transaction. It was contrary to law and invalid as to creditors, including those with notice.

Section 67-309(1) affords no defense to the defendant Gugelman. There is no issue concerning the authority of McCoy to borrow money for the partnership. The issue is whether Gugelman as a partner was bound by the obligation of the partnership, not whether the partnership was bound.

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

REVERSED AND REMANDED WITH DIRECTIONS.

PHYLLIS F. NELSON, PERSONAL REPRESENTATIVE OF THE ESTATE OF ROBERT JAMES NELSON, DECEASED, APPELLANT, V. PAUL J. DOLAN, APPELLEE.

434 N.W.2d 25

Filed January 13, 1989. No. 87-326.

1. **Actions: Wrongful Death.** The right to maintain a wrongful death action does not exist at common law and thus exists solely by virtue of legislative enactment.
2. **Actions: Wrongful Death: Damages.** The damages recoverable, the disposition of the avails obtained, and the measure of recovery in a wrongful death action are all fixed by statute.
3. **Wrongful Death: Damages.** The loss contemplated by the wrongful death statutes is a pecuniary loss, and damages on account of mental suffering or bereavement or as a solace to the next of kin on account of the death are not recoverable.
4. **Statutes: Judicial Construction: Legislature: Intent.** Generally, where a statute has been judicially construed and that construction has not evoked an amendment, it will be presumed that the Legislature has acquiesced in the court's determination of its intent.
5. **Wrongful Death.** Wrongful death statutes are not to be understood as affecting any change in the common law beyond that clearly indicated by the statutory language.
6. **Actions: Wrongful Death: Decedents' Estates.** An action for wrongful death may be joined with an action on behalf of the decedent's estate.
7. **Actions: Decedents' Estates: Abatement, Survival, and Revival.** As an element of a decedent's personal injury action, conscious prefatal-injury fear and apprehension of impending death survives a decedent's death, under the provisions of Neb. Rev. Stat. § 25-1401 (Reissue 1985), and inures to the benefit of such decedent's estate.
8. **Actions: Decedents' Estates: Damages.** A decedent's estate may recover for the mental anguish a decedent consciously suffers by the apprehension and fear of impending death prior to sustaining fatal injury.
9. **Damages: Evidence.** The nature and amount of damages cannot be sustained by evidence which is speculative and conjectural.

Appeal from the District Court for Hall County: WILLIAM H. RILEY, Judge. Affirmed in part, and in part reversed and remanded for a new trial.

Ronald S. Depue, of McDermott, Depue & Zitterkopf, for appellant.

D. Steven Leininger, of Luebs, Dowding, Beltzer, Leininger, Smith & Busick, for appellee.

BOSLAUGH, WHITE, CAPORALE, and SHANAHAN, JJ., and JAMES MURPHY, D.J.

CAPORALE, J.

In this suit joining an action for the wrongful death of Robert James Nelson with an action on behalf of his estate, the defendant-appellee, Paul J. Dolan, admitted that his negligence proximately caused decedent Nelson's death. The jury thus returned a verdict in favor of the plaintiff-appellant, Phyllis F. Nelson, personal representative of the estate of the aforenamed decedent, and judgment was rendered accordingly in the total sum of $37,968.26. The personal representative nonetheless appeals, asserting as error the district court's sustainment of Dolan's motion in limine preventing her from adducing evidence concerning (1) the mental anguish suffered by the next of kin of the decedent and (2) the mental anguish suffered by the decedent Nelson himself. We affirm in part, and in part reverse and remand for a new trial.

I. OFFER OF PROOF

As a consequence of the district court's ruling on Dolan's motion, the personal representative made an offer of proof. According thereto, a collision occurred in the early morning hours of June 22, 1984, between an automobile operated by Dolan and a motorcycle driven by the 17-year-old decedent Nelson, and on which the latter's friend, Kevin Coffin, was riding as a passenger. Decedent Nelson and Coffin had just left the scene of a fight in Grand Island, Nebraska, and were traveling on a Grand Island street when they noticed behind them an automobile driven by Dolan. In an effort to lose the Dolan automobile, decedent Nelson entered a highway and later turned onto an asphalt road, traveling at 85 miles per hour. Dolan nonetheless continued to follow the motorcycle at a distance of about 50 to 75 feet. In his deposition, Coffin said that "[a]t one point, they got really close. And I got scared, so I turned around and hit the hood of the car with my hand." The automobile was at that time about 1 or 2 feet behind the motorcycle.

After Coffin hit the hood of the Dolan automobile, Dolan backed off, sped up, and hit the motorcycle. Upon impact at a point just outside Grand Island, the two vehicles locked together and, according to an accident reconstructionist, traveled thus locked, with decedent Nelson trying to maintain

control, for about 268 feet over a period of approximately 5 seconds until the motorcycle struck a light post, fell, and went under the Dolan automobile. Decedent Nelson's body was found underneath the Dolan automobile, and the personal representative acknowledges that decedent Nelson was crushed by Dolan's automobile and that death was instantaneous.

A psychiatrist offered to testify, in effect, that in his opinion decedent Nelson understood he was going to be run down from the moment the Dolan automobile made contact with the motorcycle and that he "must have been absolutely terrified," knowing or thinking that he was going to die for whatever period of time intervened between the two vehicles' coming together and death.

The personal representative's treating physician offered to testify that he thought she suffered from endogenous depression and acute anxiety caused in part by the loss of the decedent Nelson, who was her son. He treated the condition with medication over a 2-year period and is of the opinion that the condition would continue and should be treated by a psychiatrist.

The personal representative offered to testify that she felt a great loss as the result of her son's death, has found it difficult to sleep since his death, has lost 30 to 40 pounds, is mentally unstable, and has lost her job because of her inability to work.

II. ANALYSIS

The personal representative's contentions require an examination of the types of damages which flow from an actionable death and to whose benefit such damages inure.

A. *Wrongful Death Action*

While adjudication of the first assignment of error requires only an analysis of the nature of a wrongful death action, the second assignment of error requires an analysis of both the nature of such an action and the nature of an action brought on behalf of a decedent's estate. We concern ourselves first with the wrongful death action.

1. Next of Kin's Damages

The first assignment of error asserts that the district court erred by rejecting the offer of proof concerning the mental anguish suffered by decedent Nelson's next of kin.

We have observed that the right to maintain a wrongful death action does not exist at common law and thus exists solely by virtue of legislative enactment. *Smith v. Columbus Community Hosp.*, 222 Neb. 776, 387 N.W.2d 490 (1986).

The Nebraska wrongful death action is found in Neb. Rev. Stat. §§ 30-809 and 30-810 (Reissue 1985). The first of these statutes provides in relevant part:

> Whenever the death of a person shall be caused by the wrongful act, neglect or default, of any person . . . and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who . . . would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

The second statute reads in relevant part:

> Every such action, as described in section 30-809, shall be . . . brought by and in the name of his personal representatives, for the exclusive benefit of the . . . next of kin. The verdict or judgment should be for the amount of damages which the persons in whose behalf the action is brought have sustained. The avails thereof shall be paid to and distributed among the . . . next of kin in the proportion that the pecuniary loss suffered by each bears to the total pecuniary loss suffered by all such persons.

Thus, the damages recoverable, the disposition of the avails obtained, and the measure of recovery in a wrongful death action are all fixed by statute. *Mabe v. Gross*, 167 Neb. 593, 94 N.W.2d 12 (1959). See, also, *Luckey v. Union P. R. Co.*, 117 Neb. 85, 219 N.W. 802 (1928).

Johnson County v. Carmen, 71 Neb. 682, 99 N.W. 502 (1904), determined that a statute permitting jurors to award such damages, not to exceed $5,000, "as they shall deem a fair and just compensation with reference to the pecuniary injuries, resulting from such death," Gen. Stat. ch. 15, § 2 (1873), did not permit the next of kin to recover for bereavement, mental suffering, or solace. The *Carmen* court ruled that a jury is

"limited to giving pecuniary compensation resulting to the next of kin on account of the death of the deceased." *Carmen* at 685, 99 N.W. at 503.

A 1919 amendment to the damages language found in the *Carmen* statute produced the damages language now found in § 30-810. In considering that amendment, this court, in *Ensor v. Compton*, 110 Neb. 522, 524, 194 N.W. 458, 459 (1923), said:

> This amendment was made by the legislature after this court had, by a long line of decisions, held that damages in this class of cases were limited under the statute to money loss or its equivalent. This change, while significant, does not provide a wide open door to all sorts of claims for damages. The loss under the statute is still a pecuniary loss. *Nothing can be allowed on account of mental suffering or bereavement or as a solace on account of such death.* Only such damages can be recovered as are shown by the evidence to have a monetary value. In states having a statute similar to our own, it has generally been construed as permitting recovery of damages for loss of service and companionship under special circumstances where the evidence shows they have a money value. [Citations omitted.] However, recovery for loss of services and companionship by a surviving husband or wife can only be sustained where the evidence shows a reasonable probability that such services and companionship afforded the survivor was of such a character that it would be of advantage to such survivor, and that a disallowance thereof would cause a pecuniary loss to him or her. [Citation omitted.]

(Emphasis supplied.)

In allowing recovery for the economic value of the society, comfort, and companionship lost by the next of kin, the opinion of this court in *Selders v. Armentrout*, 190 Neb. 275, 207 N.W.2d 686 (1973), noted that the wrongful death damages statute had been interpreted as limiting recovery to pecuniary loss. The *Selders* opinion then went on to explain that damages for loss of society, comfort, and companionship were recoverable because they constituted services which have a financial value to the next of kin.

This court recently reaffirmed the rules announced in *Carmen*, *Ensor*, and *Selders*, and again held that the loss contemplated by the wrongful death statutes is a pecuniary loss, *Garvin v. Coover*, 202 Neb. 582, 276 N.W.2d 225 (1979), and *Maloney v. Kaminski*, 220 Neb. 55, 368 N.W.2d 447 (1985), and that damages on account of mental suffering or bereavement or as a solace to the next of kin on account of the death are not recoverable, *Garvin v. Coover, supra*.

The personal representative concedes the current status of the law but invites us to abandon our prior interpretation and permit the next of kin to recover for her or his mental anguish in an action for wrongful death on the ground that a number of other states so permit. See, e.g., *Tommy's Elbow Room, Inc. v. Kavorkian*, 727 P.2d 1038 (Alaska 1986); *Moore v. Lillebo*, 722 S.W.2d 683 (Tex. 1986); *Sanchez v. Schindler*, 651 S.W.2d 249 (Tex. 1983); *Dawson v. Hill & Hill Truck Lines*, 206 Mont. 325, 671 P.2d 589 (1983). See, also, *Hopkins v. McBane*, 427 N.W.2d 85 (N.D. 1988); *Nance v. State Board of Education*, 277 S.C. 64, 282 S.E.2d 848 (1981).

We decline the invitation without undertaking any comparison of the various statutes of other states with our own, for the invitation overlooks the general and dispositive rule that where a statute has been judicially construed and that construction has not evoked an amendment, it will be presumed that the Legislature has acquiesced in the court's determination of its intent. *Erspamer Advertising Co. v. Dept. of Labor*, 214 Neb. 68, 333 N.W.2d 646 (1983). See, also, *Arant v. G. H., Inc.*, 229 Neb. 729, 428 N.W.2d 631 (1988). That being so, it cannot now be judicially declared that the Legislature meant something else; thus, the personal representative's first assignment of error fails.

2. Decedent Nelson's Damages

In connection with the second assignment of error, the personal representative first argues that she is entitled to recover in the wrongful death action for the mental anguish decedent Nelson himself experienced prior to his death. In doing so, she ignores the plain language of § 30-810 and thus is once again in error. The statutory language plainly limits a wrongful death recovery to the loss suffered by a decedent's

next of kin; it provides no basis upon which to recover a decedent's own damages. As noted in *Egbert v. Wenzl*, 199 Neb. 573, 260 N.W.2d 480 (1977), the wrongful death statutes are not to be understood as affecting any change in the common law beyond that clearly indicated by the statutory language.

The issue is not unlike that presented in *Kroeger v. Safranek*, 161 Neb. 182, 72 N.W.2d 831 (1955), a wrongful death action in which the trial court instructed the jury it was alleged that the person killed suffered " 'an excruciating death by electrocution.' " *Id.* at 192, 72 N.W.2d at 840. In reversing a verdict and judgment in favor of the plaintiff therein, this court, quoting from *Hindmarsh v. Sulpho Saline Bath Co.*, 108 Neb. 168, 187 N.W. 806 (1922), said at 192, 72 N.W.2d at 840:

> "[I]n the action brought by the personal representative, in behalf of the statutory beneficiaries, to recover damages for the death caused by the wrongful act of the defendant, *the recovery must be measured by the pecuniary loss suffered by those beneficiaries* . . . ."
>
> . . . .
>
> *Thus any pain or suffering endured by the decedent is not an element upon which appellee can herein base any recovery* and it was error for the court to include the allegations in its instructions.

(Emphasis supplied.)

However, the determination that damages for a decedent's preimpact mental anguish cannot be recovered in a wrongful death action does not resolve the second assignment of error; the petition here joins with the wrongful death action a separate action on behalf of the decedent's estate, a procedure which our law permits. *Rhein v. Caterpillar Tractor Co.*, 210 Neb. 321, 314 N.W.2d 19 (1982); *Wilfong v. Omaha & C. B. Street R. Co.*, 129 Neb. 600, 262 N.W. 537 (1935); *Murray v. Omaha Transfer Co.*, 95 Neb. 175, 145 N.W. 360 (1914).

B. *Estate Action*

Thus, the question becomes whether a decedent's estate may recover for the mental anguish a decedent consciously suffers by the apprehension and fear of impending death prior to sustaining fatal injury.

While we have not heretofore considered this question, we

have long permitted a decedent's estate to recover for the conscious physical pain and suffering the decedent endured after a negligently inflicted injury resulting in death. *Wilfong v. Omaha & C. B. Street R. Co., supra.* We have also long recognized postinjury mental anguish as an element of damages recoverable in personal injury actions. *Baylor v. Tyrrell*, 177 Neb. 812, 131 N.W.2d 393 (1964); *Omaha Street R. Co. v. Emminger*, 57 Neb. 240, 77 N.W. 675 (1898).

Some courts have allowed recovery for conscious preimpact mental anguish suffered by decedents aware of impending death. Most of these cases are federal diversity actions and arise out of airplane crashes.

In one such action, *Shu-Tao Lin v. McDonnell Douglas Corp.*, 742 F.2d 45 (2d Cir. 1984), the decedent was killed when a jet crashed shortly after takeoff. The reviewing court referred with approval to the language of the trial court, 574 F. Supp. 1407, 1416 (S.D.N.Y. 1983), which observed:

> New York provides a cause of action for the pain and suffering of a decedent before his death. In several cases it has been held that a decedent's estate may recover for the decedent's pain and suffering endured *after* the injury that led to his death. [Citations omitted.] From this proposition, it is only a short step to the allowing of damages for a decedent's pain and suffering *before* the mortal blow and resulting from the apprehension of impending death.

(Emphasis in original.) The reviewing court then itself reasoned:

> A decedent's representative unquestionably may recover for pain and suffering experienced in a brief interval between injury and death. . . . We see no intrinsic or logical barrier to recovery for the fear experienced during a period in which the decedent is uninjured but aware of an impending death.

742 F.2d at 53.

In *Haley v. Pan American World Airways*, 746 F.2d 311 (5th Cir. 1984), *reh'g denied* 751 F.2d 1258, the court interpreting state law concluded that Louisiana would recognize a surviving cause of action for preimpact fear and apprehension of

impending death experienced by an airline passenger killed in an airplane crash. In *Haley*, as in our present case, the decedent was killed immediately upon impact. The court based its decision on Louisiana law which permitted recovery for fear suffered during a negligently produced ordeal. While many of the Louisiana cases cited by *Haley* dealt with recovery for postimpact mental anguish associated with physical injury, the *Haley* court concluded that Louisiana would permit damages for conscious mental anguish suffered by the decedent before his death or impact, and quoted with approval the analysis from its earlier decision in *Solomon v. Warren*, 540 F.2d 777 (5th Cir. 1976), *cert. denied* 434 U.S. 801, 98 S. Ct. 28, 54 L. Ed. 2d 59 (1977) (interpreting Florida law):

> "While in the garden variety of claims under survival statutes, including the Florida Statute—fatal injuries sustained in automobile accidents and the like—the usual sequence is impact followed by pain and suffering, we are unable to discern any reason based on either law or logic for rejecting a claim because in this case as to at least part of the suffering, this sequence was reversed. We will not disallow the claims for this item of damages on that ground."

Haley at 314-15.

In *Green v. Hale*, 590 S.W.2d 231 (Tex. Civ. App. 1979), decedent was killed when he descended from the back of a truck and the defendant driver of the truck negligently backed over him. The court, in affirming a jury award of $5,000, implicitly held that recovery was appropriate for conscious preimpact mental anguish suffered by the decedent in anticipation of impending death, regardless of how brief in duration.

Similarly, in *Missouri Pacific R. Co. v. Lane*, 720 S.W.2d 830 (Tex. App. 1986), the court affirmed an award for mental anguish suffered by the decedent before a train hit his stalled truck. As to the claim that such damages were not recoverable because decedent died instantly, the court reasoned: "Such an argument fails to consider the terror and consequent mental anguish Lane suffered for the six to eight seconds while he faced imminent death." *Id.* at 833.

Similar results were obtained in *Pregeant v. Pan American*

World Airways, Inc., 762 F.2d 1245 (5th Cir. 1985) (following *Haley*); *Snyder v. Whittaker Corp.*, 839 F.2d 1085 (5th Cir. 1988) (plaintiff must prove conscious mental anguish by preponderance of the evidence); *Moorhead v. Mitsubishi Aircraft Intern., Inc.*, 828 F.2d 278 (5th Cir. 1987) (allowing such recoveries generally but holding that lower court's denial of damages for airplane passengers' precrash conscious pain and suffering not clearly erroneous where no evidence to support); *Feldman v. Allegheny Airlines, Inc.*, 382 F. Supp. 1271 (D. Conn. 1974), *aff'd in relevant part* 524 F.2d 384 (2d Cir. 1975); *Platt v. McDonnell Douglas Corp.*, 554 F. Supp. 360 (E.D. Mich. 1983); *D'Angelo v. United States*, 456 F. Supp. 127 (D. Del. 1978), *aff'd* 605 F.2d 1194 (3d Cir. 1979) (interpreting Maryland law); *Mitchell v. Akers*, 401 S.W.2d 907 (Tex. Civ. App. 1966) (holding that action instituted or which could have been instituted by person who sustains injuries later resulting in death survives the deceased and may be asserted by his heirs or the administrator of his estate and that in such action damages were recoverable for the mental anguish suffered by the 3-year-old decedent for the 2 or 3 minutes before he drowned).

Some courts, however, have denied recovery for preimpact mental anguish. E.g., *Nye v. Com., Dept. of Transp.*, 331 Pa. Super. 209, 480 A.2d 318 (1984) (no damages available under Pennsylvania statute for conscious preimpact fright); *In re Air Crash Disaster Near Chicago, Ill. etc.*, 507 F. Supp. 21 (N.D. Ill. 1980) (no recovery under Illinois law for fright and terror decedent may have suffered in anticipation of physical injury prior to death in an airplane crash); *Fogarty v. Campbell 66 Exp., Inc.*, 640 F. Supp. 953 (D. Kan. 1986) (no recovery is permitted under Kansas law for negligently induced preimpact mental anguish, not itself resulting in physical injury, notwithstanding that the collision caused physical injury).

Nonetheless, we are persuaded that there exists no sound legal or logical distinction between permitting a decedent's estate to recover as an element of damages for a decedent's conscious postinjury pain and suffering and mental anguish and permitting such an estate to recover for the conscious prefatal-injury mental anguish resulting from the apprehension and fear of impending death.

Neb. Rev. Stat. § 25-1401 (Reissue 1985) provides that, among other things, a cause of action for an injury to a personal estate survives the death of the person entitled to the same. Thus, we hold that as an element of a decedent's personal injury action, conscious prefatal-injury fear and apprehension of impending death survives a decedent's death and inures to the benefit of such decedent's estate. See *Wilfong v. Omaha & C. B. Street R. Co.*, 129 Neb. 600, 262 N.W. 537 (1935).

Dolan argues that the personal representative's offer of proof fails in any event to establish that the decedent Nelson knew how closely his motorcycle was being followed or otherwise establishes that the decedent Nelson was consciously aware of and feared his impending death. It is true that courts have denied recovery for preimpact mental anguish for lack of evidence that the decedent was aware of his impending death. E.g., *Anderson v. Rowe*, 73 A.D.2d 1030, 425 N.Y.S.2d 180 (1980); *Shatkin v. McDonnell Douglas Corp.*, 727 F.2d 202 (2d Cir. 1984); *Caldarera v. Eastern Airlines, Inc.*, 529 F. Supp. 634 (W.D. La. 1982); *Moorhead v. Mitsubishi Aircraft Intern., Inc.*, *supra*; *Feldman v. Allegheny Airlines, Inc.*, *supra*.

In *Shatkin*, the reviewing court reversed a jury award for preimpact pain and suffering, finding no evidence that the decedent passenger was awake or was aware that anything was wrong; that the pilot or anyone alerted the passengers as to the danger; nor that the airplane tilted and rolled in an unusual manner. However, in *Shu-Tao Lin v. McDonnell Douglas Corp.*, 742 F.2d 45 (2d Cir. 1984), which arose out of the same accident, the same reviewing court distinguished *Shatkin* and concluded that the jury could reasonably find that a passenger seated over the left wing of the airplane (Shatkin's assigned seat was over the right wing) could have seen the left engine and a portion of the wing break off at the beginning of the flight and suffered preimpact mental anguish during the 30 seconds before the crash. Accord *Green v. Hale*, 590 S.W.2d 231 (Tex. Civ. App. 1979).

Finally, in *Mitchell v. Akers*, 401 S.W.2d 907 (Tex. Civ. App. 1966), the court found that proof of mental anguish was sufficient where a doctor testified that a 3-year-old child who had drowned had struggled for 2 or 3 minutes before losing

consciousness.

It is fundamental that the nature and amount of damages cannot be sustained by evidence which is speculative and conjectural. *Nebraska Truck Serv. v. U.S. Fire Ins. Co.*, 213 Neb. 755, 331 N.W.2d 266 (1983); *Suhr v. City of Scribner*, 202 Neb. 364, 275 N.W.2d 596 (1979). The record must provide some basis for the jury to make a reasonable inference that the decedent suffered conscious mental anguish. See, *Haley v. Pan American World Airways*, 746 F.2d 311 (5th Cir. 1984), *reh'g denied* 751 F.2d 1258; *Green v. Hale, supra*; *Missouri Pacific R. Co. v. Lane*, 720 S.W.2d 830 (Tex. App. 1986). While it is true that in the present case there is no evidence that decedent Nelson said anything prior to his death revealing an awareness of his impending death, the personal representative's offers of proof nonetheless provide a basis upon which the jury certainly need not, but could, if it wished, find that decedent Nelson apprehended and feared his impending death during the 5 seconds his motorcycle traveled 268 feet locked with Dolan's automobile before he was crushed and thus killed.

We must therefore conclude that the record sustains the personal representative's second assignment of error.

III. DECISION

Accordingly, the judgment of the district court is hereby affirmed as to the wrongful death action, and the cause is reversed and remanded for a new trial as to the action on behalf of the decedent's estate.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR A NEW TRIAL.

DON NELSON, APPELLEE AND CROSS-APPELLANT, V. NEIL COOL, APPELLANT AND CROSS-APPELLEE.
DON NELSON, APPELLEE AND CROSS-APPELLANT, V. NORRIS COOL, APPELLANT AND CROSS-APPELLEE.
434 N.W.2d 32

Filed January 13, 1989. No. 87-395.

1. **Replevin: Judgments: Appeal and Error.** In an appeal from a judgment in replevin where a jury has been waived, the findings and disposition of the district judge have the effect of a jury verdict and are not to be disturbed unless clearly wrong.

2. **Replevin: Appeal and Error.** An appellee in a replevin action is entitled to have all factual issues, together with legitimate inferences and conclusions, resolved in his favor.
3. **Replevin: Evidence: Proof.** It is the burden of the plaintiff in a replevin action to prove by a preponderance of the evidence that (1) he was the owner of the property, (2) he was entitled to immediate possession, and (3) the defendant wrongfully detained the property.
4. **Pleadings: Appeal and Error.** An appellate court is obligated to dispose of a case on appeal on the basis of the theory presented by the pleadings on which the case was tried in the lower court.
5. **Pleadings.** A petition should not leave uncertain the theory on which the plaintiff chooses to proceed, but should state the facts which constitute the cause of action, define the issues to which defendant must respond, and inform the court of the real matter in dispute.
6. **Replevin.** An action in replevin will not lie against a defendant who is not in possession of the subject property.

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

David W. Jorgensen, of Nye, Hervert, Jorgensen & Watson, P.C., for appellants.

Mary Morgan Cote, of Cunningham, Blackburn, Livingston, Francis, Cote, Brock & Cunningham, for appellee.

HASTINGS, C.J., WHITE, and CAPORALE, JJ., and REAGAN, D.J., and COLWELL, D.J., Retired.

REAGAN, D.J.

This case arises out of two replevin actions filed by the appellee, Don Nelson, against the appellants, Neil Cool and his father, Norris Cool. The subject matter of both actions is a 1980 Kenworth motor vehicle. By stipulation, the cases were consolidated for trial and heard by the district judge, sitting without a jury. From a judgment in favor of Nelson in both cases, the Cools have brought this appeal. Nelson has cross-appealed, contending the district judge was in error in failing to award incidental damages in addition to the return of the vehicle.

In the determination of this appeal, the findings and disposition of the district judge have the effect of a jury verdict and are not to be disturbed unless clearly wrong. *Alford v.*

Neal, 229 Neb. 67, 425 N.W.2d 325 (1988); *Packett v. Lincolnland Towing*, 227 Neb. 595, 419 N.W.2d 149 (1988); *Ford v. Jordan*, 220 Neb. 492, 370 N.W.2d 714 (1985). Nelson is also entitled to have all factual issues, together with legitimate inferences and conclusions, resolved in his favor. *Middagh v. Stanal Sound Ltd.*, 222 Neb. 54, 382 N.W.2d 303 (1986). With those rules in mind, we now set forth the factual background disclosed by the record.

Nelson purchased the 1980 Kenworth tractor on about December 1, 1984. The vehicle was in a wrecked condition, and he paid the sum of $17,064 to complete the purchase. The vehicle's previous owner assigned the interest in the vehicle in blank (an open title), and Nelson took possession of the tractor and brought it to Grand Island, Nebraska, for repairs. Although Nelson had possession of the vehicle and possession of a properly endorsed title, he never had a title issued in his own name.

Repairs were made on the vehicle by Neil Cool. Parts and labor were provided and paid for by Nelson. Although the evidence is unclear as to whether Neil Cool was paid for all of his labor, it is undisputed that at some point Nelson exhausted his line of credit for further financial investment in the vehicle. At that time, Nelson and Cool reached an agreement that Nelson would transfer the open title to Neil Cool; Neil Cool would obtain an additional loan to complete the repairs, using the vehicle as security; and following completion of the repairs, the truck would be operated to haul grain and livestock, with the proceeds to be split between Nelson and Cool. Cool was to provide insurance coverage on the truck, with loss payable to Nelson, and, in the event of Cool's default on the anticipated loan, Nelson was to have the right to pay off the loan and retain possession of the truck. Although the agreement was originally in writing, it was not introduced at trial.

In furtherance of this agreement, a certificate of title covering the Kenworth was issued to Neil Cool on August 23, 1985. On the same date, a lien was noted on the title in favor of the Five Points Bank in Grand Island, and Cool obtained a loan from the bank in the amount of $6,000. Of the loaned amount, approximately $5,500 was given to Nelson and spent to

complete the repairs to the Kenworth tractor. Following completion of the repairs, there was a brief period where the tractor was used under contract, and two payments were made on the bank loan. When the trucking contract was lost and the bank loan was in default, Norris Cool loaned Neil Cool the sum of $5,168.45 to pay off the bank loan. The bank released its lien on the title, and Neil Cool then transferred title to Norris Cool in satisfaction of the personal loan.

Although there are three assignments of error set forth in the brief of appellants, they can be summarized into a single assignment for purposes of this opinion and decision: the trial court erred in finding plaintiff-appellee was the owner of the truck, entitled to immediate possession, and in ordering delivery.

It is the burden of the plaintiff in a replevin action to prove by a preponderance of the evidence that (1) he was the owner of the property, (2) he was entitled to immediate possession, and (3) the defendant wrongfully detained the property. *Packett v. Lincolnland Towing, supra.*

In both of these actions, Nelson alleged a special ownership interest in the Kenworth by virtue of having furnished the purchase price and money for repairs. Although it is unclear whether he claims a purchase money mortgage in the vehicle, a conditional interest established by the agreement between himself and Neil Cool, or some other security interest, the express provisions of the certificate of title act invalidate these interests as to subsequent purchasers, such as the appellants. Neb. Rev. Stat. § 60-110 (Reissue 1984); *The Cornhusker Bank of Omaha v. McNamara*, 205 Neb. 504, 288 N.W.2d 287 (1980); *First Nat. Bank v. Provident Finance Co.*, 176 Neb. 45, 125 N.W.2d 78 (1963).

It is true we have departed from some express provisions in the certificate of title act in order to prevent fraud, coercion, or a result that would defeat the very purpose of the legislation, such as a title procured by theft, forgery, or misrepresentation. *Alford v. Neal*, 229 Neb. 67, 425 N.W.2d 325 (1988); *Kinkenon v. Hue*, 207 Neb. 698, 301 N.W.2d 77 (1981). But the evidence in these cases clearly established that title and possession of the Kenworth were both voluntarily transferred by Nelson, and

there is no factual or legal reason properly advanced to avoid application of the act.

Nelson argues the judgment is presumed correct, and argues in his brief at 12:

> Whatever legal theory was used by the Trial Court to return the truck to the Appellee, whether the Court determined that Neil obtained the truck and title by fraud, theft or misrepresentation, or that he breached his contract with the Appellee, the result is supported by substantial evidence in the record.

We agree the judgment is supported by such a presumption of correctness. *Flood v. Keller*, 214 Neb. 797, 336 N.W.2d 549 (1983). However, we are obligated to dispose of the case on the basis of the theory presented by the pleadings on which the case was tried. *Union Pacific RR. Co. v. Kaiser Ag. Chem. Co.*, 229 Neb. 160, 425 N.W.2d 872 (1988). A petition should not leave uncertain the theory on which the plaintiff chooses to proceed, *Hutmacher v. City of Mead, ante* p. 78, 430 N.W.2d 276 (1988), but should state in logical and legal form the facts which constitute the cause of action, define the issues to which defendant must respond at trial, and inform the court of the real matter in dispute. *First Nat. Bank of Omaha v. State, ante* p. 259, 430 N.W.2d 893 (1988). Nelson did not allege in his petitions that the truck or title was obtained by fraud, theft, misrepresentation, or breach of contract, and a judgment based on any of those theories would not be supported by the pleadings. We would further point out the record discloses nothing to indicate the district judge decided the case on any basis other than as presented by the pleadings, and Nelson never asked for leave to amend his petitions to conform to any evidence which may have shown other legal theories of recovery.

The evidence is insufficient as a matter of law to establish either a special ownership or a right to immediate possession in the Kenworth by Nelson. The evidence establishes as a matter of law the Kenworth was not in the possession of Neil Cool at the time the action was filed. Replevin will not lie against a defendant who is not in possession of the subject property. *First Nat. Bank v. Rickel, Inc.*, 229 Neb. 478, 427 N.W.2d 777

(1988). For this additional reason, the judgment of replevin against Neil Cool is clearly wrong. It is unnecessary, in light of the disposition of the appeal, to consider the issue raised in Nelson's cross-appeal. The judgment in each case is reversed, and the causes are remanded with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

STATE OF NEBRASKA, APPELLEE, V. NORMAN BRUCE OLIVER, APPELLANT.

434 N.W.2d 293

Filed January 13, 1989. No. 87-940.

1. **Prior Convictions: Indictments and Informations: Habitual Criminals.** The exact time of the commission of an alleged prior felony is not of the essence of a charge under the habitual criminal act, and the failure of the information to accurately state the time of a prior felony does not render the information insufficient.
2. **Prior Convictions: Proof: Complaints: Appeal and Error.** In the absence of prejudice to any substantial right of a defendant, a discrepancy between the date of an offense as alleged in the complaint and as proved at an enhancement hearing is not reversible error.
3. **Prior Convictions: Proof: Right to Counsel: Waiver.** In order to prove a prior conviction for enhancement purposes, the State need only show that at the time of the prior conviction the defendant had, or waived, counsel.
4. **Prior Convictions: Collateral Attack.** A defendant cannot collaterally attack a prior conviction in an enhancement proceeding.
5. **Prior Convictions: Collateral Attack: Right to Counsel: Appeal and Error.** Objections to the validity of a prior conviction offered for the purpose of sentence enhancement, beyond the issue of whether the defendant had counsel or waived the right to counsel, constitute a collateral attack on the judgment, and must be raised either by a direct appeal from the prior conviction or in separate proceedings commenced expressly for the purpose of setting aside the prior conviction.
6. **Prior Convictions: Habitual Criminals.** A state is at liberty to set up whatever procedural requirements it deems necessary for processing challenges to prior convictions in a habitual criminal proceeding.
7. **Prior Convictions: Right to Counsel: Waiver: Case Overruled.** The holding in *State v. Gonzales*, 218 Neb. 43, 352 N.W.2d 571 (1984), that a defendant may

raise the constitutional invalidity of a prior conviction in an enhancement proceeding, other than whether the defendant had counsel or waived the right to counsel, is overruled.

8. **Sentences: Appeal and Error.** When part of a sentence is illegal, an appellate court may, if the sentence is divisible, modify it by striking out the illegal part.

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

Dennis R. Keefe, Lancaster County Public Defender, and Sean J. Brennan for appellant.

Norman Langemach, Jr., Lincoln City Prosecutor, and Patrick A. Campbell for appellee.

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

BOSLAUGH, J.

Upon a plea of guilty to driving while under the influence of alcoholic liquor, third offense, the defendant, Norman Bruce Oliver, was sentenced to 90 days in the county jail with credit for 30 days' time spent in inpatient treatment; he was fined $500; and his operator's license was suspended for 15 years. Upon appeal to the district court, the credit for 30 days' inpatient treatment was set aside, but the judgment in all other respects was affirmed.

The defendant has now appealed to this court and contends that the trial court erred in sentencing the defendant for a third offense because (1) the records of his previous convictions failed to show that his guilty pleas had been entered voluntarily and intelligently, and (2) the evidence as to one prior conviction failed to conform to the date of the prior conviction alleged in the complaint; and, also, that the district court erred (3) in modifying the sentence by eliminating the credit for inpatient treatment.

The complaints in this case alleged that the defendant had been convicted previously of the same offense occurring on October 17, 1980, and June 22, 1978. At the enhancement hearing on March 3, 1987, the State introduced certified copies of the records of previous convictions for offenses committed on June 22, 1978, and October 15, 1977. The defendant

objected to the evidence offered on the grounds of foundation and a bill then pending in the Legislature that would prevent convictions more than 10 years old from being used to enhance the penalty in such cases. These objections were overruled and the exhibits received in evidence. In the district court, the defendant argued that the records were not properly received because neither disclosed "full compliance with the Boykin Rights in Boykin versus Alabama."

With respect to the discrepancy between the date of one of the previous offenses as alleged in the complaint and the record offered at the enhancement hearing, in *State v. Silvacarvalho*, 193 Neb. 447, 227 N.W.2d 602 (1975), we held, "The exact time of the commission of an alleged prior felony is not of the essence of a charge under the Habitual Criminal Act and the failure of the information to accurately state the time of a prior felony does not render the information insufficient." (Syllabus of the court.)

In *State v. Jameson*, 224 Neb. 38, 395 N.W.2d 744 (1986), the complaint for driving while intoxicated, third offense, listed five previous convictions. At the enhancement hearing, evidence of five previous convictions was received, but the date of one offense differed from the date alleged in the complaint.

In affirming the judgment, we said at 43-46, 395 N.W.2d at 747-48:

> Jameson's third assignment of error is, likewise, without merit. He maintains that the previous convictions should not have been received in evidence, principally because the dates set out in the complaint did not correspond with the dates of the previous convictions. Unfortunately, the complaint alleged that *prior convictions* occurred on May 1, 1982, June 1, 1980, December 18, 1978, March 27, 1976, and July 17, 1974. While it is true that the convictions were entered on dates other than those listed in the complaint, the dates listed, other than the July 17, 1974, date, were in fact the dates on which each of the offenses was committed. The July 17, 1974, date was in error. However, in view of the fact that there were more than two prior convictions without the July 17, 1974, event, it may be disregarded. Jameson was

fully advised of the previous convictions the State intended to rely upon in proving that this was at least a third offense. Not only did the State seek to offer into evidence the prior convictions but in each instance introduced what appear to be the entire proceedings, including the complaint, any requests for continuances, and the judgment. In each instance the record reflects that Jameson was represented by counsel when he entered his plea to charges as set out in the complaint.

A reading of § 39-669.07 makes it clear that the substantive offense is driving while under the influence of alcohol or with more than .10 percent of alcohol in one's body fluid. The number of times a person has previously been convicted of such a charge is not itself a crime but, rather, is a factor which the trial court is to consider in imposing sentence. To that extent it is similar to our habitual criminal act, Neb. Rev. Stat. § 29-2221 (Reissue 1985). One is not sentenced for the crime of being a habitual criminal. Instead, the sentence imposed for violating some law of this state is enhanced because the defendant has previously been convicted. *State v. Rolling*, 209 Neb. 243, 307 N.W.2d 123 (1981). The same is true with regard to driving while under the influence of alcohol. See, also, *State v. Helgeson*, 235 Kan. 534, 680 P.2d 910 (1984); *State v. Nelson*, 178 Mont. 280, 583 P.2d 435 (1978); *State v. Carpenter*, 29 Or. App. 879, 565 P.2d 768 (1977).

And just as a wrong date in an information will not preclude a defendant from being sentenced as a habitual criminal if the record discloses the defendant could not have been misled or confused, so, too, a wrong date in a complaint will not preclude a defendant from being sentenced as one who has previously been convicted of driving while under the influence of alcohol if the record discloses that the defendant could not have been misled or confused.

In *State v. Harig*, 192 Neb. 49, 55-57, 218 N.W.2d 884, 889-90 (1974), we said: "[T]he Habitual Criminal Act does not create a new and separate criminal offense . . . but

provides merely that the repetition . . . aggravates the guilt and justifies greater punishment . . . . Under this act, the inaccurate allegation of the date or time of a prior felony would have no effect with respect to the sufficiency of the information as to its allegation of the principal or underlying felony or felonies. As to such felonies the time of a prior conviction is only a historical fact. . . .

. . . While it is undoubtedly desirable and helpful to have the dates of the prior felonies alleged in the information charging a defendant with being an habitual criminal, we do not find that the absence of such allegation would necessarily render the information invalid. . . . [I]t is necessary to read the provisions of the Habitual Criminal Act . . . with the provision of section 29-1501 . . .: 'No indictment shall be deemed invalid, nor shall the trial, judgment or other proceedings be stayed, arrested or in any manner affected . . . for omitting to state the time at which the offense was committed in any case where time is not the essence of the offense; nor for stating the time imperfectly . . . .' [U]nder Nebraska law, informations are generally subject to the same requirements as are indictments. . . . It is clear that the exact time of the commission of an alleged prior felony is not of the essence of a charge . . . and the failure of the information in this case to state accurately the time of a prior felony does not render that information insufficient

. . . .

. . . This is not to say that evidence need not be presented to establish the exact time or date of the prior felony or felonies generally alleged. But we see no constitutional problems in this regard so long as means are and were provided for the defendant to obtain the information relative to the specific dates of the offenses relied upon as prior felonies. . . ."

In the instant case the record is clear that Jameson could not have been misled or confused. If anything, he was probably better informed by being told the date the offense was committed rather than the date of the conviction, which was delayed by Jameson's requests for

continuances. The claim of error is without merit.

In this case the defendant did not claim surprise or request a continuance, and we find there was no prejudice to any substantial right of the defendant.

With respect to the defendant's contention based upon *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), it has been the rule in this State that to prove a prior conviction for enhancement purposes, the State need only show that at the time of the prior conviction the defendant had, or waived, counsel. *State v. Slezak*, 226 Neb. 404, 411 N.W.2d 632 (1987). The records of the defendant's two previous convictions show that in each case the defendant was represented by counsel.

It has also been the rule in this State that a defendant cannot collaterally attack a prior conviction in an enhancement proceeding. *State v. Smith*, 213 Neb. 446, 329 N.W.2d 564 (1983). Objections to the validity of a prior conviction offered for the purpose of sentence enhancement, beyond the issue of whether the defendant had counsel or waived the right to counsel, constitute a collateral attack on the judgment, and must be raised either by a direct appeal from the prior conviction or in separate proceedings commenced expressly for the purpose of setting aside the prior conviction. *State v. Davis*, 224 Neb. 518, 398 N.W.2d 729 (1987). See, also, *State v. Foster*, 224 Neb. 267, 398 N.W.2d 101 (1986); *State v. Hamblin*, 223 Neb. 469, 390 N.W.2d 533 (1986); *State v. Benzel*, 220 Neb. 466, 370 N.W.2d 501 (1985); *State v. Soe*, 219 Neb. 797, 366 N.W.2d 439 (1985); *State v. Jones*, 219 Neb. 184, 362 N.W.2d 58 (1985); *State v. Baxter*, 218 Neb. 414, 355 N.W.2d 514 (1984); *State v. Ziemba*, 216 Neb. 612, 346 N.W.2d 208 (1984).

In *State v. Gonzales*, 218 Neb. 43, 352 N.W.2d 571 (1984), the defendant was allowed at the enhancement hearing to introduce verbatim transcripts of the arraignment proceedings at which the defendant had entered guilty pleas resulting in convictions which the State used to establish that the defendant was a habitual criminal. The transcripts of the arraignment proceedings showed that the defendant had not been advised of his constitutional rights as set out in the *Boykin* case and in *State v. Tweedy*, 209 Neb. 649, 309 N.W.2d 94 (1981). In the

Gonzales opinion, although the judgment was affirmed, we stated at 49, 352 N.W.2d at 575: "In this habitual criminal hearing, defendant had raised the constitutional invalidity of two of his prior convictions, and we hold he may raise these issues in this manner."

Then, in *Gonzales v. Grammer*, 655 F. Supp. 1147 (D. Neb. 1987), the U.S. District Court held that the defendant's prior pleas were not voluntary. Upon appeal, that judgment was affirmed. *Gonzales v. Grammer*, 848 F.2d 894 (8th Cir. 1988).

The court of appeals noted that in our opinion in the *Gonzales* case, we had held that Gonzales had "properly" raised the issue of the validity of his earlier convictions at the hearing to determine his habitual criminal status.

The court of appeals, however, also held, "A state is at liberty to set up whatever procedural requirements it deems necessary for processing challenges to prior convictions in a habitual criminal proceeding." 848 F.2d at 896 n.8.

Upon further consideration of the matter, we now expressly disapprove our holding in the *Gonzales* case that a defendant may raise the constitutional invalidity of a prior conviction in an enhancement proceeding, and now hold that such an issue may only be raised in a direct appeal or in a separate proceeding commenced for the express purpose of setting aside the judgment alleged to be invalid.

With respect to the defendant's last assignment of error, the minimum sentence under Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1986) for driving while under the influence of alcoholic liquor, third offense, if the defendant is not placed on probation, is imprisonment in the county jail for not less than 3 nor more than 6 months, and a fine of $500.

The credit against the statutory minimum sentence granted by the county court for inpatient treatment was erroneous, and it was within the power of the district court to modify the judgment by striking the illegal credit. When part of a sentence is illegal, an appellate court may, if the sentence is divisible, modify it by striking out the illegal part. *Kroger v. State*, 158 Neb. 73, 62 N.W.2d 312 (1954).

The judgment is affirmed.

AFFIRMED.

WHITE, J., dissenting.

I dissent from the portion of the majority's opinion that limits challenges to the constitutionality of a prior conviction at an enhancement hearing.

History in the area of the constitutionality of state procedures under recidivist statutes begins with *Burgett v. Texas*, 389 U.S. 109, 88 S. Ct. 258, 19 L. Ed. 2d 319 (1967). In *Burgett*, the Supreme Court held that an uncounseled prior conviction could not be used as the basis for enhancing a sentence pursuant to a state habitual criminal statute. The U.S. Supreme Court stated, 389 U.S. at 113-15:

> The States are free to provide such procedures as they choose, including rules of evidence, provided that none of them infringes a guarantee in the Federal Constitution. The recent right-to-counsel cases, starting with *Gideon v. Wainwright*, 372 U.S. 335, are illustrative of the limitations which the Constitution places on state criminal procedures. Those limitations sometimes touch rules of evidence.
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> . . . .
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> . . . [S]ince the defect in the prior conviction was denial of the right to counsel, the accused in effect suffers anew from the deprivation of that Sixth Amendment right.

While *Burgett* was limited to the use of uncounseled prior convictions in enhancing a sentence, broad language suggesting that any unconstitutional prior conviction cannot be the basis of an enhanced sentence is contained in *Burgett*. Additionally, a number of courts have relied on *Burgett* for that proposition. (See, e.g., *People v Harris*, 61 N.Y.2d 9, 459 N.E.2d 170, 471 N.Y.S.2d 61 (1983); *State v. Holsworth*, 93 Wash. 2d 148, 607 P.2d 845 (1980).)

The requirements in receiving guilty pleas that are now popularly termed "*Boykin* requirements" were developed by the U.S. Supreme Court in *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). *Boykin* established that several federal constitutional rights are involved in a waiver that occurs when a plea of guilty is entered in a state criminal trial. The three rights delineated in *Boykin* as particularly implicated in any plea of guilty are the privilege against compulsory

self-incrimination guaranteed by the 5th amendment and applicable to the states by reason of the 14th amendment, the right to a jury trial, and the right to confront one's accusers. "We cannot presume a waiver of these three important federal rights from a silent record." *Boykin*, 395 U.S. at 243. In *Boykin*, the U.S. Supreme Court stated that the requirements applicable to establish an effective waiver of the sixth amendment right to counsel apply with *equal force* to the rights waived when a guilty plea is accepted. As stated by the Court, 395 U.S. at 242-43:

> [A] plea of guilty is more than an admission of conduct; it is a conviction. Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality. The question of an effective waiver of a federal constitutional right in a proceeding is of course governed by federal standards.

Boykin stands for the proposition that all pleas accepted without evidence of compliance with the *Boykin* requirements, on the record, are constitutionally invalid. It therefore seems obvious that a conviction obtained without *Boykin* compliance, because invalid, cannot be used as the predicate conviction to support the imposition of an enhanced sentence under a recidivist statute.

Whether guilty pleas that have been obtained without complying with the requirements of *Boykin* can be used as the basis for enhancing a sentence has not affirmatively been decided by the Supreme Court. However, two U.S. Supreme Court opinions support the proposition that compliance with *Boykin* is required before a plea can be used to enhance a sentence under a recidivist statute. In *Baldasar v. Illinois*, 446 U.S. 222, 100 S. Ct. 1585, 64 L. Ed. 2d 169 (1980), a per curiam opinion, the Court held that an uncounseled misdemeanor conviction cannot be used under an enhanced penalty statute to convert a subsequent misdemeanor into a felony with a prison term. The Court, in the concurring opinion of Justice Marshall, stated, "[A] conviction which is invalid for purposes of imposing a sentence of imprisonment for the offense itself remains invalid for purposes of increasing a term of imprisonment for a subsequent conviction under a

repeat-offender statute." 446 U.S. at 228. Although four judges dissented, their dissent was based upon the fact that the prior uncounseled misdemeanor convictions were valid for the purposes of their own penalties as long as the defendant received no prison term. The Court distinguished between the use of these previously valid convictions and constitutionally invalid convictions being put to other uses in court.

Additionally, in *Marshall v. Lonberger*, 459 U.S. 422, 103 S. Ct. 843, 74 L. Ed. 2d 646 (1983), the U.S. Supreme Court discussed the applicability of *Boykin* to a case concerning the admissibility of a prior conviction to prove a "specification" in an aggravated murder conviction. The defense in *Marshall* alleged that the prior conviction was defective under *Boykin* and therefore inadmissible pursuant to *Burgett v. Texas*, 389 U.S. 109, 88 S. Ct. 258, 19 L. Ed. 2d 319 (1967). Although the Court upheld the admission of the prior conviction, its rationale was that the state court had determined *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), had been complied with, and the factual findings of a state court are to be accorded great deference in a federal habeas proceeding. The Court in *Marshall, supra*, reiterated that the governing standard determining whether a plea of guilty is voluntary is governed by federal law and did not contest the applicability of *Boykin* to prior convictions under an enhanced penalty statute.

This court, in *State v. Turner*, 186 Neb. 424, 183 N.W.2d 763 (1971), and *State v. Tweedy*, 209 Neb. 649, 309 N.W.2d 94 (1981), held that although strict compliance with *Boykin* is unnecessary, nonetheless, the requirements must be met before a plea can be accepted. Finally, in *State v. Gonzales*, 218 Neb. 43, 352 N.W.2d 571 (1984), in language the majority is disapproving today, we held that the constitutional validity of the defendant's prior convictions could be contested at the habitual criminal proceeding. However, *Gonzales* was not the first opinion by this court to hold that a challenge to a prior conviction could be raised at an enhancement proceeding. In *State v. McGhee*, 184 Neb. 352, 358, 167 N.W.2d 765, 769 (1969), we stated, "Such cases as Burgett v. Texas, 389 U.S. 109, 88 S. Ct. 258, 19 L. Ed. 2d 319, indicate quite clearly that in a

habitual criminal proceeding a prior conviction is subject to attack on constitutional grounds . . . ."

Although the eighth circuit, in *Gonzales v. Grammer*, 848 F.2d 894 (8th Cir. 1988), noted that a state can set up whatever procedural requirements necessary to process challenges to prior convictions in a habitual criminal proceeding, to the extent that this court sets up no procedure for processing the challenges in an enhancement proceeding, I believe the majority is in error.

As stated in *Burgett*, by utilizing an uninformed guilty plea in an enhancement proceeding, a violation of the defendant's constitutional rights is "renewed," which thus violates due process. This subsequent use of a constitutionally invalid conviction renews the constitutional violation. Although *Burgett* was concerned only with uncounseled pleas, there is no logical reason why un*Boykin*ized guilty pleas are any less violative of due process than uncounseled ones. As stated by the Supreme Court in *Boykin*, the requirements applicable to establish an effective waiver of the sixth amendment right to counsel apply with equal force to the rights waived when a guilty plea is accepted. By holding that constitutional challenges to the voluntariness of guilty pleas cannot be raised in enhancement proceedings, this court is according less deference to the constitutional rights infringed when a plea without *Boykin* is accepted than to the rights at issue when counsel is not afforded to the defendant. This is a distinction clearly not authorized by the U.S. Supreme Court.

The due process clause of the 14th amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Therefore, if a defendant is convicted with insufficient evidence, his or her 14th amendment rights are clearly implicated. Pursuant to Neb. Rev. Stat. § 39-669.07(3) (Cum. Supp. 1986), two or more valid convictions are a necessary element, and this requirement, therefore, must be proven by the State beyond a reasonable doubt. In this case, evidence was introduced suggesting that the prior pleas did not comply with *Boykin*. Perhaps because the

record is silent, those pleas are invalid. Accordingly, a conviction of driving while under the influence, third offense, would be based on insufficient evidence in violation of the 14th amendment.

I submit this cause should be remanded for resentencing and the State should be required to establish the constitutional validity of the prior convictions at the sentencing hearing before these convictions can be used as the basis for enhancing criminal penalties.

SHANAHAN, J., dissenting.

Notwithstanding the axiom that a conviction based on a defendant's plea is either constitutionally valid or invalid, the majority's opinion is somewhat a judicial shell game which requires a defendant to locate the procedural pellet for challenging the constitutionality of the defendant's prior plea-based conviction. Fundamental unfairness occurs, however, because there is no pellet to be uncovered.

The majority notes the statement in *Gonzales v. Grammer*, 848 F.2d 894, 896 n.3 (8th Cir. 1988): "A state is at liberty to set up whatever procedural requirements it deems necessary for processing challenges to prior convictions in a habitual criminal proceeding." From the preceding *Gonzales* excerpt, one may infer that, although a state's legislature or judiciary may fashion a particular procedure for a defendant's challenge to the constitutionality of a prior plea-based conviction used for an enhanced penalty, the state, nonetheless, is constitutionally obligated to have a method or means by which a defendant can litigate the constitutional validity of the prior plea-based conviction used for enhancement purposes. Whatever procedure a state provides, the procedure shall not infringe a constitutional guarantee. Thus, while a specific procedure to challenge the constitutionality of a prior guilty or no-contest plea rests within the state's discretion, a defendant's right to challenge a prior and constitutionally invalid plea is not a matter of the state's discretionary and procedural largess, but is a matter of due process which must be accorded a defendant who is subjected to a potential penalty or punishment through the criminal justice system. Nevertheless, from a launching pad of the federal footnote in *Gonzales*, the majority rockets to the

conclusion that constitutional validity of a defendant's prior plea-based conviction "may only be raised in a direct appeal or in a separate proceeding commenced for the express purpose of setting aside the judgment alleged to be invalid." The logical response is: What is the "separate proceeding" available to set aside the prior plea-based conviction?

While it may be an expression of the all-too-obvious, the majority does not judicially fashion a separate proceeding for a defendant's constitutional challenge to a prior plea-based conviction which is used for enhancement purposes. Rather, apart from mentioning a statutorily authorized direct appeal to test the constitutional validity of a conviction, the majority tacitly turns to the Legislature and Nebraska's statutes for a procedure enabling a defendant to question the constitutional validity of a prior plea-based conviction. Are there any Nebraska statutory proceedings for evaluation and resolution of a defendant's constitutional challenge to a prior plea-based conviction?

Is the majority alluding to a habeas corpus proceeding as the "separate proceeding commenced for the express purpose of setting aside" a defendant's previous conviction? According to Neb. Rev. Stat. § 29-2801 (Reissue 1985), an applicant or petitioner for a writ of habeas corpus must be a person who "is or shall be confined in any jail of this state, or [who] shall be unlawfully deprived of his or her liberty . . . ." To entitle the applicant-petitioner to a writ of habeas corpus, "there must be an actual confinement or the present means of enforcing it." *Spring v. Dahlman*, 34 Neb. 692, 693, 52 N.W. 567 (1892). The writ of habeas corpus, therefore, is unavailable to attack the constitutional validity of a defendant's prior plea-based conviction unless the defendant is incarcerated as the result of that prior conviction. The likelihood of a defendant's being incarcerated on account of a prior plea-based conviction, when a current prosecution involves an enhanced penalty based on such prior conviction, is mind-boggling, especially in cases of misdemeanor convictions. It is more probable, perhaps to the point of certainty, that a defendant, presently prosecuted, will have already served the sentence imposed as the result of the prior plea-based conviction, thereby disqualifying a previously

convicted defendant as an applicant-petitioner for a writ of habeas corpus.

Is the "separate proceeding," mentioned by the majority, a proceeding brought under the postconviction act, Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1985)? Section 29-3001 provides that "[a] prisoner in custody under sentence . . . may file a verified motion [for postconviction relief]." In *State v. Moore*, 190 Neb. 271, 272, 207 N.W.2d 518, 519 (1973), this court stated: "The Post Conviction Act extends relief only to persons 'in custody.' " Consequently, a defendant who has served a sentence imposed as the result of a plea-based conviction to be constitutionally challenged, or who is not incarcerated on account of such conviction, is not entitled to request postconviction relief.

Perhaps the suggested "separate proceeding" is a motion for new trial pursuant to Neb. Rev. Stat. § 29-2101 (Reissue 1985). However, except in the case of newly discovered evidence, a motion for new trial must be filed within 10 days after verdict unless the defendant is "unavoidably prevented" from filing the motion. See Neb. Rev. Stat. § 29-2103 (Reissue 1985). In any event, as prescribed by § 29-2103, a motion for new trial "must be filed within three years after the date of such verdict." In virtually all cases, a defendant would be unable to utilize a motion for new trial to challenge a constitutionally invalid guilty or no-contest plea in reference to an enhancement proceeding because lapse of the specified time will have prevented opportunely filing the motion for new trial.

Maybe the majority is implying that a declaratory judgment action, authorized by Neb. Rev. Stat. §§ 25-21,149 et seq. (Reissue 1985), is the "separate proceeding" available to contest the constitutional validity of a prior plea-based conviction. Putting aside prodigious problems involving the statute of limitations, determination of necessary parties for the proceedings, and identification of a proper forum for the declaratory judgment action, assume that a defendant obtains a declaratory judgment that the plea on which the defendant's prior conviction is based was unconstitutionally obtained. What effect does the declaratory judgment have? The declaratory judgment would not operate to set aside the

previous plea-based conviction lest the declaring court act as an appellate court, reviewing and vacating another court's judgment in the absence of authority for appellate action. A declaratory judgment action is not a substitute for a new trial or appeal; a method of destroying proper exercise of power in a former action; authority for a second trial by the same parties on identical issues in different forums; or a justification for an unnecessary decision; and does not approve collateral attacks on former adjudications or operate to supersede former adjudications or proper proceedings already pending in court. See, *Moore v. Black*, 220 Neb. 122, 368 N.W.2d 488 (1985); *Zarybnicky v. County of Gage*, 196 Neb. 210, 241 N.W.2d 834 (1976); *Phelps County v. City of Holdrege*, 133 Neb. 139, 274 N.W. 483 (1937). Consequently, a defendant, having obtained a declaratory judgment that the defendant's prior plea was constitutionally invalid, would have to take the declaratory judgment to the court which accepted the plea in question. To what avail? One need not travel to the far boundaries of imagination to envision a judge's response on presentation of a judgment, entered by another court at the trial level, declaring the judge's prior convictional action void due to some judicial deficiency concerning a defendant's constitutional rights.

Additionally, in *Moore v. Black, supra*, we considered the absence of any procedure for appellate review of a judgment and stated:

> We have held that where no other method of appeal is provided, one may obtain judicial review by proceedings in error under [Neb. Rev. Stat. §§ 25-1901 et seq. (Reissue 1985). Citations omitted.] However, as in all appeals, the time requirements are mandatory and must be met in order for the appellate tribunal to acquire jurisdiction of the subject matter. . . .
>
> [Neb. Rev. Stat. § 25-1931 (Reissue 1985)] provides: "No proceedings for reversing, vacating, or modifying judgments or final orders shall be commenced unless within one calendar month after the rendition of the judgment or making of the final order complained of . . . ."

220 Neb. at 124-25, 368 N.W.2d at 490. Even the catchall error

proceedings will undoubtedly be unavailable for a defendant's challenge to a prior plea-based conviction.

It is indeed difficult, if not impossible, to elaborate all the questions and problems spawned in the majority's nondescript "separate proceeding," which, in the Churchillian characterization, is a "riddle wrapped in a mystery inside an enigma." The fact remains that, unless a defendant is incarcerated or has timely filed a motion for new trial, there is no Nebraska procedure, judicially fashioned or statutorily authorized, to accommodate a defendant's constitutional challenge to a prior plea-based conviction utilized for an enhanced penalty.

As expressed by the U.S. Supreme Court in *Boykin v. Alabama*, 395 U.S. 238, 243 n.5, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), regarding a guilty plea:

> "A defendant who enters such a plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers. For this waiver to be valid under the Due Process Clause, it must be 'an intentional relinquishment or abandonment of a known right or privilege.' *Johnson v. Zerbst*, 304 U.S. 458, 464 [58 S. Ct. 1019, 82 L. Ed. 1461] (1938). Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. . . ." [Quoting from *McCarthy v. United States*, 394 U.S. 459, 89 S. Ct. 1166, 22 L. Ed. 2d 418 (1969).]

Thus, according to *Boykin*, a defendant's guilty plea which is not equally voluntary and knowing violates due process and is, therefore, void and a nullity. To paraphrase a well-known observation, void is void is void is void. Unless a defendant's direct appeal challenges a constitutionally invalid plea, the majority of this court permits the State to use a defendant's constitutionally invalid plea again and again for enhancement purposes. Cf. *Burgett v. Texas*, 389 U.S. 109, 115, 88 S. Ct. 258, 19 L. Ed. 2d 319 (1967): "[S]ince the defect in the prior conviction was denial of the right to counsel, the accused in effect suffers anew from the deprivation of that Sixth

Amendment right." However, a challenge to a prior plea-based conviction, proposed to be used for sentence enhancement, is not restricted to the ground that the prior conviction was obtained in violation of a defendant's right to counsel, but may be based on violations of other constitutional rights, such as the rights mentioned in *Boykin*, namely, the rights to trial by jury, to remain silent, and to confront accusers. See *People v. Sumstine*, 36 Cal. 3d 909, 687 P.2d 904, 206 Cal. Rptr. 707 (1984). As a matter of due process required by the Nebraska and U.S. Constitutions, a prior plea-based conviction obtained in violation or denial of a constitutional right accorded an accused cannot be used in a subsequent criminal proceeding to establish the accused's guilt or support an enhanced punishment. See *Watkins v. People*, 655 P.2d 834 (Colo. 1983).

Correctly analyzed, the question raised in Oliver's case does not relate to a separate or collateral proceeding to set aside a prior conviction. Oliver's case involves what basically is an evidential principle based on, and demanded by, due process, namely, a challenge to the present use of a constitutionally invalid plea at a present sentence hearing. In an enhancement proceeding, a defendant's successful constitutional challenge to the validity of a prior plea-based conviction does not overturn the prior conviction, but results in exclusion or foreclosure of the prior plea-based conviction for the purpose of an enhanced penalty. See *State v. Holsworth*, 93 Wash. 2d 148, 607 P.2d 845 (1980). Therefore, challenging a prior plea-based conviction in a proceeding for an enhanced penalty is not a collateral attack to set aside the prior conviction alleged to be constitutionally invalid.

Further, in reference to prospective imposition of an enhanced penalty, the requirement of a separate proceeding to set aside a prior conviction based on a constitutionally invalid plea frustrates judicial economy and defeats efficient judicial administration in the criminal justice system. As a practicable procedure, the determination whether a defendant has previously entered a constitutionally valid guilty or no-contest plea, resulting in a conviction subsequently available for an enhanced penalty, should be a matter for the court in which the enhanced penalty is sought. This procedure would promote

judicial economy as well as furnish fundamental fairness necessary for due process. The constitutional right of due process is much too precious to languish in a legal labyrinth. In accordance with due process required in the criminal justice system, Oliver must be permitted to question the constitutional validity of his prior plea-based convictions used for imposition of an enhanced penalty. As a prerequisite for imposition of any enhanced penalty, the State has, and must satisfy, the burden to prove the constitutional validity of every prior plea-based conviction in the basis for an enhanced penalty. See *Watkins v. People, supra*. To that end, the sentence imposed on Oliver should be set aside, and these proceedings should be remanded for a sentence hearing at which Oliver may challenge the constitutional validity of every prior plea-based conviction in the basis for an enhanced penalty. As the result of the sentence hearing on remand, the appropriate sentence should be imposed on Oliver.

STATE OF NEBRASKA, APPELLEE, V. GARY L. CADWALLADER, APPELLANT.

434 N.W.2d 506

Filed January 13, 1989. No. 87-990.

1. **Constitutional Law: Double Jeopardy.** The double jeopardy clauses of the Nebraska and U.S. Constitutions protect against multiple punishments for the same offense.
2. **Constitutional Law: Double Jeopardy: Indictments and Informations: Lesser-Included Offenses.** In a prosecution on a multiple-count information based on a single event or the same transaction, constitutional protection against double jeopardy prevents convictions for different degrees of the same offense arising out of the same event or transaction and prohibits a conviction for the lesser offense included in a greater offense.
3. **Presentence Reports: Crime Victims: Sentences.** Victim impact statements and similar materials may be included in presentence reports but, ordinarily, cannot be used as a basis for determining the sentence to be imposed.
4. **Crime Victims: Sentences.** A trial judge should take into account facts obtained from a victim's statement under the provisions of Neb. Rev. Stat. § 29-2261 (Reissue 1985), as all facts pertinent to sentencing should be considered, but a

judge must not and cannot allow the judgments and conclusions of the victim to be substituted for those of the judge in imposing sentence.

5. **Sentences.** The sentence should be such as to provide some deterrence; of sufficient length to at least afford a possibility of rehabilitation; of sufficient severity so as not to depreciate the seriousness of the crime; and, in a proper case, such as to provide some measure of protection to society by removing the offender temporarily from society.
6. **Sentences: Prisoners: Probation and Parole.** In fixing the term of a sentence to imprisonment, the trial court may consider the factors that may determine how much of a particular sentence must be served before the prisoner can be released.
7. **Sentences: Appeal and Error.** A sentence imposed within the statutory limits will not be disturbed on appeal in the absence of an abuse of discretion by the trial court.

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

Bruce Dalluge, of Morrissey, Morrissey & Dalluge, for appellant.

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

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

PER CURIAM.

In separate informations, the defendant, Gary L. Cadwallader, was charged with two counts of felony motor vehicle homicide, and with operating a motor vehicle while under the influence of alcoholic liquor, third offense. Another count, charging operating a motor vehicle while his operator's license had been revoked, was dismissed pursuant to a plea bargain.

Upon pleas of no contest, the defendant was sentenced to 5 years' imprisonment on each of the motor vehicle homicide counts, and to 6 months' imprisonment, a fine of $500, and revocation of his operator's license for 15 years on the charge of operating a motor vehicle while under the influence of alcoholic liquor, third offense. All sentences run consecutively and are to be served in a facility of the Department of Correctional Services. Since all three sentences were the maximum permitted by statute, the defendant is entitled to credit for 149 days of

presentence incarceration.

The defendant has appealed. His assignments of error, all of which relate to the sentences imposed on the defendant, may be summarized as follows: (1) The sentences constitute double jeopardy; (2) it was error for the trial court to consider victim impact statements and similar materials; (3) it was error for the trial court to consider the effect of parole and good time upon any sentence imposed; and (4) the sentences are excessive.

The charges are the result of an automobile accident that occurred near Table Rock, Nebraska, on May 5, 1987. The defendant was driving west on Highway 4 with David Huffman as a passenger in his vehicle. Tamberlyn LaVigne was driving east on the same highway. At a point approximately 2.7 miles east of Table Rock, the defendant's vehicle left the roadway twice and then crossed the centerline of the highway and collided with the LaVigne automobile in the eastbound traffic lane. Both Huffman and LaVigne died as a result of injuries sustained in the accident. Several witnesses who talked with the defendant just before the accident recognized that the defendant was intoxicated. A blood alcohol test made just after the accident showed the defendant's blood contained .178 percent alcohol.

The first assignment of error is based upon our decision in *State v. Hoffman*, 227 Neb. 131, 416 N.W.2d 231 (1987). In the *Hoffman* case, the defendant, after a bench trial, was convicted of second degree assault, motor vehicle homicide, and drunk driving.

Neb. Rev. Stat. § 28-306 (Reissue 1985), the Nebraska motor vehicle homicide statute, provides:

> (1) A person who causes the death of another unintentionally while engaged in the operation of a motor vehicle in violation of the law of the State of Nebraska or in violation of any city or village ordinance commits motor vehicle homicide.
>
> (2) Except as provided in subsection (3) of this section, motor vehicle homicide is a Class I misdemeanor.
>
> (3) If the proximate cause of the death of another is the operation of a motor vehicle in violation of section 39-669.01, 39-669.03, or 39-669.07, motor vehicle

homicide is a Class IV felony.

Motor vehicle homicide can be committed in a number of different ways because the operation of the motor vehicle need only be in violation of any state law or city or village ordinance. In the *Hoffman* case, one of the violations proved was operating a motor vehicle while under the influence of alcoholic liquor. Since that was a violation on which the conviction on the motor vehicle homicide count rested, and separate consecutive sentences were imposed on each count, the State could not punish the defendant separately for driving while under the influence of alcoholic liquor. As stated in the *Hoffman* case at 146-47, 416 N.W.2d at 241:

> In finding Hoffman guilty of motor vehicle homicide (count II), the district court found Hoffman guilty of drunk driving in violation of § 39-669.07, and also found Hoffman guilty of the separate charge of drunk driving alleged in count III. There is no question that the drunk driving, as a violation of a Nebraska statute necessary for the crime of motor vehicle homicide charged in count II, was the identical prohibited act and the exact offense charged in count III. Consequently, count II and count III involved the same act—drunk driving. . . . The constitutional protection against double jeopardy, therefore, applies to Hoffman's convictions on counts II and III. In Hoffman's case, the district court imposed consecutive sentences for all the convictions. The consecutive sentences imposed on Hoffman for motor vehicle homicide and drunk driving are cumulative sentences for the same offense and constitute separate and multiple punishments for the same offense, a denial of the protection against double jeopardy afforded by the Constitutions, both state and federal. See *Brown v. Ohio,* 432 U.S. 161, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977).

The information filed in this case alleged felony motor vehicle homicides by operating a motor vehicle "in violation of Sections 39-669.01, 39-669.03, or 39-669.07." Neb. Rev. Stat. § 39-669.01 (Reissue 1988) is the reckless driving statute; Neb. Rev. Stat. § 39-669.03 (Reissue 1988) is the willful reckless driving statute; and Neb. Rev. Stat. § 39-669.07 (Reissue 1988)

is the driving under the influence of alcoholic liquor statute. Unlike the *Hoffman* case, there was no finding by the trial court in this case that the motor vehicle homicides were the result of the defendant's operation of a motor vehicle while under the influence of intoxicating liquor. The fact that the information in this case alleged the offenses in the alternative and there was no finding by the trial court as to which violation was the basis for the findings of guilty distinguishes this case from the *Hoffman* case and prevents a finding of double jeopardy because of cumulative sentences for the same offense.

The second assignment of error relates to victim impact statements and similar materials which were included in the presentence report and were considered at the sentencing hearing. The defendant contends that it was improper for the court to consider these matters and that Neb. Rev. Stat. § 29-2261 (Reissue 1985), which provides that a presentence report should include written statements submitted to the county attorney or probation officer by a victim, should be declared unconstitutional.

Booth v. Maryland, 482 U.S. 496, 107 S. Ct. 2529, 96 L. Ed. 2d 440 (1987), cited by the defendant, involved the admission into evidence of a victim impact statement in a capital case in which the defendant had elected to have his sentence determined by the jury. The majority of the Court held the statement was irrelevant and inadmissible in a capital sentencing case but recognized that "the full range of foreseeable consequences of a defendant's actions may be relevant in other criminal and civil contexts." 107 S. Ct. at 2533. In a footnote to the opinion, the Court stated:

> Our disapproval of victim impact statements at the sentencing phase of a capital case does not mean, however, that this type of information will never be relevant in any context. Similar types of information may well be admissible because they relate directly to the circumstances of the crime. Facts about the victim and family also may be relevant in a noncapital criminal trial. Moreover, there may be times that the victim's personal characteristics are relevant to rebut an argument offered by the defendant. . . .

107 S. Ct. at 2535 n.10.

In *State v. Carlson*, 225 Neb. 490, 491, 406 N.W.2d 139, 140 (1987), we said:

> The sentencing judge appeared to rely heavily upon the demands of the victims in this case that the punishment be severe. . . . A judge should take into account facts obtained from such source in imposing sentence, as he or she should consider all facts pertinent to sentencing, but a judge must not and cannot allow the judgments and conclusions of the victim to be substituted for those of the court in imposing sentence. To do so constitutes an abuse of discretion.

At the sentencing hearing in the instant case, the trial court stated on the record that it was not relying on victim impact statements and similar materials in determining what sentences should be imposed on the defendant. Before imposing the sentences the trial court stated:

> And for the record right now, I want to state that even though, and it becomes important that I say this, it's not that I wouldn't like to use your letters and that I don't have a tremendous amount of sympathy for the family and the friends of the victim, but the law does not allow me to look at who the victim is to determine what sentence should be pronounced. So even though I want to go on record stating that — and I want the letters to become a part of the record, I have to go on record and say that I did not consider what type of person either of the deceased were [sic] in deciding what my sentence is.

The record in this case shows that the sentences imposed on the defendant were based upon his blameworthiness, his character, and the circumstances of the crime, and not upon the character of the victims. There was no prejudicial error in placing the victim impact statements and similar materials in the presentence report.

The third assignment of error is that it was error for the trial court to consider the effect of parole and good time upon any sentence imposed. The defendant argues that the trial court was trying to compensate for the effects of parole and good time when the defendant was sentenced to a maximum possible term

of imprisonment for 10 years 6 months on the three counts.

During the sentencing hearing the trial court remarked,

> According to my chart, a ten year sentence, his earliest possible release date, taking into consideration the total maximum good time, meritorious good time, and good time behavior is five years and five months. So if he jammed out with no problems at all, it'd be five years and five months on a ten year sentence. And it's my understanding now the policy is if it's — after they've served a third of their sentence, they're eligible for parole.

In fixing the term of imprisonment, a trial court has a number of matters to consider. The sentence should be such as to provide some deterrence; of sufficient length to at least afford a possibility of rehabilitation; of sufficient severity so as not to depreciate the seriousness of the crime; and, in a proper case, such as to provide some measure of protection to society by removing the offender temporarily from society. It would be strange to think that a sentencing judge could make a decision as to a proper term of imprisonment if no consideration were given to the various factors that determine how much of a particular sentence must be served before the prisoner can be released.

It is important to recognize that a sentencing court cannot control the operation or application of good time and parole statutes, because they are administered by the executive branch of government. As we stated in *State v. Houston*, 196 Neb. 724, 727, 246 N.W.2d 63, 65 (1976):

> The defendant's argument apparently is that the possible effect of the good time law is an irrelevant matter for consideration by the court in determining the sentence it will impose. Perhaps it is, but the mere fact the court stated that it took the effects of the statute into consideration does not, in our judgment, constitute a due process violation. First of all, whatever the court does in imposing sentence cannot affect the actual application of the statute, or other statutes which affect time served, for those statutes are administered by agents of the executive branch of government pursuant to statutes enacted by the legislative branch. Anything a sentencing court may say

cannot prevent their application.

Further, "[t]he time served usually depends upon the defendant himself and those who are by law charged with carrying out the constitutional and legislative mandates." *Id.* We find no merit in this assignment of error.

The final assignment of error is that the sentences which were imposed are excessive. In this regard it is important to note that although the trial court fixed the sentences at the maximum term permitted by statute, the trial court did not specify a minimum term. Since there is no statutory minimum term for felony motor vehicle homicide, the defendant will be eligible for parole on the date he begins serving those sentences. See, Neb. Rev. Stat. §§ 28-105 (Reissue 1985), 83-170(5) (Reissue 1987), and 83-1,110 (Reissue 1987).

The defendant was 37 years old at the time of the offenses. The previous convictions relied on to prove operating a motor vehicle under the influence of alcoholic liquor, third offense, were on January 16, 1985, which was for a third offense, and March 18, 1985, which was charged as a second offense.

On the day of the accident, the defendant had been drinking throughout the day. Shortly before the accident happened, the defendant stopped to ask directions. The person who spoke with the defendant told the defendant, who was obviously intoxicated, "You need to park that car and sleep it off." The defendant disregarded this advice and continued to drive until the accident happened and the two victims were killed.

The defendant's prior criminal record shows numerous traffic offenses, with probation granted on at least four occasions. It is obvious that the defendant failed to benefit from these prior probations.

The defendant's many convictions resulted in numerous suspensions of his operator's license. The May 20, 1984, offense in Hall County, which originally resulted in probation and apparently resulted in the dismissal of a later charge on June 30, 1984, eventually resulted in a 15-year suspension when his probation was revoked on November 25, 1986. The defendant, however, disregarded the suspension and was arrested twice in Holt County in 1986 for driving under suspension. In view of the defendant's attitude and disregard for the law, it was just a

matter of time until he would be involved in a serious accident. That happened on May 5, 1987, when he killed the two victims in this case.

A sentence imposed within the statutory limits will not be disturbed on appeal in the absence of an abuse of discretion by the trial court. *State v. Clark*, 228 Neb. 599, 423 N.W.2d 471 (1988). The record in this case shows no abuse of discretion.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. VINCENT EUGENE KAVANAUGH, APPELLANT.

434 N.W.2d 36

Filed January 13, 1989. No. 87-1125.

1. **Criminal Law: Police Officers and Sheriffs: Investigative Stops: Probable Cause.** A police officer may in appropriate circumstances and in an appropriate manner approach a person for the purpose of investigating possible criminal behavior even though there is no probable cause to make an arrest.
2. _____: _____: _____: _____. An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity.
3. _____: _____: _____: _____. In determining what cause is sufficient to authorize police to stop a person, the totality of the circumstances must be taken into account.
4. _____: _____: _____: _____. Police officers must have a particularized and objective basis for suspecting the person stopped of criminal activity. The assessment of the totality of circumstances includes all of the objective observations and considerations, as well as the suspicion drawn by a trained and experienced police officer by inference and deduction that the individual stopped is, has been, or is about to be engaged in criminal behavior.

Appeal from the District Court for Dakota County: ROBERT E. OTTE, Judge. Affirmed.

Robert G. Scoville, of Ryan & Scoville, for appellant.

Robert M. Spire, Attorney General, and David Edward Cygan for appellee.

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

BOSLAUGH, J.

After a trial to the court, the defendant, Vincent Eugene Kavanaugh, was found guilty of driving while under the influence of alcoholic liquor and refusing to submit to a breath test under the implied consent law. The defendant was sentenced to 6 months' probation and fined $250 on each count, and his driving privileges were suspended for 60 days. Upon appeal to the district court, the judgment was affirmed.

The defendant has now appealed to this court and contends that his arrest was the result of an illegal stop and that the evidence obtained as a result of the illegal stop should have been suppressed.

The defendant operates a mobile home business, which is located approximately a block and a half west of the intersection of U.S. Highway 77 and old U.S. Highway 20 in South Sioux City, Nebraska. On April 23, 1987, at about 1:20 a.m., Deputy Sheriff Randall Walsh, who was on patrol, stopped at that intersection for a traffic light. While he was stopped, Walsh saw a pickup truck with a camper top drive out of the mobile home business and turn west on old Highway 20. It was a foggy night, and Walsh would not have been able to see the pickup truck except for its headlights. Walsh turned west on old Highway 20 and stopped the pickup truck about three-fourths of a mile west of the defendant's place of business.

After the pickup truck had been stopped, Walsh recognized the defendant as the driver. When the defendant rolled down the window on the driver's side, Walsh noticed the odor of alcohol, and the defendant admitted he had been drinking. The defendant's eyes appeared red and watery. Walsh asked the defendant to perform several field sobriety tests, which he failed. The defendant was also unsteady on his feet.

Walsh arrested the defendant and took him to the Dakota County sheriff's office. At the sheriff's office the defendant was asked to submit to a breath test, which he refused.

The issue on this appeal is whether the investigatory stop of

the defendant's vehicle was lawful. At the trial the defendant moved to suppress the testimony relating to the evidence gained as a result of the stop of his vehicle, as a violation of his fourth amendment rights under the U.S. Constitution and of his rights under article I, § 7, of the Nebraska Constitution. That motion was overruled.

A police officer may in appropriate circumstances and in an appropriate manner approach a person for the purpose of investigating possible criminal behavior even though there is no probable cause to make an arrest. *State v. Brewer*, 190 Neb. 667, 212 N.W.2d 90 (1973).

In *United States v. Cortez*, 449 U.S. 411, 417-18, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981), the U.S. Supreme Court held:

> The Fourth Amendment applies to seizures of the person, including brief investigatory stops . . . . An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity. . . .
>
> . . . .
>
> The idea that an assessment of the whole picture must yield a particularized suspicion contains two elements, each of which must be present before a stop is permissible. First, the assessment must be based upon all of the circumstances. The analysis proceeds with various objective observations, information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kinds of lawbreakers. From these data, a trained officer draws inferences and makes deductions—inferences and deductions that might well elude an untrained person.
>
> The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain commonsense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.

> The second element contained in the idea that an assessment of the whole picture must yield a particularized suspicion is the concept that the process just described must raise a suspicion that the particular individual being stopped is engaged in wrongdoing.

As we said in *State v. Longa*, 211 Neb. 356, 363-64, 318 N.W.2d 733, 738-39 (1982),

> The rationale behind requiring something less than probable cause for such stops is readily applicable to the present case. "The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* [*Terry v. Ohio,* 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)] recognizes that it may be the essence of good police work to adopt an intermediate response. . . . A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." *Adams v. Williams*, 407 U.S. 143, 145-46, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972). See, *State v. Jefferson*, 196 Neb. 340, 242 N.W.2d 881 (1976); *State v. Micek*, 193 Neb. 379, 227 N.W.2d 409 (1975).
>
> This lesser standard for investigative stops was recently articulated by this court in *State v. Ebberson*, 209 Neb. 41, 305 N.W.2d 904 (1981), and reiterated in *State v. Nowicki*, 209 Neb. 640, 309 N.W.2d 89 (1981). Therein, relying on *United States v. Cortez*, 449 U.S. 411, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981), we determined that " 'an investigatory stop must be justified by objective manifestation that the person stopped is, has been, or is about to be engaged in criminal activity. In determining what cause is sufficient to authorize police to stop a person, the totality of the circumstances — the whole picture — must be taken into account.
>
> " 'Police officers must have a particularized and objective basis for suspecting the person stopped of

> criminal activity. The assessment of the totality of circumstances includes all of the objective observations and considerations, *as well as the suspicion drawn by a trained and experienced police officer by inference and deduction that the individual stopped is or has been or is about to be engaged in criminal behavior. . . .*' "

See, also, *State v. Thomte*, 226 Neb. 659, 413 N.W.2d 916 (1987); *State v. Pierce and Wells*, 215 Neb. 512, 340 N.W.2d 122 (1983); *State v. Ebberson*, 209 Neb. 41, 305 N.W.2d 904 (1981).

In this case, Walsh explained that he stopped the defendant's vehicle because he suspected that a burglary might have taken place at the defendant's business. Businesses located along old Highway 20 had experienced burglaries and vandalism. Those facts, together with the lateness of the hour and the fact that Walsh did not recognize the truck as belonging to the defendant, caused him to believe that criminal activity might have taken place and that it was his duty to stop the truck and find out what its driver had been doing at the defendant's place of business more than an hour after midnight.

At the hearing on the motion to dismiss, Deputy Sheriff Walsh testified,

> Q- Okay. Have you had prior contact with this defendant?
>
> A- Not on a personal basis.
>
> Q- Did you know him?
>
> A- I didn't [sic] him at the time, who it was, no.
>
> Q- Okay. Are you familiar with the location of his business where he sells mobile homes?
>
> A- Yes, I am.
>
> Q- Do you go by there very often?
>
> A- As much as possible.
>
> Q- Okay. While on duty?
>
> A- Yes, that's one of our areas in the county that we have a problem with.
>
> Q- Okay. Do you — are you familiar with the business hours?
>
> A- I've very seldom saw [sic] people in there after — like — 6 - 6:30 at night.
>
> Q- Okay. Are you familiar with the other businesses in

the area?

A- Yes, I am.

. . . .

Q- What types of activity?

A- Well, we have several complaints on suspicious vehicles in the area of the Diamond Horseshoe which is right adjacent to Mr. Kavanaughs. We have several alarms and burglary complaints of the junk yards in that area, mainly Garvins and stuff like that and Knights of Columbus, we have several complaints on file in that general area of suspicious activities, vehicles people called us on. Burglaries to residences and businesses.

Q- All within a fairly close proximity to Mr. Kavanaugh's business?

A- Within about a mile — mile and a half area right there, yeah.

Q- Within the county, that would be a close proximity, wouldn't it?

A- Yes, that's our junk yard area. It goes out there on Old Highway 20.

Q- And on the day in question, the 23rd of April, you had that knowledge at the time you were on patrol?

A- Yes, I did.

Q- You contacted the defendant, for what purpose?

A- As I said, I was at the intersection. I saw a vehicle pull out. It was real foggy out. It was dark. I had no idea who the vehicle belonged to.

Q- Okay, what time was it that you contacted him?

A- About 1:20 in the morning.

. . . .

Q- Okay. Had you observed any late night activity at the Kavanaugh — the business before?

A- No, I hadn't.

Q- Ever seen lights on?

A- No I do not.

Q- Ever see any people there?

A- No.

Q- Any vehicles?

A- Just vehicles that are parked there all the time. That's

it.

Q- Okay. You mentioned the fog, did that create any significant factor, as far as your considerations in this matter?

A- As I said, I was sitting at the intersection. If the vehicle pulling out of the business would not have had it's [sic] lights on, I probably wouldn't have even noticed.

Q- Okay. Was that fog have any- — okay, you stopped him for what purpose?

A- Because the vehicle was coming out of a business at 1:20 in the morning.

Q- And what did that mean to you?

A- That suspicious — suspicious activity may have possibly meant that a burglary had just occurred there.

Q- And did you think — what facts did you rely on to say that a burglary may possibly have just occurred?

A- My past experiences of knowing when most of your burglaries occur and the suspicious activity and burglaries we've had in that general area.

Q- Fog have any significance?

A- Yes, it did.

Q- What?

A- Visibility was approximately — his driveway is maybe a block to a block and a half from that intersection and on nights when it's dark and foggy, it offers concealment for criminal activity.

Q- Time have any significance?

A- Yes.

Q- What?

A- At 1:20 in the morning, most businesses are closed.

Q- So after making this observation, what did you do next?

A- I turned and went westbound on Old Highway 20 following the vehicle and stopped it. I also called South Sioux Police Department to have their officers come out to the area because there was another vehicle that was getting ready to exit the — the business. It was a panel truck type deal.

Q- What business is that?

A- Kavanaugh's Mobile Homes.

At the trial, Deputy Walsh testified,

Q- Okay. Approximately what time was this?

A- About 1:22 in the morning.

Q- And you observed a vehicle leave Mr. Kavanaugh's business?

A- Yes, I did.

Q- Were you familiar with that vehicle?

A- No, I wasn't.

Q- Did these items cause any thoughts to come across your mind?

A- Well, I'm norm- — Sheriff's Office has had an increase in burglaries. Residential and business, vandalism. That is one of the areas of the County that we've had problems with the Truck Stop and the junk yard dealerships down the road and so as I was there, I made a left. I decided I better check it out and find out if there was a burglary going on or what.

He further testified,

A- I explained to him that I observed his vehicle leave the parking lot and that I was not aware of who it was.

Q- That was why you stopped him?

A- Yes, sir.

Q- Now, you say that there was no other reason for stopping him?

A- Other than my knowledge of past burglaries and vandalisms we've had in that area - - -

Q- Had Kavanaugh ever called in and had a burglary?

A- Not to my knowledge he hasn't.

Q- How many incidents of burglaries were there in that neighborhood?

A-We've had several of 'em within - - -

Q-How many?

A- - - - I would estimate 15 to 20 — 10 to 20.

Q- In what area?

A- We've had vandalisms at the truck stop right to the west and at Garvin's Salvage down the road has had several burglaries where items have been taken. Trio's has been broke into several times down the road. We've got

several burglaries out there.

Q- Those are places that are two miles to the west, aren't they?

A- That whole stretch is where we've had problems, yes. The old highway.

Q- But Trio and Garvin are two miles west?

A- No Garvin's is between Mr. Kavanaugh's business and where I stopped him, probably a quarter to a half mile down the road.

Q- Garvin's is a quarter to a half mile down the road from Kavanaugh's?

A- No, G & R Salvage (indiscernible) G & R Salvage. Garvin is down the road from Trio's.

Q-But Garvin is the one that reported the break in?

A- No, G & R Salvage.

Q- Oh, now it's — now it's G & R Salvage?

A- Yes, it is, sir.

Q- Are you sure who reported the breakins, officer?

A- Yes, I am. I do have copies of various complaints if you'd like to see them.

In 3 W. LaFave, Search and Seizure, a Treatise on the Fourth Amendment, § 9.3(c) at 440 (2d ed. 1987), the author comments,

> Especially during the hours of darkness, the police will have a sufficient basis to stop in order to investigate whether a burglary of a closed commercial establishment is pending or had occurred when the suspect is seen in such close proximity to that establishment that he appears to be something other than a mere passerby. Sometimes the time of day and nature of the area will be very significant in establishing the requisite proximity, and thus where a car pulled away from a tavern located in an industrial area at about 5 o'clock in the morning, it was proper to stop the vehicle, as the tavern had been closed for several hours and there would be no valid reason for persons to be stopping in this industrial area during this time.

In this case, the evidence as to the totality of the circumstances was such that the trial court could conclude that the investigatory stop of the defendant's vehicle by Deputy

Walsh was justified. It is difficult to imagine what legitimate reason a stranger would have entering the defendant's premises at 1:20 a.m. on a foggy night when visibility was poor.

As the New Jersey Supreme Court stated in *State v. Davis*, 104 N.J. 490, 504, 517 A.2d 859, 866-67 (1986),

> "[P]olice officers are trained in the prevention and detection of crime. Events which would go unnoticed by a layman ofttimes serve as an indication to the trained eye that something amiss might be taking place or is about to take place. The police would be derelict in their duties if they did not investigate such events."

See, also, *State v. Fillion*, 474 A.2d 187 (Me. 1984); *People v Bloyd*, 416 Mich. 538, 331 N.W.2d 447 (1982); *Leaper v. State*, 753 P.2d 914 (Okla. Crim. 1988); *State v. Fox*, 58 N.C. App. 692, 294 S.E.2d 410 (1982); *People v. Ellis*, 113 Ill. App. 3d 314, 446 N.E.2d 1282 (1983); *People v. Allen*, 50 Cal. App. 3d 896, 123 Cal. Rptr. 80 (1975).

The judgment is affirmed.

AFFIRMED.

WHITE, J., dissenting.

" '[A]n investigatory stop must be justified by objective manifestation that the person stopped is, has been, or is about to be engaged in criminal activity. . . .' " *State v. Nowicki*, 209 Neb. 640, 645, 309 N.W.2d 89, 92 (1981).

In this case, Kavanaugh was leaving his mobile home business at 1:20 a.m., driving a pickup with a camper. He stated that he often worked late at his place of business. The officer testified that he saw Kavanaugh pull out of the parking lot but did not recognize the truck through the fog. He then followed the defendant for approximately 2 minutes and, after observing no aberrant driving behavior, stopped the defendant.

The officer stated that his reason for the stop was that the vehicle was coming out of a business at 1:20 in the morning. No thefts or burglaries or any incidents of vandalism had been reported by Kavanaugh that day. The officer testified that there was "suspicious activity"; there had been some vandalism and other criminal activity within 1 or 2 miles of the defendant's business. There is no testimony as to the exact nature of the criminal activity nor as to how near in time the activity had

occurred.

These observations and suspicions do not establish an "objective manifestation" that criminal activity has been, or will be, engaged in. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. amend. IV. The U.S. Supreme Court has held that this protection applies not only to citizens in their homes, but also to citizens driving on the public roads. See *Delaware v. Prouse*, 440 U.S. 648, 99 S. Ct. 1391, 58 L. Ed. 2d 660 (1979). In this case, that constitutional safeguard has been abridged. Both the stop and the subsequent arrest were illegal.

Therefore, any evidence arising from the unlawful conduct of the officer, including his observations of the defendant's apparent intoxication, should have been suppressed.

SHANAHAN, J., joins in this dissent.

MIRACLE HILLS CENTRE LIMITED PARTNERSHIP, APPELLEE AND CROSS-APPELLANT, V. NEBRASKA NATIONAL BANK OF OMAHA, APPELLANT AND CROSS-APPELLEE.

434 N.W.2d 304

Filed January 20, 1989. No. 86-1035.

1. **Equity: Appeal and Error.** In an action in equity, the Supreme Court reviews the record de novo and reaches an independent conclusion under the pleadings and the evidence.
2. **Banks and Banking: Debtors and Creditors.** A bank may set off the funds of a depositor to pay a debt due the bank from the depositor, and, absent an agreement to the contrary or specific instructions from the debtor, the bank may apply the proceeds to such debts and in such order as the bank determines.
3. **Banks and Banking: Presumptions.** Absent evidence to the contrary, it will be presumed that a deposit to a customer's checking account is a general deposit, not a special deposit.

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

Virgil J. Haggart, Jr., of Daub Haggart & Rebensdorf, for appellant.

James F. Fenlon and William G. Stockdale, of Harris, Feldman Law Offices, for appellee.

William B. Brandt and Robert J. Hallstrom, of Brandt, Horan, Hallstrom and Sedlacek, for amicus curiae Nebraska Bankers Association, Inc.

BOSLAUGH, SHANAHAN, and GRANT, JJ., and ENDACOTT and QUIST, D. JJ.

QUIST, D.J.

Plaintiff-appellee, Miracle Hills Centre Limited Partnership (Miracle Hills), sought an accounting from defendant-appellant, Nebraska National Bank of Omaha (bank), claiming the bank wrongfully converted funds deposited to an account that Financial Structures, Inc. (FSI), maintained with the bank. FSI was the general contractor on a construction project for Miracle Hills. In its petition, Miracle Hills asked the court to impose an implied trust on the deposit for the benefit of Miracle Hills and the subcontractors and materialmen on the Miracle Hills project.

The bank generally denied the allegations of Miracle Hills, claiming that the bank had rightfully set off against FSI's account to pay past-due FSI indebtedness owing the bank, in the amount of $86,625.69.

Each party filed a motion for summary judgment against the other. The district court ruled that the bank was not entitled to setoff and sustained the motion for summary judgment against the bank in the amount of $86,625.69. The district court also dismissed the bank's motion for summary judgment. The bank appeals and Miracle Hills cross-appeals, alleging error by the trial court in not allowing prejudgment interest. We reverse and remand with directions to enter judgment in favor of the bank.

The several assignments of error advanced by the appellant may be summarized as follows: (1) The trial court erred in dismissing the bank's motion for summary judgment because the bank had a common-law right of setoff against the FSI account, and no express or implied trust attached to the deposit

to the FSI account; (2) the trial court erred in sustaining Miracle Hills' motion for summary judgment because (a) the evidence is insufficient to show the bank was placed on "inquiry notice" and (b) the evidence is insufficient to sustain a finding that an express or implied trust was imposed upon the deposit to the FSI account; and (3) the trial court erred in finding that Miracle Hills' damages were liquidated.

A brief review of the facts is necessary. FSI maintained two checking accounts at the bank, a regular account and a payroll account. Deposits were made to the regular account, and checks were drawn on this account for payment of subcontractors on various projects, as well as for general overhead expenses. At the time in question, FSI was the general contractor on at least nine different construction projects.

At the time of the transaction that is the subject of this dispute, FSI was indebted to the bank on a promissory note in the amount of $84,867.37, plus interest. The note was past due and in default.

One of the FSI projects was the Miracle Hills Shopping Center. Miracle Hills was the developer, with construction financing provided by Westmark Financial Corporation. On September 10, 1985, the bank received for deposit by FSI Westmark's check payable to FSI in the amount of $129,208. No special instructions or limitations accompanied the check. At that time FSI's regular account had a balance of $51.87, and checks in excess of that amount had been presented for payment.

Westmark's check was drawn on the Douglas County Bank in Omaha. On learning that there was an insufficient balance in Westmark's account to cover the check to FSI, checks presented for payment were returned. On September 11, Westmark wire-transferred $129,208 to the Financial Structures account, No. 4003276, at the bank. The bank then honored checks presented for payment on that account, and also set off against the account in the amount of $86,625.69 to pay the principal and interest on FSI's past-due note. Some 6 weeks later, Miracle Hills made demand for the amount set off. The bank refused, and Miracle Hills commenced this action.

This is an action in equity, and this court reviews the record

de novo, reaching an independent conclusion under the pleadings and the evidence. *Brown v. Borland, ante* p. 391, 432 N.W.2d 13 (1988). The trial court heard no testimony in this case, as all the evidence was submitted in the form of affidavits and depositions.

It is undisputed that FSI's indebtedness to the bank was past due at the time of the setoff. This court dealt with that issue in *First Nat. Bank v. Benedict Consol. Indus.*, 224 Neb. 860, 866, 402 N.W.2d 259, 263 (1987), when we stated:

> We have long held that a bank may set off the funds of a depositor to pay a debt due the bank from the depositor, see, *Stauffer Seeds, Inc. v. Nebraska Sec. Bank*, 222 Neb. 594, 386 N.W.2d 2 (1986), and *State, ex rel. Davis, v. Farmers & Merchants Bank*, 114 Neb. 378, 207 N.W. 666 (1926), and, absent an agreement to the contrary or specific instructions from the debtor, a creditor may apply the proceeds to such debts and in such order as the creditor determines.

A party claiming that a deposit made in the ordinary course of business was a special deposit bears the burden of proving the special nature of the deposit by clear and satisfactory evidence. Until such a showing has been made, deposits made in the ordinary course of business are general deposits. *Glass v. Nebraska State Bank*, 175 Neb. 673, 122 N.W.2d 882 (1963). Miracle Hills has failed to provide clear and satisfactory evidence that the deposit in question was not a general deposit.

Miracle Hills argues that under the circumstances a duty was imposed upon the bank to see to it that the proceeds of the Westmark deposit were applied only for the payment of subcontractors on the Miracle Hills Shopping Center project. Miracle Hills contends that the bank had actual knowledge of the ownership of the funds and, at a bare minimum, sufficient knowledge to put the bank on inquiry as to the ownership of the funds.

In support of this contention, Miracle Hills cites *Globe Savings Bank v. National Bank of Commerce*, 64 Neb. 413, 89 N.W. 1030 (1902), and, generally, Annot., 8 A.L.R.3d 235 (1966).

However, a careful review of the evidence in this case

established neither actual knowledge nor notice of facts sufficient to put the bank on inquiry as to any special ownership of the funds.

Westmark's wire transfer states, "Please forward [$129,208] and notify Nebr Natl Bank Omaha for Financial Structures #4003276." Clearly, the wire transfer calls for an unconditional payment to FSI's general checking account. Westmark placed no limitation on the deposit and gave no indication to the bank that the deposit was to be used solely for payments on the Miracle Hills project. Therefore, there was no express trust imposed on the deposit.

The bank was subject to the duties and liabilities of a payor bank under the Uniform Commercial Code. See Neb. U.C.C. §§ 4-302 and 4-104(1)(h) (Reissue 1980). The record indicates the bank had no independent knowledge of which project any given check was connected with. If a trust were implied from these facts, the lack of such information would make it virtually impossible for the bank to meet its duties under the U.C.C. without subjecting itself to significant liability. Therefore, we find no implied trust existed.

Miracle Hills further argues that even if the bank did not have actual knowledge or inquiry notice, equitable principles would hold that the bank cannot set off the deposit when it has not changed its position and has no superior equities. In applying general equitable principles, it must be kept in mind that Miracle Hills is largely responsible for its own predicament. It failed to take steps which could have been taken to assure desired distribution of the funds. The simple expedient of issuing joint checks payable to FSI and the subcontractors or providing limitations or conditions on the deposit or account could have avoided the situation in which Miracle Hills now finds itself.

In view of the foregoing, it is not necessary to address the cross-appeal of Miracle Hills concerning the demand of the prejudgment interest.

REVERSED AND REMANDED WITH DIRECTIONS.

CARL W. OLSON, APPELLANT, V. COUNTY OF LANCASTER, NEBRASKA, APPELLEE.

434 N.W.2d 307

Filed January 20, 1989. No. 87-135.

1. **Demurrer: Pleadings: Appeal and Error.** In reviewing an order sustaining a general demurrer, the Supreme Court is required to accept as true all the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but we do not accept as true the conclusions of the pleader.
2. **Counties: Claims: Notice.** The purpose of the filing requirement of Neb. Rev. Stat. § 23-135 (Reissue 1987) is to provide the county with full information of the rights asserted against it and enable it to make proper investigation concerning the merits of claims against it, and to settle those of merit without the expense of litigation.

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

Richard L. Spangler, Jr., of Woods, Aitken, Smith, Greer, Overcash & Spangler, for appellant.

Patrick M. Heng, Deputy Lancaster County Attorney, for appellee.

BOSLAUGH, WHITE, CAPORALE, and SHANAHAN, JJ., and JAMES MURPHY, D.J.

WHITE, J.

This action originated as a petition by Carl W. Olson for a declaratory judgment to construe the terms of a written lease agreement Olson entered into with the County of Lancaster, and to declare the rights of the parties affected by the lease. The district judge for Lancaster County sustained the defendant's demurrer, finding that the action was a claim against the county and therefore subject to Neb. Rev. Stat. § 23-135 (Reissue 1987), and that it was never filed with the county clerk as required by the statute.

In reviewing an order sustaining a general demurrer, "we are required to accept as true all the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but we do not accept as

true the conclusions of the pleader." *Reimer v. K N Energy, Inc.*, 223 Neb. 142, 146, 388 N.W.2d 479, 482-83 (1986).

The primary issue in the appeal is whether Olson's claim for rent due under an existing rental contract with the county is a claim covered by the provisions of § 23-135, the county claims statute. The background of this case is as follows. In August of 1984, Olson and Lancaster County began negotiations to lease the second floor of a building owned by Olson located at 721 K Street, Lincoln, Nebraska. The county, in turn, was to sublease this area to Cornhusker Place for its detoxification and protective services programs. Cornhusker Place was required to vacate its previous location by March 31, 1985.

Olson proposed to lease the premises to the county for a base rent of $2.35 per square foot per year, plus additional rent based upon the cost of renovation amortized over the 15-year term of the lease, less sums paid by the county "up front."

Regarding the additional rent, paragraph 6 of the lease agreement provides in part:

> 6. Payment of Renovation Chargeable to Tenant. As to the renovation chargeable to Tenant . . . Tenant anticipates paying for the same up to a maximum of $100,000.00 plus approximately $33,000.00 in the form of volunteer labor. The balance thereof to be paid by Landlord, up to a maximum of $175,000.00, shall be recovered by the Landlord in the form of additional rent calculated as though the Landlord were recoverying [sic] such amount on an amortized basis . . . .

During the negotiations, no final plans or specifications had been prepared so that the cost of renovation could be determined. However, the general contractor, Olson Construction Company, prepared a preliminary estimate indicating a cost of approximately $275,000, excluding architect fees.

The lease was signed on December 27, 1984. The renovation was substantially complete on March 31, 1985, at which time the county took possession of the premises. During the course of construction, extra costs totaling $51,268 were incurred, in addition to the determination made in the preliminary estimate.

The county contributed only $13,600 in labor, as opposed to

the $33,000 anticipated, resulting in a shortfall of contributed labor and an additional cost of renovation of $19,400. Olson claims he is entitled to be reimbursed these renovation costs pursuant to the lease contract.

By letters dated May 15 and June 3, 1985, Olson wrote to the county requesting the money he alleged was due him pursuant to the lease terms. These letters were not directed to the Lancaster County clerk. The county contends that this failure to file with the clerk constituted a violation of § 23-135. Instead of filing with the clerk, Olson served the letters directly and personally on the county board. He contends he served the claim letters on the board instead of the clerk because of a requirement in the lease agreement.

We are not concerned with the validity of Olson's claims for money allegedly due him pursuant to the lease agreement. Instead, we must decide whether the demurrer was properly granted based on Olson's noncompliance with § 23-135, or whether his claim is somehow exempt from the requirements of the statute.

Section 23-135 provides, in pertinent part, "All claims against a county must be filed with the county clerk within ninety days from and after a time when any materials or labor, which form the basis of the claims, shall have been furnished or performed . . . ." The statute expressly refers only to filing a claim with the county clerk within 90 days from and after a time when any *materials or labor, which form the basis of the claims*, shall have been furnished or performed. This language would seem to suggest that any claims for rent due, as opposed to materials or labor furnished to the county, are not encompassed by the statute. Although in this action the formula for determining the amount of additional rent is based upon the amount of labor and materials furnished by the Olson Construction Company, the claim itself is still a request for rent due under a lease agreement. The fact that the formula is based on labor or materials does not change the characterization of the claim.

Currently, no Nebraska case under § 23-135 directly involves a situation where a claim arises under contract for something other than labor or materials. A review of opinions holding

compliance with the filing requirements of § 23-135 to be a necessary prerequisite to filing a claim against the county demonstrates that all cases involve claims for labor or materials in some form. *Jackson v. County of Douglas*, 223 Neb. 65, 388 N.W.2d 64 (1986), involved employees of the county who brought an action against the county for additional wages allegedly due them for overtime work; *Zeller Sand & Gravel v. Butler Co.*, 222 Neb. 847, 388 N.W.2d 62 (1986), concerned a breach of a requirements contract that had been entered into by the county for the purchase of gravel for its roads; *Strawn v. County of Sarpy,* 154 Neb. 844, 49 N.W.2d 677 (1951), involved a claim for a fee for legal services performed by the claimant under a written contract entered into with the county; and, finally, *Coverdale & Colpitts v. Dakota County*, 144 Neb. 166, 12 N.W.2d 764 (1944), involved a claim for payment for a traffic survey and report on a prospective bridge construction project. All of these cases are easily distinguishable from an action for rent due under an existing contract. Claims such as the one at bar do not involve "materials or labor" as used in § 23-135.

However, we do not need to definitively decide today whether a claim for rent allegedly due from the county is covered by the requirements of § 23-135. In this action, the county, in its contract with Olson, set forth the procedure to be followed when a claim was made against the county for the additional rent due under the lease agreement. Paragraph 35 of the lease agreement provides in part:

> 35. Notices. All notices or demands upon the Landlord or Tenant desired or required to be given under any of the provisions hereof shall be in writing. Any notice or demands from the Landlord to the Tenant shall be deemed to have been duly and sufficiently given if a copy thereof has been mailed by United States certified mail in an envelope properly stamped and addressed to the Tenant as follows:
>
> County Board
> Lancaster County, Nebraska
> County-City Building
> Lincoln, Nebraska 68508 . . . .

Olson's written claims were addressed as indicated in the lease agreement and delivered personally to the board by Olson. Because Olson in good faith relied upon the terms of the lease agreement, the county cannot now invoke § 23-135 in an attempt to avoid its contractual obligations.

The purpose of the county claims statute, § 23-135, is to ensure that the board has proper notice of claims against the county. As stated in *Zeller, supra* at 848, 388 N.W.2d at 63, the filing requirement "provides the county with full information of the rights asserted against it, and enables it to make proper investigation concerning the merits of claims against it and to settle those of merit without the expense of litigation." Olson's filing of the claim directly with the county board as opposed to the county clerk, as provided for in the contract, satisfied the notice requirement of § 23-135.

Therefore, the demurrer was improperly sustained, and we remand this cause to the district court for further proceedings consistent with this opinion.

REMANDED FOR FURTHER PROCEEDINGS.

RALPH BOCK AND LUCILE D. BOCK, APPELLANTS, V. BANK OF BELLEVUE, APPELLEE.

434 N.W.2d 310

Filed January 20, 1989. Nos. 87-139, 87-146.

1. **Appeal and Error.** Errors assigned but not argued will not be considered.
2. **Equity: Appeal and Error.** On appeal to this court, an equity action is reviewed de novo on the record, subject to the rule that where the credible evidence is in conflict, the Supreme Court may consider the fact that the trial court observed the witnesses and accepted one version of the facts over another.
3. **Pleadings: Appeal and Error.** Where an issue is not raised by the pleadings, it will not be addressed for the first time on appeal.
4. **Contracts: Consideration.** There is sufficient consideration for a promise if there is any benefit to the promisor or any detriment to the promisee. The benefit rendered need not be to the party contracting, but may be to anyone else at the contracting party's procurement or request.

5. **Duress: Words and Phrases.** To constitute duress, there must be an application of such pressure or constraint that compels a person to go against that person's will and takes away that person's free agency, destroying the power of refusing to comply with the unjust demands of another.
6. **Contracts: Duress.** To be voidable because of duress, an agreement must not only be obtained by means of the pressure brought to bear, but the agreement itself must be unjust, unconscionable, or illegal. The essence of duress is the surrender to unlawful or unconscionable demands. It cannot be predicated upon demands which are lawful, or the threat to do that which the demanding party has a legal right to do.
7. **Fraud: Proof.** To establish misrepresentation, the party alleging it must plead and prove that a representation was made; that the representation was false; that the representation was known to be false when made, or was made recklessly without knowledge of its truth and as a positive assertion; that it was made with the intention that the plaintiff should rely on it; that the plaintiff reasonably did so rely; and that the plaintiff suffered damage as a result.
8. **Fraud: Equity: Proof: Evidence.** In an equity case, a fraudulent misrepresentation must be proved by clear and convincing evidence.
9. **Contracts.** One who signs an instrument without reading it, when he can read and has the opportunity to do so, cannot avoid the effect of his signature merely because he was not informed of the contents of the instrument.
10. **Contracts: Principal and Surety: Debtors and Creditors.** Where the surety makes no inquiry on the subject, the duty of disclosure as to facts increasing the risks of the undertaking depends upon the circumstances of the case. Generally, the creditor may assume that the surety has obtained information from other sources or has chosen to assume whatever risks may be involved. A duty of disclosure may arise when the creditor knows or has good grounds for believing (1) the surety is being deceived or misled or (2) the surety has been induced to enter the contract in ignorance of facts materially increasing his risks, of which the creditor has knowledge and the opportunity to disclose prior to the surety's acceptance of the undertaking.

Appeal from the District Courts for Gage and Jefferson Counties: WILLIAM B. RIST, Judge. Affirmed.

Kenneth Cobb, of Law Offices of Cobb & Hallinan, P.C., for appellants.

Gerald P. Laughlin and Jill Robb Ackerman, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, and Emmett D. Childers for appellee.

HASTINGS, C.J., GRANT, and FAHRNBRUCH, JJ., and HENDRIX and OLBERDING, D. JJ.

FAHRNBRUCH, J.

Ralph and Lucile D. Bock appeal a district judge's refusal to rescind, vacate, and set aside their personal guaranty and two deeds of trust given to the Bank of Bellevue at the request of their son to secure a $250,000 loan. The judge also refused to enjoin the sale, pursuant to the deeds of trust, of two Bock farm properties.

The trial judge's rulings were entered in separate equitable actions in Gage and Jefferson Counties, where the Bocks own farmland. The cases were consolidated for trial and for purposes of appeal. We affirm the trial judge in both cases.

Bocks' assignments of error number 16. Not all of the assigned errors were briefed or argued. Those errors assigned but not argued will not be considered. *Wells Fargo Ag Credit Corp. v. Batterman*, 229 Neb. 15, 424 N.W.2d 870 (1988); *In re Estate of West*, 226 Neb. 813, 415 N.W.2d 769 (1987). Consolidated, those assignments of error properly before this court claim the trial court erred in finding: (1) that Neb. Rev. Stat. § 40-104 (Reissue 1988) does not require that a guaranty be acknowledged; (2) that the guaranty and deeds of trust were supported by sufficient consideration; (3) that the bank did not have a duty to disclose the son's financial situation to the Bocks and that the bank did not coerce the Bocks through fraud, duress, or misrepresentations; and (4) that the appellants had the burden of proving their case by clear and convincing evidence.

On appeal to this court, an equity action is reviewed de novo on the record, subject to the rule that where the credible evidence is in conflict, the Supreme Court may consider the fact that the trial court observed the witnesses and accepted one version of the facts over another. *Brown v. Borland, ante* p. 391, 432 N.W.2d 13 (1988). The fact that the trial court observed the witnesses and accepted one version of the facts over another is indeed important in these cases, if not crucial.

In the spring of 1983, the appellants' son LaVern Bock wanted to refinance his business indebtedness with a loan from the Bellevue bank. He also wanted computer equipment for his business, Photo Laboratory of Lincoln, Inc. (Photo Lab). LaVern was told by a Bellevue bank officer that he needed

additional collateral to secure the desired loan. In 1979, Ralph and Lucile Bock had mortgaged their farm so that LaVern could obtain a loan from First National Bank of Beatrice. At the time LaVern approached the Bellevue bank, the Beatrice bank loan was still unpaid. LaVern suggested to the Bellevue bank officer that his parents would provide the additional security it required to loan him money.

Unbeknown to his parents, LaVern submitted a financial statement to the Bellevue bank showing that Ralph and Lucile Bock owned 580 acres of farmland worth $940,000. A later appraisal of the Bock land for the bank by Wayne Kubert showed the Bocks owned about 480 acres of land worth $577,000. The guaranty and deeds of trust recite 320 acres.

LaVern testified that his father was aware an appraisal for the Bellevue bank was to be made and that he explained that the appraisal was being required by the bank. LaVern said he accompanied Kubert to the farm and introduced him to Ralph Bock. Kerby Cunningham, the elder Bocks' C.P.A., testified that he had been contacted by Ralph Bock regarding the lease-purchase of computer equipment by LaVern. The C.P.A. said Ralph was interested in the tax consequences of a lease-purchase of the computer equipment in his own name and its rental to Photo Lab. Cunningham recalled that Ralph had not yet agreed to help LaVern on the lease-purchase, but was favorable to the idea.

The loan was closed and the lease-purchase agreement finalized at the Bock farm home on November 22, 1983. The elder Bocks testified that LaVern called their home the morning of November 22 and told them he had papers for them to sign. Kyle Eichorn, an employee of Affiliated Midwest Bancs Leasing and the leasing officer in charge of LaVern's computer equipment lease, accompanied LaVern to the farm. Eichorn brought with him the papers for the loan from the Bellevue bank. Both Ralph and Lucile Bock claimed they knew nothing of the loan or the lease-purchase agreement until the morning the documents were executed.

The elder Bocks executed and delivered to the Bank of Bellevue a "Term Loan Agreement," a "Continuing Personal Guaranty," a "First Deed of Trust" to a quarter section of land

in Gage County, and a "First Deed of Trust" to a quarter section of land in Jefferson County, and in their own right executed a lease-purchase agreement for computer equipment.

The "Term Loan Agreement" provided that the Bellevue bank would loan $250,000 to Photo Lab, which was owned by LaVern Bock. Besides the elder Bocks, LaVern and his wife were to be guarantors. The "Continuing Personal Guaranty" guaranteed payment of the $250,000 loan upon default and provided it would be secured by the two deeds of trust to the elder Bocks' land. It was signed by the elder Bocks but was not notarized. Each of the elder Bocks signed each of the deeds of trust before a notary, who took their acknowledgments and notarized their signatures. Eichorn served as the notary.

Eichorn testified that each document was explained to Ralph and Lucile Bock and that they were given an opportunity to read the papers. Neither of them read any of the documents, although LaVern Bock testified that his parents "paged" through the papers. Eichorn said he told the Bocks they would have to make the payments or lose their farm if their son LaVern defaulted. Ralph Bock said he told Eichorn that he could not make the loan payments if LaVern did not. Lucile Bock testified that she was reluctant to sign the required documents. However, she wanted to do the right thing and help LaVern. Both parents testified they trusted LaVern.

Both Ralph and Lucile Bock testified Eichorn told them the loan was "safe" and would be paid off in the spring after he, Eichorn, sold condominiums owned by LaVern. Eichorn denied making any such statement. LaVern testified that it was he who told his parents the loan was safe and would be paid off shortly after the condominiums were sold. The Bocks claim they did not know that the condominiums were heavily mortgaged nor that their sale would not produce enough money to pay off the loan.

Both the elder Bocks testified they did not understand the potential of losing their farm. LaVern received the use of $84,000 in computer equipment and a $250,000 loan from the bank. He eventually defaulted on the loan. The Bank of Bellevue gave the elder Bocks notice of default and elected to sell the land described in the deeds of trust. Thereafter, the

Bocks filed their petitions in both the Gage and Jefferson County District Courts seeking relief from the documents they had signed.

The appellants argue, first, that the trial court erred in finding that the personal guaranty was valid and enforceable when it was not acknowledged. The elder Bocks now claim § 40-104 requires a guaranty be acknowledged. The trial court found the guaranty valid and enforceable, but in its rulings, the court made no mention of § 40-104. There is nothing in appellants' amended petitions challenging the validity of the personal guaranty for lack of any acknowledgment. Where an issue is not raised by the pleadings, it will not be addressed for the first time on appeal. See, *First Nat. Bank v. Rickel, Inc.*, 229 Neb. 478, 427 N.W.2d 777 (1988); *Aldridge v. School Dist. of North Platte*, 225 Neb. 580, 407 N.W.2d 495 (1987). Therefore, we decline to consider this issue. *Meyer v. Meyer*, 180 Neb. 379, 142 N.W.2d 922 (1966).

We next consider appellants' second assigned error that the court erred in finding that the guaranty and trust deeds were supported by sufficient consideration. In its opening paragraph, the guaranty states, "In consideration of the Bank of Bellevue at my request, giving or extenting [sic] terms of credit to PHOTO LABORATORY OF LINCOLN, INC., herein after called "Borrower", I(we) hereby give this Continuing Personal Guaranty to the said Bank of Bellevue . . . ." The appellants now claim that it was their intention to assist a failing business owned by their son LaVern and that the majority of the loan proceeds was not put to this use. The trial court found that Ralph and Lucile Bock intended to obtain credit for LaVern, not just one of his corporations. The court also found the record was not clear which of LaVern's businesses incurred the expenses paid with some of the loan proceeds.

There is sufficient consideration for a promise if there is any benefit to the promisor or any detriment to the promisee. *Kearney Centre Inv. v. Thomas*, 229 Neb. 21, 424 N.W.2d 620 (1988). The record is clear that $140, 752.52 was paid for the benefit of Ralph and Lucile Bock or Photo Lab. Nearly half of that amount was used to pay off the mortgage on Ralph and

Lucile Bock's farm at the First National Bank of Beatrice. The remainder of that sum went directly to Photo Lab or paid for loan fees. LaVern testified an additional $65,000 of the loan money was paid on his condominiums and his home mortgage. The record is not clear as to whether Photo Lab or LaVern personally benefited from the rest of the loan proceeds.

However, there is no question the Bellevue bank, to its detriment, paid out all of the $250,000 it was obligated to loan and that all of the money was used for the benefit of either LaVern, his parents, or Photo Lab. That, alone, is sufficient consideration to satisfy the above-quoted rule from *Kearney Centre Inv.* Further, this court has stated that for there to be consideration for an agreement, "[t]he benefit rendered need not be to the party contracting but may be to anyone else at his [contracting party's] procurement or request." *Erftmier v. Eickhoff*, 210 Neb. 726, 733, 316 N.W.2d 754, 758 (1982). The testimony of both Ralph and Lucile Bock makes it clear that the parents intended to help their son. The now-claimed intent to benefit only Photo Lab lacks credibility. Moreover, it was Photo Lab, through LaVern Bock, its president and principal stockholder, that directed the Bank of Bellevue to name certain payees on the checks. On the cashier's checks, Photo Lab is shown as the remitter.

We find there was sufficient consideration for the personal guaranty and deeds of trust.

Appellants next argue that the trial court erred in failing to find the personal guaranty and deeds of trust were signed by Ralph and Lucile Bock as a result of duress and fraudulent misrepresentations by the Bellevue bank. They also assert that the bank had a duty to disclose details of LaVern's financial situation and to explain the nature of a deed of trust.

To constitute duress, there must be an application of such pressure or constraint that compels a person to go against that person's will and takes away that person's free agency, destroying the power of refusing to comply with the unjust demands of another. See *Haumont v. Security State Bank*, 220 Neb. 809, 374 N.W.2d 2 (1985). In *Haumont*, the trial court found that the father and mother of an adult son were induced to execute a guaranty agreement, note, and mortgage by threats

and fear of criminal punishment of their son. Here, there is no suggestion of a threat of criminal prosecution of LaVern Bock. Moreover, to be voidable because of duress, an agreement must not only be obtained by means of the pressure brought to bear, but the agreement itself must be unjust, unconscionable, or illegal. The essence of duress is the surrender to unlawful or unconscionable demands. It cannot be predicated upon demands which are lawful, or the threat to do that which the demanding party has a legal right to do. *Lustgarten v. Jones*, 220 Neb. 585, 371 N.W.2d 668 (1985).

Appellants apparently contend that alleged misrepresentations by the Bellevue bank, coupled with Ralph and Lucile Bocks' ages, education, and claimed lack of experience, constitute duress sufficient to void their personal guaranty and deeds of trust. The evidence is insufficient to show pressure or constraint placed upon the Bocks by the bank. Nor is the evidence sufficient to show that the guaranty and deeds of trust are unjust, unconscionable, or illegal. The elder Bocks were not novices at pledging their farm for their son's benefit. They had done it at least once before at the bank in Beatrice. Ralph Bock had sufficient business sense to contact his C.P.A. regarding tax consequences of the lease-purchase agreement and to place it in his own name for tax purposes. He had knowledge about the lease-purchase before he was contacted by Eichorn. Clearly, the Bocks were not victims of duress.

The appellants' claim of fraudulent misrepresentation is also without merit. To establish misrepresentation, the party alleging it must plead and prove that a representation was made; that the representation was false; that the representation was known to be false when made, or was made recklessly without knowledge of its truth and as a positive assertion; that it was made with the intention that the plaintiff should rely on it; that the plaintiff reasonably did so rely; and that the plaintiff suffered damage as a result. *Pawnee County Bank v. Droge*, 226 Neb. 314, 411 N.W.2d 324 (1987). See, also, *Edwin Bender & Sons v. Ericson Livestock Comm. Co.*, 228 Neb. 157, 421 N.W.2d 766 (1988). As will be discussed below, in an equity case a fraudulent misrepresentation must be proved by clear and

convincing evidence.

In their petitions to the district courts, the elder Bocks allege the following misrepresentations by the bank: (1) LaVern's or Photo Lab's ability to repay the loan; (2) the financial well-being of Photo Lab and of LaVern Bock; (3) the nature of the documents; (4) the use of the loan proceeds; and (5) characterization of the deeds of trust as liens on the Bocks' property.

In their brief and argument to this court, appellants also claim that Eichorn's alleged statement regarding the sale of LaVern's condominiums was a misrepresentation. As stated earlier, Eichorn denied saying anything to Ralph and Lucile Bock about selling the condominiums. It is LaVern who admitted telling his parents that proceeds from the sale of the condominiums would be applied to the loan. It is obvious that the trial court accepted Eichorn's version of the conversation concerning the sale of the condominiums. We give weight to the trial court's acceptance of Eichorn's version, that court having observed the witnesses.

The record is completely devoid of any statements by Bellevue bank representatives to Ralph and Lucile Bock regarding any person's or entity's ability to repay the loan, the financial well-being of Photo Lab or LaVern, or the nature of the documents. We agree with the findings of the trial court that the elder Bocks were well aware of the purpose of the loan transactions and that they desired to help their son. The parents had previously mortgaged their land and understood that the land was again being pledged to secure a loan to assist LaVern. They were told that the land would be subject to claim by the Bellevue bank if the loan was not repaid. Finally, Ralph and Lucile Bock were given, and refused, the opportunity to read the documents. One who signs an instrument without reading it, when he can read and has the opportunity to do so, cannot avoid the effect of his signature merely because he was not informed of the contents of the instrument. *Meek v. Gratzfeld*, 223 Neb. 306, 389 N.W.2d 300 (1986).

We find that the appellants have failed to prove, by clear and convincing evidence, that fraudulent representations were made by the defendant bank. We also find that the Bank of

Bellevue had no duty to disclose LaVern Bock's financial situation to his parents.

Where the surety makes no inquiry on the subject, the duty of disclosure as to facts increasing the risks of the undertaking depends upon the circumstances of the case. Generally, the creditor may assume that the surety has obtained information from other sources or has chosen to assume whatever risks may be involved. A duty of disclosure may arise when the creditor knows or has good grounds for believing (1) the surety is being deceived or misled or (2) the surety has been induced to enter the contract in ignorance of facts materially increasing his risks, of which the creditor has knowledge and the opportunity to disclose prior to the surety's acceptance of the undertaking. *Meek v. Gratzfeld, supra.* See, also, *Pawnee County Bank v. Droge, supra.*

There is no credible evidence that either Ralph or Lucile Bock asked for information regarding their son's financial condition. Appellants contend that the Bellevue bank had grounds for believing that the Bocks were being deceived or misled, giving rise to a duty to disclose without being asked. Specifically, the Bocks point to the Bellevue bank's knowledge (1) of the mortgage on LaVern's condominiums, (2) that Photo Lab had no profitable years behind it, (3) that Photo Lab did not have sufficient cash-flow to service the debt, and (4) of the discrepancy between the appraisal of the farmland and the Bocks' financial statement as filled out by LaVern.

The evidence shows that Photo Lab had made a small profit in 1981 and 1982 and was expected to show a profit of $70,000 to $80,000 in 1983. In addition to any profits, Photo Lab's cash-flow was increased by $50,593 in 1980, $60,590 in 1981, $73,582 in 1982, and $80,432 in 1983, due to depreciation. Robert Hawley, who recommended approval of the loan, testified that he believed Photo Lab would be able to make the loan payments. Hawley considered both the elder Bocks' financial statement and the Kubert appraisal, as well as LaVern Bock's other debts, in determining that the loan was bankable. By hindsight, it is easy to say that Hawley made a mistake when he recommended that the loan be approved. However, making what may be a poor business decision does not render data

relied upon so suspect as to require a bank to disclose data without being asked to do so. Further, the bank was entitled to rely upon Ralph and Lucile Bocks' prior experience with a mortgage and loan and their knowledge that their son needed financial assistance. The elder Bocks claimed naivete is not credible.

The circumstances surrounding the loan, guaranty, and deeds of trust do not take this situation out of the general rule that the creditor may assume that the surety has obtained information from other sources or has agreed to assume whatever risks may be involved. We find that the appellants' third assigned error has no merit.

Finally, appellants assign as error that the trial court required them to prove their fraudulent misrepresentation allegations by clear and convincing evidence. They contend that the proper standard should be preponderance of the evidence. Appellants recognize the longstanding rule that courts of law require proof of fraud by a preponderance of the evidence, while courts of equity require clear and convincing evidence. See *Tobin v. Flynn & Larsen Implement Co.*, 220 Neb. 259, 369 N.W.2d 96 (1985). However, they argue that there is no rational basis for placing a higher burden of proof on one who seeks equity rather than money damages at law.

In *Tobin v. Flynn & Larsen Implement Co., supra*, this court adhered to the burden of proof distinction in law and equity actions for fraud. We clearly stated that the burden of proof in fraud actions at law is by a preponderance of the evidence, while in equity it is by clear and convincing evidence. We see no reason to depart from those rules.

Taking into consideration that the trial judge had an opportunity to observe the witnesses, upon de novo review of the record, we find that none of appellants' assigned errors has merit. The orders of the district court are correct and should be affirmed.

AFFIRMED.

FLOR LIANA RUBIN, APPELLANT, V. ALLAN MAIER RUBIN, APPELLEE.
434 N.W.2d 329

Filed January 20, 1989. No. 87-295.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Affirmed.

Robert William Chapin, Jr., of Mowbray, Chapin & Walker, P.C., for appellant.

Steven J. Lustgarten, of Lustgarten & Roberts, P.C., for appellee.

HASTINGS, C.J., GRANT, and FAHRNBRUCH, JJ., and HENDRIX and OLBERDING, D. JJ.

PER CURIAM.

Petitioner wife has appealed from the judgment of the district court for Douglas County. The decree of dissolution ordered a dissolution of the marriage of the parties, granted custody of the parties' three daughters to petitioner, gave specified visitation rights to respondent husband, divided the marital assets of the parties, and ordered the husband to pay a total of $1,200 per month as child support plus $1,750 per month as alimony for a period of 10 years. The alimony was terminable on the death or remarriage of the wife.

The wife in her appeal assigns as error the actions of the trial court in awarding insufficient child support and alimony; in making certain evidentiary rulings; and in failing to award to the wife, as a part of the division of property, "a monetary award based on appellee's education and license to practice medicine acquired during the marriage which constitutes marital property . . . ."

Determinations as to the amount of child support and alimony and as to the division of property in a dissolution action are matters initially entrusted to the discretion of the trial court, as are determinations as to the admission or exclusion of evidence. This court reviews dissolution cases de novo on the record, and may give weight to the fact that the trial court heard the witnesses and accepted one version of the facts rather than

another. *Ritz v. Ritz*, 229 Neb. 859, 429 N.W.2d 707 (1988).

The trial court's determination in these matters will ordinarily be affirmed in the absence of an abuse of discretion by the trial court. *Dabbs v. Dabbs, ante* p. 368, 431 N.W.2d 640 (1988); *Ritz v. Ritz, supra.*

After our de novo review of the record, we cannot say that the trial court abused its discretion in the determinations as to the division of property and the amount of child support and alimony, and the court's order in those regards is affirmed.

With regard to the contention that the trial court erred in failing to value the husband's education and medical license and award a portion of the monetary value of those items to the wife, we hold that the trial court did not abuse its discretion in failing to make the requested determinations. We are fully aware that the great majority of the states that have considered the matter have concluded that a professional license is not to be considered as marital property capable of being divided between two separating spouses. See, Annot., 4 A.L.R.4th 1294 (1981 & Supp. 1988).

The question need not be decided in this case, however, because the evidence presented did not provide any basis for such a determination. The wife's expert witness did not know the specialized medical qualifications of the husband and attempted to draw a parallel between business executives and physicians. The evidence did not establish any basis for the determination of the value of the husband's medical license. The court did consider the earnings of the husband in making the monetary awards. In so doing, the court did not err.

The judgment of the trial court is affirmed.

AFFIRMED.

ROBERT A. MULLENDORE, APPELLEE AND CROSS-APPELLANT, V. RICHARD NUERNBERGER, COUNTY TREASURER OF LANCASTER COUNTY, NEBRASKA, ET AL., APPELLANTS AND CROSS-APPELLEES.

434 N.W.2d 511

Filed January 20, 1989. No. 87-426.

1. **Declaratory Judgments.** The remedy of declaratory judgment may be available to a litigant when a controversy exists as a result of a claim asserted against one who has an interest in contesting such claim, the controversy is between persons whose interests are adverse, the party seeking declaratory relief has a legally protectable interest or right in the subject matter of the controversy, and the issue involved is capable of present judicial determination.
2. **Courts: Jurisdiction.** While not a constitutional prerequisite for jurisdiction of courts of the State of Nebraska, existence of an actual case or controversy, nevertheless, is necessary for the exercise of judicial power in Nebraska.
3. **Declaratory Judgments.** The Uniform Declaratory Judgments Act, Neb. Rev. Stat. §§ 25-21,149 et seq. (Reissue 1985), is available when a present actual controversy exists and all interested persons are parties to the proceedings, and then only when a justiciable issue exists for resolution.
4. _____. For purposes of determining whether a litigant is entitled to declaratory relief, existence of a controversy depends not only on the circumstances existing at the commencement of the action for a declaratory judgment but also the circumstances existing when the judgment is granted.
5. **Declaratory Judgments: Moot Question.** As any other lawsuit, a declaratory judgment action becomes moot when the issues initially presented in the proceedings no longer exist or the parties lack a legally cognizable interest in the outcome of the action.
6. **Declaratory Judgments: Proof.** To obtain declaratory relief, a plaintiff has the burden to prove the existence of a justiciable controversy and an interest in the subject matter of the action.
7. **Declaratory Judgments: Proof: Statutes: Standing.** A plaintiff in a declaratory judgment action challenging the validity of a statute must prove that the plaintiff is a person whose rights, status, or other legal relations are affected by the challenged statute.

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

James B. Gessford, of Perry, Perry, Witthoff, Guthery, Haase & Gessford, P.C., and Douglas D. Cyr, Deputy Lancaster County Attorney, for appellants.

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

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

SHANAHAN, J.

In his declaratory judgment action filed during 1983 in the district court for Lancaster County, Robert A. Mullendore sought a declaration that Neb. Rev. Stat. § 79-4,102 (Cum. Supp. 1982), also identified as 1982 Neb. Laws, L.B. 933, was unconstitutional. The statute in question contained a formula and factors for determination of nonresident high school tuition rates and a corresponding tax levy.

In his amended petition, Mullendore alleged that the statutory scheme in L.B. 933 was a violation of certain provisions of the Nebraska Constitution, namely, an invalid delegation of legislative authority to the receiving school districts and the Nebraska Department of Education in violation of article II, § 1 (separation of powers), and article III, § 1 (legislative authority vested in Legislature); an improper tax measure in contravention of article VIII, § 1 (revenue by taxation), and § 4 (prohibition against remission of taxes); and noncompliance with article III, § 14 (one subject in a legislative bill), relative to enactment of L.B. 933.

In July of 1984, more than 1 year after Mullendore had filed his petition, the Legislature repealed the 1982 version of § 79-4,102 (L.B. 933) and replaced the repealed legislation with what was subsequently codified as § 79-4,102 (Cum. Supp. 1984). After repeal of L.B. 933, the defendant school districts filed a motion for summary judgment, alleging that repeal of L.B. 933 rendered Mullendore's questions moot. After the district court granted summary judgment to the school districts, Mullendore appealed. In the initial appeal of this case, *Mullendore v. School Dist. No. 1*, 223 Neb. 28, 388 N.W.2d 93 (1986) (*Mullendore I*), we determined that the district court had incorrectly sustained the motion for summary judgment and held that Mullendore's action was not moot at that time, when we noted:

> Although Mullendore has alleged that the school districts had certified tuition rates pursuant to L.B. 933, the record does not conclusively establish that taxes authorized by

> L.B. 933 have been collected from Mullendore and other resident taxpayers of the school districts. Mullendore's amended petition, considered by the district court in connection with the motion for summary judgment, see Neb. Rev. Stat. § 25-1332 (Reissue 1985), provides a reasonable inference that taxes have been levied under L.B. 933 against the property of Mullendore and other resident taxpayers of the school districts. If taxes levied against the property of resident taxpayers have been paid, a declaration of unconstitutionality would resolve a real or actual controversy between the school districts and their resident taxpayers. *On the assumption that taxes have been collected*, an action for declaratory judgment is not moot, since a declaration of unconstitutionality may entitle an individual taxpayer to a refund of taxes paid. . . .
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> . . . .
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> The record before us raises a question of fact regarding the viability of an action for declaratory judgment, which question underlies the substantive constitutional claims asserted by Mullendore. The school districts' introduction of a copy of [§ 79-4,102], repealing its predecessor, L.B. 933, did not satisfy the burden of showing that no viable cause of action survived repeal of L.B. 933. The district court erred in summarily dismissing Mullendore's action for declaratory judgment.

(Emphasis supplied.) *Mullendore I*, 223 Neb. at 37-38, 388 N.W.2d at 100-01. Therefore, we reversed the district court's decision as erroneous in the determination that Mullendore's claim was moot and remanded the cause for further proceedings.

A brief summary of L.B. 933 is found in our opinion rendered in *Mullendore I*, 223 Neb. at 30, 388 N.W.2d at 96:

> L.B. 933, which became effective on July 1, 1982, was enacted as part of a statutory scheme for computing and allocating nonresident high school tuition rates. Under such scheme the parent or guardian of any high school age pupil residing in a school district which does not maintain a high school grade [a "Class I" or "sending school district"] may apply for nonresident high school tuition

> privileges to districts maintaining such grade [a "receiving school district"]. [Citations omitted.] By L.B. 933, a school district which decided to receive nonresident high school pupils computed a nonresident tuition rate and certified that rate to the superintendent of the county where the pupils resided. L.B. 933 allowed a receiving school district to set the high school tuition rate on a "uniform taxation basis." The rate to be certified by a receiving school district was "any amount decided by the receiving board but not less than the per pupil cost [nor more than] one hundred twenty-five per cent of the computed rate." Eventually the board of equalization for the resident county levied a tax on "the actual value of all the taxable property" in the county, which taxes are collectible by the county treasurer and distributable to the receiving school districts.

On remand, the parties stipulated that the case be tried solely on evidence contained in certain exhibits received at trial on December 12, 1986. These exhibits included various versions of L.B. 933, as it evolved during the 1982 legislative session, and the appropriate parts of the legislative history for the bill. The evidence also included a list of property owners in Lancaster County, indicating individuals who owned property in Class I (or "sending") school districts within the county. Mullendore was listed as a property owner in a Class I school district.

The district court interpreted our opinion in *Mullendore I* to the effect that constitutionality of L.B. 933 was "a valid issue even though repealed by the passage of [§ 79-4,102] in 1984." The court then found that L.B. 933 contained an unconstitutional delegation of legislative authority in violation of article II, § 1, and article III, § 1, of the Nebraska Constitution and that the bill contained more than one subject contrary to article III, § 14, of the Nebraska Constitution. As a result of those findings, the district court declared L.B. 933 (§ 79-4,102 (Cum. Supp. 1982)) unconstitutional.

The school districts contend that the district court erred in (1) failing to determine that the matter was moot; (2) determining that Mullendore was entitled to declaratory relief; (3) finding that Mullendore had presented a prima facie case entitling him

to declaratory relief; and (4) determining that Mullendore had standing to assert his claims. The school districts also contend that the district court's determination of the substantive constitutional issues is erroneous. Mullendore cross-appeals, claiming that the district court should have added one more ground for declaring L.B. 933 unconstitutional, namely, passage of the bill violated article III, § 14, of the Nebraska Constitution insofar as the bill was passed within 5 days of its introduction.

Mullendore brought his action under Nebraska's Uniform Declaratory Judgments Act, Neb. Rev. Stat. §§ 25-21,149 et seq. (Reissue 1985), which includes: "Any person . . . whose rights, status or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status or other legal relations thereunder." § 25-21,150.

Certain requirements must be satisfied as conditions precedent to obtaining declaratory relief.

> The remedy of declaratory judgment may be available to a litigant when a controversy exists as a result of a claim asserted against one who has an interest in contesting such claim, the controversy is between persons whose interests are adverse, the party seeking declaratory relief has a legally protectable interest or right in the subject matter of the controversy, and the issue involved is capable of present judicial determination.

Mullendore v. School Dist. No. 1, 223 Neb. 28, 33, 388 N.W.2d 93, 98 (1986). See, also, *Slosburg v. City of Omaha*, 183 Neb. 839, 165 N.W.2d 90 (1969); *Nebraska Seedsmen Assn. v. Department of Agriculture & Inspection*, 162 Neb. 781, 77 N.W.2d 464 (1956); *Schroder v. City of Lincoln*, 155 Neb. 599, 52 N.W.2d 808 (1952).

While not a constitutional prerequisite for jurisdiction of courts of the State of Nebraska (cf. U.S. Const. art. III, § 2), existence of an actual case or controversy, nevertheless, is necessary for the exercise of judicial power in Nebraska. See *In re Estate of West*, 226 Neb. 813, 830, 415 N.W.2d 769, 781 (1987) (" ' "The province of a court is to decide real controversies and to determine rights actually controverted . . . ." ' ").

The "case or controversy" prerequisite to maintain litigation applies with equal, if not stronger, force to an action for a declaratory judgment, since the right to maintain the action is expressly granted only to those "person[s] . . . whose rights, status or other legal relations are affected by a statute." § 25-21,150.

> In order to maintain an action for declaratory judgment under the provisions of [§ 25-21,149], there must be an actual controversy. It cannot be used to decide the legal effect of a state of facts which are future, contingent, or uncertain. There must, at the time that the declaration is sought, be an actual justiciable issue.

Allstate Ins. Co. v. Novak, 210 Neb. 184, 188, 313 N.W.2d 636, 638-39 (1981). The Uniform Declaratory Judgments Act is applicable when a present actual controversy exists and all interested persons are parties to the proceedings, and then only when a justiciable issue exists for resolution. *Graham v. Beauchamp*, 154 Neb. 889, 50 N.W.2d 104 (1951).

For purposes of determining whether a litigant is entitled to declaratory relief, existence of a controversy depends not only on the circumstances existing at the commencement of the action for a declaratory judgment but also the circumstances existing when the judgment is granted. See, *Golden v. Zwickler*, 394 U.S. 103, 89 S. Ct. 956, 22 L. Ed. 2d 113 (1969); *Caldwell v. Gurley Refining Co.*, 755 F.2d 645 (8th Cir. 1985). As any other lawsuit, a declaratory judgment action becomes moot when the issues initially presented in the proceedings no longer exist or the parties lack a legally cognizable interest in the outcome of the action. *Mullendore I, supra.* As the U.S. Supreme Court has noted, the doctrine of mootness is " 'the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).' " *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397, 100 S. Ct. 1202, 63 L. Ed. 2d 479 (1980) (quoting Monaghan, *Constitutional Adjudication: The Who and When*, 82 Yale L.J. 1363 (1973)).

Consequently, standing and mootness are key functions in determining whether a justiciable controversy exists, or

whether a litigant has a sufficient interest in a case to warrant declaratory relief. "In order to maintain an action to enforce private rights the plaintiff must show that he will be benefited by the relief to be granted." *Stahmer v. Marsh*, 202 Neb. 281, 284, 275 N.W.2d 64, 66 (1979). See, 22A Am. Jur. 2d *Declaratory Judgments* § 231 at 872 (1988): "Clearly, the plaintiff must show that conditions exist which justify the court's exercise of its discretionary power to grant declaratory relief. Thus the plaintiff has the burden of establishing the existence of an actual controversy . . . "; *Arens v. Village of Rogers*, 240 Minn. 386, 61 N.W.2d 508 (1953); *City of Miami Beach v. New Floridian Hotel, Inc.*, 324 So. 2d 715 (Fla. App. 1976); *Luby v. City of Corpus Christi*, 540 S.W.2d 805 (Tex. Civ. App. 1976). See, also, *Golden v. Zwickler, supra*, 394 U.S. at 110 (plaintiff who "did not establish the existence at the time of the hearing . . . the elements governing the issuance of a declaratory judgment" could not succeed). Thus, to obtain declaratory relief, a plaintiff has the burden to prove the existence of a justiciable controversy and an interest in the subject matter of the action.

Therefore, a plaintiff in a declaratory judgment action challenging the validity of a statute must prove that the plaintiff is a person "whose rights, status or other legal relations are affected" by the challenged statute. See § 25-21,150.

The statutory duties of the public officials mentioned in L.B. 933 existed only when a Class I school district found it necessary to send its high-school-age students to a larger district with a high school. In other words, the tax scheme of L.B. 933 was activated only when a sending district needed to send, and a receiving district decided to receive, high school students. It is entirely possible that, in any given year, a Class I school district may not need to send any students to another school district. It is equally plausible that a prospective receiving school district may reject applications concerning nonresident students seeking to enroll in the receiving district's high school. The statutory duties of certifying a nonresident tuition rate, see § 79-4,102(2) (Cum. Supp. 1982), and the consequent tax levy pursuant to L.B. 933 are, therefore, conditioned on sending and receiving high school students of different school districts.

Mullendore failed to show that any resident students of his school district were sent to another district while L.B. 933 existed and was operative. Without this proof, it is impossible to tell whether the amount of nonresident tuition was certified for taxation and whether any taxes were ever levied on Mullendore's property pursuant to L.B. 933. Therefore, whatever interest Mullendore may have had to support his contesting the validity of L.B. 933 at the time he filed his lawsuit, which was commenced while L.B. 933 was still in effect, repeal of the statute (L.B. 933) removed the possibility that any future tax would be levied against Mullendore's property pursuant to L.B. 933.

Given the 1984 repeal of L.B. 933 (§ 79-4,102 (Cum. Supp. 1982)) and Mullendore's failure to prove any adverse impact on him during the existence of the statute in question, we conclude that Mullendore has failed to establish the existence of a justiciable controversy, and has failed to prove that he is a "person . . . whose rights, status or other legal relations are affected by a statute . . . ." § 25-21,150. Thus, Mullendore has failed to establish a prima facie case entitling him to declaratory relief. Because Mullendore failed to establish that he was entitled to declaratory relief, the district court should not have decided the substantive constitutional issues. Therefore, we need not consider whether the district court's judgment on the constitutional issues is correct. In view of our conclusion that Mullendore did not establish that he was entitled to declaratory relief, resolution of the question raised on Mullendore's cross-appeal is unnecessary, inasmuch as Mullendore's appellate question relates to the nature of declaratory relief, which is unavailable to Mullendore.

Inasmuch as Mullendore has failed to factually establish that a case or controversy existed at the time of the trial and declaratory judgment involved in this appeal, we reverse the district court's judgment declaring L.B. 933 (§ 79-4,102 (Cum. Supp. 1982)) unconstitutional and remand this matter to the district court with direction to dismiss Mullendore's petition.

REVERSED AND REMANDED WITH DIRECTION.

STATE OF NEBRASKA, APPELLEE, V. JEAN L. ABDOUCH, APPELLANT.

434 N.W.2d 317

Filed January 20, 1989. No. 88-079.

1. **Constitutional Law: Search and Seizure.** To determine whether a private person's search is actually a search by the state depends on whether the private person must be regarded as having acted as an instrument or agent of the state. The preceding test to determine governmental involvement in a search with a private person is applicable to questions relative to the fourth amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution.
2. _____: _____. A private person's status as a state or government agent in a search is not restricted to a search ordered, requested, or initiated by the state or government official but may include a search which is a joint endeavor between a private person and a state or government official.
3. _____: _____. A search is subject to the constitutional safeguard against an unreasonable search, prohibited by the fourth amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution, if the search is a joint endeavor involving a private person and a state or government official.
4. **Constitutional Law: Search and Seizure: Words and Phrases.** In *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963), reference to "fruit of the poisonous tree" is a condemnation of the government's subsequent exploitation of a prior violation of a defendant's constitutional right.
5. **Constitutional Law: Search and Seizure.** Whether evidence is the derivative product of a constitutionally invalid search turns on the question whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.
6. **Constitutional Law: Search and Seizure: Miranda Rights: Confessions.** The *Miranda* warning, by itself, does not preclude exclusion of a defendant's custodial statement induced by confrontation with evidence obtained through the constitutionally invalid search because the *Miranda* warning does not break the cause-and-effect relationship between an illegal search and a defendant's subsequent incriminating statement, confession, or admission.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Reversed and remanded for a new trial.

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

Robert M. Spire, Attorney General, and Donald E. Hyde for appellee.

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

SHANAHAN, J.

In a bench trial, Jean L. Abdouch, formerly Jean Fletcher, was convicted on the charge of manufacturing a controlled substance, marijuana, in violation of Neb. Rev. Stat. § 28-416(1)(a) (Cum. Supp. 1986). Abdouch claims that certain physical evidence and her oral statements, made while she was in police custody, were constitutionally inadmissible evidence under the fourth amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution. Before trial, Abdouch moved for suppression of the evidence in question. See Neb. Rev. Stat. §§ 29-115 (suppression of accused's statement) and 29-822 (Reissue 1985) (suppression of physical evidence). The district court overruled Abdouch's suppression motions and, over Abdouch's objection at trial, admitted into evidence the physical evidence and statements which were the subject of Abdouch's suppression motions.

STANDARDS OF REVIEW

In determining the correctness of a trial court's ruling on a motion to suppress, the Supreme Court will uphold the trial court's findings of fact unless those findings are clearly erroneous. *State v. Blakely*, 227 Neb. 816, 420 N.W.2d 300 (1988). In determining whether a trial court's findings on a motion to suppress are clearly erroneous, the Supreme Court recognizes the trial court as the "trier of fact" and takes into consideration that the trial court has observed witnesses testifying regarding such motion to suppress. *State v. Blakely, supra*. Admission or exclusion of evidence is a matter for the discretion of the trial court, whose ruling on an evidential question will be upheld unless such ruling constitutes an abuse of discretion. *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987); *State v. Clancy*, 224 Neb. 492, 398 N.W.2d 710 (1987). If police have acted without a search warrant, the State has the burden of proof that the search was conducted under circumstances substantiating the reasonableness of such search or seizure. *State v. Vrtiska*, 225 Neb. 454, 406 N.W.2d 114 (1987).

BACKDROP FOR THE SEARCH

In April 1979, Terry and Susan Clark, as tenants in common, signed a month-to-month lease for a 7-acre rural tract on a

quarter section near Elkhorn in Douglas County, Nebraska. The leasehold consisted of a house and some outbuildings. Susan left Terry in 1984, after which she never lived on or claimed the leased premises as her residence. However, since 1984 Terry Clark and Abdouch lived together on the leasehold but were not married to each other. Terry and Susan Clark were divorced in June 1985. What effect Clarks' dissolution proceeding may have had on the lease is undisclosed.

Two days after Terry Clark's intestate death on June 15, 1987, Susan Clark, the mother of Terry's 8-year-old son, Lee, unsuccessfully attempted to contact Abdouch by telephone to obtain any of Terry's personal property for the benefit of Lee. There were no probate proceedings relative to Terry Clark's death. In view of her inability to reach Abdouch, Susan Clark contacted the Douglas County Sheriff's Department for assistance in securing Terry Clark's belongings "[t]o make sure there would not be any problems when we went to the farm . . . ."

Sgt. Ronald A. Larson of the Douglas County Sheriff's Department was assigned to accompany Susan Clark to the farmstead which was previously Terry Clark's residence and which was presently occupied by Abdouch as her home. Larson and Deputy Sam Christensen met with Susan Clark and other members of Terry Clark's family at a bowling alley in Elkhorn, where Larson was shown a copy of the 1979 lease to Terry and Susan Clark. Christensen had an arrest warrant for Abdouch on the charge of drunk driving. Although the officers realized that Susan and Terry Clark were divorced, and none of the Clark family had a court order authorizing entry on the leasehold or possession of Terry Clark's personal property, the officers accompanied the Clark family to the farmstead to search for and retrieve Terry Clark's personal property. Neither officer had a search warrant for the premises.

SEARCH OF THE FARMSTEAD

On arrival at Abdouch's residence on June 17, Clarks and the officers found an adult babysitter caring for Abdouch's children in Abdouch's absence. When the babysitter said Abdouch would be returning shortly, Sergeant Larson stated the reason for the officers' presence with the Clark family,

namely, to take possession of Terry Clark's belongings. Without further incident, the Clark family, including Susan Clark, and the officers entered the house and began looking for tools, clothing, miscellaneous household items, and firearms of Terry Clark, which articles were not specifically described or identified with any degree of particularity. Household furnishings belonged to Abdouch.

While members of the Clark family continued to rummage through the house in search of Terry Clark's property, the officers went to a barn, about 50 yards from the house, and, on entering the barn through an open doorway, found two tables comprised of sawhorses and plywood slats. On the tables were 23 plastic trays with paper cups, which contained soil and germinating marijuana seeds, and a plastic bag of marijuana seeds. As the officers left the barn through a side door, they saw six cultivated plots, adjacent to the barn, with seedling marijuana plants in various stages of growth. The officers summoned members of the narcotics unit of the Douglas County Sheriff's Department. Before the narcotics officers arrived, Abdouch returned, was arrested pursuant to the DWI warrant, and was removed to the Douglas County corrections office.

When the narcotics officers arrived, Larson briefed them on his discovery at the barn. During this briefing, Terry Clark's sister-in-law called to the officers, asking them to come to the house because Lee, Terry Clark's 8-year-old son, had something to show the officers. Responding, the officers found the boy, apparently at the door, with a paper grocery sack containing 3 1/2 pounds of marijuana seeds. Lee went back inside the house and returned shortly with a "bong," a pipe used to smoke marijuana. The officers asked Susan Clark whether they could search the house. According to Deputy William H. Jackson, one of the narcotics officers, entry without a search warrant was not the result of apprehension that potential evidence or contraband might be destroyed or unofficially removed. With Susan Clark's permission, the officers entered the house and commenced their search of its interior. Jackson, searching in the kitchen, found a letter, dated June 15 and presumably written by Abdouch to a person named "Ann," which stated:

> Those seeds we got are doin' great. I just pinched them all, fertilized em! Wait' til' you see them. I wish Kevin was comin' with you. (I) We miss him too. He's got to make me another Blues tape. He has the best blues in the world. I tell ya what a tape for the weed. Huh Kevin?! . . . .
>
> Love
>
> Jean.

At some point during the officers' search of the house, Terry Clark's sister-in-law gave Jackson a "Dream Book," which was Abdouch's diary and contained the May 19 entry, "planted dope."

CUSTODIAL STATEMENTS

Approximately 5 hours after discovery of the contraband, smoking paraphernalia, correspondence, and diary, Jackson arrived at the Douglas County corrections office to interrogate Abdouch about "all the evidence" found at Abdouch's residence. Before the interrogation, Jackson administered the "*Miranda*" warning to Abdouch, who signed a "Rights Advisory Form" and acknowledged receipt of the *Miranda* warning. Early in his interrogation of Abdouch, Jackson recounted the "evidence . . . found on the farm," which included the growing marijuana plants, marijuana seeds, the letter to Ann, and Abdouch's diary. Abdouch never responded until Jackson had finished detailing the evidence obtained at Abdouch's residence, or, as related by Jackson: "[S]he didn't make any comments until I had finished laying out what we had." Abdouch became tearful and asked: "You read my diary?" Jackson responded "yes" and continued interrogating Abdouch, who then admitted her participation in the marijuana production on the farmstead.

DISPOSITION OF ABDOUCH'S SUPPRESSION MOTION

Abdouch moved for suppression of all physical evidence obtained during the farmstead search and for the additional suppression of her custodial statements, which she claimed were the result of the illegal search. The district court, referring to *Jones v. United States*, 362 U.S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960), correctly found that Abdouch had standing to challenge the search. The court then made other determinations

concerning the constitutional validity of the search of Abdouch's residence. The court found that the State's evidence failed to substantiate that the 1979 farmstead lease to Terry and Susan Clark was still effective when the officers searched the premises. The court concluded that Susan Clark, on account of her dissociation with the leasehold, lacked authority to consent to the search. Consequently, the officers' search, inside the house and at the barn, was conducted without valid authority and, therefore, was an unreasonable search which produced the letter and marijuana material at the barn—evidence which the court ruled was unconstitutionally obtained and inadmissible. The State has not complained, and does not complain, about such suppression.

However, the court found that all items derived through the Clark family's efforts inside the house were produced by "nongovernmental persons," who were not "acting as instruments or agents of the State." Accordingly, the court ruled that the items discovered by the Clark family, namely, the paper sack of marijuana seeds found by Lee, the smoking paraphernalia, and Abdouch's diary, were constitutionally admissible evidence.

Concerning Abdouch's custodial statements, the court found that the statements were "made freely, voluntarily, knowingly and intelligently" to Officer Jackson, were not "the fruit of a poisonous tree," and, therefore, were constitutionally admissible evidence.

In the bench trial of Abdouch, the record for the suppression hearing and other evidence were introduced over Abdouch's renewed objection that the physical evidence in question and her custodial statements resulted from a constitutionally invalid search. The court found Abdouch guilty as charged.

NEBRASKA PROBATE CODE

Before addressing the constitutional question concerning the search of the farmstead, we note that Neb. Rev. Stat. §§ 30-24,125 to 30-24,128 (Reissue 1985) of the Nebraska Probate Code furnish a statutory mechanism and procedure for the "Collection of Personal Property by Affidavit and Summary Administration Procedure for Small Estates." In substance, § 30-24,125 provides that, 30 days after a decedent's

death, a decedent's successor may obtain possession of the decedent's tangible property by presenting to the possessor of the property an affidavit, by or on behalf of the successor, which contains certain statements about the value of the property, the absence of a petition for the appointment of a personal representative, and the successor's entitlement to the decedent's property. As prescribed by § 30-24,126, if the person who has received the affidavit refuses to deliver the decedent's property to the decedent's successor, a proceeding may be brought to obtain delivery of the decedent's property. Apart from collection of a decedent's property by affidavit and the summary administration for small estates, authorized by §§ 30-24,125 et seq., a personal representative, generally, has the right and duty to take possession or control of the decedent's property. See Neb. Rev. Stat. § 30-2470 (Reissue 1985). If the circumstances warrant, a special administrator may be appointed. See Neb. Rev. Stat. § 30-2457 (Reissue 1985). There may be other legal remedies in addition to the foregoing, which are only illustrative.

GOVERNMENT SEARCHES WITH PRIVATE PERSONS

In response to Abdouch's first assignment of error, namely, constitutional inadmissibility of the articles found by the Clark family, the State contends that members of the Clark family, as private citizens without a police request, found the articles in question, which were delivered to the police and were admissible as evidence obtained without governmental activity. To support its contention, the State relies on *Burdeau v. McDowell*, 256 U.S. 465, 41 S. Ct. 574, 65 L. Ed. 1048 (1921), in which the U.S. Supreme Court held that the fourth amendment does not apply to searches by private parties acting without governmental involvement. In *Burdeau*, the Court stated:

> The Fourth Amendment gives protection against unlawful searches and seizures, and as shown in the previous cases, its protection applies to governmental action. Its origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon

> other than governmental agencies; as against such authority it was the purpose of the Fourth Amendment to secure the citizen in the right of unmolested occupation of his dwelling and the possession of his property, subject to the right of seizure by process duly issued.
>
> In the present case the record clearly shows that no official of the Federal Government had anything to do with the wrongful seizure of the petitioner's property, or any knowledge thereof until several months after the property had been taken from him . . . . It is manifest that there was no invasion of the security afforded by the Fourth Amendment against unreasonable search and seizure, as whatever wrong was done was the act of individuals in taking the property of another. A portion of the property so taken and held was turned over to the prosecuting officers of the Federal Government.

257 U.S. at 475.

In *State v. Ware*, 219 Neb. 594, 365 N.W.2d 418 (1985), Ware claimed that evidence, found by teachers in their search of his room at Boys Town, was the result of a warrantless search in violation of the fourth amendment. This court in *Ware* expressed:

> It is clear that the fourth amendment prohibition against unreasonable searches and seizures is inapplicable to the conduct of private parties. [Citing *Burdeau v. McDowell, supra*.] . . .
>
> . . . .
>
> In the defendant's case there is nothing to indicate that the police participated in or directed the actions of the family teachers. To the contrary, it was the Boys Town employees who asserted their responsibility and willingness to search Ware's room. The uncontroverted testimony is that the teachers instigated and carried out the searches, and the only police response was that "if they wanted to and it was their policy, they could."
>
> In light of these facts there was no agency relationship created by the police. Therefore, the searches of the defendant's residence in Boys Town were conducted by private individuals not subject to the warrant requirement

embodied in the fourth amendment.
219 Neb. at 599-601, 365 N.W.2d at 422-23.

In light of *Burdeau v. McDowell, supra*, this court concluded in *State v. Gundlach*, 192 Neb. 692, 695, 224 N.W.2d 167, 170 (1974): "Unless a private citizen in making a search is acting as an agent for the police, his acts may not be attributed to them." See, also, *State v. Skonberg*, 194 Neb. 550, 551, 233 N.W.2d 919, 920 (1975): "The constitutional provision against unreasonable searches and seizures applies only to governmental agencies and not to private persons." See, further, *State v. Howard*, 184 Neb. 274, 278, 167 N.W.2d 80, 84 (1969): "The protection of the Fourth Amendment is a restriction on governmental action only. [Citing *Burdeau v. McDowell, supra*.]"

To determine whether a private person's search is actually a search by the state depends on whether the private person "must be regarded as having acted as an 'instrument' or agent of the state . . . ." *Coolidge v. New Hampshire*, 403 U.S. 443, 487, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971). The preceding test to determine governmental involvement in a search with a private person is applicable to questions relative to the fourth amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution.

In *Byars v. United States*, 273 U.S. 28, 47 S. Ct. 248, 71 L. Ed. 520 (1927), state officers, equipped with an invalid search warrant, asked a local "prohibition agent" of the U.S. Treasury Department to accompany them in a search of Byars' residence for contraband liquor and material related to the illegal manufacture of liquor. During the search, the federal agent took possession of counterfeit whiskey stamps found on the premises searched. The trial court overruled Byars' motion to suppress the stamps as evidence obtained during the search, and Byars was convicted of possessing the counterfeit stamps. Rejecting the government's claim that the seized stamps were constitutionally admissible evidence, the Supreme Court stated:

> [T]he court must be vigilant to scrutinize the attendant facts with an eye to detect and a hand to prevent violations of the Constitution by circuitous and indirect methods.

> Constitutional provisions for the security of person and property are to be liberally construed . . . .
>
> . . . [T]he federal prohibition agent was not invited to join the state squad as a private person might have been, but was asked to participate and did participate as a federal enforcement officer, upon the chance, which was subsequently realized, that something would be disclosed of official interest to him as such agent. . . . We cannot avoid the conclusion that the participation of the agent in the search was under color of his federal office and that the search in substance and effect was a joint operation of the local and federal officers. In that view, so far as this inquiry is concerned, the effect is the same as though he had engaged in the undertaking as one exclusively his own.

273 U.S. at 32-33.

Approximately 20 years after *Byars*, the Supreme Court decided *Lustig v. United States*, 338 U.S. 74, 69 S. Ct. 1372, 93 L. Ed. 1819 (1949). In *Lustig*, city police summoned Greene, a federal agent, to Lustig's hotel room, where police were engaged in an illegal search after Greene had reported to police that "something was going on" in Lustig's room. When Greene arrived at the hotel room, he examined the evidence in controversy, counterfeit U.S. currency, and, from the discovered counterfeit currency, selected evidence to be used in federal prosecution of Lustig for counterfeiting. The trial court refused to suppress the physical evidence of counterfeiting, which led to Lustig's conviction. In finding that Lustig's conviction was based on constitutionally inadmissible evidence, the Supreme Court set aside Lustig's conviction and stated:

> We therefore accept as a fact that Greene did not request the search, that, beyond indicating to the local police that there was something wrong, he was not the moving force of the search, and that the search was not undertaken by the police to help enforcement of a federal law. But search is a functional, not merely a physical, process. Search is not completed until effective appropriation, as part of an uninterrupted transaction, is made of illicitly obtained objects for subsequent proof of an offense. Greene's selection of the evidence deemed important for use in a

federal prosecution for counterfeiting, as part of the entire transaction in [Lustig's room] was not severable, and therefore was part of the search carried on in that room. The uncontroverted facts show that before the search was concluded Greene was called in, and although he himself did not help to empty the physical containers of the seized articles he did share in the critical examination of the uncovered articles as the physical search proceeded. It surely can make no difference whether a state officer turns up the evidence and hands it over to a federal agent for his critical inspection with the view to its use in a federal prosecution, or the federal agent himself takes the articles out of a bag. It would trivialize law to base legal significance on such a differentiation. Had Greene accompanied the city police to the hotel, his participation could not be open to question even though the door of [Lustig's room] had not been opened by him. [Citation omitted.] To differentiate between participation from the beginning of an illegal search and joining it before it had run its course, would be to draw too fine a line in the application of the prohibition of the Fourth Amendment as interpreted in *Byars v. United States* [citation omitted].

The crux of that doctrine is that a search is a search by a federal official if he had a hand in it; it is not a search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a silver platter. The decisive factor in determining the applicability of the *Byars* case is the actuality of a share by a federal official in the total enterprise of securing and selecting evidence by other than sanctioned means. It is immaterial whether a federal agent originated the idea or joined in it while the search was in progress. So long as he was in it before the object of the search was completely accomplished, he must be deemed to have participated in it. Where there is participation on the part of federal officers it is not necessary to consider what would be the result if the search had been conducted entirely by State officers. Evidence secured through such federal participation is inadmissible

. . . .

> . . . The fact that state officers preceded [Greene] in breach of the rights of privacy does not negative the legal significance of this collaboration in the illegal enterprise before it had run its course.

338 U.S. at 78-79.

The "silver platter" doctrine mentioned in *Lustig* was rejected in *Elkins v. United States*, 364 U.S. 206, 223, 80 S. Ct. 1437, 4 L. Ed. 2d 1669 (1960), when the U.S. Supreme Court stated: "[W]e hold that evidence obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant's immunity from unreasonable searches and seizures under the Fourth Amendment is inadmissible over the defendant's timely objection in a federal criminal trial."

While *Byars* and *Lustig* pertained to interaction by governmental agencies, one state and the other federal, a question arises concerning a search in which a private person and a government official have combined parts. Government involvement or participation in a search with a private person is not always in the form of an officer's imperative direction to the private individual: "Make the search." There are more subtle and less obvious forms of governmental involvement, but governmental involvement nonetheless.

Although the "silver platter" doctrine regarding joint endeavors between state and federal officials has been rejected, the concept may still apply to searches by private parties. Nevertheless, courts which have considered combined efforts of a government official and a private person in a search hold that a search is subject to the fourth amendment prohibition against an unreasonable search if the search is a joint endeavor involving a private person and a government official. See, *Corngold v. United States*, 367 F.2d 1 (9th Cir. 1966) (search by an airline employee and customs agents held to be a joint search where the customs agents "joined actively in the search"); *State v. Cox*, 100 N.M. 667, 674 P.2d 1127 (1983) (search by police officer, fire chief, and private insurance arson investigator held to be a joint search where the officers participated with private persons in a continuing arson investigation); *State v. Scrotsky*, 39 N.J. 410, 189 A.2d 23 (1963) (entry by police officers and a

landlady without the right of entry; search held to be "concert of action" even though landlady effected the actual identification and seizure of evidence).

Referring to a joint endeavor between a private person and a government official, LaFave notes:

> It is not essential that the government official be involved in the endeavor at the very outset; cases in this area often apply the rule from *Lustig v. United States* [338 U.S. 74, 69 S. Ct. 1372, 93 L. Ed. 1819 (1949)] that it is "immaterial" whether the government official "originated the idea or joined in it while the search was in progress" and that it is sufficient that the official "was in it before the object of the search was completely accomplished." Nor is it necessary that the government official directly participate in the illegal entry. The courts have found sufficient government involvement where the officer was standing by giving tacit approval to the entry made by a private person.

1 W. LaFave, Search & Seizure, a Treatise on the Fourth Amendment § 1.8(b) at 179-80 (2d ed. 1987).

We hold, therefore, that a private person's status as a state or government agent in a search is not restricted to a search ordered, requested, or initiated by the state or government official but may include a search which is a joint endeavor between a private person and a state or government official. We further hold that a search is subject to the constitutional safeguard against an unreasonable search, prohibited by the fourth amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution, if the search is a joint endeavor involving a private person and a state or government official.

In Abdouch's case, the Clark family, accompanied by members of the Douglas County Sheriff's Department, went to Abdouch's residence. The Clark family, obviously lacking authority to enter on the farmstead, would not have ventured to the Abdouch residence without the officers. None of the group had legal authority to take possession of any property which belonged to Terry Clark and which might be found on the premises. Although the Nebraska Probate Code specifically furnishes procedures to obtain possession of a decedent's

personal property, none availed herself or himself of those probate procedures. Concerning the Abdouch residence, none of the group, comprised of the Clark family and the officers, had a claim to enter, or a legal status, greater or stronger than a stranger's.

When the group encountered the babysitter, Sergeant Larson stated the objective of the group, namely, to retrieve personal property belonging to Terry Clark. Entry into the house was gained under auspices of the officers, who accompanied the Clark family during their incipient search of the dwelling. Thus, the officers placed the Clark family in a position to search the Abdouch residence—an official involvement which cannot be reasonably characterized as passive. What apparently and initially germinated as an ersatz probate distribution of Terry Clark's personal property burgeoned into a general search for any property, which might have belonged to Terry Clark, and later blossomed into a full-scale search by officers of the sheriff's department. While the State argues that the search of Abdouch's residence should be divided into two separate searches—one by the Clark family and the other by the officers—such bisection is as impossible as it is illogical. By the officers' approval and participation in the Clark family extra-probate scheme, a plan which could not have been executed without the officers' involvement, the search of Abdouch's residence was saturated with the color of governmental authority. To dissect the search as suggested by the State would effectively eviscerate constitutional protection from every joint search by officers and private citizens. When the rationale of *Lustig* is applied to the farmstead search in Abdouch's case, the joint search or search by joint endeavor was a single search conducted by both private citizens, who had entered the premises with police assistance and approval, and officers, who, in effect, provided the "key" to enter the premises through a display of government authority. The actions of the Clark family and the officers are too interdependently connected and inseparable to allow isolation of the Clark family's activity from the officers' participation in the search. As the result of the joint endeavor of the Clark family and the officers, "the effect is the same as though [the

officers] had engaged in the undertaking as one exclusively" their own. *Byars v. United States*, 273 U.S. 28, 33, 47 S. Ct. 248, 71 L. Ed. 520 (1927).

Without conceptual dissection of the search into degrees of responsibility and participation, suffice it to say that the search would not have occurred without the officers' presence and involvement, which, under the circumstances, constituted a search as a joint endeavor of private persons and the State's officers. Thus, all evidence obtained at the farmstead, which was Abdouch's residence, was the result of governmental involvement in a search contrary to the constitutional safeguard against an unreasonable search. For that reason, the district court should have sustained Abdouch's suppression motion regarding the physical evidence obtained during the search of the farmstead and should have excluded those illegally obtained items as evidence against Abdouch. The district court's findings concerning Abdouch's suppression motion are clearly erroneous and resulted in error prejudicial to Abdouch, when the court overruled the suppression motion. The district court's reception of the constitutionally inadmissible physical evidence obtained through the illegal search of the farmstead was an abuse of discretion.

"FRUIT OF THE POISONOUS TREE"

Abdouch also contends that her custodial statements to Officer Jackson should have been suppressed because her statements were the product of an illegal search or, as condemned by *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963), were the "fruit of the poisonous tree." In *Wong Sun*, the U.S. Supreme Court required exclusion not only of evidence directly produced by a constitutionally invalid search but also evidence indirectly derived from the unconstitutional search. Reference to "fruit of the poisonous tree" in *Wong Sun* is a condemnation of the government's subsequent exploitation of a prior violation of a defendant's constitutional right. As expressed in *Wong Sun*, whether evidence is the derivative product of a constitutionally invalid search turns on the question " 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of

that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' " 371 U.S. at 488. (Quoting from J. Maguire, Evidence of Guilt (1959).)

The U.S. Supreme Court, in *Brown v. Illinois*, 422 U.S. 590, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975), considered a statement which satisfied the voluntariness requirement of the fifth amendment, notwithstanding an illegal arrest, and stated:

> In order for the causal chain, between the illegal arrest and the statements made subsequent thereto, to be broken, *Wong Sun* requires not merely that the statement meet the Fifth Amendment standard of voluntariness but that it be "sufficiently an act of free will to purge the primary taint." 371 U.S. at 486. *Wong Sun* thus mandates consideration of a statement's admissibility in light of the distinct policies and interests of the Fourth Amendment.
>
> If *Miranda* warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be substantially diluted. See *Davis v. Mississippi*, 394 U. S. 721, 726-727 (1969). Arrests made without warrant or without probable cause, for questioning or "investigation," would be encouraged by the knowledge that evidence derived therefrom could well be made admissible at trial by the simple expedient of giving *Miranda* warnings. Any incentive to avoid Fourth Amendment violations would be eviscerated by making the warnings, in effect, a "cure-all," and the constitutional guarantee against unlawful searches and seizures could be said to be reduced to "a form of words." See *Mapp v. Ohio* [citation omitted].

422 U.S. at 602-03.

Evaluating the effect of the *Miranda* warning in the related context of a fourth amendment violation concerning an arrest, the Supreme Court continued in *Brown v. Illinois, supra*:

> [T]he *Miranda* warnings, *alone* and *per se*, cannot always make the act sufficiently a product of free will to break, for Fourth Amendment purposes, the causal connection between the illegality and the confession. They cannot

> assure in every case that the Fourth Amendment violation has not been unduly exploited. [Citation omitted.]
>
> . . . The *Miranda* warnings are an important factor, to be sure, in determining whether the confession is obtained by exploitation of an illegal arrest. But they are not the only factor to be considered. The temporal proximity of the arrest and the confession, the presence of intervening circumstances . . . and, particularly, the purpose and flagrancy of the official misconduct are all relevant. . . . The voluntariness of the statement is a threshold requirement.

(Emphasis in original.) 422 U.S. at 603-04. See, also, *Oregon v. Elstad*, 470 U.S. 298, 306, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985): "The *Wong Sun* doctrine ['fruit of the poisonous tree'] applies as well when the fruit of the Fourth Amendment violation is a confession."

This court has adopted the five-factor test enunciated in *Brown v. Illinois, supra*, to determine whether a defendant's statement, obtained after an illegal arrest, must be excluded under the fourth amendment. See *State v. Smith*, 209 Neb. 505, 308 N.W.2d 820 (1981).

In considering a custodial statement relative to the different settings involved in an illegal arrest and an illegal search, LaFave points out:

> In the typical case in which the defendant was present when incriminating evidence was found in an illegal search or in which the defendant was confronted by the police with evidence they had illegally seized, it is apparent that there has been an "exploitation of that illegality" when the police subsequently question the defendant about that evidence or the crime to which it relates. This is because "the realization that the 'cat is out of the bag' plays a significant role in encouraging the suspect to speak."
>
> Because this is the case, the more fine-tuned assessment which the Supreme Court mandated in *Brown v. Illinois* for determination of when a confession is the fruit of an illegal *arrest*, is ordinarily unnecessary when the "poisonous tree" is instead an illegal search. As explained in *People v. Robbins* [54 Ill. App. 3d 298, 369 N.E.2d 577

> (1977)], the two situations are quite different: "Confronting a suspect with illegally seized evidence tends to induce a confession by demonstrating the futility of remaining silent. On the other hand, the custodial environment resulting from a false arrest is merely one factor to be considered in determining whether a confession is inadmissible." Thus, though the government in *Robbins* argued that the taint was dissipated because two of the factors enumerated in *Brown* (the giving of the *Miranda* warnings, and the absence of a flagrant Fourth Amendment violation) were present, the court quite properly concluded that the confession must be suppressed nonetheless. The defendant had confessed after being confronted with the marijuana illegally seized from his room, and thus it was obvious that he "confessed only because he had already been caught 'red-handed.' " (Similarly, the *Brown* "temporal proximity" factor is of virtually no significance in the present context.)
>
> . . . [I]t is crystal clear that giving the defendant the *Miranda* warnings will not break the causal chain between an illegal search and a subsequent confession. The Court in *Brown* found the warnings alone insufficient when the primary illegality was an illegal arrest, and the warnings have even less of an impact when the prior Fourth Amendment violation was a fruitful illegal search.

4 W. LaFave, Search & Seizure, a Treatise on the Fourth Amendment § 11.4(c) at 403-05 (2d ed. 1987).

As stated in *People v. Johnson*, 70 Cal. 2d 541, 450 P.2d 865, 75 Cal. Rptr. 401 (1969):

> There is little, if any reason, to assume that the *Miranda* warning neutralizes the inducement to confess furnished by the confrontation of the defendant with the illegally obtained evidence which shows his guilt and the futility of remaining silent. If *Miranda* warnings were held to insulate from the exclusionary rule confessions induced by unlawfully obtained evidence, the police would be encouraged to make illegal searches in the hope of obtaining confessions after *Miranda* warnings even though the actual evidence seized might later be found

inadmissible. . . . To so hold would result in the *Miranda* warning—intended to protect the defendant's rights to counsel and to remain silent . . . and to prevent exploitive police practice . . . —becoming the instrument of a bootstrap operation to insulate unlawful police activities from the effects of the exclusionary rule.

. . . We recognize, of course, that *Miranda* did not purport to eliminate the use of confessions "given freely and voluntarily without any compelling influences." [Quoting from *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).] We recognize, too, that the taint of illegal action in this context can be dissipated by an intervening act of defendant's free will [citation omitted], and that the *Miranda* warning may be a factor to be considered with other evidence indicating that the defendant has acted independently of the unlawful inducement. However, the shield of *Miranda* should not become a sword to vitiate the keystone of the rule excluding illegally obtained evidence, namely, that "the prosecutor may not profit directly or indirectly from an illegal search." [Citations omitted.] Accordingly, although the *Miranda* warning may be a factor in determining whether there is an intervening act of free will, it does not in isolation demonstrate the requisite attenuation.

70 Cal. 2d at 550-51, 450 P. 2d at 871, 75 Cal. Rptr. at 407.

In *Rogers v. Superior Court*, 46 Cal.2d 3, 10 [291 P.2d 929], we found a basic distinction between evidence seized in violation of search and seizure provisions and voluntary statements made during an illegal detention. "The voluntary admission is not a necessary product of the illegal detention; the evidence obtained by an illegal search or by a coerced confession is the necessary product of the search or of the coercion."

The distinction in *Rogers* is similarly applicable to the effect of a *Miranda* warning on a confession obtained by confrontation with evidence secured by an unlawful search, and a confession following an illegal arrest. Cases where a confession follows an unlawful arrest, and those where the confession follows a confrontation of the

> defendant with illegally seized evidence are distinguishable. In the latter case, the illegality induces the confession by showing the suspect the futility of remaining silent. [Citation omitted.] Where . . . a confession follows a false arrest, the custodial environment is merely one factor (though a significant one) to be considered in determining whether the confession is inadmissible.

70 Cal. 2d at 551-52, 450 P.2d at 871-72, 75 Cal. Rptr. at 407-08.

We agree with the conclusion expressed in *People v. Johnson, supra*, that is, the *Miranda* warning, by itself, does not preclude exclusion of a defendant's custodial statement induced by confrontation with evidence obtained through a constitutionally invalid search because the *Miranda* warning does not break the cause-and-effect relationship between an illegal search and a defendant's subsequent incriminating statement, confession, or admission. See, also, *State v. Blair*, 691 S.W.2d 259 (Mo. 1985) (confession on confrontation with palm print, taken after illegal arrest, matched with that at murder scene); *State v. Jennings*, 461 A.2d 361 (R.I. 1983) (confrontation with fact that police found the murder weapon during an illegal search of defendant's apartment); *Hart v. Commonwealth*, 221 Va. 283, 269 S.E.2d 806 (1980) (defendant confronted with lab results on illegal search of his clothing for glass particles; confession was exploitation of search); *People v. Hines*, 195 Colo. 71, 575 P.2d 414 (1978) (statements after marijuana found in backpack properly excluded although *Miranda* warning was given); *State v. Williams*, 162 W. Va. 309, 249 S.E.2d 758 (1978) (confession after confrontation with illegally seized evidence regarding a murder charge could not be used despite the *Miranda* warning); *Com. v. Johnson*, 474 Pa. 512, 379 A.2d 72 (1977) (confession relative to murder after police illegally found bloodied sheets and victim's clothing in defendant's house); *Fuller v. State*, 246 Ark. 138, 437 S.W.2d 780 (1969) (statements regarding stolen property inadmissible as fruit of illegal search).

Jackson's presence at the corrections office was directly connected with the search in question and was an avowed interrogation concerning "all the evidence" obtained at Abdouch's residence. Although the *Miranda* warning was given

to Abdouch before her statements and there is no indication that her statements were other than voluntary, Jackson prefaced the interrogation by reference to all items obtained as the result of the constitutionally invalid search. Confronted with an item-by-item description and verbal inventory of the illegally seized evidence, Abdouch undoubtedly recognized the futility of remaining silent and admitted her participation in production of the contraband marijuana. Therefore, we conclude that Abdouch's custodial statements were obtained as an exploitation of the constitutionally invalid search and seizure of evidence at Abdouch's residence and, as such, were the "fruit of the poisonous tree." *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). The district court's findings concerning Abdouch's suppression motion are clearly erroneous and resulted in error prejudicial to Abdouch, when the court overruled the suppression motion concerning Abdouch's custodial statements. The district court's reception of the constitutionally inadmissible statements obtained as the result of the illegal search of the farmstead was an abuse of discretion.

Because constitutionally inadmissible evidence was introduced over Abdouch's objection in the trial and resulted in Abdouch's conviction, we reverse the judgment entered on Abdouch's conviction and remand this matter for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

STATE OF NEBRASKA, APPELLEE, V. LAURA L. BARNES, APPELLANT.

434 N.W.2d 516

Filed January 20, 1989. No. 88-119.

1. **Motions to Suppress: Appeal and Error.** In determining the correctness of a trial court's ruling on a motion to suppress, the Supreme Court will uphold the trial court's findings of fact unless those findings are clearly erroneous.
2. _____: _____. In determining whether a trial court's findings on a motion to suppress are clearly erroneous, the Supreme Court recognizes the trial court as the trier of fact and takes into consideration that the trial court has observed

witnesses testifying regarding such motion to suppress.

3. **Confessions: Miranda Rights: Right to Counsel.** Before a defendant's custodial statement is admissible as evidence, the absolute and indispensable prerequisites of the *Miranda* warning must have been satisfied preceding the interrogation producing such statement, namely, law enforcement personnel must (1) inform the defendant of the right to remain silent, (2) explain that anything said can and will be used against the defendant in court, and (3) inform the defendant of the right to consult with a lawyer, retained or court-appointed, and to have a lawyer present during interrogation.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Affirmed.

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

Robert M. Spire, Attorney General, and Royce N. Harper for appellee.

HASTINGS, C.J., WHITE, and FAHRNBRUCH, JJ., and FUHRMAN and WHITEHEAD, D. JJ.

HASTINGS, C.J.

Following a trial by jury, the defendant was found guilty of obtaining, by means of a willfully false statement, representation, or other device, a benefit administered by the Department of Social Services (DSS); i.e., a payment to which she was not entitled, or a larger payment than that to which she was entitled, in excess of $500. She was sentenced to probation for 5 years and ordered to pay restitution in the amount of $3,635.28.

On appeal, defendant assigns as error that the trial court improperly admitted statements made by the defendant after having overruled her motion to suppress.

In determining the correctness of a trial court's ruling on a motion to suppress, the Supreme Court will uphold the trial court's findings of fact unless those findings are clearly erroneous. *State v. Texel, ante* p. 810, 433 N.W.2d 541 (1989); *State v. Marco, ante* p. 355, 432 N.W.2d 1 (1988).

In determining whether a trial court's findings on a motion to suppress are clearly erroneous, the Supreme Court recognizes the trial court as the trier of fact and takes into consideration that the trial court has observed witnesses testifying regarding

such motion to suppress. *Texel, supra.*

The defendant received Aid to Dependent Children (ADC) from November of 1984 through December of 1986. When she initially applied for ADC, she received information about her rights and responsibilities. One of her responsibilities was to report any change in employment status. The defendant's case was reviewed on July 17, 1985, and July 16, 1986, to determine her continuing eligibility. During both of those interviews, Frankie Jean Williams, the defendant's caseworker, orally reviewed with defendant her rights and responsibilities, including the responsibility to report any change in employment status. During those interviews, the defendant did not tell Williams that she was working.

In December of 1986, DSS became aware that the defendant had received income that she had not reported, from working at the Viking Ship from July 1985 to August 1986. In April of 1987, welfare fraud investigator Ron Heath was assigned to defendant's case to determine whether an overpayment of benefits had been made. Using information supplied by the Viking Ship, Heath determined that an overpayment in the amount of $3,635.28 had been made to the defendant during the period from June 15, 1985, to August 31, 1986.

On June 12, 1987, Heath sent the defendant a letter requesting that she contact him for an appointment to discuss an overpayment of ADC funds. The letter stated, "I'm sure you understand that this is a very serious matter which should be resolved as soon as possible." The letter also stated, "It would be to your advantage to give this matter your immediate attention." After receiving the letter, the defendant phoned Heath to set up an appointment. According to the defendant, during the phone conversation Heath said it would be in her best interest to come and talk to him. Heath admitted that it is possible he told her that it would be to her advantage to talk to him.

On June 23, 1987, the defendant voluntarily met with Heath. The meeting took place at the Omaha office of DSS, in a separate interview room, with the door closed and only Heath and the defendant present. The defendant was advised that she was not in custody, that she was free to leave at any time, and

that Heath had no arrest power. Furthermore, Heath informed her that there were three possible outcomes of her case—criminal prosecution, civil action, or just repayment, but he would not be making the decision of what action would be taken against her. Heath then read the "Warning and Waiver of Rights" form to the defendant, gave her an opportunity to read it for herself, and witnessed her signing the form.

After she signed the form, Heath conducted an interview, during which the defendant admitted she had made false statements or failed to report employment although she was required to do so. The defendant's motion to suppress her admissions was overruled.

Defendant argues first that *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), protects an individual from police "custodial interrogation" in the absence of appropriate warnings. Of course, this point is beyond debate.

The courts of other states that have dealt with the issue have held that *Miranda* warnings are not required when a welfare recipient is questioned by welfare fraud investigators. See, *State v. Bruske*, 288 N.W.2d 319 (S.D. 1980); *State v. O'Keefe*, 48 Or. App. 755, 617 P.2d 938 (1980); *People v. Rosen*, 89 Misc. 2d 51, 390 N.Y.S.2d 578 (1977); *Doe v. Chang*, 58 Haw. 94, 564 P.2d 1271 (1977); *People v. Parada*, 188 Colo. 230, 533 P.2d 1121 (1975); *State v. Graves*, 60 N.J. 441, 291 A.2d 2 (1972); *People v. Legerretta*, 8 Cal. App. 3d 928, 87 Cal. Rptr. 587 (1970). The courts in those cases reasoned that no warnings were required since the welfare recipient was not in custody, under any type of restraint, or in a coercive environment.

Nebraska has not dealt with this issue. However, it is unnecessary for us to do so, because in this case the requirements of *Miranda* were met. Heath did inform the defendant of her constitutional rights. The "Warning and Waiver of Rights" form Heath read to the defendant states:

- You have a right to remain silent.
- Anything you say can be used against you in court.
- You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning.

> • If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.
>
> • If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

This court has said:

> Before a defendant's custodial statement is admissible as evidence, the absolute and indispensable prerequisites of the *Miranda* warning must have been satisfied preceding the interrogation producing such statement, namely, law enforcement personnel must (1) inform the defendant of the right to remain silent, (2) explain that anything said can and will be used against the defendant in court, and (3) inform the defendant of the right to consult with a lawyer, retained or court-appointed, and to have a lawyer present during interrogation.

State v. Gibson, 228 Neb. 455, 459, 422 N.W.2d 570, 573 (1988). The warning given by Heath contained the requisite elements of a sufficient *Miranda* warning.

After reading the form to the defendant, Heath gave it to her to read for herself. He felt that she understood what she had read. She then signed the waiver portion of the "Warning and Waiver of Rights" form, which stated as follows:

> I have read this statement of my rights (This statement of my rights has been read to me) and I understand what my rights are. I am willing to discuss subjects presented and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

It is therefore reasonable to infer that defendant understood her rights and voluntarily waived them.

The trial court found that Heath's statements in the letter that "[i]t would be to your advantage to give this matter your immediate attention" and over the phone that it would be in the defendant's best interest to discuss this matter with him did not constitute inducements or promises to the defendant such as to render her admissions involuntary. This court is bound to

uphold that finding unless it is clearly erroneous. It is not.

The defendant also claims that her admissions were involuntary because Heath told her that restitution is usually all that is required.

However, Heath testified that at the beginning of the interview at the DSS offices, before he read the "Warning and Waiver of Rights" form to the defendant, and before she had made any admissions, he informed the defendant that there were three possible outcomes for her case—criminal prosecution, civil action, or restitution. He also specifically told her that he would not be making the decision about what action would be taken against her. This information was sufficient to dispel any belief the defendant may have had that leniency would result if she talked to Heath.

As for Heath telling the defendant during the interview that restitution is the usual practice, during the suppression hearing he testified that it was toward the end of the interview, after the defendant made her admissions, that he discussed restitution as the usual practice in cases such as hers.

The record does not permit this court to say that the trial court's finding that no promises were made is clearly erroneous. The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL ZEMUNSKI, APPELLANT.

434 N.W.2d 520

Filed January 20, 1989. No. 88-148.

1. **Convictions: Appeal and Error.** In resolving a challenge to the sufficiency of the evidence to sustain a criminal conviction, the Supreme Court does not resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh evidence. The State is entitled to have all its relevant evidence accepted or treated as true, every controverted fact as favorably resolved for the State, and the benefit of every favorable inference reasonably deducible from the evidence.
2. **Convictions: Circumstantial Evidence.** Circumstantial evidence is sufficient to

support a criminal conviction if such evidence and reasonable inferences drawn from the evidence establish the defendant's guilt beyond a reasonable doubt.

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

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

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

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

CAPORALE, J.

Following a jury trial, defendant, Michael Zemunski, was convicted of burglary, a violation of Neb. Rev. Stat. § 28-507(1) (Reissue 1985), and sentenced accordingly. He appeals, assigning as error the trial court's failure to find the evidence insufficient to support the conviction. We affirm.

At approximately 2:45 a.m. on Friday, July 3, 1987, Omaha police were informed by a private security company that 11 burglar alarms had all stopped functioning at the same time, apparently due to disruption of telephone lines connecting the alarm systems to the security company offices. Of the 11 businesses whose alarms had ceased functioning, one near 120th and L Streets also suffered disruption of its regular telephone service. Although a telephone junction box in the area was found to have been vandalized, nothing amiss was discovered at the location of the business suffering disruption of its telephone service.

As he was leaving the grounds of the business with the disrupted telephone service, Officer Richard Shook happened to see a dark-haired white man, wearing dark-colored jeans and dark jean jacket, coming out of the back door of a restaurant at 120th and L Streets. The man crouched outside the restaurant's back door for a moment, then ran west around the building. Shook got into his cruiser and used his radio to alert other officers, and the chase was on.

Shook momentarily lost sight of the fleeing man as he navigated his cruiser in the man's direction. Another officer

spotted the man running in a nearby "ditch" (apparently a grassy draw or swale), and guided Shook toward the man by radio. Shook followed the radioed directions and found a dark-haired white man, dressed as described above, "[r]unning just as fast as he could." The man saw Shook approaching and turned to run into a nearby apartment building; he did not enter the building, however, perhaps because two other officers were there already. Instead, the man turned abruptly to run back the way he had come, toward the ever-approaching Shook, who shortly thereafter, with assistance from another officer and without again losing sight of the man, captured Zemunski. At the time of capture, Zemunski was out of breath and perspiring profusely. At trial, Shook stated that he was positive Zemunski was the man he had seen running from the restaurant.

The manager of the restaurant testified that when he left the premises at about 2 that morning, the front door, the office door, and the back door of the restaurant were all closed and locked, and the restaurant's safe was in an undamaged condition. Following Zemunski's capture, it was noted that the back door to the restaurant building had been pried open and was ajar. Just inside, the door to the restaurant office had been kicked open, and the safe in the office had been attacked in an apparent attempt to "peel" it open. A crowbar was found on the ground near the back door; the manager testified that it had not been there when he left. Tools found on the desk in the office, following Zemunski's capture, were not the restaurant's property, nor were they familiar to the manager.

Sand, metal, and paint particles were found atop the safe and on the office floor, and were collected by police. Following arrest, Zemunski's clothes were removed from him and sealed in a plastic bag. Analyses subsequently performed on Zemunski's clothing by an expert at the State Criminalistics Laboratory disclosed the presence of sand, metal, and paint particles; the paint particles were identical to those recovered from the crime scene.

Zemunski denied any involvement in the burglary of the restaurant, and testified that at about 3 a.m. on July 3, 1987, he left his residence in Council Bluffs, Iowa, intending to visit a friend in Lincoln before 6 a.m. He drove on Interstate 29 to L

Street when, at about 108th Street, he noticed he was short of fuel. He then crossed a bridge over the Interstate on L Street and turned into a parking lot at 120th Street, intending to turn around and go to a gas station. Zemunski, who seems prone to this sort of thing, see *State v. Zemunski, ante* p. 613, 433 N.W.2d 170 (1988), ran entirely out of gas in the parking lot. Unable to restart the vehicle, he pushed it into a parking space and went looking for a telephone.

Zemunski further testified that he intended to walk across the restaurant parking lot toward a nearby motel, but the arrival at that time of a police cruiser deterred him. As Zemunski explained it, "Well, with having a record and all that, I knew I would be detained if—if there was any problems in the area." Again, see *State v. Zemunski, supra.*

Zemunski walked instead through a "depression area," evidently the draw or swale referred to earlier, toward the intersection of 120th and L Streets. Suddenly, according to Zemunski, two individuals ran from the restaurant, across the parking lot, into the swale, and toward Zemunski. Zemunski hid behind a tree, and the two other individuals ran past him, out of the swale, and across the parking lot where Zemunski had left his vehicle. As a police cruiser approached, Zemunski started to run, too, following the two unknown individuals toward his vehicle and away from the police cruiser. Police officers then chased and captured Zemunski as outlined above.

This case is controlled by two oft-stated rules. The first is that in resolving a challenge to the sufficiency of the evidence to sustain a criminal conviction, the Supreme Court does not resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh evidence. The State is entitled to have all its relevant evidence accepted or treated as true, every controverted fact as favorably resolved for the State, and the benefit of every favorable inference reasonably deducible from the evidence. *State v. Marrs, post* p. 977, 434 N.W.2d 336 (1989); *State v. Jones, post* p. 968, 434 N.W.2d 333 (1989). The second is that circumstantial evidence is sufficient to support a criminal conviction if such evidence and reasonable inferences drawn from the evidence establish the defendant's guilt beyond a

reasonable doubt. *State v. Jones, supra; State v. Wiggins, ante* p. 632, 432 N.W.2d 824 (1988).

Section 28-507(1) provides: "A person commits burglary if such person willfully, maliciously, and forcibly breaks and enters any real estate or any improvements erected thereon with intent to commit any felony or with intent to steal property of any value."

Clearly, the evidence adduced at trial was sufficient to support the jury's implicit conclusion that Zemunski had used a crowbar to break into the restaurant through the back door, and had kicked in the office door and attacked the safe within, using the tools later found there; that particles of sand, metal, and paint had adhered to Zemunski's clothing as he attacked the safe; that Zemunski was seen by Shook leaving the restaurant; and that he was subsequently captured following a brief chase.

Zemunski's assignment of error being without merit, we affirm.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES E. FERRELL, APPELLANT.
434 N.W.2d 331

Filed January 20, 1989. No. 88-167.

1. **Postconviction: Constitutional Law.** The Postconviction Act, Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1985), applies only where the prisoner has sustained such a denial or infringement of constitutional rights that the judgment is void or voidable.
2. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used as a substitute for an appeal or to receive a further review of issues already litigated.
3. **Postconviction: Proof.** A person seeking postconviction relief has the burden of establishing the basis for such relief.

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

James Ferrell, pro se.

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

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

PER CURIAM.

In 1983, the defendant, James E. Ferrell, was convicted of robbery and use of a firearm in the commission of a felony. At an enhancement hearing he was adjudged to be a habitual criminal and was sentenced to 15 years on the robbery count and 2 to 5 years on the second count, the sentences to run consecutively. On appeal, the sentence on count I was affirmed. *State v. Ferrell*, 218 Neb. 463, 356 N.W.2d 868 (1984). Since the sentence on count II was erroneous, that sentence was vacated and the cause remanded for resentencing on count II. On remand, the defendant was sentenced to 10 years on count II, the sentence to run consecutively to the sentence on count I.

On October 5, 1987, the defendant, pro se, filed a "Petition for Review and Reduction of Sentence" in the district court. The defendant sought a reduction of his sentences under Neb. Rev. Stat. § 29-2308.01 (Cum. Supp. 1986), and postconviction relief. On October 13, 1987, the trial court denied the defendant's request for a reduction of his sentences. Following a hearing on January 22, 1988, the trial court, on February 1, 1988, denied the defendant's motion for postconviction relief. The defendant has appealed from the order of February 1, 1988.

The defendant has assigned as error (1) that he was arraigned and pleaded not guilty less than 1 day after the information had been served upon him; (2) that he was denied a fair hearing on his motion for postconviction relief; (3) that the trial court made prejudicial comments during his trial; (4) that his arrest in Iowa and his return to Nebraska were illegal; (5) that there was false testimony by witnesses for the State; and (6) that references to the defendant as "you" and positive statements as to his guilt were made by witnesses for the State.

The Postconviction Act, Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1985), applies only where the prisoner has sustained such a denial or infringement of constitutional rights that the

judgment is void or voidable. *State v. Miles*, 194 Neb. 128, 230 N.W.2d 227 (1975). A motion for postconviction relief cannot be used as a substitute for an appeal or to receive a further review of issues already litigated. *State v. Hochstein*, 216 Neb. 515, 344 N.W.2d 469 (1984). A person seeking postconviction relief has the burden of establishing the basis for such relief. *State v. Hochstein, supra.*

The defendant's first assignment of error relates to a statutory right, not a constitutional right. Neb. Rev. Stat. § 29-1802 (Reissue 1985). The issue was not raised until just before trial, and the trial court properly held that any error had been waived. This matter presents no basis for postconviction relief.

The second assignment of error relates to the hearing on the defendant's motion for postconviction relief. At the hearing on January 22, 1988, the defendant presented no evidence other than the pleadings and his own testimony. The trial court inquired as to whether the defendant wanted to call witnesses, and offered to continue the hearing if necessary. The defendant answered, "No, I don't believe so at this point." The testimony of the defendant himself provided no basis for postconviction relief.

At the hearing, the defendant referred to his contentions that his arrest and return to Nebraska were illegal, that there was an absence of black persons on the jury, that Marianne McCormack was not a competent witness, that he was not allowed to examine the presentence report, and that his sentence was illegal. These matters, and the remaining assignments of error, were all considered and determined upon the direct appeal or could have been raised at that time. They do not furnish a basis for postconviction relief at this time.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. STEVEN J. GUIDA, APPELLANT.

434 N.W.2d 522

Filed January 20, 1989. No. 88-181.

1. **Presentence Reports: Evidence.** A trial court has broad discretion as to the information that may be included in a presentence report. The trial court may consider reports of probation officers, police reports, affidavits, and other information, including its own observations of the defendant.
2. **Sentences: Presentence Reports.** 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.
3. **Presentence Reports.** Neb. Rev. Stat. § 29-3506 (Reissue 1985), a part of the Security, Privacy, and Dissemination of Criminal History Information Act, Neb. Rev. Stat. §§ 29-3501 et seq. (Reissue 1985 & Cum. Supp. 1988), has no application to presentence reports.
4. **Sentences: Appeal and Error.** The issue in reviewing a sentence is whether the defendant in question received an appropriate sentence, not whether someone else received a lesser one. Similarly, the mere fact that a defendant's sentence differs from those which have been issued to the coperpetrators in the same court does not make the imposition of defendant's sentence an abuse of discretion.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Affirmed.

Douglas Veith, of Veith, P.C., Bertolini, Schroeder, Blount and Sapone, for appellant.

Robert M. Spire, Attorney General, and LeRoy W. Sievers for appellee.

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

BOSLAUGH, J.

The defendant, Steven J. Guida, was originally charged with four counts of delivery of cocaine. Pursuant to a plea bargain, the defendant pleaded guilty to count I, and the other three counts of the information were dismissed. The defendant was sentenced to imprisonment for 30 to 90 months, with credit for 3 days. He was also ordered to pay restitution in the amount of $500 to the Bellevue Police Department's drug fund.

The defendant has appealed and contends that it was error to

include a letter in the presentence report that contained intelligence information and personal opinion recommendations of a police officer, and to base the sentence in whole or in part on the presentence report.

The offense charged in count I of the information consisted of the sale of cocaine to an undercover officer on August 22, 1988. The offense is a Class II felony with a penalty of imprisonment for 1 to 50 years.

The letter which the defendant contends should not have been included in the presentence report was addressed to the adult probation officer and signed by a sergeant in the vice/narcotic unit of the Bellevue, Nebraska, police department. The letter stated that the defendant

> was affiliated with a group of individuals suspected of trafficking in cocaine for the past 12-18 months. During the course of the investigation, Mr. Guida had access to at least three different sources of cocaine and at least two of these separate, distinct sources were identified.

It further stated that the defendant,

> on at least two occasions, advised the undercover officer that he had other customers he dealt cocaine to. Based on intelligence information gathered by the Omaha and Bellevue Police Departments, Mr. Guida was affiliated with and obtained cocaine from sources involved in very sophisticated drug conspiracies.

The letter also referred to the fact that the defendant had agreed to assist the Bellevue Police Department in investigations in an effort to reduce some of the charges against him, but that the defendant

> put forth little or no effort and did not comply with what was asked of him. Many times he would not return phone calls or messages and he lied to officers several times concerning his efforts and whereabouts. Mr. Guida continued to affiliate with several people involved in the drug trade including a co-defendant he was specifically asked not to associate with during his workings with this department.

The letter further stated that the defendant's

> attitude while affiliated with the Narcotics Unit was very

obstinate, lackadaisical and uncaring or unworried about the future consequences he faced through the courts regarding his drug dealings. We impressed upon Mr. Guida the seriousness of the offenses and requested he strive harder in his efforts to assist the narcotics unit in their investigative endeavors. Mr. Guida seems to have the attitude that things will work themselves out without any effort on his part.

It is my opinion Mr. Guida is not a candidate for probation and I strongly recommend a jail sentence. My opinion is based on the seriousness of the offenses (i.e., four counts of delivery of a dangerous drug), the complex and involved drug trafficking his sources were involved in and his obvious disrespect for the law and disinterested attitude regarding his future.

Neb. Rev. Stat. § 29-2261 (Reissue 1985) governs presentence investigations and establishes guidelines for presentence reports. The statute states, in part, that "[t]he presentence investigation and report shall include, when available, an analysis of the circumstances attending the commission of the crime, the offender's history of delinquency or criminality . . . and any other matters that the probation officer deems relevant or the court directs to be included." A trial court has broad discretion as to the information that may be included in a presentence report. In *State v. Jordan*, 229 Neb. 563, 427 N.W.2d 796 (1988), the defendant objected to a presentence report which contained police reports and hearsay statements. We stated:

"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. . . . [T]he 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.*"

(Emphasis supplied.) *Id.* at 568, 427 N.W.2d at 800.

In contending that the letter should not have been included in the presentence report, the defendant relies on Neb. Rev. Stat. § 29-3506 (Reissue 1985), a part of the Security, Privacy, and Dissemination of Criminal History Information Act, Neb. Rev. Stat. §§ 29-3501 et seq. (Reissue 1985 & Cum. Supp. 1988). The purpose of the act is (1) to control and coordinate criminal offender recordkeeping, (2) to establish more efficient and uniform systems of criminal offender recordkeeping, (3) to assure periodic audits of recordkeeping, (4) to establish a more effective administrative structure for the protection of individual privacy in connection with such recordkeeping, and (5) to preserve the principle of the public's right to know of the official actions of criminal justice agencies. § 29-3502 (Reissue 1985).

An examination of the statute discloses that it has no application to presentence reports.

The act relates to the dissemination of criminal information to the public, with special attention to the news media's right to such information. There is nothing in the act which restricts the use of criminal history information in determining appropriate sentencing. Although the act restricts intelligence and investigative reports from public availability, all information contained in a presentence report is confidential and not available to the public.

The defendant also contends that his sentence is excessive because a codefendant received a lesser sentence. The record contains no specific information concerning a sentence imposed on a codefendant or a presentence report concerning such a person. As we said in *State v. Tate*, 222 Neb. 586, 590-91, 385 N.W.2d 456, 459 (1986),

> We have before us no transcript of this individual's sentencing proceeding and no information concerning his

> past criminal conduct, if any. It therefore is not possible for us to compare the coperpetrator's background and prior record with those of defendant. Information as to an alleged discriminatory sentencing not appearing in the record may not be considered by this court on appeal.

See, also, *State v. Evans*, 214 Neb. 432, 334 N.W.2d 5 (1983).

In *State v. Spotted Elk*, 227 Neb. 869, 877, 420 N.W.2d 707, 713 (1988), we stated that

> the issue in reviewing a sentence is whether the defendant in question received an appropriate sentence, not whether someone else received a lesser one. . . . Similarly, the mere fact that a defendant's sentence differs from those which have been issued to the coperpetrators in the same court does not make the imposition of defendant's sentence an abuse of discretion. Each defendant is unique; evidence as to each defendant's life, character, and previous conduct may be considered in determining the propriety of the sentence.

(Citations omitted.) See, also, *State v. High*, 225 Neb. 695, 407 N.W.2d 772 (1987); *State v. Sianouthai*, 225 Neb. 62, 402 N.W.2d 316 (1987).

The defendant is now 24 years of age. Although he has no significant history of prior offenses, distribution of cocaine is a very serious offense. The trial court specifically found that the sentence imposed was necessary for the protection of the public, that there was substantial risk the defendant would engage in additional criminal conduct if placed on probation, and that a lesser sentence would depreciate the seriousness of the crime and promote disrespect for the law. Under the circumstances in this case, we find no abuse of discretion in the sentence which was imposed.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. VICTOR LUNA, APPELLANT.

434 N.W.2d 526

Filed January 20, 1989. No. 88-189.

1. **Postconviction.** A defendant is entitled to bring a second proceeding for postconviction relief only if the grounds relied upon did not exist at the time the first motion was filed.
2. _____. Once a motion for postconviction relief has been judicially determined, any subsequent motion for such relief from the same conviction and sentence may be dismissed unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time the prior motion was filed.
3. _____. A motion for postconviction relief may not be used to obtain a further review of issues already litigated, and the mere fact that the issues are rephrased does not change that rule.
4. _____. An evidential hearing may properly be denied on a motion for postconviction relief when the records and files in the case affirmatively establish that the defendant is entitled to no relief.
5. **Postconviction: Proof.** A criminal defendant seeking postconviction relief has the burden of establishing a basis for such relief.
6. **Postconviction: Appeal and Error.** The finding of the postconviction hearing court will not be disturbed unless clearly erroneous.

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

Victor Luna, pro se.

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

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

CAPORALE, J.

Defendant-appellant, Victor Luna, appeals from the denial of his second motion for postconviction relief brought under the provisions of Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1985). He assigns as error the district court's determination that he (1) is not entitled to an evidential hearing and (2) is not entitled to relief. We affirm.

After a jury trial, during which he was represented by the Douglas County public defender, Luna was found guilty of first degree assault for having stabbed and slashed his live-in mistress, and of third degree assault for having slashed the

woman's daughter. He was subsequently found to be a habitual criminal and was sentenced accordingly.

Following his conviction, Luna, still represented by the Douglas County public defender, appealed to this court, alleging that the habitual criminal charge should have been dismissed for the reason that there was insufficient evidence to establish that he met the statutory definition of such a person. We, however, affirmed the district court's application of the habitual criminal offender statute on the evidence of Luna's criminal history. *State v. Luna*, 211 Neb. 630, 319 N.W.2d 737 (1982).

Luna next filed his first motion for postconviction relief, alleging, among other things, that his "court-appointed attorneys, in both trial and appeal, failed to adequately represent him." The district court, finding that Luna was "entitled to no relief and that an evidentiary hearing thereon is not justified," overruled the motion. Luna's appeal of that ruling to this court elicited from the State a motion for summary affirmance pursuant to Neb. Ct. R. of Prac. 7B(2) (rev. 1986), which this court sustained. *State v. Luna*, 216 Neb. xxiv (case No. 83-746, Dec. 14, 1983).

Luna then filed the motion now at issue, again alleging ineffective assistance of counsel at both the trial and appellate levels, as noted earlier. The district court held that Luna was not entitled to relief and denied his second postconviction motion without hearing, as a consequence of which Luna returns to this court a third time.

This appeal, too, must fail, for, as the district court correctly noted, a defendant is entitled to bring a second proceeding for postconviction relief only if the grounds relied upon did not exist at the time the first motion was filed. *State v. Nance*, 227 Neb. 581, 418 N.W.2d 598 (1988). Once a motion for postconviction relief has been judicially determined, any subsequent motion for such relief from the same conviction and sentence may be dismissed unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time the prior motion was filed. *State v. Harper*, 225 Neb. 300, 404 N.W.2d 436 (1987).

While it is true Luna seeks this time to ground his allegation

of ineffective assistance of counsel in different errors allegedly committed by counsel than those cited for the same purpose in his prior postconviction relief attempt, the fact remains that a motion for postconviction relief may not be used to obtain a further review of issues already litigated, and the mere fact that the issues are rephrased does not change that rule. *State v. Ferrell, ante* p. 958, 434 N.W.2d 331 (1989); *State v. Rubek,* 225 Neb. 477, 406 N.W.2d 130 (1987).

The applicable rule is that an evidential hearing may properly be denied on a motion for postconviction relief when the records and files in the case affirmatively establish that the defendant is entitled to no relief. *State v. Reddick, ante* p. 218, 430 N.W.2d 542 (1988).

A criminal defendant seeking postconviction relief has the burden of establishing a basis for such relief, *State v. Reddick, supra*; *State v. Harton, ante* p. 167, 430 N.W.2d 313 (1988), and the finding of the postconviction hearing court will not be disturbed unless clearly erroneous, *State v. Harton, supra*; *State v. Petitte*, 228 Neb. 144, 421 N.W.2d 460 (1988). The district court's order denying an evidential hearing and overruling Luna's motion for postconviction relief is not clearly erroneous; the judgment of the district court must therefore be, and hereby is, affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. STANLEY E. JONES, ALSO KNOWN AS RONNIE BANKS, APPELLANT.

434 N.W.2d 333

Filed January 20, 1989. No. 88-214.

1. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to sustain a criminal conviction, it is not the province of the Supreme Court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence; such matters are for the finder of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.

2. **Convictions: Circumstantial Evidence.** Circumstantial evidence is sufficient to support a conviction if such evidence and reasonable inferences that may be drawn from the evidence establish the defendant's guilt beyond a reasonable doubt.
3. **Burglary: Words and Phrases.** The opening of a closed door to enter a building is a breaking within the definition of burglary.

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

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

Robert M. Spire, Attorney General, and Donald E. Hyde for appellee.

HASTINGS, C.J., WHITE, and FAHRNBRUCH, JJ., and FUHRMAN and WHITEHEAD, D. JJ.

HASTINGS, C.J.

Following a trial by jury, the defendant was found guilty of burglary and theft by receiving stolen property, was thereafter determined to be a habitual criminal, and was sentenced to two concurrent terms of 15 years' imprisonment. He has appealed, assigning as error the insufficiency of the evidence. We affirm.

At approximately 2 p.m. on September 5, 1987, Anne Ludlow and her husband, together with their son, were working in their backyard. The storm door on the front entrance to the house was closed, but the inside door was open. The Ludlows went back inside at approximately 4 p.m., at which time Mrs. Ludlow noticed that her wallet was missing from inside her purse. Also missing was the son's new Seiko watch and $421, mostly in $20 bills. The Ludlows called the police.

In the meantime, after being asked by another Ludlow son, an across-the-street neighbor recalled having seen a white car pull up with two men in it. The car parked, and the driver walked up to the Ludlows' house. He walked up a wheelchair ramp to the front porch, and then he "more or less just disappeared from the porch." A few minutes later, the man returned down the ramp, got back in the car, and drove off.

The neighbor described for the police the man he had seen. He was described as wearing a navy blue shirt with flowers; he

had a cast on his left forearm and had a shower cap on his head. He was about 5 feet 8 or 9 inches tall, and about 160 pounds.

Later on, this neighbor went out to look for the man he had seen. While driving, he saw the defendant and his passenger make a left turn in front of the witness. The witness obtained the license plate number and then called the police from a phone at a nearby store. In the meantime, the witness continued to follow the defendant, until eventually a police officer who had investigated the burglary appeared and pulled the defendant over. The witness followed the defendant and the police officer and was able to make an identification of the defendant.

When stopped by the police, the defendant "very closely" matched the description given by the neighbor. He was wearing the shirt previously described and had a cast on his left arm. A shower cap was found on the driver's seat of the car. He was also wearing a Seiko watch which matched the description previously given by young Ludlow. A search of the defendant turned up 13 $20 bills and some other smaller denomination bills hidden in defendant's socks and front pockets.

The owner of the stolen watch had given the police a detailed description of the missing watch, including the first four digits of the six-digit serial number. He was also able to identify the watch by the location of two scratches on the band. Based on these facts, the owner was able to identify the watch taken from his home as the one defendant was wearing when arrested.

The police also discovered that the license plates on the automobile being driven by the defendant did not belong with that vehicle. The defendant had no driver's license, auto registration, or insurance card for the vehicle. It was discovered that the vehicle had been stolen from Littleton, Colorado, and the registered owner had not given the defendant permission to use the car.

It was on these facts that defendant was convicted of burglary and receiving stolen property. The defendant, perhaps understandably, offered no evidence in his defense. However, he argues the insufficiency of the evidence on the basis that the State did not prove (1) that the defendant entered the Ludlows' house, (2) that there was a breaking and entering, and (3) that the defendant knew the car was stolen.

In determining the sufficiency of the evidence to sustain a criminal conviction, it is not the province of the Supreme Court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence; such matters are for the finder of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Quiring, ante* p. 535, 432 N.W.2d 243 (1988); *State v. Anderson,* 229 Neb. 427, 427 N.W.2d 764 (1988).

The facts show that the defendant was seen on the Ludlows' front porch and that unless he jumped 4 feet off the porch, the only place he could have gone where the neighbor could not have seen him, or where the defendant could have obtained the property found on him, was in the house. Circumstantial evidence is sufficient to support a conviction if such evidence and reasonable inferences that may be drawn from the evidence establish the defendant's guilt beyond a reasonable doubt. *State v. Wiggins, ante* p. 632, 432 N.W.2d 824 (1988); *State v. Zellner,* 228 Neb. 272, 422 N.W.2d 96 (1988).

Mrs. Ludlow testified that the door was shut, and the neighbor also testified that he could have seen if the door was open, and it was not. "The opening of a closed door to enter a building is a 'breaking' within the definition of burglary." *State v. Sutton*, 220 Neb. 128, 131, 368 N.W.2d 492, 495 (1985); *State v. Sedlacek*, 178 Neb. 322, 133 N.W.2d 380 (1965).

As to the defendant's knowledge or belief that the car was stolen, the situation is similar to *State v. Holman*, 221 Neb. 730, 380 N.W.2d 304 (1986). The defendant was charged with theft by receiving stolen property after a police officer discovered four new tires in her trunk. The defendant admitted that she was not the owner of the tires but that she knew who the owner was. Her conviction was affirmed by this court, which found that her statements and the circumstantial evidence were sufficient to support the jury's verdict.

Here, the defendant admitted that the car was not his. The circumstantial evidence creates a strong inference that the defendant knew the car was stolen. Viewed in the light most favorable to the State, the evidence is sufficient to support the defendant's conviction.

This case is not unlike that in *State v. LynCook*, 227 Neb. 719, 419 N.W.2d 686 (1988). In that case, the court found that the circumstantial evidence was sufficient to support the defendant's conviction of theft by receiving stolen property. There, as here, "The requisite guilty knowledge for the offense is established by the circumstances. The evidence and evidentiary inferences sustain the verdict that [the defendant] was guilty as charged." *Id.* at 722, 419 N.W.2d at 688.

All of the defendant's arguments are without merit, and the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHN L. LEWIS, ALSO KNOWN AS RODNEY CRAIG FRAZIER, APPELLANT.

434 N.W.2d 528

Filed January 20, 1989. No. 88-233.

1. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact. The verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
2. **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 on the part of the sentencing judge.

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

Larry F. Fugit 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.

Defendant-appellant, John L. Lewis, also known as Rodney Craig Frazier, was convicted by a jury in the district court for Sarpy County of two counts of robbery, use of a deadly weapon to commit a felony, first degree false imprisonment, and burglary in connection with the robbery of an Albertson's grocery store in Bellevue on April 12, 1987. After a separate hearing, defendant was found to be a habitual criminal. He was sentenced to 15 to 30 years' imprisonment on each of the robbery, false imprisonment, and burglary counts. Those sentences were to run concurrently, but consecutively to any other sentences currently being served. Defendant was sentenced to not less than 10 nor more than 20 years on the weapons charge, to be served consecutively to all other sentences. He timely appealed, claiming that there was insufficient evidence of his identity to sustain his convictions and that the district court abused its discretion in imposing an excessive sentence. We affirm.

In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact. The verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Wiggins, ante* p. 632, 432 N.W.2d 824 (1988).

Taking the view most favorable to the State, the record shows that Albertson's grocery store on Fort Crook Road in Bellevue was robbed at approximately 5 a.m. on Sunday, April 12, 1987. George Kubr, a night stocker for Albertson's, worked the 11 p.m. to 5 a.m. shift. At the end of his shift, Kubr went upstairs to check out. As Kubr descended the stairs, he encountered two men. Kubr said, "Hi," to the first man, who he testified looked like "one of the bakery people." The second man, later identified as Kenny Richardson, stopped Kubr on the landing and kept "ask[ing] how many people were in this store and where's the safe . . . ."

Richardson shoved Kubr back up the stairs. When Kubr got to the top of the stairs, he looked to his right and saw the same

man he had passed on the stairway. Kubr testified that "as soon as I looked at him he slapped me in the face and he said, 'Don't look at me.' " Kubr realized then that the man was not a bakery employee. When Kubr looked at the man a second time, the man hit him in the left side of the ribs with a torque wrench and forced him to crawl approximately 25 feet to the office area of the store. In the office area, the two men continued to ask Kubr where the safe was. They then took Kubr to a storage area and took $8 from his billfold.

Kubr told the men that the safe was located downstairs in the customer service area and that there was "only me and Jeff and one other guy and the cleaning guy and maybe a couple of bakery people" in the store. Kubr was forced to crawl back down the stairs. The men proceeded first to the bakery area. Two of the intruders then dragged Kubr to the frozen food aisle and eventually to the customer service area, where Kubr was told to lie down on the floor by the safe.

Albertson's produce department manager, Bill Baumann, arrived at work shortly before 5 on the morning of April 12. Baumann testified that he usually came in through the north door of the building and that he usually has to have someone let him in. On April 12, however, the north door was unlocked. Baumann noticed that the glass panes had been removed from the door and were leaning against the building.

Baumann pushed the door open and walked into the store to the front counter. At that point, he encountered Kenny Richardson, who forced Baumann to crawl through several areas of the store. Richardson then took Baumann's wallet and forced him to crawl to the safe. Baumann saw Kubr being dragged through the frozen food aisle by two other men, but did not see Kubr again until he reached the customer service area.

Both Kubr and Baumann were told to keep down and not look up. They heard a lot of "rattling" and "rummaging" in the customer service area. The noise continued for a few minutes. About 5 to 10 minutes after the noise stopped, Kubr asked Baumann if he was okay, peeked over the counter, and called "911." Kubr, Baumann, and a third employee then searched the store for other victims and found three employees bound and

gagged in a storage room.

The value of the merchandise missing after the robbery was approximately $14,000. Among the items stolen were an MSI 88D inventory control label scanner and a number of ABC Sports logo sunglasses.

On April 14, defendant and two other men were arrested as suspects in a series of robberies which had been committed in the Omaha area. Defendant consented to a search of his vehicle at the time of his Omaha arrest. The investigating officers found the MSI 88D inventory control label scanner in the trunk. On the same day, Omaha police officers obtained permission to search the residence where defendant had been staying as a guest. They discovered one pair of ABC Sports logo sunglasses in the room occupied by defendant, Richardson, and one James Williams. The Omaha police notified the Bellevue police and their efforts were thereafter coordinated.

Kubr had given physical descriptions of the intruders to the Bellevue Police Department. He testified that the first man he saw walking up the stairway looked like "Willie," the bakery employee, because his hair style was the same and "the forehead or the eyebrow area, was a lot like Willie." Kubr mistook the man for Willie in the dim lighting of the stairway. Although the lighting in the stairway was dim, there was a light on the landing and bright lighting in the break room. Kubr further testified that he observed the man from 3 to 4 feet away when the man slapped him at the top of the stairs.

During a lineup coordinated by the Omaha Police Division on Tuesday, April 14, 1987, Kubr identified the defendant as the man who slapped him and hit him with the torque wrench. Bellevue police Sgt. William Gumm was present during the lineup and testified Kubr was not hesitant in his identification of defendant. Kubr also identified defendant at trial and testified he was 100 percent sure he had identified the right man.

Sergeant Gumm further testified that he showed a photo lineup to Bill Baumann. Baumann was 100 percent sure that Kenny Richardson had been involved in the robbery, but only 50 percent sure that defendant had been involved. Baumann verified that defendant does look like Willie. He further

testified that defendant "looked real familiar" and looked like the man who was carrying the wrench during the robbery.

Defendant testified at trial that he was at home asleep at the time the robbery occurred and that Richardson had taken his car without permission. Richardson testified that he drove to Albertson's in defendant's car and that he, Danny Williams, and Michael Stanfield had committed the robbery. Richardson further testified that defendant looks like Danny Williams and that defendant was not involved in the Albertson's robbery.

Defendant does not contend on appeal that he was identified as the result of an improper lineup procedure. He only claims the record contains insufficient evidence of his identity to sustain his convictions. We disagree. Kubr positively identified defendant as one of the men involved in the robbery. Proceeds of the crime were found in the trunk of the defendant's car and in the room occupied by the defendant and Richardson, who had previously been convicted of robbery in connection with this incident. The jury resolved the conflicts in the evidence as to defendant's identity in favor of the State, and there is sufficient evidence in the record to support the convictions.

Defendant further claims the trial court abused its discretion in imposing an excessive sentence. Robbery is a Class II felony, punishable by a minimum of 1 year's imprisonment and a maximum of 50 years' imprisonment. Burglary and use of a deadly weapon to commit a felony are Class III felonies, punishable by a maximum of 20 years' imprisonment, a $25,000 fine, or both. First degree false imprisonment is a Class IV felony, punishable by a maximum of 5 years' imprisonment, a $10,000 fine, or both.

Defendant was found to be a habitual criminal, pursuant to Neb. Rev. Stat. § 29-2221 (Reissue 1985). Section 29-2221 provides that one adjudged to be a habitual criminal shall be imprisoned for not less than 10 nor more than 60 years. Neb. Rev. Stat. § 28-1205 (Reissue 1985) provides that sentences imposed for use of a deadly weapon to commit a felony "shall be consecutive to any other sentence imposed."

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. Jones, ante* p. 528,

432 N.W.2d 523 (1988). We find no abuse of discretion.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DENNIS MARRS, APPELLANT.
434 N.W.2d 336

Filed January 20, 1989. No. 88-327.

Convictions: Appeal and Error. In determining the sufficiency of the evidence to sustain a conviction, it is not the province of the Supreme Court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact. The verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.

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

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

Robert M. Spire, Attorney General, and Kimberly A. Klein for appellee.

HASTINGS, C.J., WHITE, and FAHRNBRUCH, JJ., and FUHRMAN and WHITEHEAD, D. JJ.

FAHRNBRUCH, J.

Dennis Marrs was convicted by a jury of delivering marijuana to an undercover police officer. Marrs appeals, claiming the evidence is insufficient to support the conviction. We affirm.

Marrs was charged with two counts of unlawful delivery of marijuana, in violation of Neb. Rev. Stat. § 28-416(1)(a) (Cum. Supp. 1986). Each count is classified as a Class III felony. 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. Neb. Rev. Stat. § 28-105 (Reissue 1985).

Marrs was acquitted on one count. On the other count, he

was convicted and sentenced to 18 to 24 months' imprisonment. It is from the conviction that Marrs appeals.

In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact. The verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Wiggins, ante* p. 632, 432 N.W.2d 824 (1988); *State v. Tatara, ante* p. 279, 430 N.W.2d 692 (1988); *State v. Zellner,* 228 Neb. 272, 422 N.W.2d 96 (1988).

Taking the view most favorable to the State, the evidence reflects that on July 7, 1987, an Omaha police officer, Ted Green, working undercover in the narcotics unit, received an anonymous telephone call about a high volume of pedestrian and vehicular traffic in the area of 24th and Larimore Streets in Omaha. The caller thought people in the area were selling drugs on the street.

On the evening of July 7, 1987, during surveillance of the 24th and Larimore vicinity, Green and his partner saw a large group of people in front of a house. Cars would pull up to the side of the street, and a party from the group of people would run up to the passenger side of a car, stay 1 or 2 minutes, and disappear back into the crowd. The officers contacted their sergeant. It was decided that Green should attempt to purchase controlled substances in the area of the surveillance.

Later on the night of July 7, 1987, Green pulled up to the area as he had observed the other vehicles do earlier. He purchased two dime bags of marijuana for $20 from a black male. No arrest was made. Contents of the two dime bags were tested and found to be marijuana.

On July 24, 1987, Green passed by the area of 24th and Larimore, and again he saw the black male from whom he had purchased the marijuana. As Green drove by, the male motioned to his mouth as if smoking.

Green set up surveillance of the area on July 27, 1987. Before stopping to observe the area, Green drove by a church at 24th and Larimore and saw the same black male on the steps of the

church. On that evening, upon Green's request, uniformed officers conducted an identification check of the men on the church steps. The man who had sold Green marijuana was identified as Dennis Marrs, the defendant. Once Green had the defendant's name, he conducted a records check and positively identified a photo of Marrs as being the person who sold him the marijuana on July 7, 1987. Green also made an in-court identification of Marrs as the man who sold him the marijuana.

Green again purchased marijuana in the 24th and Larimore area on August 24, 1987. Marrs was arrested for both the July and August sales of marijuana to Green. He was acquitted of charges related to the August sale.

The evidence, when viewed most favorably to the State, is sufficient to sustain, beyond a reasonable doubt, the defendant's conviction for the sale of marijuana to Green on July 7, 1987.

The defendant's conviction and sentence are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RUDOLPH G. SHERIDAN, APPELLANT.

434 N.W.2d 338

Filed January 20, 1989. No. 88-330.

1. **Sexual Assault: Witnesses.** A complaining witness in a prosecution for sexual assault who made a complaint to another person within a reasonable time after the assault may testify as to the fact and nature of the complaint, but not as to its details.
2. _____: _____. A person to whom the complaining witness has complained about a sexual assault may testify as to the fact and nature of the complaint, but not as to its details, if the complaint was made voluntarily and within a reasonable time.
3. **Trial: Evidence: Convictions: Appeal and Error.** The improper admission of evidence is harmless error and does not require reversal if the evidence is cumulative and there is other competent evidence to support the conviction.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, 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 was convicted of first degree sexual assault of his 7-year-old niece, following a bench trial, and was sentenced to imprisonment for 5 to 10 years. He has assigned as error that the trial court admitted the testimony of an investigating officer which included details of the incident told to him by the victim.

The victim testified that the defendant, her uncle, did "bad stuff"; that he touched her in "private spots"; that he touched her on the "bottom" and "where [she went] to the bathroom"; that she was lying down and did not have clothes on at the time; and that the defendant told her that he would hurt her. She further testified that she had told Officer Cisar, who came to her school, some of what had happened.

James G. Cisar, an officer of the Omaha Police Division, testified that he was called to the victim's school on April 7, 1987, to investigate an alleged sexual assault. The victim's aunt had come to the school principal with indications that the child had been sexually assaulted in the past week. Cisar interviewed the victim alone and asked her if something bad had happened to her in the past week. The victim then told the officer what had happened. Without objection, Cisar testified:

> Ah, at first she was reluctant to talk about it. She said that she had forgotten. And I made some statement to the effect that things like this are hard to talk about, and she agreed. She said, yes, they are. And I asked her if something had happened to her and she said that Junior had hurt her. And when I went to ask her how Junior had hurt her, I learned that she had been violated in—from what she said in the anus and in the vagina.

The record shows that the defendant's nickname is "Junior." When asked specifically what the victim had said, Cisar

testified over objection:

> Her specific phrasing was that Junior had touched her and hurt her. And I asked her where she—where he had hurt her at, where she had been touched at, and again, she was reluctant to talk about it. And I asked her if Junior had touched her on her feet and she said no. I asked her if Junior had touched her on her ankles and she said no. I asked her if Junior had touched her on her knees and she said no. And then I asked her if Junior had touched her between her legs, and she said yes. And I then asked her if Junior had touched her in the area where she goes potty or poopie, and she at first said that he had touched her where she goes potty. And then I asked her did he touch her where she goes poopie, and she said, yes, that he had.

The defendant contends the testimony which was received over objection should not have been admitted.

After being advised as to his *Miranda* rights, the defendant gave a statement to Officer Francisco Greco of the Omaha Police Division. When Greco asked the defendant if he had had any sexual contact with his niece, the victim, the defendant initially denied having any contact. Later, the defendant responded that it would have been possible if he was drunk, but he did not think so. In a later interview with Greco, after being reminded of his *Miranda* rights, the defendant admitted that he had in fact had sexual contact with his niece. Officer Greco testified that the defendant said that while watching "R"-rated movies, he would assault his niece. The sexual contact described included digital penetration of the victim's vagina. The defendant denied any other type of penetration.

The evidence which has been summarized was received at a hearing on a motion to suppress. After the motion had been overruled, the parties stipulated that the evidence could be considered for the purposes of the trial.

Richard Circo, an Omaha police officer, testified that after having advised the defendant of his *Miranda* rights preparatory to a polygraph examination, the defendant told him that on occasion in the prior 3 months the defendant had sexual contact with his niece in the form of digital penetration of her vagina.

The sole issue on the appeal is whether the admission of

Officer Cisar's testimony concerning the details of the sexual assault as the victim described them was reversible error.

> " 'The rule is well established in this state that in a prosecution for sexual assault, the prosecutrix may testify in chief on direct examination, if within a reasonable time under all the circumstances after the act was committed she made complaint to another, to the fact and nature of the complaint, but not as to its details; and that others may likewise testify in chief to such fact and nature of the complaint, but not as to its details. . . .' "

(Emphasis omitted.) *State v. Daniels*, 222 Neb. 850, 853, 388 N.W.2d 446, 449 (1986).

The admission of testimony which goes beyond the fact that a complaint was made is not always reversible error. In *State v. Guy*, 227 Neb. 610, 419 N.W.2d 152 (1988), such testimony was held to be harmless error since the evidence was cumulative and there was other competent evidence to support a finding of guilty. In view of the defendant's confession to two police officers in this case, the error in the admission of Officer Cisar's testimony concerning the victim's statement as to the details of the offense was harmless.

Since this was a trial to the court, it is presumed that the trial court disregarded evidence which should not have been admitted.

> In a case tried to the court without a jury, there is a presumption that the trial court, in reaching its decision, considered only evidence that is competent and relevant, and this court will not overturn such a decision where there is sufficient material, competent, and relevant evidence to sustain the judgment. *Barber v. Barber*, 207 Neb. 101, 296 N.W.2d 463 (1980); *Murdoch v. Murdoch*, 200 Neb. 429, 264 N.W.2d 183 (1978).

State v. Tomes, 218 Neb. 148, 150, 352 N.W.2d 608, 609 (1984). See, also, *State v. Methe*, 228 Neb. 468, 422 N.W.2d 803 (1988).

The judgment is affirmed.

AFFIRMED.

WALTER E. SIEVERS, APPELLANT, V. SUZANNE OLDFIELD SIEVERS, APPELLEE.
434 N.W.2d 340

Filed January 20, 1989. No. 88-584.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed.

Sally Millett Rau for appellant.

Donald A. Roberts, of Lustgarten & Roberts, P.C., for appellee.

HASTINGS, C.J., WHITE, and FAHRNBRUCH, JJ., and FUHRMAN and WHITEHEAD, D. JJ.

PER CURIAM.

Walter E. Sievers appeals the Douglas County District Court's refusal to grant him custody of his daughter through modification of a Louisiana divorce decree. The child's home has been in Nebraska since 1984, and the case was brought under the Nebraska Child Custody Jurisdiction Act.

Although denying the father's request for custody, the trial court did place legal custody of the child in the court and continued physical possession of the child with her mother. The court further instituted measures to ensure the safety and stability of the child while she resides with the mother.

Child custody determinations are matters initially entrusted to the discretion of the trial court, and, on appeal, although the Supreme Court reviews these cases de novo on the record, the trial court's determination will normally be affirmed in the absence of an abuse of discretion. See, *Hibbard v. Hibbard, ante* p. 364, 431 N.W.2d 637 (1988); *Clark v. Clark*, 228 Neb. 440, 422 N.W.2d 793 (1988); *Staman v. Staman*, 225 Neb. 864, 408 N.W.2d 320 (1987).

Under all of the circumstances, considering only the competent evidence in this case, we cannot say that the trial court abused its discretion. The trial court's order relative to custody, visitation, and plan for the safety and stability of the child involved is affirmed.

AFFIRMED.

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