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STATE OF NEBRASKA, APPELLEE, V. RONALD R. COX, APPELLANT.

437 N.W.2d 134

Filed March 17, 1989. No. 88-280.

1. **Preliminary Hearings: Indictments and Informations: Courts.** There is no prohibition, constitutional or otherwise, to a preliminary hearing in the district court on a felony charge alleged in an information, notwithstanding a county court's refusal to bind the defendant over to the district court for a trial after a preliminary hearing in the county court on the same felony charge subsequently filed in the district court.
2. **Evidence: Trial: Appeal and Error.** To preserve a claimed error in admission of evidence, a litigant must make a timely objection, which specifies the ground of the objection to the offered evidence.
3. **Trial: Evidence: Waiver: Appeal and Error.** If a party does not make a timely objection to evidence, the party waives the right on appeal to assert prejudicial error concerning the evidence received without objection.
4. **Criminal Law: Trial: Juries: Evidence: Appeal and Error.** In a jury trial of a criminal case, whether an error in admitting or excluding evidence reaches a constitutional dimension or not, an erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt.
5. **Criminal Law: Trial: Juries: Appeal and Error: Words and Phrases.** Harmless error exists in a jury trial of a criminal case when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in a verdict adverse to a substantial right of the defendant.
6. **Trial: Evidence: Appeal and Error.** Erroneous admission of evidence is harmless error and does not require reversal if the evidence erroneously admitted is cumulative and other relevant evidence, properly admitted, or admitted without objection, supports the finding by the trier of fact.
7. **Rules of the Supreme Court: Evidence: Appeal and Error.** In order that assignments of error concerning the admission or rejection of evidence may be considered, the Supreme Court requires that appropriate references be made to the specific evidence against which objection is urged.
8. **Trial: Evidence: Appeal and Error.** When a court overrules a motion in limine to exclude evidence, the movant must object when the particular evidence, previously sought to be excluded by the motion, is offered during trial and cannot predicate error on the admission of evidence to which no objection was made when the evidence was adduced.

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

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

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

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

SHANAHAN, J.

A Sarpy County District Court jury convicted Ronald R. Cox of child abuse, a Class IV felony under Neb. Rev. Stat. § 28-707 (Reissue 1985), and third degree assault, see Neb. Rev. Stat. § 28-310 (Reissue 1985), which, under the circumstances, constituted a Class I misdemeanor. Both convictions resulted from first and second degree burns on the feet of Christopher Ranne, the 3-year-old son of Cox's former fiance, Connie Ranne. Although Cox had been charged with first degree assault of Christopher Ranne based on head injuries to the child, the jury acquitted Cox on the first degree assault charge. Cox was sentenced to imprisonment in the Sarpy County jail. We mention the head injuries of Christopher Ranne only as background for the discovery of Christopher Ranne's burns.

APPLICABLE STATUTES

Pertinent to the prosecution of Cox, § 28-707(1) defines the offense of child abuse: "A person commits child abuse if he or she knowingly, intentionally, or negligently causes or permits a minor child to be: (a) Placed in a situation that endangers his or her life or health; or (b) Cruelly confined or cruelly punished . . . ."

Under § 28-310(1)(a), a person commits the offense of assault in the third degree if he or she "[i]ntentionally, knowingly, or recklessly causes bodily injury to another person."

BACKGROUND FOR THE CHARGES

In the months prior to August 5, 1987, Cox frequently stayed with Connie Ranne and her two children, 6-year-old Joseph and 3-year-old Christopher. Sometime in July of 1987, Christopher sustained "submersion burns," which were first and second degree burns caused when Cox disciplined Christopher by placing him in the bathtub and running hot water on the child's feet. These burns, however, were not discovered by law enforcement officials until August 5, 1987, when Christopher was taken to the hospital with serious head injuries.

On August 5, 1987, Cox, Christopher, and Joseph were in the

Ranne home. Cox periodically forced Christopher to eat in the bathroom because Christopher "didn't eat the way [Cox] wanted him to eat." Both children were eating in the bathroom when, for some undisclosed reason, Cox took Christopher downstairs and forced him to do pushups. According to Joseph, Christopher was crying during the pushups and Cox "was telling him [Christopher] to do his pushups as he told him, but he didn't do it right, so — and then he kept on spanking him if he wouldn't do it right." After the pushup incident, Cox carried Christopher back to the bathroom. Although Joseph believed that Christopher was asleep while carried by Cox, Christopher had actually suffered a "subdural hematoma," a "collection of blood between the skull or the bone of the head and the brain tissue itself."

According to Cox's version of the incident, Christopher's head injuries resulted from the child's fall in the bathtub on August 5, 1987. Cox testified that he had placed the two children in the bathtub and proceeded downstairs to study for classes. About 10 to 15 minutes later, Joseph called out that Christopher was hurt. When Cox responded to Joseph's call, he found Christopher lying faceup in water in the bathtub. Joseph told Cox that Christopher had fallen and hit his head. As he pulled Christopher from the tub, Cox discovered that Christopher was not breathing. Cox began to administer cardiopulmonary resuscitation and then decided to take Christopher to the hospital.

During Christopher's treatment at Midlands Community Hospital, hospital staff saw physical indications which led them to suspect that Christopher was a victim of child abuse. Tamara Field, a registered nurse at Midlands' intensive care unit, noticed that Christopher had "multiple bruises all over his body" and "burns on his feet, his heels." When Christopher's condition began to deteriorate rapidly, he was removed from Midlands hospital and flown by emergency helicopter to St. Joseph Hospital in Omaha.

On arrival at St. Joseph, hospital personnel attempted to ascertain how Christopher had sustained burns to his heels. Cox told hospital personnel that the burns to Christopher's feet were caused by a combination of ill-fitting shoes and the fact

that Christopher had walked barefoot on hot pavement. Cox's explanation about the burns was inconsistent with the nature or type of burns sustained by Christopher, inasmuch as the burns were anywhere from a week to a month old and were first and second degree burns, commencing on the bottom of Christopher's feet and continuing up the back of his heels.

Dr. Douglas White, chief resident of St. Joseph's department of family practice, diagnosed Christopher's injuries as "submersion burns," resulting when a child is dipped into hot water. In Dr. White's opinion, Christopher's injuries were submersion burns in view of the pattern of the burns, namely, similar burns on both heels with no sign of injury to the child's forefeet, a condition which indicated that Christopher's burns did not result from the child's stepping into a tub of hot water. While in St. Joseph, Christopher was treated for his head injury, but no treatment was prescribed for Christopher's burns.

Pursuant to a request by personnel at Midlands hospital, an investigator from the Sarpy County Sheriff's Department, Officer Steve Grabowski, investigated Christopher's injuries. When Grabowski asked Christopher how his feet became burned, Christopher answered: "Daddy had poured hot water on his feet." Later, Grabowski learned that Christopher, in using "Daddy," was referring to Cox, who was later arrested and charged with two counts of first degree assault and one count of child abuse.

THE PRELIMINARY HEARING

In the county court charges against Cox, "Count #3," later designated as "Count III" in the information, contained the assault charge based on the burns to Christopher's feet. After a preliminary hearing in the county court, Cox was bound over to the district court for trial on the child abuse charge and the assault charge based on Christopher Ranne's head injuries. The county court found that there was insufficient evidence to bind over Cox for trial on the assault charge for burns to Christopher's feet and purported to "dismiss Count #3." In its information filed in the district court, the State charged Cox with child abuse and both assault charges. In view of the county court's refusal to bind over Cox on the assault charge reflected

in count III of the information, the district court held a preliminary hearing on the burn-related assault charge (count III) and found sufficient evidence to require that Cox stand trial on the assault charge alleged in count III of the information. The district court's "Journal Entry" contains: "Preliminary hearing held on Count III of the Information. Now comes on for decision. The Court finds the evidence established . . . probable cause to hold the defendant for trial on Count III." Consequently, Cox was tried on all three counts, that is, the charge of child abuse and the two assault charges.

ISSUES AT TRIAL

The cause of Christopher's burned feet is the crucial issue in Cox's convictions.

Cox maintained that Christopher had burned his feet at the end of July when Cox was preparing Christopher's bath and was interrupted by a phone call. As Cox was answering the phone, Christopher got into the bathtub and yelled, "Hot." When Cox returned to the bathroom, he saw Christopher standing "in the back of the tub on his heels." While removing Christopher from the tub, Cox saw that the child's feet were "red," but did not believe that Christopher was injured in the incident.

The prosecution claimed that Cox had poured hot water on Christopher's feet as a form of discipline. According to Joseph, Cox would "[g]ive [Christopher] hot water" if Christopher would not eat properly. As Joseph described the incident in which Christopher's feet were scalded, the water would "go into [his] brother's feet" while his brother was standing in the bathtub. Cox would let hot water run into the bathtub until Christopher swallowed his food. When hot water struck Christopher's feet, he would flee to the back of the tub, only to have Cox order him back into the running hot water at the front of the tub.

IN CAMERA HEARING

When the prosecutor indicated that he intended to call Christopher Ranne as a witness, the court held an in camera hearing to determine whether 3-year-old Christopher was competent to be a witness in Cox's trial. As a result of the hearing, the court declared that Christopher was incompetent

to testify because "his attention span is so short that I really question whether he understands what the proceedings are about." When the court ruled that Christopher was not competent to testify, the prosecutor expressed his intention to have a witness accompany Christopher into the courtroom and identify the child for the jury. Although the prosecutor never requested a ruling for authorization of Christopher's presence in the courtroom, the judge indicated that Christopher's presence would be relevant information for the jury. On the basis of relevance, Cox's lawyer objected to Christopher's prospective appearance in the courtroom and identification for the jury. For Cox's appeal, we consider the court's action as authorization for Christopher's appearance before the jury.

HEARSAY

On resumption of Cox's trial before the jury, Mary Drouillard, a registered nurse in the St. Joseph Hospital pediatric intensive care unit, testified regarding Christopher's burns. While Drouillard was testifying that she had spoken with Christopher on the night of his admission to the hospital, the following exchange occurred:

> [Prosecutor:] And I'm talking now about the first night, the night of his admission.
>
> [Drouillard:] Yes.
>
> [Defense counsel:] Your Honor, we're going to object to any eliciting of any testimony of statements by any witness who is not present in court, hearsay.
>
> THE COURT: Overruled.
>
> [Prosecutor:] And can you tell us when you first had any kind of conversation, and maybe conversation is a little bit too elaborate, but whenever Christopher said anything to you that first night, can you tell me what he said to you?
>
> [Drouillard:] On the first night admission, when he said to me?
>
> [Prosecutor:] Sure, let's start there.
>
> [Drouillard:] When we first set him in the bed he said that his feet hurt, and he proceeded to tell us what had happened to his feet.
>
> [Prosecutor:] What did he tell you?

> [Drouillard:] He said that his daddy poured hot water on his feet, but they were healing.

Later in the trial, Steve Grabowski, the investigator for the Sarpy County sheriff's office and a State's witness, testified without objection that he asked Christopher how the child's feet became burned, and Christopher, using "Daddy" to designate Cox, answered, "Daddy . . . poured hot water on [my] feet."

CHRISTOPHER IN COURT

Connie Ranne, Christopher's mother, testified that Cox had threatened to pour hot water on Christopher to discipline him, but she never saw Cox carry out the threatened discipline. The prosecutor, without objection by defense counsel, asked Connie Ranne whether either of her children had accompanied her to court. Connie Ranne stated that Christopher had come with her to court and, at the prosecutor's request, pointed out Christopher in the courtroom.

ASSIGNMENTS OF ERROR

Cox claims the district court committed reversible error in (1) ordering Cox to stand trial on count III of the information without a preliminary hearing; (2) receiving in evidence the out-of-court statement by Christopher Ranne, who was declared to be incompetent as a witness in Cox's trial, and (3) allowing the jury to see Christopher in court.

COX'S PRELIMINARY HEARING

Cox does not contend that evidence is insufficient to establish that a felony had been committed and probable cause to believe that he had committed the offense. See Neb. Rev. Stat. § 29-506 (Reissue 1985) (felony charge and preliminary examination). Rather, Cox asserts that the district court erred "in having [Cox] stand trial on Count III which was not bound over by the County Court without preliminary hearing or finding in District Court." Although the county court found insufficient evidence to bind Cox over to the district court for trial on the assault charge eventually embodied in count III of the information, the record unmistakably and conclusively shows that Cox was given a preliminary hearing in the district court on count III, the burn-assault charge.

"It has long been the rule in this jurisdiction that the discharge of one accused of crime by an examining magistrate

following a preliminary hearing does not bar the refiling of the same or different charges before another magistrate." *State v. Rubek*, 220 Neb. 537, 539, 371 N.W.2d 115, 117 (1985). There is no prohibition, constitutional or otherwise, to a preliminary hearing in the district court on a felony charge alleged in an information, notwithstanding a county court's refusal to bind the defendant over to the district court for a trial after a preliminary hearing in the county court on the same felony charge subsequently filed in the district court. *State v. Rubek, supra*. Cox had a preliminary hearing in the district court. The assignment of error regarding a preliminary hearing is without merit.

HEARSAY STATEMENTS OF CHRISTOPHER RANNE

Cox next complains that the district court erred by admitting Drouillard's testimony containing Christopher Ranne's out-of-court statement regarding the cause of injuries to his feet, namely, "[D]addy poured hot water on [my] feet." Defense counsel's objection to "any eliciting of any testimony of statements by any witness who is not present in court, hearsay," is apparently directed to Christopher's statement, admitted into evidence through Drouillard's testimony regarding Christopher's scalded feet.

To preserve a claimed error in admission of evidence, a litigant must make a timely objection, which specifies the ground of the objection to the offered evidence. Neb. Evid. R. 103(1)(a), Neb. Rev. Stat. § 27-103(1)(a) (Reissue 1985); *State v. Roggenkamp*, 224 Neb. 914, 402 N.W.2d 682 (1987); *State v. Pointer*, 224 Neb. 892, 402 N.W.2d 268 (1987). If a party does not make a timely objection to evidence, the party waives the right on appeal to assert prejudicial error concerning the evidence received without objection. *State v. Archbold*, 217 Neb. 345, 350 N.W.2d 500 (1984). Perhaps as prognostication of Neb. Evid. R. 103(1)(a), this court observed in *Havlicek v. State*, 101 Neb. 782, 784-85, 165 N.W. 251, 251-52 (1917):

> It is the duty of counsel to make his objections so specific that the court may understand the point intended to be raised, and, unless prejudicially erroneous on the point presented, the admission of the evidence to which objection is offered will not be held prejudicially

erroneous for some reason which counsel did not suggest at the trial.

"Unless the objection to offered evidence be sufficiently specific to enlighten the trial court and enable it to pass upon the sufficiency of such objection and to observe the alleged harmful bearing of the evidence from the standpoint of the objector, no question can be presented therefrom in the court of appeal." 5 Jones, Commentaries on Law of Evidence, sec. 893.

Both timeliness and specificity of defense counsel's objection in Cox's case are, at best, questionable. In apparent anticipation of a hearsay response, counsel chose to object well in advance of the prosecutor's question to Drouillard, "What did he [Christopher] tell you?" Consequently, when defense counsel objected, there was no pending question calling for an answer containing hearsay. At the point of the objection, without inquiring into the content of Christopher's conversation with Drouillard, the prosecutor was evidentially establishing the existence of a conversation between Christopher and Drouillard and was in the process of introducing a foundation for prospective admission of the conversation's content as evidence. With respect to timeliness, just as some objections may be procedurally too late, some objections may be procedurally too early. Cox's hearsay objection was, therefore, premature. Furthermore, counsel phrased the objection in the broadest possible terms, "any testimony of statements by any witness . . . not present in court." Given the all-inclusive nature and universality of counsel's objection, the district court had no choice but to overrule the objection. Under the Nebraska Evidence Rules, the hearsay rule does not require exclusion of all out-of-court or extrajudicial statements. See Neb. Evid. R. 803, Neb. Rev. Stat. § 27-803 (Reissue 1985). An extrajudicial statement must be examined to determine whether (1) it is hearsay defined by Neb. Evid. R. 801, Neb. Rev. Stat. § 27-801 (Reissue 1985), and (2) if hearsay, whether any exception to the hearsay rule authorizes admission of the statement into evidence. See, Neb. Evid. R. 803; Neb. Evid. R. 804, Neb. Rev. Stat. § 27-804 (Reissue 1985). To afford a trial court a fair opportunity to examine an

out-of-court or extrajudicial statement in the light of the Nebraska Evidence Rules, counsel must direct a hearsay objection to the statement to be excluded pursuant to the objection. Failure to direct a hearsay objection to a particular extrajudicial statement, offered as evidence, may result in a waiver of the right on appeal to assert prejudicial error. See, *State v. Roggenkamp, supra*; *State v. Archbold, supra*.

However, we need not decide whether Cox waived his right to claim error regarding Christopher's statement contained in Drouillard's testimony. In a jury trial of a criminal case, whether an error in admitting or excluding evidence reaches a constitutional dimension or not, an erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt. *State v. Olsan, ante* p. 214, 436 N.W.2d 128 (1989). See, also, *State v. Watkins*, 227 Neb. 677, 419 N.W.2d 660 (1988).

"Harmless error exists in a jury trial of a criminal case when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in a verdict adverse to a substantial right of the defendant." *State v. Watkins, supra* at 686, 419 N.W.2d at 666.

Erroneous admission of evidence is harmless error and does not require reversal if the evidence erroneously admitted is cumulative and other relevant evidence, properly admitted, or admitted without objection, supports the finding by the trier of fact. *State v. Guy*, 227 Neb. 610, 419 N.W.2d 152 (1988) (police officer's testimony containing a victim's statement to the officer was erroneously admitted into evidence over the defendant's objection; however, the error was harmless beyond a reasonable doubt because other witnesses testified without objection regarding the same details related in the officer's testimony containing hearsay). See, also, *State v. Thierstein*, 220 Neb. 766, 371 N.W.2d 746 (1985).

Cox did not object to Officer Grabowski's testimony, which coincided with the content of Drouillard's testimony concerning Christopher Ranne's response to inquiries about the cause of his burns, namely, "Daddy had poured hot water on [my] feet." Furthermore, Joseph Ranne, Christopher's brother, testified in detail regarding Cox's disciplinary practice of

placing Christopher in the bathtub and running hot water on Christopher's feet. If Christopher's extrajudicial statement is excluded by the hearsay rule, testimony from Joseph Ranne and Officer Grabowski rendered the admission of Drouillard's testimony, which contained Christopher's statement about the cause of his burns, error which was harmless beyond a reasonable doubt.

Cox also claims the district court erred in admitting hearsay during the testimony of witnesses in addition to Drouillard. Without an express reference to the statute, as far as we can gather, Cox relies on Neb. Rev. Stat. § 25-1141 (Reissue 1985), which provides:

> Where an objection has once been made to the admission of testimony and overruled by the court it shall be unnecessary to repeat the same objection to further testimony of the same nature by the same witness in order to save the error, if any, in the ruling of the court whereby such testimony was received.

If we assume that Cox is relying on § 25-1141 (perhaps an unwarranted assumption, since Cox did not mention the statute at trial and has not referred to the statute in his appellate brief), then there may be some meaning to Cox's casual comment in his brief: "The Court may note here that objection was not made by the defense counsel to the admission of this hearsay for defense counsel had a continuing hearsay objection." Brief for appellant at 6. In the preceding comment, "this hearsay" refers to various witnesses other than Drouillard and their testimony which Cox claims is hearsay. Certainly, we do note that defense counsel has made no objection regarding the evidence now questioned as hearsay. More important, we also note that Cox's assertion of a "continuing hearsay objection" is not correlated with any reference to the record which locates or reflects counsel's statement of such objection or ruling by the judge. Believing that absence of any reference to the record is an oversight of counsel, we have examined the nearly 1,000 pages in the four volumes of the bill of exceptions and are unable to locate the hearsay objection claimed by Cox, the objection which Cox asserts was granted a "continuing" status by the trial court. In order that assignments of error concerning the

admission or rejection of evidence may be considered, the Supreme Court requires that appropriate references be made to the specific evidence against which objection is urged. *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987); *Pulliam v. State*, 167 Neb. 614, 94 N.W.2d 51 (1959). As the result of counsel's failure to direct our attention to a specific location in the record, reflecting a "continuing hearsay objection," and as a consequence of our inability to locate the claimed objection, notwithstanding our examination for such objection, we must conclude that there is no continuing hearsay objection by Cox. Even if one were to conclude that, during direct examination of Drouillard, defense counsel's objection attained the stature of a proper and continuing objection to hearsay, the exemption from an otherwise necessary objection, available under § 25-1141, applies to "further testimony of the same nature by the same witness." It would take a lot of legal legerdemain to transform the objection during Drouillard's testimony into an objection to testimony from other witnesses, some of whom testified 2 days after Drouillard had testified. Therefore, beyond Drouillard's testimony, we consider no witness' testimony in relation to the hearsay rule or any other rule for admissibility of evidence.

Cox's claimed error regarding hearsay is without merit.

IDENTIFICATION AND PRESENCE OF CHRISTOPHER AT TRIAL

Finally, Cox claims reversible error in Connie Ranne's identification of Christopher during her testimony. After the in camera hearing and when trial resumed before the jury, Cox did not make any objection to Christopher's presence in the courtroom or Connie Ranne's in-court identification of Christopher. Cox's evidential complaint regarding the presence and identification of Christopher fails because Cox made no objection at the time of those occurrences.

When a court overrules a motion in limine to exclude evidence, the movant must object when the particular evidence, previously sought to be excluded by the motion, is offered during trial and cannot predicate error on the admission of evidence to which no objection was made when the evidence was adduced. *State v. Sailors*, 217 Neb. 693, 352 N.W.2d 860

(1984). Thus, by his failure to object, Cox waived any error predicated on Christopher's presence in the courtroom and Connie Ranne's in-court identification of Christopher.

We do not reach the substantive evidential questions raised in Cox's brief regarding the admissibility of Christopher's statement, nor do we express any view concerning the propriety of the in-court identification of Christopher, a child abuse victim who was not a witness in the trial. Cox has not presented a record on which we can reach those questions. Therefore, Cox's conviction is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RICHARD WATSON, APPELLANT.

437 N.W.2d 142

Filed March 17, 1989. No. 88-421.

1. **Verdicts: Appeal and Error.** A jury verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support the verdict.
2. **Controlled Substances: Convictions: Circumstantial Evidence: Witnesses: Proof.** Proof of the identity of a substance by circumstantial evidence, including lay testimony by a person sufficiently familiar with the drug in question, may be sufficient to sustain a criminal conviction resulting from a drug prosecution, so long as this evidence establishes the identity of the drug beyond a reasonable doubt.
3. **Controlled Substances: Proof: Evidence.** Some of the factors to be considered in determining whether the State has met its burden of proving the identity of a controlled substance beyond a reasonable doubt include: (1) the privacy or secretiveness of the transaction, (2) references made to the drug by the defendant and others, (3) testimony by witnesses who have a significant amount of experience with the drug in question, (4) high price paid for the substance, (5) behavior characteristic of sale and use of a particular substance, (6) prior involvement by the defendant in drug trafficking, (7) corroborating testimony by officers or other experts as to the identification of the substance or the expected effects of the substance, and (8) sensory identification of the substance if the substance is sufficiently unique.
4. **Rules of Evidence.** Neb. Rev. Stat. § 27-403 (Reissue 1985) provides that evidence, although relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.

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

Kirk E. Naylor, Jr., for appellant.

Robert M. Spire, Attorney General, and Charles A. Kandt, Lincoln County Attorney, for appellee.

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

PER CURIAM.

The defendant-appellant in this action, Richard Watson, was charged with three drug-related offenses. The first count alleged that on March 14, 1985, appellant distributed methamphetamine; the second count alleged that on June 6, Watson possessed cocaine; and the final count charged that on October 6, he distributed cocaine. A jury convened in the district court for Lincoln County convicted the appellant on count III, distribution of cocaine, and acquitted him of all other charges. Watson was sentenced to a term of 2 to 5 years' imprisonment.

Watson appeals to this court, contending that the district court erred in two respects: (1) The evidence was insufficient as a matter of law to support the charge that the appellant delivered cocaine to Diane Lackey on October 6, 1985, and (2) allowing the prosecution to present, as rebuttal evidence, a portion of an unedited videotape made on October 6, 1985, containing sexual activity between the appellant and the primary witness against him, Lackey, unduly prejudiced the jury against him.

In this drug prosecution, no controlled substances were introduced into evidence against the appellant. Instead, to establish the elements of the crimes charged, the prosecution was based primarily upon the testimony of the appellant's estranged girlfriend, Lackey, and upon two versions of a videotape, one edited and one unedited, made by appellant and Lackey on October 6. There is some conflict in the evidence adduced at trial regarding the events in question; however, a jury verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.

State v. Schenck, 222 Neb. 523, 384 N.W.2d 642 (1986). Therefore, we must assume that the testimony of the State's primary witness, Lackey, is credible.

Lackey had been living at Watson's home since March of 1985. She quit her job prior to moving in with him, and her primary source of support was through the appellant, Watson. Soon after she moved in, on March 14, she and the appellant met a friend of Watson's, Bruce Lingenfelter, for dinner. After dinner the three of them drove around in Watson's car and went to a few bars in town. On the way to these bars, Lackey testified that she ingested a controlled substance with Lingenfelter and Watson. Lackey testified that Watson identified the substance as "crank" and "crystal" and that it was Lingenfelter who brought the substance with him. She further stated that Watson helped her consume the substance, as this was her first time using that controlled substance. Lackey described how she ingested the substance, the physical appearance of the drug, and how the substance affected her. Later, the three of them went to Watson's residence and continued to use this substance. The day after she engaged in this activity, she was very ill.

According to her testimony, the next experience Lackey had with drugs was also with the appellant. Lackey stated that on June 6, she and the appellant did "several grams of nose candy." An expert for the State testified earlier that "nose candy" was a slang term for cocaine. On the evening of the 6th, Lackey and Watson began using "nose candy," drinking wine, and making a video of their sexual activity. According to Lackey, she and the appellant often would make videos of their sexual activity, but these would generally be destroyed soon after. Lackey went on to describe the physical appearance and effect of this drug, as distinguished from the substance she ingested with the appellant and Lingenfelter on March 14.

Finally, Lackey testified regarding the events of October 6, the date the incidents occurred that led to Watson's conviction for distribution of cocaine. Lackey testified that she could remember the date very specifically because Watson was supposed to return earlier that weekend from Colorado, but failed to do so. Before Watson returned, Lackey received a phone call that made her very upset and confirmed in her mind

the suspicions she had that Watson was in Colorado with another woman. However, when the appellant returned from Colorado on October 6, Lackey said nothing to him about her suspicions. Instead, Lackey testified that when Watson returned, he wanted to get some "nose candy" and make a video of their sexual activity. The two of them went to a video store, rented the equipment necessary to make the film, and stopped at a person's house to pick up the drug. The two then returned home and began to snort the substance while making a video of their sexual acts. Lackey described ingesting the drug on that date. Lackey then hid the tape from Watson in a drawer in the bedroom.

From this point, their relationship began to deteriorate rapidly. On the evening of October 9, Watson stayed out all night and telephoned Lackey on the morning of the 10th. At that time, Lackey expressed her desire to move out of Watson's house, and he said he would come home to discuss the particulars of her departure. However, before Watson called her on the 10th, Lackey had contacted Jack Bachelor, a police officer in Valentine, Nebraska. She told Bachelor that she needed "help" because of her use of drugs and did not know where to go. Officer Bachelor put her in contact with Officer David Elliott. Lackey met Officer Elliott on October 10 and discussed her need to get help for her drug problem. At that time Lackey told Officer Elliott about the videotapes she had made with the appellant. Officer Elliott asked her if she had any of the tapes, and she agreed to turn the tape made on October 6 over to him. Lackey gave the videotape to Officer Elliott on October 11. This film is the video that was admitted into evidence. Because the tape contained explicit sexual activity, an edited version was made with all nudity and sexual activity blocked out.

To assist the jury in viewing the tape, Lackey explained the action that correlated to what the jurors were viewing and hearing. She identified the substance that was being ingested on camera as "nose candy."

The testimony of Watson conflicted with Lackey's in several respects. According to the appellant, Lackey moved into his home in North Platte during March of 1985. However, Watson

vehemently denied consuming any drugs with Lackey on March 14. Regarding the events of October 6, Watson testified that when he returned from his trip to Colorado, Lackey stated that she had a "surprise" for him. The appellant contended that Lackey called this surprise "crystal" and that it was Lackey who supplied this substance, not the appellant. During the State's case in chief, an expert for the State testified that "crystal" is a common slang term for methamphetamine. Watson admitted participating in the making of the videotape and in the consuming of what he testified Lackey called "crystal," but contended that it was originally Lackey's idea to make the tape. Lackey moved out of the appellant's home on October 12, 1985.

In rebuttal, the State sought to introduce into evidence an unedited portion of the videotape made on October 6. The basis for introduction of the unedited tape was to rebut testimony by Watson that Lackey, not Watson, initiated the activities on October 6 and that she provided the controlled substance on that date. The defense objected to the introduction of any portion of the unedited tape on the basis of Neb. Rev. Stat. § 27-403 (Reissue 1985), contending that the probative value of the tape was substantially outweighed by the danger of unfair prejudice. The trial court found the unedited tape to be proper rebuttal and admitted approximately the first 10 minutes of the video, stating that "everything after that is sexual in nature."

Regarding the first assignment of error, the lack of physical evidence of the chemical content of any of the drugs allegedly ingested by the appellant and Lackey required the prosecution to rely on purely circumstantial evidence to establish the identity of the drugs at issue in this case. Although this court has never explicitly discussed the issue of the use of circumstantial evidence in a drug prosecution to identify the chemical content of drugs alleged to be prohibited controlled substances, the courts that have addressed this issue have held such evidence may be sufficient to prove the identity of illegal drugs beyond a reasonable doubt. For example, in *United States v. Harrell*, 737 F.2d 971 (11th Cir. 1984), *cert. denied* 470 U.S. 1027, 105 S. Ct. 1392, 84 L. Ed. 2d 781 (1985), the U.S. Court of Appeals for the 11th Circuit held that identification of

a controlled substance does not require direct evidence if the available circumstantial evidence establishes the identification beyond a reasonable doubt. Both federal and state courts are in agreement with this proposition. See, e.g., *U.S. v. Meeks*, 857 F.2d 1201 (8th Cir. 1988); *United States v. Osgood*, 794 F.2d 1087 (5th Cir. 1986), *cert. denied* 479 U.S. 994, 107 S. Ct. 596, 93 L. Ed. 2d 596; *United States v. Murray*, 753 F.2d 612 (7th Cir. 1985); *United States v. Roman*, 728 F.2d 846 (7th Cir. 1984), *cert. denied* 466 U.S. 977, 104 S. Ct. 2360, 80 L. Ed. 2d 832; *United States v. Scott*, 725 F.2d 43 (4th Cir. 1984); *United States v. Sweeney*, 688 F.2d 1131 (7th Cir. 1982); *United States v. Crisp*, 563 F.2d 1242 (5th Cir. 1977); *United States v. Gregorio*, 497 F.2d 1253 (4th Cir. 1974), *cert. denied* 419 U.S. 1024, 95 S. Ct. 501, 42 L. Ed. 2d 298; *United States v. Atkins*, 473 F.2d 308 (8th Cir. 1973), *cert. denied* 412 U.S. 931, 93 S. Ct. 2751, 37 L. Ed. 2d 160; *Jenkins v. State*, 46 Ala. App. 719, 248 So. 2d 758 (1971); *Johnson v. State*, 501 So. 2d 568 (Ala. Crim. App. 1986); *Winters v. State*, 646 P.2d 867 (Alaska App. 1982); *State v. Cunningham*, 17 Ariz. App. 314, 497 P.2d 821 (1972); *People v. Sonleitner*, 183 Cal. App. 3d 364, 228 Cal. Rptr. 96 (1986); *People v. Garcia*, 166 Cal. App. 3d 1056, 212 Cal. Rptr. 822 (1985); *People v. McLean*, 56 Cal. 2d 660, 365 P.2d 403, 16 Cal. Rptr. 347 (1961), *cert. denied* 370 U.S. 958, 82 S. Ct. 1613, 8 L. Ed. 2d 824 (1962); *People v. Sanchez*, 197 Cal. App. 2d 617, 17 Cal. Rptr. 230 (1961); *People v. Partin*, 254 Cal. App. 2d 89, 62 Cal. Rptr. 59 (1967); *People v. Rios*, 127 Cal. App. 2d 620, 274 P.2d 163 (1954); *In re Waylon M.*, 129 Cal. App. 3d 950, 181 Cal. Rptr. 413 (1982); *People v. Tipton*, 124 Cal. App. 2d 213, 268 P.2d 196 (1954); *People v. Steiner*, 640 P.2d 250 (Colo. App. 1981); *People v. Edwards*, 198 Colo. 52, 598 P.2d 126 (1979); *A.A. v. State*, 461 So. 2d 165 (Fla. App. 1984); *State v. Schofill*, 63 Haw. 77, 621 P.2d 364 (1980); *The People v. Robinson*, 14 Ill. 2d 325, 153 N.E.2d 65 (1958); *Copeland v. State*, 430 N.E.2d 393 (Ind. App. 1982); *Warthan v. State*, 440 N.E.2d 657 (Ind. 1982); *Locklayer v. State*, 162 Ind. App. 64, 317 N.E.2d 868 (1974); *Pettit v. State*, 258 Ind. 409, 281 N.E.2d 807 (1972); *Edwards v. Commonwealth*, 489 S.W.2d 23 (Ky. 1973); *People v Boyd*, 65 Mich. App. 11, 236 N.W.2d 744 (1975); *State v. Kerfoot*, 675 S.W.2d 658 (Mo. App. 1984); *State v. Neal*, 624

S.W.2d 182 (Mo. App. 1981); *State v. Starr*, 204 Mont. 210, 664 P.2d 893 (1983); *State v. Dunn*, 155 Mont. 319, 472 P.2d 288 (1970); *State v. Pipkin*, 101 N.J. Super. 598, 245 A.2d 72 (1968), *cert. denied* 393 U.S. 1042, 89 S. Ct. 668, 21 L. Ed. 2d 590 (1969); *People v Jewsbury*, 115 A.D.2d 341, 496 N.Y.S.2d 164 (1985); *People v. Kenny*, 30 N.Y.2d 154, 282 N.E.2d 295, 331 N.Y.S.2d 392 (1972); *Cory v. State*, 543 P.2d 565 (Okla. Crim. App. 1975); *Commonwealth v. Leskovic et al.*, 227 Pa. Super. 565, 307 A.2d 357 (1973); *Commonwealth v. Aikens*, 179 Pa. Super. 501, 118 A.2d 205 (1955); *Miller v. State*, 168 Tex. Crim. 570, 330 S.W.2d 466 (1959); *State v. Hutton*, 7 Wash. App. 726, 502 P.2d 1037 (1972); *State v. Frazier*, 162 W. Va. 602, 252 S.E.2d 39 (1979); *State v. Haller*, 363 S.E.2d 719 (W. Va. 1987).

That lay opinion can be used to identify the substances in question in a drug prosecution seems clearly authorized by our statutes. Neb. Rev. Stat. § 27-701 (Reissue 1985) states:

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

We are therefore in agreement with the vast majority of courts in this nation that hold proof of the identity of a substance by circumstantial evidence, including lay testimony by a person sufficiently familiar with the drug in question, may be sufficient in a drug prosecution. Of course, this circumstantial evidence must prove the identity of the substance beyond a reasonable doubt. See *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). In this challenge to the sufficiency of the evidence, whether the State has met its burden of establishing the identity of the substance beyond a reasonable doubt remains at issue.

In ascertaining whether the State has met its burden of proof beyond a reasonable doubt, the decisions of the federal courts and various states regarding the issue of the quantum of proof necessary to sustain a drug conviction when the drug is not entered into evidence or subjected to chemical testing must be

closely evaluated. An examination of these cases evidences the existence of a number of common factors utilized by the courts to assist in determining whether the evidence is sufficient to sustain a conviction.

The U.S. courts of appeals have decided a number of drug cases in which no drug was available for chemical analysis. The factors most commonly utilized by these courts include: (1) the privacy or secretiveness of the transaction (*U.S. v. Meeks*, 857 F.2d 1201 (8th Cir. 1988); *United States v. Murray*, 753 F.2d 612 (7th Cir. 1985); *United States v. Roman*, 728 F.2d 846 (7th Cir. 1984); *United States v. Scott*, 725 F.2d 43 (4th Cir. 1984); *United States v. Gregorio*, 497 F.2d 1253 (4th Cir. 1974)); (2) references made to the drug by the defendant and others, either by the drug's name or a slang term commonly used to connote the drug (*United States v. Harrell*, 737 F.2d 971 (11th Cir. 1984); *United States v. Crisp*, 563 F.2d 1242 (5th Cir. 1977); *Meeks, supra*; *Scott, supra*; *Gregorio, supra*); (3) testimony by witnesses who have a significant amount of experience with the drug in question, so that their identification of the drug as the same as the drug in their past experience is highly credible (*United States v. Osgood*, 794 F.2d 1087 (5th Cir. 1986); *United States v. Sweeney*, 688 F.2d 1131 (7th Cir. 1982); *United States v. Atkins*, 473 F.2d 308 (8th Cir. 1973); *Meeks, supra*; *Roman, supra*; *Harrell, supra*; *Scott, supra*); (4) high price paid for the substance (*Murray, supra*; *Roman, supra*; *Harrell, supra*; *Scott, supra*; *Crisp, supra*; *Gregorio, supra*; *Atkins, supra*); (5) behavior characteristic of sale and use of a particular substance, such as testing, weighing, cutting, and peculiar ingestion (*Harrell, supra*; *Crisp, supra*); and (6) prior involvement by the defendant in drug trafficking (*Osgood, supra*). In each of the above cases, a number of the elements listed above were present. Regarding factor (3), the prior use of the substance by the witness, the courts all stressed the necessity of significant past experience with the drug in question before a positive identification could be made.

An examination of the decisions in other states evidences an evaluation of factors similar to those utilized by the federal courts to determine whether the government has met its burden of establishing the identity of the substance beyond a

reasonable doubt. A number of cases held the evidence to be sufficient. In these cases, the courts considered: (1) The experience of the person testifying (*Johnson v. State*, 501 So. 2d 568 (Ala. Crim. App. 1986) (identification by an officer with years of experience of marijuana by unique appearance and smell); *People v. Partin*, 254 Cal. App. 2d 89, 62 Cal. Rptr. 59 (1967) (witness smoked marijuana on prior occasions, the defendant had sold him the substance previously in the same type container, substance from similar container sold by the defendant was recovered and tested positive); *People v. Rios*, 127 Cal. App. 2d 620, 274 P.2d 163 (1954) (heroin addict testified as to drug and effect compared to same drug, and as to past use of it with the same people who were defendants in this action); *People v. Garcia*, 166 Cal. App. 3d 1056, 212 Cal. Rptr. 822 (1985) (past use by witness significant, and reactions same before as with use of drug now); *A.A. v. State*, 461 So. 2d 165 (Fla. App. 1984) (arresting officer, who testified and identified marijuana by unique smell, had 4 years' experience in narcotics unit and viewed and smelled "tons" of marijuana in preceding 4 years); *The People v. Robinson*, 14 Ill. 2d 325, 153 N.E.2d 65 (1958) (testimony of heroin addicts); *Pettit v. State*, 258 Ind. 409, 281 N.E.2d 807 (1972); *Edwards v. Commonwealth*, 489 S.W.2d 23 (Ky. 1973) (witness heroin addict for 20 years); *People v Boyd*, 65 Mich. App. 11, 236 N.W.2d 744 (1975) (witness heroin addict); *State v. Kerfoot*, 675 S.W.2d 658 (Mo. App. 1984) (identification of marijuana by officer); *State v. Neal*, 624 S.W.2d 182 (Mo. App. 1981) (identification sufficient where witness testified that he used marijuana daily, that he bought and sold marijuana, and that he smoked some of the substance the defendant sold him); *State v. Pipkin*, 101 N.J. Super. 598, 245 A.2d 72 (1968) (four witnesses testified, all with long histories of heroin addiction); *People v Jewsbury*, 115 A.D.2d 341, 496 N.Y.S.2d 164 (1985) (prior experiences with the drug; witness processed and sold some of the substance sold him by the defendant and received no complaints); *Cory v. State*, 543 P.2d 565 (Okla. Crim. App. 1975) (witness police officer with many years of experience with marijuana); *Commonwealth v. Aikens*, 179 Pa. Super. 501, 118 A.2d 205 (1955) (witness heroin addict); *Miller v. State*, 168 Tex. Crim.

570, 330 S.W.2d 466 (1959) (narcotics officer's identification testimony sufficient); *State v. Haller*, 363 S.E.2d 719 (W. Va. 1987) (both witnesses previously used cocaine extensively)); (2) corroborating testimony by officers or other experts as to the identification of the substance or the expected effects after use of the drug in question (*Johnson v. State, supra; State v. Cunningham*, 17 Ariz. App. 314, 497 P.2d 821 (1972); *People v. Sanchez*, 197 Cal. App. 2d 617, 17 Cal. Rptr. 230 (1961); *People v. Steiner*, 640 P.2d 250 (Colo. App. 1981); *State v. Schofill*, 63 Haw. 77, 621 P.2d 364 (1980); *People v. Edwards*, 198 Colo. 52, 598 P.2d 126 (1979)); (3) references and representations made by the defendent as to the identity of the drug, either by name or common slang term (*Winters v. State*, 646 P.2d 867 (Alaska App. 1982); *People v. Partin, supra; People v. Rios, supra; People v. Steiner, supra; People v. Edwards, supra; State v. Schofill, supra; Edwards v. Commonwealth, supra*); (4) behavior characteristic of use or possession of the particular controlled substance (*State v. Cunningham, supra; People v. Sonleitner*, 183 Cal. App. 3d 364, 228 Cal. Rptr. 96 (1986); *People v. Rios, supra; The People v. Robinson, supra; Pettit v. State, supra; Edwards v. Commonwealth, supra*); (5) secretiveness of transaction (*People v. Steiner, supra; People v. Edwards, supra*); and (6) sensory identification of the substance if the substance is sufficiently unique (*A.A. v. State, supra* (unique smell of marijuana); *Cory v. State, supra* (unique visual appearance of marijuana); *Commonwealth v. Leskovic et al.*, 227 Pa. Super. 565, 307 A.2d 357 (1973) (capsules called "Christmas trees" were identifiable by color and letters unique to that of barbiturate)).

On the other hand, a number of states have held the evidence insufficient to establish the identity of the substance as an illegal drug. In the vast majority of these cases, the prosecution was primarily based upon the testimony of a witness who was shown to have insufficient experience with the drug in question to positively identify the drug as the substance the defendant was charged with having in his possession. A New York court, in *People v. Kenny*, 30 N.Y.2d 154, 282 N.E.2d 295, 331 N.Y.S.2d 392 (1972), held the evidence insufficient when it was based on

witness testimony in identifying marijuana. In *Kenny*, the witness testified that he had smoked marijuana with the defendant and described the physical appearance of the marijuana. He also stated that he became "high" after smoking the substance, as he became " 'like dizzy, and it was sort of like being drunk, yet I was conscious of my senses.' " 30 N.Y.2d at 156, 282 N.E.2d at 296, 331 N.Y.S.2d at 394. The court stressed that the witness was testifying about an experience 17 months prior to trial and the facts that the witness had one similar experience with marijuana 6 months prior to the event he testified about and one sometime after. The court stated: "These isolated experiences, one of which is before the time charged in the indictment, do not afford a reliable basis to establish the technical identity of the drug which is the essence of the crime charged." 30 N.Y.2d at 157, 282 N.E.2d at 296, 331 N.Y.S.2d at 394. In *Jenkins v. State*, 46 Ala. App. 719, 248 So. 2d 758 (1971), the Alabama court held the evidence insufficient because the witness that testified for the prosecution was not shown to be sufficiently familiar with the subject upon which he was asked to give an opinion. The court stated that it must be proven that the witness is qualified either by study, practice, experience, or observation of a given subject. In California, in *People v. McLean*, 56 Cal. 2d 660, 365 P.2d 403, 16 Cal. Rptr. 347 (1961), the court overturned a defendant's conviction, finding the evidence insufficient. In *McLean*, the witness testified that she smoked marijuana cigarettes furnished by the accused on seven occasions, the first two times being the basis of the charge; described the effect as "happy"; and testified that she recognized the substance from pictures she had seen and effects described to her by a number of people. Similarly, in *State v. Hutton*, 7 Wash. App. 726, 502 P.2d 1037 (1972), the witness testified that she ingested a "white, flaky substance" she had heard to be speed and explained the physical effect of the drug in general detail. At a later date, she asked the defendant for some speed, and he gave a similar substance to her. She ingested the substance and experienced feelings analogous to what she had experienced on the prior occasion. The court held this testimony insufficient.

Other cases are in agreement with those discussed above.

Copeland v. State, 430 N.E.2d 393 (Ind. App. 1982) (drug addict was legitimate expert, but evidence held insufficient because he only identified substance by sight and no evidence as to how he knew); *Warthan v. State*, 440 N.E.2d 657 (Ind. 1982) (witness testified that defendant represented substance on blotter paper to be LSD, and agent knew LSD generally sold in this form, but insufficient because conclusion that substance was LSD could only be garnered by the statements of the defendant); *State v. Starr*, 204 Mont. 210, 664 P.2d 893 (1983) (where State produced circumstantial evidence through field test that substance was cocaine, but subsequent evidence indicated that the substance could have been lidocaine, evidence of identity of drug insufficient); *State v. Frazier*, 162 W. Va. 602, 252 S.E.2d 39 (1979) (no objective factors were given or special familiarity shown other than witness' testimony that his past experience in smoking marijuana enabled him to identify cigarettes defendant gave him as containing marijuana); *In re Waylon M.*, 129 Cal. App. 3d 950, 181 Cal. Rptr. 413 (1982) (identification of a narcotic requires expert opinion, and a user can identify the drug only where there is evidence that the user knows the nature of the drug due to past use; here, witness did not testify as to his past use or as to the effects).

From this exhaustive review of the factors courts consider important in determining whether a substance is sufficiently identified by circumstantial evidence, we now turn to the identification evidence offered in this action. The State began the prosecution by calling James Parish, a member of the Nebraska State Patrol, to the stand. Parish testified that he had been working with drug investigations for 5 years and had extensive training in drug cases, including work as an undercover agent investigating suspected cocaine dealers. He described cocaine as a white or off-white fluffy powder, which is most commonly ingested by snorting the substance through the nose. Parish also testified that the drug is usually laid out on a mirror and that a razor blade is used to break up any chunks in the drug and to push the cocaine into "lines" to facilitate ingestion. The drug is then snorted through a straw or a rolled up dollar bill. He stated that a tapping sound is often associated

with preparing the drug for ingestion because the cocaine often sticks to the razor blade and must be tapped on the mirror to remove any residue of the drug from the surface of the blade. Common slang words for cocaine include "nose candy," and this drug numbs the nose of the user when it is being snorted.

Parish also testified as to the drug methamphetamine. He described methamphetamine as physically similar to cocaine. It ranges in color from white to off-white and is generally not as "crystally" as cocaine. Parish stated that methamphetamine is generally snorted like cocaine but that it burns the nose of the user when it is being ingested. Additionally, Parish testified that the effects of methamphetamine are longer lasting than the effects of cocaine. The paraphernalia needed to prepare methamphetamine for ingestion is the same as cocaine. Some of the slang terms for this drug are "crank" and "crystal."

The State then called Lackey to the stand to assist in identifying the drugs in question. She testified that she had no experience with cocaine or methamphetamine before she met the appellant. As for her subsequent use of drugs, she only testified regarding her experiences on the three occasions that were the bases of the charges against the defendant. Lackey stated that on March 14, she ingested a substance referred to by the appellant as "crystal" or "crank." She further testified that this drug made her feel "wiry" and "hyper" and burned her nose very badly. She testified that it looked off-white and grainy and that the effect lasted several hours; however, she ingested the substance three other times that night. The day after taking the substance she was very ill. Regarding the events of June 6, Lackey testified that she and the appellant did several grams of a substance Watson called "nose candy." She stated that the substance was snorted and did not burn her nose like the substance ingested on March 14. Physically, the substance was described as very white and of a powdery texture. In comparing the effects of the two drugs, Lackey stated that the "nose candy" was "more mellow" than the substance she took on March 14.

As for the substance that Lackey ingested on October 6, Lackey testified that she and the appellant ingested a substance referred to by the appellant as "nose candy." She did not testify

as to the effect the drug had upon her on this particular occasion, but described in detail the method used to ingest the substance and recalled ingesting the substance 3 or 4 times on that date. When the video made on October 6 was introduced into evidence, Lackey explained the various scenes, pointed out the location of the drug in the room, and explained the tapping noise that was heard on the tape as Watson drawing the "lines" to prepare the substance to be snorted. This was the extent of the evidence that the prosecution adduced to identify the substance as cocaine.

Although Lackey did not have a lot of experience with the drug in question, enough factors exist in this case to establish the identity of cocaine beyond a reasonable doubt. The following factors are present in this case: (1) references and representations made by the defendant as to the identity of the drug (Lackey testified that the appellant called the substance "nose candy" as opposed to "crystal," a term he had used on a prior occasion to identify a drug that burned the witness' nose); (2) behavior characteristic of use or possession of the particular controlled substance (as Parish testified, the drug was snorted through the nose and a blade was used on a mirror to "cut up" any chunks found in the substance; the sound of the blade tapping the mirror could be heard clearly on the videotape); (3) corroborating testimony as to the expected effects of the drug (Parish did testify regarding the expected effects of both methamphetamine and cocaine and distinguished the two; additionally, from a review of the portions of the tape that were admitted into evidence, it is obvious the two were consuming a controlled substance). Therefore, this assignment of error is without merit.

Secondly, the appellant assigns as error the admission of the unedited portion of the videotape in the rebuttal portion of the State's case. The trial court upheld the admission of the tape, ruling that it was proper impeachment for a number of reasons, including: (1) There was a factual dispute as to who was in charge of making the videotape, with an inference to be made from that fact regarding who was in charge of furnishing the alleged controlled substance; (2) credibility of the appellant and Lackey is the major issue in this case, and the defense was based

upon the assertion that Lackey set up the making of the video on October 6 for purposes of extortion, while Lackey testified that the defendant was in charge and provided the drug; and (3) there was testimony that the appellant had limited or no knowledge of the use of drugs prior to October 6, and his actions on the tape tended to show that he knew how to use the drugs.

In order to sustain an objection to admission of the videotape, the defense was required to show that the proffered evidence met the prejudice standard delineated in § 27-403. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." Following a review of the videotape, we see nothing that would support a finding that the probative value of the film is *substantially* outweighed by the danger of unfair prejudice to the appellant, confusion of the issues, or misleading the jury.

Because we find both assignments of error to be without merit, the conviction and subsequent sentence of the appellant must be affirmed.

AFFIRMED.

WHITE, J., dissenting.

The experience of Lackey with cocaine, when compared to the cases relied upon by the majority, is clearly insufficient. Lackey testified that she had not used cocaine or methamphetamine before she met the appellant. I believe the majority appropriately characterizes the testimony of Lackey. However, her broad general statements in contrasting the two drugs, that "nose candy" was "more mellow" than the substance referred to by the appellant as "crystal" and that "crystal" burned her nose very badly, while "nose candy" did not, seem hardly an adequate basis upon which to sustain a conviction. Instead, her testimony more closely resembles that found insufficient in *People v. Kenny*, 30 N.Y.2d 154, 282 N.E.2d 295, 331 N.Y.S.2d 392 (1972); *Jenkins v. State*, 46 Ala. App. 719, 248 So. 2d 758 (1971); *People v. McLean*, 56 Cal. 2d 660, 365 P.2d 403, 16 Cal. Rptr. 347 (1961); and *State v. Hutton*, 7 Wash. App. 726, 502 P.2d 1037 (1972).

Without either direct evidence of the chemical content of the

substance or circumstantial evidence that the substance was cocaine beyond a reasonable doubt, this conviction cannot be sustained.

STATE OF NEBRASKA, APPELLEE, V. PHILLIP CAMACHO, APPELLANT.

437 N.W.2d 151

Filed March 17, 1989. No. 88-555.

1. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to sustain a criminal conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence; such matters are for the finder of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
2. **Sentences: Appeal and Error.** 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 Scotts Bluff County: ALFRED J. KORTUM, Judge. Affirmed.

Charles F. Fitzke, Scotts Bluff County Public Defender, and Rae Ann Schmitz for appellant.

Robert M. Spire, Attorney General, and Denise E. Frost for appellee.

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

HASTINGS, C.J.

Following a trial by jury, defendant was convicted of breaking and entering, a violation of Neb. Rev. Stat. § 28-507 (Reissue 1985) and a Class III felony. He was sentenced to a term of imprisonment of 4 to 5 years. He has appealed, assigning as error the insufficiency of the evidence and the excessiveness of his sentence. We affirm.

Upon arriving at work on the morning of December 3, 1987, the owner of the Super Drug Store in Scottsbluff discovered

that the store had been burglarized. The screening from the air-conditioning shaft was broken, and there was dust and dirt on the floor beneath the shaft. Missing from the store were several wristwatches, calculators, camera lenses, and cameras. The air-conditioning serviceman testified that the insulation inside the unit had been disturbed and the dust had been cleaned from the shaft, as if "something went down through it." A brown leather jacket was found on the roof near the access panel to the air-conditioning unit. The police had theorized that the burglar entered the building through the air-conditioner vent, dropped down the shaft to the inside of the building, and then exited through the back door.

On this same morning, December 3, at approximately 6:30 a.m., three bags were found in the Dumpster in the alley next to the Super Drug Store. The bags were found to contain watches, camera equipment, calculators, etc., that were identified by the owner of the Super Drug Store as having been taken in the burglary.

According to a witness, Renee Foos, an occupant of the same house where defendant resided, the defendant knocked at the door of this house at about 5:30 a.m. on the morning of December 3. The defendant was extremely dirty, and his ankles were so swollen that he could hardly walk. She testified that the defendant told her that he had broken into a place, but he could not remember where; that he had left the stolen items in the trash and left the lid open on the trash; and that he had broken his ankles jumping from a roof.

Foos also testified that when the defendant left the house the night of December 2 he was wearing a brown leather coat of hers that he always wore, but that when he returned in the morning he did not have the coat. According to her further testimony, the defendant told Foos that he had left the coat on the roof because he could not "get through the hole" with it on.

The defendant denied his involvement in the burglary. He claimed he broke his ankles doing backflips as part of his workout to alleviate a hangover. He also claimed that he spent the night of December 2 at his uncle's house and knew nothing about the burglary.

The State's evidence, if believed, was sufficient to support a

guilty verdict. 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*, 230 Neb. 535, 432 N.W.2d 243 (1988). There is no merit to defendant's first assignment of error.

A Class III felony carries a possible penalty of 1 to 20 years' imprisonment and/or a fine of $25,000. The sentence imposed in this case was well within those limits. A sentence imposed within the statutorily prescribed limits will not be disturbed on appeal unless there has been an abuse of discretion. *State v. Masur*, 230 Neb. 620, 432 N.W.2d 815 (1988).

The defendant first ran into trouble with the law while a juvenile, and he has been involved in a number of offenses since then, including a previous breaking and entering, receiving stolen property, resisting arrest, damaging property, assault, and a variety of alcohol-related offenses. The trial judge did not abuse his discretion.

The judgment of the district court is affirmed.

AFFIRMED.

MARK W. VAN NORMAN, APPELLANT, V. CHERRI R. UPPERMAN, APPELLEE.

436 N.W.2d 834

Filed March 17, 1989. No. 88-603.

1. **Child Custody: Jurisdiction: Judgments: Appeal and Error.** The review of a judgment in a proceeding under the Nebraska Child Custody Jurisdiction Act, Neb. Rev. Stat. §§ 43-1201 to 43-1225 (Reissue 1988), is de novo. In the absence of an abuse of discretion, the judgment of the trial court will be affirmed.
2. **Child Custody: Motions to Dismiss: Jurisdiction: Pleadings.** A motion to dismiss because of an inconvenient forum is a proper response to a petition filed

under the Nebraska Child Custody Jurisdiction Act, Neb. Rev. Stat. §§ 43-1201 to 43-1225 (Reissue 1988).

3. **Child Custody: Jurisdiction.** Where children have lived in another state for a prolonged period or have never lived in Nebraska and where it would be an extreme hardship on the parent living with the children to litigate custody in this state, the trial court may dismiss a petition to determine custody upon the ground that Nebraska is an inconvenient forum.

Appeal from the District Court for Saunders County: WILLIAM H. NORTON, Judge. Affirmed.

John H. Sohl for appellant.

Ronald L. Gilbride for appellee.

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

BOSLAUGH, J.

The petitioner, Mark W. Van Norman, appeals from the order of the district court sustaining the motion of the respondent, Cherri R. Upperman, to dismiss his amended petition under the Nebraska Child Custody Jurisdiction Act, Neb. Rev. Stat. §§ 43-1201 to 43-1225 (Reissues 1984 & 1988), on the ground that Nebraska is an inconvenient forum.

The petitioner, who is 26 years of age, and the respondent, who is 36 years of age, have never been married. In 1982, they commenced living together in Costa Mesa, California. As a result of their cohabitation, they have two children who were born in California. One boy was born June 3, 1983, and the second boy was born May 30, 1984. From birth until August of 1985, both children resided in Costa Mesa, California, and from August 1985 until August 1987, they resided in Malmo, Nebraska, with the petitioner and the respondent.

On August 29, 1987, the respondent left Nebraska with the children because she feared that her life, as well as the welfare of her children, was in danger. According to the respondent, her fear arose because of an incident in which the petitioner had stated that he wanted their relationship to end and threatened to kill her if she left the family home with the children. When the respondent left Malmo, Nebraska, she moved with the children to Orange County, California, and resided there until October

4, 1987. Since October 5, 1987, the respondent has lived with the children in Yates Center, Kansas, where several maternal relatives of the respondent also reside. A third child, a girl, was born in Iola, Kansas, after the respondent had moved to Kansas.

Although the petitioner did not amend his amended petition to request custody of the third child, he testified that he was requesting custody of all three children.

The petitioner's amended petition requesting determination of custody pursuant to the Nebraska Child Custody Jurisdiction Act was filed January 19, 1988.

The petition alleges that on August 28, 1987, the respondent absconded with the minor children and because the respondent is unfit, the petitioner should be vested with the custody and control of the children. The prayer requests that temporary custody be granted to the petitioner; that upon a final hearing, permanent care, custody, and control of the children be granted to the petitioner; and that a determination of child support be made.

The petitioner contends that the trial court erred in sustaining the respondent's motion to dismiss and that the motion to dismiss was an improper pleading. Section 43-1207(2) and (5) (Reissue 1988) provides that "[a] finding of inconvenient forum may be made upon the court's own motion or *upon motion of a party* or a guardian ad litem or other representative of the child" and "[i]f the court finds that it is an inconvenient forum and that a court of another state is a more appropriate forum, *it may dismiss the proceedings*, or it may stay the proceedings . . . ." (Emphasis supplied.) The respondent's motion to dismiss, as a response to the petition for custody, was a proper pleading and was properly considered by the trial court.

With respect to the order sustaining the motion to dismiss, § 43-1207(1) provides:

> A court which has jurisdiction under sections 43-1201 to 43-1225 to make an initial or modification decree may decline to exercise its jurisdiction any time before making a decree if it finds that it is an inconvenient forum to make a custody determination under the circumstances of the

> case and that a court of another state is a more appropriate forum.

In determining whether the court should entertain a child custody proceeding having interstate implications, the court should first determine whether it has jurisdiction and then determine whether it is appropriate to exercise jurisdiction. *Dennis v. Dennis*, 387 N.W.2d 234 (N.D. 1986).

Since the petition for custody was filed on or before January 19, 1988, and Nebraska had been the "home state" of the boys, the trial court had jurisdiction at least as to them. §§ 43-1202 and 43-1203 (Reissue 1988). Since the third child has never lived in Nebraska, the trial court had no jurisdiction as to that child.

The review of the judgment of the trial court is de novo. *In re Marriage of Bolson*, 394 N.W.2d 361 (Iowa 1986); *In re Marriage of Olive*, 340 N.W.2d 792 (Iowa App. 1983); *O'Neal v. O'Neal*, 329 N.W.2d 666 (Iowa 1983). The judgment of the trial court will be upheld absent an abuse of discretion. *Dennis v. Dennis, supra*; *Lustig v Lustig*, 99 Mich. App. 716, 299 N.W.2d 375 (1980). As the court in the *Lustig* case said:

> " 'Where, as here, the exercise of discretion turns upon a factual determination made by the trier of the facts, an abuse of discretion involves far more than a difference in judicial opinion between the trial and appellate courts. The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an "abuse" in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.' "

Id. at 726, 299 N.W.2d at 380.

In reviewing the factors set forth in § 43-1207,

> [a] paramount consideration in the balancing of these various factors is a determination of what court is most able to act in the best interests of the children. [Citation omitted.] A court should exercise jurisdiction over a child-custody proceeding only when it is in the child's best interest to do so.

Dennis v. Dennis, supra at 236. See, also, *In re Wicks*, 10 Kan. App. 2d 124, 693 P.2d 481 (1985).

Although Kansas was not the boys' home state when the petition was filed, the contacts that the children currently have with Kansas weigh in favor of this action's being litigated in Kansas. The youngest child has never lived in Nebraska, but has lived her entire life in Kansas. In addition, this child is receiving physical therapy in Kansas because of shortened muscles in her neck and has no contacts whatsoever with Nebraska. Both boys are currently taking speech therapy in Kansas and are undergoing some other form of counseling in Kansas. The respondent testified that she has several aunts, uncles, and cousins residing in Yates Center, Kansas; that she is receiving welfare in Kansas; and that she has to travel 480 miles one way to appear in Nebraska courts. Because of her unemployment, limited income, and the schedules of the children, coming to Nebraska for court appearances would be an extreme hardship for her. Similar factors were considered in *Bem v. Bem*, 316 Pa. Super. 390, 463 A.2d 16 (1983); *Farrell v Farrell*, 133 Mich. App. 502, 351 N.W.2d 219 (1984); *Fernandez v. Rodriguez*, 97 Misc. 2d 353, 411 N.Y.S.2d 134 (1978).

The boys have now been away from Nebraska for about 18 months. All of the contacts they had with Nebraska relate to the past and are therefore not as pertinent to the issues of care, protection, and training as are their present contacts with Kansas. The relevant facts about the children's present condition and care and the present facts about the qualifications of the respondent are to be found in Kansas. The "maximum contacts" lie in the State of Kansas. See *Mace v. Mace*, 215 Neb. 640, 341 N.W.2d 307 (1983).

There is another circumstance that must be considered. It is quite apparent from the record that litigation in Nebraska would not end the controversy between the parties. If the petitioner were successful in Nebraska, he would have to go to Kansas to enforce whatever judgment he obtained. Upon consideration of all of the facts and circumstances, we find that the judgment of the trial court should be affirmed.

AFFIRMED.

IN RE INTEREST OF J.S.O., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. R.O., APPELLEE, N.J.W., ALSO KNOWN AS N.J.O., APPELLANT.

436 N.W.2d 837

Filed March 17, 1989. No. 88-612.

Appeal from the County Court for Richardson County: THOMAS J. GIST, Judge. Appeal dismissed.

William T. Ginsburg, of Zuber & Ginsburg, for appellant.

Douglas E. Merz, Richardson County Attorney, for appellee State.

Richard L. Halbert and Michael R. Dunn, of Halbert & Dunn, for appellee R.O.

William C. Nelson, guardian ad litem.

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

HASTINGS, C.J.

The mother of the juvenile, J.S.O., has appealed from the judgment of the county court for Richardson County, juvenile division, continuing custody of the juvenile in the father. This followed a determination that the juvenile lacked proper parental care by reason of the fault or habits of his parent under the provisions of Neb. Rev. Stat. § 43-247(3) (Reissue 1988). We dismiss the appeal for want of jurisdiction.

Neb. Rev. Stat. § 24-541.01 (Cum. Supp. 1988) provides in part as follows:

> (1) Any party in a civil case and any defendant in a criminal case may appeal from the final judgment or final order of the county court to the district court of the county where the county court is located, *except in cases of appeals from proceedings for the termination of parental rights in the county court sitting as a juvenile court*. . . .
>
> . . . .
>
> (4) In cases of appeals from proceedings *for the termination of parental rights in the county court sitting as a juvenile court*, the appeal shall be taken directly to the

> Supreme Court in the same manner as cases appealed from a separate juvenile court pursuant to section 43-2,126.

(Emphasis supplied.)

This is *not* a case involving the termination of parental rights. Therefore, the appeal should have been to the district court, and, accordingly, this court has no jurisdiction to hear this appeal.

Appellant cites to us *In re Interest of V.T. and L.T.*, 220 Neb. 256, 369 N.W.2d 94 (1985), in which the parent appealed directly to this court. However, in that case, the appeal was from an order entered by the *separate* juvenile court of Douglas County. Appeals from all orders and judgments of the *separate* juvenile court are directly to the Supreme Court. Neb. Rev. Stat. § 43-2,126 (Reissue 1988).

Inasmuch as we have acquired no jurisdiction, the appeal must be dismissed.

APPEAL DISMISSED.

IN RE INTEREST OF J.G., A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLANT, V. J.G., APPELLEE.

437 N.W.2d 153

Filed March 17, 1989. No. 88-955.

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

Michael G. Heavican, Lancaster County Attorney, and Alicia B. Henderson for appellant.

Sandra A. DeLair, of DeLair & DeLair Law Offices, for appellee.

WHITE, J.

This is an appeal by the State of Nebraska to one judge of the Nebraska Supreme Court pursuant to Neb. Rev. Stat. § 29-824 (Reissue 1985). The State appeals an order of the separate

juvenile court of Lancaster County suppressing a statement made by J.G., a 14-year-old minor, and the seizure of a BB gun by the Lincoln Police Department.

On September 13, 1988, Officer Thomas Addeson of the Lincoln Police Department went to the residence of Dorothy White, J.G.'s legal guardian, to arrest J.G. for attempted sexual assault and burglary. Officer Addeson told J.G. he was under arrest, and then handed him a *Miranda* warning and waiver form. J.G. was instructed by Officer Addeson to read each question, answer as he saw fit, and sign his name on the bottom when he was finished. The last question on the form said, "Do you willingly waive and do without the services of an attorney at this time?" J.G. answered "yes" to each question on the form, including the last one, and handed it back to the officer.

According to Officer Addeson, after examining the form and seeing that J.G. had "waive[d] his rights," he asked a question or made a statement concerning the whereabouts of a BB gun taken from the victim's house. In response, J.G. said that he had the gun but that another person had the victim's boots. Officer Addeson then handed the *Miranda* warning and waiver form to White, who crossed out J.G.'s affirmative response to the last question and wrote in "no." She also verbally stated that she wanted an attorney for J.G.

In contrast, White's testimony indicates that after J.G. filled out the form, Officer Addeson then handed it to her. She filled out the form, crossed out J.G.'s response to the last question, and wrote in "no." White told the officer, "We're changing this last one because we are going to have to have an attorney." By White's account, it was after she had requested an attorney that Officer Addeson asked about the BB gun, to which question J.G. stated he had the gun.

J.G. testified that Officer Addeson questioned him about the BB gun during the time White was filling out the *Miranda* warning and waiver form.

The record also shows that Officer Addeson had J.G. retrieve the gun and give it to him after White had filled out the form and requested an attorney.

J.G.'s attorney moved to suppress the statement and the seizure of the BB gun on the grounds that the statement was

obtained after J.G. had requested an attorney, and therefore illegally obtained, and that the seizure of the BB gun was the fruit of the illegal interrogation. The court suppressed the statement and the seizure of the gun, finding that

> [J.G.] and his legal guardian, Ms. Dorothy White, had a right to request legal counsel and *legal counsel was requested*. Once legal counsel was requested, all further interrogation or the direction to adduce alleged evidence was improper. The motion to suppress any alleged evidence on any statement made by [J.G.] in regard to [the victim's] BB gun and the direction to retrieve a BB gun should be suppressed.
>
> IT IS THEREFORE . . . ORDERED . . . that any statement made by [J.G.] *after his legal guardian, Ms. Dorothy White, requested legal counsel* for [J.G.] and any seizure of property after said request for legal counsel, are suppressed.

(Emphasis supplied.)

It is apparent from the court's order that the judge, as a matter of law, believed that White, as J.G.'s legal guardian, had the authority to assert J.G.'s right to counsel pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

> In determining the correctness of a trial court's ruling on a motion to suppress, this court will uphold a trial court's findings of fact unless those findings are clearly erroneous. [Citations omitted.] In determining whether a trial court's findings are clearly erroneous, this court recognizes the trial court as the trier of fact and takes into consideration that the trial court has observed the witnesses testifying regarding such motion to suppress.

State v. Price, 229 Neb. 448, 450, 427 N.W.2d 81, 83 (1988). However, the posture of this case requires a review of the district court's application of law, not fact. "[R]egardless of the differing standards of review accorded factual questions, this court has an obligation to reach an independent conclusion on a question of law." *Fisbeck v. Scherbarth, Inc.*, 229 Neb. 453, 466, 428 N.W.2d 141, 150 (1988).

An examination of J.G.'s motion to suppress reveals that

suppression of his statement and the BB gun was requested on the grounds that these items were obtained or seized after J.G. allegedly asserted his right to counsel. The issue of whether J.G., under the totality of the circumstances, knowingly, intelligently, and voluntarily waived his right to counsel prior to making the statement was never raised, nor was the issue of whether J.G. made the statement knowingly, intelligently, and voluntarily under the totality of the circumstances. See *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964). The only issue the separate juvenile court addressed was whether J.G. was questioned, in violation of *Miranda v. Arizona, supra*, after his legal guardian allegedly invoked his right to counsel. Therefore, review of this matter will be limited to that issue alone.

Generally, cases in this jurisdiction involving the admissibility of a minor's statement have centered on the issue of whether, under the totality of the circumstances, the statement was knowingly, intelligently, and voluntarily made. See, *State v. Smith*, 203 Neb. 64, 277 N.W.2d 441 (1979); *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977), *disapproved on other grounds*, *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986); *State v. McDonald*, 195 Neb. 625, 240 N.W.2d 8 (1976); *State v. Lytle*, 194 Neb. 353, 231 N.W.2d 681 (1975); *State v. Russell*, 194 Neb. 64, 230 N.W.2d 196 (1975). There are no cases in Nebraska which directly hold that the legal guardian or parent of a minor can assert the *Miranda* rights on behalf of that minor, or even that a legal guardian or parent has to be present at the time the minor gives a statement to the police. Nebraska case law is in conformity with the current position of the U.S. Supreme Court on these issues. See, e.g., *Gallegos v. Colorado*, 370 U.S. 49, 82 S. Ct. 1209, 8 L. Ed. 2d 325 (1962); *Little v. Arkansas*, 435 U.S. 957, 98 S. Ct. 1590, 55 L. Ed. 2d 809 (1978) (Marshall, J., dissenting).

However, Nebraska does not entirely ignore the impact a legal guardian or parent can have on a minor who is asked to respond to police questions where *Miranda* would be applicable. For example, in *State v. Stewart, supra*, one of the grounds on which the minor contended that his confession was inadmissible was that it was obtained without first notifying his

parents. That court, citing *State v. McDonald, supra*, *State v. Lytle, supra*, and *State v. Russell, supra*, for the proposition that there is no requirement in Nebraska that the juvenile's parents be notified prior to taking a statement, held that the role of the parents is a factor to be measured in determining if the confession was knowingly, intelligently, and voluntarily made under the "totality of the circumstances." Clearly, then, this jurisdiction holds that the absence of a parent will not make a juvenile's statement involuntary per se, but it is a factor to be considered in the totality of the circumstances.

Furthermore, the Nebraska Supreme Court has, in other contexts, recognized that rights guaranteed by the U.S. Constitution are personal. For example, the court has held that the constitutional right to be free from unreasonable searches and seizures is personal, and therefore can only be asserted by the person aggrieved by the unreasonable search and seizure. *State v. Searles*, 214 Neb. 849, 336 N.W.2d 571 (1983), *cert. denied* 466 U.S. 906, 104 S. Ct. 1684, 80 L. Ed. 2d 158 (1984). By analogy, it logically follows that a person's right against compulsory self-incrimination, which is protected by the *Miranda* rules, see *Michigan v. Tucker*, 417 U.S. 433, 94 S. Ct. 2357, 41 L. Ed. 2d 182 (1974), is personal and can only be asserted or waived by the person whose right against self-incrimination is affected. Therefore, since the right against self-incrimination is personal, the right to invoke the protections of *Miranda* must also be personal.

Hence, in the case at bar, White did not have carte blanche to invoke a *Miranda* right to counsel on behalf of J.G., especially since the facts indicate that J.G. initially waived that right. This holding is not to be interpreted as making all actions of a parent or legal guardian who attempts to assert *Miranda* rights on behalf of his or her minor children irrelevant. Rather, these actions are the proper subject of review when the motion to suppress challenges whether the waiver of *Miranda* rights was knowingly, intelligently, and voluntarily made under the totality of the circumstances or whether the statement was made knowingly, intelligently, and voluntarily under the totality of the circumstances, and had J.G. brought the motion to suppress on other grounds, the result might have been different.

The court erred in holding that White had the authority to assert J.G.'s right to counsel on his behalf. Since J.G. chose to waive his *Miranda* rights and did not reassert those rights prior to the making of the statement at issue or the seizure of the BB gun, those items were improperly suppressed. Accordingly, the judgment of the separate juvenile court is reversed.

REVERSED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. JAMES G. SHARP, RESPONDENT.

436 N.W.2d 838

Filed March 17, 1989. No. 89-141.

Original action. Judgment of disbarment.

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

PER CURIAM.

This is an original proceeding submitted to this court upon the respondent's voluntary surrender of his license to practice law. Respondent, James G. Sharp, voluntarily surrenders his license and consents to the entry of a disciplinary order against him.

Upon a review of the record in this action, and based on the respondent's voluntary surrender of his license and his consent to the entry of an order of disbarment against him, we order that the respondent, James G. Sharp, be, and hereby is, disbarred, effective immediately.

JUDGMENT OF DISBARMENT.

WHITE, J., not participating.

SECURITY INVESTMENT COMPANY, APPELLANT, V. STATE OF NEBRASKA AND NEBRASKA DEPARTMENT OF BANKING AND FINANCE, APPELLEES.

437 N.W.2d 439

Filed March 24, 1989. No. 87-182.

1. **Demurrer: Pleadings: Appeal and Error.** In reviewing an order sustaining a demurrer, the Supreme Court accepts the truth of facts well pled and the factual and legal inferences which may be reasonably deduced from such facts, but does not accept conclusions of the pleader.
2. **Demurrer: Pleadings.** When ruling on a demurrer, a court must assume that the pleaded facts, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of a fact not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial.
3. **Tort Claims Act: Liability.** Performance of or failure to perform a discretionary function cannot be the basis for liability under the State Tort Claims Act, Neb. Rev. Stat. §§ 81-8,209 et seq. (Reissue 1987).
4. **Tort Claims Act.** Applicability of the discretionary function exception in the State Tort Claims Act depends on the conduct in question, not on the identity of the actor.
5. _____. The discretionary function exception of the State Tort Claims Act includes a governmental regulatory agency and its action, conduct, and decisions.
6. **Tort Claims Act: Negligence.** Judgment or choice is essential and indispensable for discretionary conduct excepted from negligence liability under the State Tort Claims Act.
7. **Tort Claims Act: Public Policy.** The discretionary function exception of the State Tort Claims Act protects or excepts only governmental decision, action, or conduct based on a permissible exercise of a public policy judgment.
8. **Tort Claims Act.** The discretionary function exception is inapplicable to a claim under the State Tort Claims Act if a statute, regulation, or policy specifically prescribes a course of governmental action or conduct.
9. **Pleadings.** A court must examine and construe a petition's essential and factual allegations by which the plaintiff requests relief, rather than the legal terminology utilized in the petition or the form of a pleading.
10. **Estoppel.** The doctrine of equitable estoppel is not a cause of action, but is a judicial device to preserve a right already acquired, not generate a new right.
11. **Words and Phrases.** *Conceal* means to hide, secrete, or withhold from knowledge of others; to withhold from utterance or declaration; to cover or keep from sight; to hide or withdraw from observation, cover or keep from sight, or prevent discovery. The word *conceal* pertains to affirmative action likely to prevent or intended to prevent knowledge of a fact and has reference to some advantage to the concealing party or a disadvantage to some interested party

from whom the fact is withheld.

12. **Fraud.** The elements of fraud by concealment are: (1) The defendant concealed or suppressed a material fact; (2) the defendant had knowledge of this material fact; (3) this material fact was not within the reasonably diligent attention, observation, and judgment of the plaintiff; (4) the defendant suppressed or concealed this fact with the intention that the plaintiff be misled; (5) the plaintiff was reasonably so misled; and (6) the plaintiff suffered damage as a result.
13. **Immunity: Waiver.** Waiver of sovereign immunity will only be found where stated by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction.
14. **Tort Claims Act: Immunity: Waiver.** Neb. Rev. Stat. § 21-17,141 (Reissue 1987) is not a waiver of common-law governmental immunity. Tort liability of the State, pursuant to § 21-17,141, is controlled by the State Tort Claims Act, which grants the right to sue the State for its negligent or wrongful act or omission.

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

David A. Ludtke and Kim M. Robak, of Rembolt Ludtke Parker & Berger, for appellant.

Robert M. Spire, Attorney General, and Martel J. Bundy for appellees.

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

SHANAHAN, J.

Security Investment Company (SIC), assignee of SSS Co., which was formerly an industrial loan and investment company, see Neb. Rev. Stat. §§ 8-401 et seq. (Reissue 1987), appeals from the judgment of the district court for Lancaster County, sustaining the demurrer of the State of Nebraska and Nebraska Department of Banking and Finance and dismissing SIC's action brought under the State Tort Claims Act, Neb. Rev. Stat. §§ 81-8,209 et seq. (Reissue 1987). The State of Nebraska and Nebraska Department of Banking and Finance are collectively called "Department."

SIC claims that damages were sustained by SSS after the Department closed another industrial loan and investment company, Commonwealth Company. SIC alleged that the Department's negligence regarding Commonwealth caused SSS' loss of deposit insurance protection and customer accounts and necessitated reorganization under chapter 11 of

the U.S. Bankruptcy Code. Also, SIC contends that the Department is estopped from denying liability on account of its promises and concealment concerning Commonwealth.

STANDARD OF REVIEW

"In reviewing an order sustaining a demurrer, the Supreme Court accepts the truth of facts well pled and the factual and legal inferences which may be reasonably deduced from such facts, but does not accept conclusions of the pleader." *Weiner v. Hazer*, 230 Neb. 53, 55-56, 430 N.W.2d 269, 271 (1988).

> When ruling on a demurrer, a court must assume that the pleaded facts, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of a fact not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial.

Schuyler State Bank v. Cech, 228 Neb. 588, 593, 423 N.W.2d 464, 468 (1988).

THE DEPARTMENT OF BANKING AND FINANCE

The Department has general supervision and control over industrial loan and investment companies ("industrials"), and over other financial institutions in Nebraska, and the duty of enforcing Nebraska statutes pertaining to industrials. See Neb. Rev. Stat. §§ 8-102 and 8-401.01 et seq. (Reissue 1987). Section 8-403.02 requires a minimum amount of paid-up capital, surplus, and paid-in undivided profits, and § 8-409.02 limits insider loans. Section 8-403.04 specifies the qualifications for an industrial's executive officers and gives the Department authority to revoke any officer's license in the event of the officer's unsafe or unauthorized operation of an industrial.

If an industrial's capital stock is impaired, its operations are unsafe or unauthorized and endanger interests of its certificate of indebtedness holders, or the industrial refuses or neglects to obey the Department's lawful order, the Department may seize control of the industrial's assets until the industrial is fit to resume business or may dissolve the industrial. § 8-416.

NDIGC

Pursuant to the Nebraska Depository Institution Guaranty Corporation Act, Neb. Rev. Stat. §§ 21-17,127 to 21-17,145

(Reissue 1987), the Department may approve formation of a corporation (NDIGC) composed of 10 or more depository institutions, including industrials. See §§ 21-17,131(1) and 21-17,132. NDIGC's directors are persons who have served 2 years in an official capacity with an eligible member depository. § 21-17,133. NDIGC is a mechanism for guaranteeing shareholdings, savings, and deposits in member depositories and assists in the detection and prevention of depository insolvencies and liquidations. § 21-17,128.

NDIGC submits its plan of operation to the Department for approval, § 21-17,136, a plan which may be amended with the Department's approval. NDIGC's plan of operation establishes, among other things, the amount of insurance to guarantee each deposit or certificate of indebtedness concerning a member depository. §§ 21-17,131(5) and 21-17,135(1)(a).

The Department must immediately report in writing to NDIGC when the Department has reasonable cause to believe that any of NDIGC's member depositories may be insolvent or in an unsound financial condition. § 21-17,139(3).

NDIGC may make recommendations to the Department concerning solvency, liquidation, rehabilitation, or conservation of any member depository. NDIGC, on a good-faith belief that a member depository's accounts are endangered, may request that the Department apply to the district court for an order placing the Department in charge of the endangered depository. If the Department fails to act on NDIGC's request within 15 days, NDIGC may apply directly to the court for the custodial order concerning the endangered depository. § 21-17,139(8).

Section 21-17,141 provides:

> There shall be no liability for damages on the part of, and no cause of action in tort of any nature shall arise against, any member depository institution, the corporation or its agents or employees, the board of directors, or the department or any of its representatives or employees for any action taken by any of them in the performance of their powers and duties under sections 21-17,127 to 21-17,145, unless such action shall be willful,

wanton, or fraudulent.

COMMONWEALTH'S INSOLVENCY

Before August 7, 1979, a Department examination showed Commonwealth's unsound financial condition and excessive insider loans in violation of § 8-409.02. However, on August 7, the Department approved Commonwealth and SSS as member depositories of NDIGC.

On February 8, 1980, the Department's second examination of Commonwealth showed excessive insider loans. Nevertheless, on April 28, 1980, the Department approved NDIGC's increase in the insurance, from $10,000 to $30,000, for each certificate of indebtedness of a member depository notwithstanding that the Department knew, or should have known, that NDIGC's reserves were insufficient to provide the $30,000 insurance for each certificate holder. The Department required each NDIGC member depository to display a sign at its place of business, stating that the depository was a member of NDIGC which guaranteed each certificate of indebtedness to a limit of $30,000.

On February 13, 1981, the Department's third examination of Commonwealth showed the industrial's insufficient paid-up capital in violation of § 8-403.02 and excessive insider loans.

In March of 1982, the Department's fourth examination disclosed that Commonwealth was insolvent, and the Department took supervisory control of Commonwealth. In December 1982, after its fifth examination of Commonwealth, the Department continued its supervisory control.

On March 10, 1983, the Federal Bureau of Investigation informed the Department that Commonwealth and its officers were involved in fraudulent loan activities. In June, the Department appointed a special prosecutor to investigate alleged criminal activities involving Commonwealth and its officers. On August 31, the Department's sixth examination showed that Commonwealth was still insolvent. It was not until October 27 that the Department notified NDIGC and NDIGC's member depositories concerning the Commonwealth problem.

The Department took possession of Commonwealth's assets on November 1, 1983, and decided to liquidate Commonwealth. In view of claims against

Commonwealth—claims which exceeded NDIGC's assets—all NDIGC assets were turned over to the court-appointed receiver for Commonwealth, resulting in NDIGC's collapse and leaving SSS without insurance coverage for its customers' certificates of indebtedness. After November 1, 1983, the Department prohibited withdrawal of unmatured certificates of indebtedness from all industrials, but did not restrict withdrawal of matured certificates. Absence of deposit insurance caused concern to holders of SSS' certificates of indebtedness. SSS' certificate holders withdrew their matured certificates of indebtedness, producing an SSS loss of nearly $19 million in withdrawn customer accounts. Customer accounts of $31.2 million were frozen at SSS. On December 19, SSS applied for deposit insurance coverage with Federal Savings & Loan Insurance Corporation (FSLIC). When, on July 9, 1984, FSLIC had not approved SSS' application for insurance, SSS filed for protection and reorganization under federal bankruptcy law at a reorganizational cost of $260,000.

FIRST THEORY OF RECOVERY

SIC claims that the Department was "willfully and wantonly negligent" in its conduct involving Commonwealth, such as the Department's general failure to enforce Nebraska banking laws, take remedial action concerning Commonwealth or place Commonwealth in receivership, remove Commonwealth's officers, inform other industrials about Commonwealth's unsound financial position and later insolvency, exercise due care in supervisory control of Commonwealth after March 1982, require commercial reinsurance by NDIGC, and freeze matured certificates of indebtedness after Commonwealth closed. SIC also alleged that the Department was negligent in approving Commonwealth's membership in NDIGC and authorizing NDIGC's increase of insurance on accounts at member depositories.

DISCRETIONARY FUNCTION

Regarding SIC's negligence claim, the first question is whether the Department's allegedly negligent conduct was a discretionary function excepted from tort liability under § 81-8,219(1)(a), which provides that the State Tort Claims Act does not apply to "[a]ny claim . . . based upon the exercise or

performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency or an employee of the state, whether or not the discretion be abused."

Performance of or failure to perform a discretionary function cannot be the basis for liability under the State Tort Claims Act. *Wickersham v. State*, 218 Neb. 175, 354 N.W.2d 134 (1984); *Fletcher v. State*, 216 Neb. 342, 344 N.W.2d 899 (1984). Cf. *Allen v. County of Lancaster*, 218 Neb. 163, 352 N.W.2d 883 (1984) (discretionary function exception of the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. § 23-2409(2) (Reissue 1977)).

In *Wickersham, supra*, the State adopted regulations of the U.S. Department of Agriculture concerning brucellosis examination and reporting, requiring the State to notify the owner of any herd discovered, through State testing, to be exposed to brucellosis. The State discovered brucellosis in a herd owned by Peddicord, a cattle rancher. Wickersham, another rancher, bought 17 head of Peddicord's heifers, but the State failed to inform Wickersham concerning the brucellosis infection in Peddicord's herd. By the time Wickersham learned about the brucellosis, it was too late to protect Wickersham's entire herd from brucellosis carried by the Peddicord cattle. Wickersham sued the State for its negligence. The State argued that the discretionary function exception of the State Tort Claims Act exempted its conduct from negligence liability. In rejecting the State's argument, the *Wickersham* court stated:

> That which is protected under the State Tort Claims Act, § 81-8,219(1)(a), is the discretion of a governmental executive or administrator to act according to one's judgment of the best course to be taken. Such discretion includes more than the initiation of programs and activities. Discretion includes determinations or judgments made in establishing plans, specifications, or schedules of operations. Where policy judgment exists, there also exists discretion exempted from liability under the State Tort Claims Act. . . .
>
> However, the discretionary function or duty exemption in the State Tort Claims Act extends only to the basic

> policy decisions made in governmental activity, and not to ministerial activities implementing such policy decisions. [Citations omitted.] In other words, the State is liable for negligence of its employees at the operational level, where there is no room for policy judgment. [Citation omitted.]
>
> In Wickersham's case there is no attempt to impose liability on the State for a policy judgment. The State's acquisition and accumulation of specific information about the dangerous and contagious disease brucellosis are activities conducted as part of the official brucellosis program in Nebraska. The duty of immediate notification to a Nebraska herd owner is imposed by the regulations under which the State was operating. . . . [T]he State's conduct in response to the discovery of brucellosis cannot be characterized as formulation of policy, planning, or discretionary action. The activity of the State moved from the province of planning into the realm of reality by the State's executing a duty imposed by the regulations. It may be that the State's conduct will eventually be evaluated in terms of the specific standards and regulations for the brucellosis eradication program. The State's action or inaction in response to detected brucellosis involved a State operational task governed by recognized regulations. At that point policy had long since passed from the picture.

218 Neb. at 180-81, 354 N.W.2d at 138-39.

The *Wickersham* court reversed a summary judgment against Wickersham, which was granted on the basis of the discretionary function exception in the State Tort Claims Act.

Four years after *Wickersham*, in *Berkovitz by Berkovitz v. U.S.*, ____ U.S. ____, 108 S. Ct. 1954, 100 L. Ed. 2d 531 (1988), the Supreme Court interpreted the discretionary function exception of the Federal Tort Claims Act, 28 U.S.C. § 2680(a) (1982), which is the pattern and substantial counterpart of Nebraska's State Tort Claims Act, including the discretionary function exception. Kevan Berkovitz ingested an oral polio vaccine, Orimune, manufactured by Lederle Laboratories, and within 1 month contracted polio, which left Berkovitz paralyzed. Berkovitz sued the United States, alleging

that the Division of Biologic Standards, a federal agency now within the Food and Drug Administration, had licensed Lederle to produce the vaccine in the absence of compliance with federal law regarding inspection and approval of polio vaccines. Berkovitz claimed that the FDA had violated its own policy of testing all polio vaccines for compliance with safety standards and allowed polio vaccines to be marketed without testing. The Court held that Berkovitz' claim was not barred by the discretionary function exception and noted: " '[I]t is the nature of the conduct, rather than the status of the actor that governs whether the discretionary function exception applies in a given case.' " 108 S. Ct. at 1958 (quoting *United States v. Varig Airlines*, 467 U.S. 797, 104 S. Ct. 2755, 81 L. Ed. 2d 660 (1984)). The Court then described the conduct which is within the discretionary function exception:

> In examining the nature of the challenged conduct, a court must first consider whether the action is a matter of choice for the acting employee. This inquiry is mandated by the language of the exception; conduct cannot be discretionary unless it involves an element of judgment or choice. See *Dalehite v. United States*, 346 U.S. 15, 34, 73 S.Ct. 956, 967, 97 L.Ed. 1427 (1953) (stating that the exception protects "the discretion of the executive or the administrator to act according to one's judgment of the best course"). Thus, the discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow. In this event, the employee has no rightful option but to adhere to the directive. And if the employee's conduct cannot appropriately be the product of judgment or choice, then there is no discretion in the conduct for the discretionary function exception to protect. Cf. *Westfall v. Erwin*, 484 U.S. ____, ____, 108 S.Ct. 580, ____, 98 L.Ed.2d 619 (1988) (recognizing that conduct cannot be discretionary if prescribed by law).
>
> Moreover, assuming the challenged conduct involves an element of judgment, a court must determine whether that judgment is of the kind that the discretionary function exception was designed to shield. The basis for the

> discretionary function exception was Congress' desire to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *United States v. Varig Airlines, supra*, at 814, 104 S.Ct., at 2764-2765. The exception, properly construed, therefore protects only governmental actions and decisions based on considerations of public policy. See *Dalehite v. United States, supra*, at 36, 73 S.Ct., at 968 ("Where there is room for policy judgment and decision there is discretion"). In sum, the discretionary function exception insulates the Government from liability if the action challenged in the case involves the permissible exercise of policy judgment.

108 S. Ct. at 1958-59.

The Court in *Berkovitz* rejected the government's argument that "the exception precludes liability for any and all acts arising out of the regulatory programs of federal agencies." *Id.* at 1959-60. In rejecting the government's argument for "regulatory function immunity," the Court stated:

> That argument is rebutted first by the language of the exception, which protects "discretionary" function, rather than "regulatory" functions. The significance of Congress' choice of language is supported by the legislative history. As this Court previously has indicated, the relevant legislative materials demonstrate that the exception was designed to cover not all acts of regulatory agencies and their employees, but only such acts as are "discretionary" in nature. [Citation omitted.] This coverage accords with Congress' purpose in enacting the exception: to prevent "[j]udicial intervention in . . . the political, social, and economic judgments" of governmental—including regulatory—agencies. [Citation omitted.] Moreover, this Court twice before has rejected a variant of the Government's position. See *Indian Towing Co. v. United States*, 350 U.S. 61, 64-65, 76 S.Ct. 122, 124, 100 L.Ed. 48 (1955) (disapproving argument that FTCA precludes liability for the performance of "uniquely governmental functions");

> *Rayonier, Inc. v. United States*, 352 U.S. 315, 318-319, 77 S.Ct. 374, 376-377, 1 L.Ed.2d 354 (1957) . . . .

108 S. Ct. at 1960. Cf., *United States v. Varig Airlines, supra* (discretionary function exception protected FAA decision to use spot inspections to verify compliance with federal safety standards for aircraft and evaluate actions of FAA employees in making the spot safety inspections); *Dalehite v. United States*, 346 U.S. 15, 73 S. Ct. 956, 97 L. Ed. 1427 (1953) (discretionary function exception protected governmental decision to manufacture and transport fertilizer-grade ammonium nitrate, a known explosive).

Thus, we conclude that applicability of the discretionary function exception in the State Tort Claims Act depends on the conduct in question, not on the identity of the actor. The discretionary function exception of the State Tort Claims Act includes a governmental regulatory agency and its action, conduct, and decisions. Judgment or choice is essential and indispensable for discretionary conduct excepted from negligence liability under the State Tort Claims Act. The discretionary function exception of the State Tort Claims Act protects or excepts only governmental decision, action, or conduct based on a permissible exercise of a public policy judgment. The discretionary function exception is inapplicable to a claim under the State Tort Claims Act if a statute, regulation, or policy specifically prescribes a course of governmental action or conduct. *Wickersham v. State*, 218 Neb. 175, 354 N.W.2d 134 (1984). See *Berkovitz by Berkovitz v. U.S.*, ____ U.S. ____, 108 S. Ct. 1954, 100 L. Ed. 2d 531 (1988).

SIC does not allege that the Department was negligent in its examinations of Commonwealth between 1979 and 1983 or that the Department was negligent in gathering information about Commonwealth or by failing to examine Commonwealth at regular intervals. SIC's allegations relate to the Department's conduct in the light of information received through departmental examinations of Commonwealth's operations. Consequently, SIC claims that the Department was negligent in its use, or failure to use, information obtained concerning Commonwealth's operations and financial condition.

SIC asserts numerous contentions regarding the Department's allegedly negligent conduct in handling the Commonwealth matter which led to NDIGC's collapse and injury to industrial loan and investment companies, namely, the Department negligently: (1) breached its duty to enforce Nebraska banking laws by ignoring Commonwealth's persistent violations of banking laws; (2) failed to place Commonwealth in receivership at the earliest convenient date; (3) failed to remove Commonwealth's officers despite the Department's knowledge that the officers were involved in fraudulent loan activity; (4) approved Commonwealth's membership in NDIGC; (5) approved NDIGC's increase in insurance coverage for accounts in member depositories; (6) failed to require commercial reinsurance by NDIGC; (7) failed to freeze matured certificates of indebtedness after Commonwealth closed and NDIGC collapsed; and (8) failed to inform industrial loan and investment companies about Commonwealth's precarious financial position.

At the outset, we note that, while the Department is obligated to enforce Nebraska banking laws, §§ 8-102 and 8-401.01, the Department is nevertheless vested with broad discretion to determine the method and manner of enforcing state banking laws. See, e.g., *Bartlett v. State Real Estate Commission*, 188 Neb. 828, 199 N.W.2d 709 (1972) (a governmental agency's method and manner of enforcing the law must be left to the discretion of proper agency or administrative officers). Public policy considerations necessarily operate whenever the Department decides or attempts to discern what action is appropriate in the light of allegations concerning improper operation of a financial institution. Dissemination of information concerning Commonwealth's precarious financial condition would likely have had a widespread adverse impact on the industrial loan and investment industry in Nebraska—a situation which the Department undoubtedly desired to avoid or minimize. While the Department was obligated to perform some functions in its supervision of the financial industry, e.g., § 21-17,139(3) (report to NDIGC), supervision of industrial loan and investment companies is generally accomplished by entrusting

such matters to the discretion of the Department.

Without further discussion of the specific acts of negligence enumerated above, we conclude that each of SIC's allegations concerns matters within the discretion of the Department. While the Department is statutorily empowered to perform each of its specified tasks mentioned in SIC's allegations, none of the statutes which is the basis for SIC's allegations of negligence requires the Department to execute any of its authorized powers. Furthermore, the Department's discretion concerning the proper course of conduct in reference to Commonwealth's insolvency is guided and influenced by important considerations of public policy. SIC's allegations of the Department's negligence are within the purview of the discretionary function exception of the State Tort Claims Act and, therefore, are not actionable under the State Tort Claims Act. Accord, *Emch v. United States*, 630 F.2d 523 (7th Cir. 1980) (failure of bank regulators to anticipate financial difficulties of a particular bank, to ensure the honesty and competency of bank officers, and to successfully prevent losses to shareholders are within the discretionary function exception of the Federal Tort Claims Act); *Huntington Towers, Ltd. v. Franklin Nat. Bank*, 559 F.2d 863 (2d Cir. 1977) (comptroller's decision to close an insolvent bank is a discretionary act).

The district court correctly sustained the Department's demurrer to SIC's "First Theory of Recovery" based on negligence.

SECOND THEORY OF RECOVERY

SIC contends that equitable estoppel precludes the Department's denying any obligation because, in its duty to supervise industrials and NDIGC, the Department impliedly promised protection of $30,000 for each certificate of indebtedness of an industrial loan and investment company. In the language of SIC's petition, the Department "knowingly concealed material facts regarding the financial stability and management of Commonwealth," a situation unknown to SIC and its assignor, SSS. According to SIC, the Department's implied promise to insure an industrial's certificates of indebtedness, coupled with concealment of Commonwealth's condition, induced SIC to forbear obtaining alternate deposit

insurance.

As expressed in *L. J. Vontz Constr. Co. v. State*, 230 Neb. 377, 382, 432 N.W.2d 7, 11 (1988): "[A] court must examine and construe a petition's essential and factual allegations by which the plaintiff requests relief, rather than the legal terminology utilized in the petition or the form of a pleading."

The doctrine of equitable estoppel is not a cause of action, but is a judicial device to preserve a right already acquired, not generate a new right. *Warren v. Papillion School Dist. No. 27*, 199 Neb. 410, 259 N.W.2d 281 (1977); *Clark & Enersen, Hamersky, S., B. & T., Inc. v. Schimmel Hotels Corp.*, 194 Neb. 810, 235 N.W.2d 870 (1975); *State v. Bardsley*, 185 Neb. 629, 177 N.W.2d 599 (1970).

Rather than allegations of equitable estoppel, SIC's second theory of recovery contains allegations that "the Department knowingly concealed material facts" about Commonwealth, SIC "reasonably relied on the . . . Department's . . . concealment of material facts," and "[a]s a direct result of [SIC's] reasonable reliance upon . . . the concealment of Commonwealth's condition by the State and the Department," SIC was injured.

> *Conceal* means to hide, secrete, or withhold from knowledge of others; to withhold from utterance or declaration; to cover or keep from sight; to hide or withdraw from observation, cover or keep from sight, or prevent discovery. *Christopher v. Evans*, 219 Neb. 51, 361 N.W.2d 193 (1985). The word *conceal* pertains to affirmative action likely to prevent or intended to prevent knowledge of a fact and has reference to some advantage to the concealing party or a disadvantage to some interested party from whom the fact is withheld. *Christopher v. Evans, supra.*

State v. Copple, 224 Neb. 672, 691, 401 N.W.2d 141, 155 (1987).

In *Nelson v. Cheney*, 224 Neb. 756, 762, 401 N.W.2d 472, 476-77 (1987), this court specified the elements of fraud by concealment:

> (1) that the defendant concealed or suppressed a material fact; (2) that the defendant had knowledge of this material

> fact; (3) that this material fact was not within the reasonably diligent attention, observation, and judgment of the plaintiff; (4) that the defendant suppressed or concealed this fact with the intention that the plaintiff be misled . . . (5) that the plaintiff was reasonably so misled; and (6) that the plaintiff suffered damage as a result.

Examining SIC's petition in terms of essential and factual allegations, we conclude that SIC's cause of action against the Department is based on the Department's alleged concealment of Commonwealth's unsound financial condition. While § 21-17,141 provides that certain parties, including the Department, may be held liable only for "willful, wanton, or fraudulent" acts in connection with the NDIGC Act, the State Tort Claims Act precludes the Department's liability based on misrepresentation or deceit. See § 81-8,219(1)(d). Does § 21-17,141, which provides for the Department's liability under the Nebraska Depository Institution Guaranty Corporation Act, waive the State's common-law immunity from suit?

"Waiver [of sovereign immunity] will only be found 'where stated "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." ' " *Wiseman v. Keller*, 218 Neb. 717, 720, 358 N.W.2d 768, 770 (1984) (quoting *Edelman v. Jordan*, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974)).

Section 21-17,141 is not a waiver of common-law governmental immunity. Section 21-17,141 imposes tort liability on certain defendants, many of whom are not protected by sovereign immunity, for conduct which is "willful, wanton, or fraudulent" and provides a shield from liability which might otherwise be imposed for negligent conduct. Tort liability of the State, pursuant to § 21-17,141, is controlled by the State Tort Claims Act, which grants the right to sue the state for its "negligent or wrongful act or omission." See § 81-8,210(4). Under § 81-8,219(1)(d) of the State Tort Claims Act, the State is not liable for misrepresentation or deceit. Fraud by concealment is a form of deceit and conduct for which the State is immune from liability under the State Tort Claims Act. SIC's "Second Theory of Recovery" fails to state a cause

of action against the Department. The district court correctly sustained the Department's demurrer.

CONCLUSION

Referring to the discretionary function exception under the Federal Tort Claims Act, the Supreme Court, in *Berkovitz by Berkovitz v. U.S.*, ____ U.S. ____, 108 S. Ct. 1954, 1960, 100 L. Ed. 2d 531 (1988), observed that the exception

> was designed to cover not all acts of regulatory agencies and their employees, but only such acts as are "discretionary" in nature. . . . This coverage accords with Congress' purpose in enacting the exception: to prevent "[j]udicial intervention in . . . the political, social, and economic judgments" of governmental—including regulatory—agencies.

We believe that the Supreme Court's observations about the discretionary function exception of the Federal Tort Claims Act, examined in *Berkovitz*, are appropriate in describing this court's role in relation to the discretionary function exception prescribed by § 81-8,219(1)(a) of the State Tort Claims Act—prevention of judicial intervention in the political, social, and economic judgments of the government, including its regulatory agencies.

SIC failed to state a cause of action under the State Tort Claims Act. The district court properly sustained the demurrer to SIC's petition and dismissed SIC's action against the Department (State of Nebraska).

AFFIRMED.

PAUL J. WIETZKI ET AL., APPELLEES, V. DANIEL J. WIETZKI ET AL., APPELLEES, ERICSON STATE BANK, APPELLANT.

437 N.W.2d 449

Filed March 24, 1989. No. 87-197.

1. **Mortgages: Title: Intent: Presumptions.** Ordinarily, when a mortgagee becomes the owner of the fee, the former estate is merged in the latter. But the mortgagee may keep his mortgage alive when it is essential to his security against an

intervening title. If there was no expression of his intention in relation to the matter at the time he acquired the equity of redemption, it will be presumed, in the absence of circumstances indicating a contrary purpose, that he intended to do that which would prove most advantageous to himself.

2. **Equity: Appeal and Error.** Actions in equity, on appeal to the Supreme Court, are triable de novo on the record, subject, however, to the rule that when credible evidence on material questions of fact is in irreconcilable conflict, the Supreme Court may, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite.

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

Gregory G. Jensen for appellant.

James H. Buhrmann, of Buhrmann, Johnson & Wilson, and, on brief, Carole H. Larson for appellees Paul J. and Mildred Wietzki.

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

CARLSON, D.J.

This is a suit for strict foreclosure of a real estate contract brought by Paul J. Wietzki and Mildred Wietzki, husband and wife, hereinafter referred to as "plaintiffs," against the contract purchaser, Daniel J. Wietzki, and the Ericson State Bank, assignee of an assignment of equity in real estate in said contract, hereinafter referred to as "Bank."

The Bank cross-petitioned, claiming that on March 10, 1985, plaintiffs took a quitclaim deed from the contract purchasers in full and complete settlement and discharge of the agreement for sale of real estate alleged in plaintiffs' petition. The Bank in its cross-petition also claimed that the plaintiffs took such property by reconveyance from the contract purchaser subject to all liens and encumbrances existing therein, specifically, the lien of the Bank. The plaintiffs denied the Bank's cross-petition, and the matter proceeded to trial.

The trial court determined that plaintiffs were not entitled to strict foreclosure of the contract and that the plaintiffs had a first lien on the property and the Bank a second lien in a specified amount. The court further ordered the real estate sold

if the indebtedness of the parties was not paid within 20 days from the entry of the order. A motion for new trial was overruled, and an appeal was taken by the Bank.

The Bank's numerous assignments of error may be summarized into one: that the district court erred in finding that the plaintiffs had a first lien and the Bank a second lien on the property. To resolve this issue we first must look to the relevant facts.

On May 28, 1975, Paul Wietzki, plaintiff, sold a section of land in Greeley County, Nebraska, to his grandson, Dan Wietzki. The agreement for sale of real estate provided for installment payments and a deed to be held in escrow. The sale price was $64,000, with a $3,000 downpayment and $3,000 a year for 10 years, and a $31,000 payment on August 1, 1986. The grandson was in arrears on his payments almost immediately and, arguably because of deficient payments and interest, had little, if any, equity in the land during this whole scenario. This is shown by the uncontroverted evidence of the grandson's payment record, which was received into evidence.

Two separate assignments of equity in the agreement for sale of real estate contract dated May 28, 1975, were made by Dan Wietzki to the Bank, on March 25, 1983, and February 26, 1984. Each secured loans to Dan which, with interest, amounted to over $50,000. These assignments were recorded by the Bank. Dan also failed to meet this contract obligation. During this period, the land substantially decreased in value.

On March 10, 1985, Dan Wietzki conveyed the subject real estate to Paul Wietzki by quitclaim deed. The deed itself disclosed as consideration "One Dollar ($1.00) and o. v. c.," and the real estate transfer statement filed with the deed had the typed words, in regard to the value of stamp affixed, "deed to release debt." Unsuccessful negotiations for sale of the real estate were had, and this suit was filed December 19, 1985.

The Bank advances a merger theory in claiming priority of its liens over that of plaintiffs. In simple terms, it alleges that the quitclaim deed merged Paul Wietzki's title and lien and thereby extinguished the plaintiffs' lien and priority. The plaintiffs counter by arguing that a merger did not occur and that the plaintiffs' security was kept alive as against the intervening

interests of the Bank. What the parties do agree on is that the controlling factor determinative of this question is intention.

It has been stated that the question of merger of the interests of a mortgagee as mortgagee and his interests as transferee of the mortgage is primarily a question of intention, and a merger will generally be held to take place where there is an intention to merge the two estates, and not to take place where there is an intention to keep the mortgage alive. This result has been regarded as prevailing whether such intention is expressed or implied. Stated another way, an essential prerequisite of a merger is that the party having both legal and equitable interests have the intention that the interests should merge. See, 55 Am. Jur. 2d *Mortgages* § 1258 (1971); *Lampert Yards v. Thompson-Wetterling Const. & Realty*, 302 Minn. 83, 223 N.W.2d 418 (1974); *Gourley v. Wollam*, 348 So. 2d 1218 (Fla. App. 1977).

Nebraska agrees. In *Overland-Wolf, Inc. v. Koory*, 183 Neb. 611, 614, 162 N.W.2d 889, 890-91 (1968), it was stated as follows:

> Ordinarily, when a mortgagee becomes the owner of the fee, the former estate is merged in the latter. But the mortgagee may keep his mortgage alive when it is essential to his security against an intervening title. If there was no expression of his intention in relation to the matter at the time he acquired the equity of redemption, it will be presumed, in the absence of circumstances indicating a contrary purpose, *that he intended to do that which would prove most advantageous to himself*. [Citations omitted.]
>
> It is the intention of the mortgagee that is controlling.

(Emphasis supplied.) See, *Dupuy v. Western State Bank*, 221 Neb. 230, 375 N.W.2d 909 (1985); *Edney v. Jensen*, 116 Neb. 242, 216 N.W. 812 (1927).

What was Paul Wietzki's intent in regard to merger? It is patent from the evidence that he had no specific intent relative to "merger." What is true is that he wanted to do "that which would prove most advantageous to himself." *Overland-Wolf, supra* at 614, 162 N.W.2d at 891. In that regard, upon advice of counsel, he had the quitclaim deed executed. This attorney also prepared the real estate transfer statement indicating "deed to

release debt" and sent a letter to the Bank acknowledging its interest. These actions, plus the testimony of Dan Wietzki that Paul would "take care of the Bank"; that Paul had knowledge of the Bank's interests; and, finally, that he treated the land as his own are all proffered by the Bank as conclusive of the intent to merge. We do not agree. What this evidence does show is a person acting, on advice of counsel, with the intent to salvage his lien. An assignee (Bank) acquires only the rights of the assignor (Dan Wietzki). *State Securities Co. v. Daringer*, 206 Neb. 427, 293 N.W.2d 102 (1980). On this basis the Bank could be in no better position vis-a-vis the plaintiffs than Dan.

As to knowledge of the Bank's interest by Paul, another fact claimed as determinative of the case by the Bank, this is a two-way street. Knowledge by the Bank is also relevant, as is evidenced by the following exchanges:

> Q. And you had seen that contract prior to taking the assignment as collateral?
>
> A. Yes. [In fact, a copy of the "Agreement for Sale of Real Estate" dated May 28, 1975, was attached to the Bank's first filed "Assignment of Equity in Real Estate" dated March 25, 1983.]
>
> . . . .
>
> Q. Do you know if he [Paul Wietzki] ever came into your bank to discuss this matter with anybody else?
>
> A. Not that I am aware of.
>
> Q. Do you know of your own knowledge whether he was aware of how much Dan's debt was?
>
> A. He would have had constructive notice from the County Clerk's office as to the amount of our liens.
>
> Q. I don't believe that was the question I asked. From your own knowledge do you know whether he knew the amount of debt that Dan --- from Dan to the Bank?
>
> A. As far as saying, Paul, Dan owes the Bank (x) amount of dollars, no.
>
> Q. Did you ever talk to Paul Wietzki when you took your first or second assignment in equity?
>
> A. No.
>
> Q. On the property?
>
> A. No.

Q. Did you find out whether there was any equity in the contract at that time?

A. Assuming there were no legal proceedings against Dan and looking at the payment schedule and the real estate values at the time the assignments were taken, there was considerable equity.

Q. In the contract, nothing in the land, in the contract?

A. I guess we were looking at the equity in the real estate.

Q. Did you realize that Dan was in arrears on his contract with Paul?

A. No, we did not.

Q. Did you ask Dan if he was in arrears in the contract with Paul?

A. I assume that came up in our discussion.

Q. And yet you still did not know he was in arrears?

A. No, we did not.

Q. Are you saying that Dan told you he was current?

A. I believe we took the assignment in 1981. Without looking up the document --- According to Dan's testimony, he was current the first seven payments.

Q. I believe it was '83.

A. Or '83.

Q. Yet you didn't check that out?

A. No.

These loans were made by the Bank without any knowledge of the status of the first lien, i.e., the collateral. See, *Department of Banking v. Colburn*, 188 Neb. 500, 198 N.W.2d 69 (1972); Annot., 25 A.L.R.3d 941 (1969).

Paul Wietzki testified that he never had a conversation with the Bank about giving it money for its interest in the land and that he never told Dan or the Bank that he would pay off the Bank. There is a conflict in the evidence on this point, and on others. Actions in equity, on appeal to the Supreme Court, are triable de novo on the record, subject, however, to the rule that when credible evidence on material questions of fact is in irreconcilable conflict, the Supreme Court may, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must

have accepted one version of the facts rather than the opposite. *III Lounge, Inc. v. Gaines*, 227 Neb. 585, 419 N.W.2d 143 (1988). The trial court found no merger of title and lien, and we agree. The Bank also claims error based on sympathy of the trial court. This has no merit. See, *Bohaty v. Briard*, 219 Neb. 42, 361 N.W.2d 502 (1985); *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987).

We therefore affirm the trial court's determination of priority in the plaintiffs, and also affirm all other aspects of said decree.

AFFIRMED.

GFH FINANCIAL SERVICES CORPORATION, APPELLEE, V. DELORIS KIRK, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ARTHUR L. KIRK, DECEASED, APPELLANT.

437 N.W.2d 453

Filed March 24, 1989. No. 87-260.

1. **Verdicts: Appeal and Error.** A party procuring a favorable verdict at trial is entitled to retain the benefits of that verdict on appeal, absent prejudicial error.
2. **Records: Appeal and Error.** It is an appellant's duty to point out alleged errors, and, unless the briefs indicate at what page of the bill of exceptions these may be found, the court will not search for nor consider them.
3. **Affidavits: Records: Appeal and Error.** Affidavits which have not been marked, offered in evidence, and made a part of the bill of exceptions will not be considered on appeal.
4. **Records: Appeal and Error.** It is incumbent on the party appealing to present a record which supports the errors assigned, and absent such a record, the decision of the lower court should be affirmed.
5. **Appeal and Error: Words and Phrases.** "Plain error" is error which was unasserted or uncomplained of at trial or on appeal, but is plainly evident from the record, which prejudicially affects a litigant's substantial right and which is of such a nature as to cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process, if left uncorrected.
6. **Attorney Fees.** Attorney fees are recoverable in Nebraska only where provided by statute or allowed by custom.
7. **Prejudgment Interest: Claims.** Prejudgment interest may not be recovered on an unliquidated claim. A claim is unliquidated where a reasonable controversy exists as to either the right to recover or the amount of recovery.

Appeal from the District Court for Hall County: JOSEPH D. MARTIN, Judge. Remanded for further proceedings.

Deloris Kirk, pro se.

Roger G. Steele, of Luebs, Dowding, Beltzer, Leininger, Smith & Busick, for appellee.

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

REAGAN, D.J.

Plaintiff, GFH Financial Services Corporation (GFH), filed its petition with the Hall County District Court on February 15, 1985. The petition contained two causes of action, identical in form, seeking the return of personal property leased to the defendant and judgment for damages incurred as a result of breach of the lease agreements by the defendant. Both leases covered center pivot irrigation systems and miscellaneous items used in conjunction therewith. Plaintiff alleged there were due and remaining on the leases the sums of $42,017.19 and $35,064.41 as of February 12, 1985, together with interest and late charges, and prayed for judgment for that amount less what would be realized as proceeds in a sale of the equipment in a commercially reasonable manner.

Defendant answered on May 13, 1985, admitting generally the leases, the nonpayments, and the return of the leased property to the plaintiff. Defendant denied further liability, claiming the leases had been procured by fraud and misrepresentation. Specifically, defendant alleged that agents of the plaintiff knew the systems were to be installed on land under government lease, that defendant might be unable to renew these leases, and that plaintiff's agents represented if defendant did not renew these farm leases and was unable to make the lease payments for the pivot systems, plaintiff would take the systems back and defendant would have no further liability.

After a number of pretrial matters, the case was tried to a jury on essentially the foregoing issues on February 17 and 18, 1987. The jury returned a verdict in favor of the plaintiff and against the defendant for the total sum of $73,275.49.

Defendant has brought this appeal pro se, assigning the following as error: (1) the trial court's excluding testimony of defense witnesses as to representations made concerning the return of the leased property; (2) the trial court's excluding testimony of Deloris Kirk as to representations made to her and her husband at the time the leases were executed; (3) the trial court's excluding the defendant from pretrial conferences in chambers when issues of the case were discussed and decided; (4) plaintiff's failure to mitigate its damages; and (5) the trial court's permitting plaintiff to call witnesses not listed on the pretrial order, over defendant's objections.

Appellant, Deloris Kirk, and her late husband, Arthur L. Kirk, were farmers in the Grand Island area for some period of time prior to 1979. They had obtained a 5-year lease on two tracts of government land (designated as tracts 6 and 26 within the boundaries of the Cornhusker Army Ammunition Plant). Each tract contained more than a quarter section of land, but somewhat less than a half section, and was to be used for farming purposes.

In January of 1979, Arthur Kirk had attended a farm show which included some displays of farm irrigation equipment. He later began negotiations with Leon Hecht, who was general manager of Grand Island Irrigation and Construction Company, for the installation of a center pivot irrigation system on tract 6. The center pivot was manufactured by Gifford-Hill & Company, Inc., and other parts of the system were manufactured by various other entities. Hecht suggested various lease options of the irrigation system as means of financing its purchase and installation, and placed the Kirks in contact with representatives of plaintiff, GFH Financial Services Corporation, a wholly-owned subsidiary of Gifford-Hill.

A lease agreement for the irrigation system was reached on May 28, 1979, between the Kirks and GFH, and the system was installed by Grand Island Irrigation and Construction Company. The lease was received in evidence as exhibit 4. It shows the original cost of the system as $39,513, the term of the lease as 10 years 9 months, the annual payment as $5,795.77, and the total lease payments as $60,846.07. On termination of

the lease, the Kirks had the option to purchase the system at its then fair market value. On default, GFH had the right to take possession of the equipment and claim from the Kirks as damages the remaining rental payments, reduced to present worth (using a 6-percent per annum discount figure) less the fair market value of the equipment, and incidental damages. A similar lease was entered into on November 20, 1979, for an irrigation system on tract 26, although the term was 10 years 6 months, the annual payments were $6,944.89, and the total lease payments were $69,448.90. The original cost of the additional system as shown on exhibit 1, the second lease, was $45,856.

Unfortunately, the Kirks were not able to renew their government ground leases (these were evidently awarded every 5 years on a sealed-bid basis, and the Kirks were unsuccessful bidders in that process), and they defaulted on the irrigation system leases in 1984. This suit was commenced February 15, 1985. Following default, GFH recovered both irrigation systems and has made efforts to sell them. These efforts, except for sale of one of the diesel units powering the systems, have been unsuccessful.

Appellant's contentions that the leases were procured by fraud and misrepresentation were resolved adversely to her by the jury verdict, and absent prejudicial error, GFH is entitled to retain the benefit of that verdict. *Uryasz v. Archbishop Bergan Mercy Hosp.*, 230 Neb. 323, 431 N.W.2d 617 (1988); *Schmidt v. Schmidt*, 228 Neb. 758, 424 N.W.2d 339 (1988). Appellant assigns no error to the instructions outlining the issues of liability, and we note none which would vitiate the jury verdict in that regard.

Review of the errors assigned is made more difficult by the appellant's failure to make any reference to specific portions of the record which would support her position. It has long been the rule of this court that it is counsel's duty to specifically point out alleged errors, and, unless the briefs indicate at what page of the bill of exceptions these may be found, the court will not search for nor consider them. *Stroman v. Atlas Refining Corporation*, 112 Neb. 187, 199 N.W. 26 (1924). It is the duty of counsel in briefing a case for this court to comply with the rules

and so assist the court in the ready transaction of business. *White v. Ardan, Inc.*, 230 Neb. 11, 430 N.W.2d 27 (1988). A litigant proceeding on a pro se basis is obligated to follow these same rules and procedures.

Notwithstanding that the assigned errors could be disposed of under the foregoing proposition, we have reviewed the record in this case and address them. With respect to appellant's first assignment of error, that the trial court erred in excluding testimony of defense witnesses, we learn from the brief that this is directed to the affidavits (attached to the brief) of Leon Hecht and Glen McKoski. This assignment fails for two reasons. Firstly, the bill of exceptions fails to show these affidavits were ever marked as exhibits, let alone offered and refused. *Anderson v. Autocrat Corp.*, 194 Neb. 278, 231 N.W.2d 560 (1975); *Blanco v. General Motors Acceptance Corp.*, 180 Neb. 365, 143 N.W.2d 257 (1966). Secondly, these witnesses personally appeared at trial and testified, and the bill of exceptions fails to show any objection as to their testimony which was improperly sustained.

Appellant's second, third, and fifth assignments of error may be treated together. It is incumbent on the party appealing to present a record which supports the errors assigned, and absent such a record, the decision of the lower court should be affirmed. *Chalupa v. Chalupa*, 220 Neb. 704, 371 N.W.2d 706 (1985). The bill of exceptions fails to disclose any testimony of Deloris Kirk that was excluded; it fails to disclose she was excluded from pretrial conferences; and it fails to disclose the plaintiff was permitted to call witnesses, over the defendant's objections, who were not listed on the pretrial order. Accordingly, these assignments of error are without merit.

Appellant's fourth assignment of error, that GFH failed to mitigate its damages, is also without merit. Both parties are in agreement that the law requires any party to a contract to take reasonable steps to reduce its damages in the event of a breach by another. Instruction No. 17 to the jury set forth this legal requirement. GFH produced evidence of the steps it had taken to resell the equipment, and we cannot say, as a matter of law, that it breached its legal duty to mitigate. However, GFH had a contractual duty, which should have been translated to an

evidentiary burden, to establish a "reasonable sales value" of the pivots at the time of termination and repossession in order to prove its damages.

The lack of an instruction on the plaintiff's burden to establish a "reasonable sales value," coupled with the instruction on damages that was actually given, the lease provisions, and the testimony on damages, demonstrates plain error which requires us to remand for further proceedings on the limited issue of damages. "Plain error" is error which was unasserted or uncomplained of at trial or on appeal, but is plainly evident from the record, which prejudicially affects a litigant's substantial right and which is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process. *Keller v. Noble*, 229 Neb. 542, 428 N.W.2d 170 (1988). In the appellate process, the Supreme Court may, at its option, notice plain error not assigned. Neb. Ct. R. of Prac. 9D(1)d (rev. 1988); *In re Estate of Fischer*, 227 Neb. 722, 419 N.W.2d 860 (1988).

To show this error, it is necessary to look at a portion of instruction No. 18, certain paragraphs of the lease, and testimony elicited from the plaintiff's vice president and general manager, Richard Eastman. Instruction No. 18 provided in part as follows:

> If you find for Plaintiff on the issue of liability, you must they [sic] fix the amount of money which will fairly and reasonably compensate Plaintiff for any of the following elements of damage proved by a preponderance of the evidence to have proximately resulted from the negligence [sic] of the Defendant:
>
> 1. Amount owing as a result of the termination of the May 28, 1979 lease.
>
> 2. Amount owing as a result of the termination of the November 20, 1979 lease.
>
> 3. The cost of repossession.

Paragraph 4, a portion of paragraph 23, and paragraph 24 of each lease provided as follows:

> 4. LATE PAYMENTS. The LESSOR may collect a "late charge" not to exceed 5% of the unpaid lease

payment or the highest amount allowed by law, whichever is less, for each lease payment more than ten days in arrears to cover the extra expenses involved in handling delinquency payments. In addition, the LESSEE shall pay unto the LESSOR interest on such delinquent payment from the date when due until paid at the highest lawful rate which may be charged the LESSEE.

. . . .

23. DEFAULT. . . . In the event this Lease is terminated . . . the Lessor at its option shall recover from the Lessee any and all amounts which under the terms of the Lease may be then due or which may have accrued to the date of such termination and also to recover from the Lessee in lieu of any further claim for loss of rent accruing from and after the date of such termination, a sum, with respect to the equipment, which represents . . . (b) the excess of the present worth, at the date of such termination, of all rents for the equipment which would have otherwise accrued hereunder from the date of such termination to the end of the term of this Lease over the sales value which the Lessor reasonably estimates to be obtainable for the equipment, such present worth to be computed on a basis of six percent (6%) per annum discount, compounded from the respective dates on which rent would have been payable hereunder had this Lease not been terminated.

. . . .

24. LESSOR'S EXPENSES. Lessee shall pay Lessor all costs and expenses, including reasonable attorneys fees, incurred by Lessor in exercising any of its rights or remedies or in enforcing any of the terms or conditions of this Lease.

Lastly, with respect to damages, Eastman testified as follows:

Q. Okay. Could you describe for the jury what paragraph 23 provides for when lease payments are not made?

A. Well, in conjunction with paragraph 4, if a customer does not make the lease payments that they agreed to make when they entered into the contract, he is obligated,

of course, to make the payments that he said he would make. If he doesn't make them timely he's obligated to make — he's obligated to pay a late charge on the payment. And in addition to that he's also obligated to pay interest for on the payment during the time — from the time that it is due until the time that it is ultimately paid. And that relates to all payments which are and become past due. In the — in paragraph 23 it indicates that if the customer doesn't make his payments ever that there is — that is a condition of default and in addition to the payments which have already become due the customer is liable for future payments that would have become due on the lease also. However, there is a discount given on those future payments because they are not yet due, but it is money that will ultimately become due and so the contract provides that there is a discount given because those payments are not yet due.

Q. Have you made any calculations pursuant to paragraph 23 of the leases to determine how much is owed by the Kirks on the May lease, which is Exhibit 1?

A. Yes. Using the — both the terms of paragraph 4, the late payment paragraph, and paragraph 23, the default paragraph, using the method that's described in each of those paragraphs, under the May lease as of today there would be a total amount owing of $37,217.16.

Q. That is as of today?

A. As of today.

Q. To date how much is due and owing GFH Financial Services from the Kirks on the November 20, 1979, lease, which is Exhibit 4?

A. Utilizing the same methodology for calculating the amount, the November lease has an amount due as of today of $44,902.62.

The witness further testified that the cost of removing the center pivots was $3,268.47 and the cost of storage was $1,655.42. The witness also testified the plaintiff had incurred attorney fees of $5,359.17 at time of trial, and further testified as follows:

Q. And do the leases, Exhibit 1 and Exhibit 4, say anywhere where GFH is entitled to recover attorney fees

and expenses?

A. Yes, paragraph 24 "Lessor's Expenses" also indicates that we should be entitled to recover for attorney fees as well.

Firstly, it would appear that paragraph 4 applies only to late payments under the lease, not future payments, even where discounted. Assuming, although the evidence is unclear, that both leases were terminated in May or June of 1984, the May lease would have one delinquent or late payment ($5,795.77) of 90 to 120 days' duration. The November lease would have, at the most, one delinquent or late payment ($6,944.89) of 30 days' duration. GFH would be entitled to 5 percent of each delinquent payment (a total of $637.03) plus interest on the payments at the "highest lawful rate" for 120 and 30 days, respectively. The highest lawful rate was 16 percent, Neb. Rev. Stat. § 45-101.03 (Reissue 1988), which would translate to a possible maximum interest recovery under this paragraph of $396.20. The total possible amount that would have accrued under this paragraph up to date of termination would then amount to the two lease payments, the late charges, and the interest, or a total of $13,773.89.

After making that determination, we look at the portion of paragraph 23 to determine the additional possible damages occasioned to plaintiff by defendant's breach of the leases. At the time of the assumed termination, there were five annual payments left on each lease. Each annual payment had to be discounted at 6 percent per annum to determine the present worth. Utilizing the present worth table from NJI 4.13, we can compute the value of the discounted lease payments as follows:

Year	May Lease Payment	Discounted	Nov. Lease Payment	Discounted
1985	$ 5,795.77	$ 5,467.71	$ 6,944.89	$ 6,551.78
1986	5,795.77	5,158.22	6,944.89	6,180.92
1987	5,795.77	4,866.24	6,944.89	5,831.06
1988	5,795.77	4,590.79	6,944.89	5,501.00
1989	5,795.77	4,330.94	6,944.89	5,189.62
TOTALS	$28,978.85	$24,413.90	$34,724.45	$29,254.38

From the total future rents, discounted to $53,668.28, plaintiff was entitled to recover the excess over the "reasonable sales value" of the equipment. The only evidence of reasonable sales value came from the testimony of plaintiff's vice president and general manager, Eastman. He testified as follows:

> Well, when we began advertising this equipment in 1984 we felt that if — that a fair value for the equipment was in the twenty to $21,000 range for each irrigation system. And that included not only the center pivot but the pumping unit and the — I'm sorry — the pumps and the power unit and the electrical generator that's attached to it.

We recognize the plaintiff's efforts to resell the equipment were unsuccessful and that there is other testimony in evidence as to the equipment's present market value, but, under the express terms of the lease, the equipment's "reasonable sales value" at the date of termination of the lease is the criterion to be used in ascertaining the lessor's damage. Accordingly, the appellant is entitled to be credited a minimum sum of $40,000 and a maximum sum of $42,000 against the discounted total of the future rent payments. GFH's maximum recovery, in addition to the amounts accrued under paragraph 4 at the date of termination, would then be the sum of $13,668.28. Its minimum recovery would be the sum of $11,668.28. GFH's total possible recovery, including the accrued amounts, would be $27,442.17 under both leases, as opposed to $82,119.78 as testified to by Eastman. We understand that his calculations, in all likelihood, included amounts for interest for the period of time beyond the termination of the leases. But the leases do not expressly provide for such interest, and prejudgment interest may not be recovered on an unliquidated claim. A claim is unliquidated and does not support such an award where a reasonable controversy exists either as to the right to recover or as to the amount of recovery. *Suess v. Lee Sapp Leasing*, 229 Neb. 755, 428 N.W.2d 899 (1988); *Langel Chevrolet-Cadillac v. Midwest Bridge*, 213 Neb. 283, 329 N.W.2d 97 (1983). GFH's right to recover anything beyond the equipment itself was in reasonable controversy, as was the amount of recovery, if any. Accordingly, GFH is not entitled to recover any prejudgment

interest.

Under paragraph 24 of the lease, in the event of termination, the lessor is also entitled to recover all costs and expenses. As we have previously noted, Eastman testified as to the cost of removing the center pivots, the cost of storage, and also the amount of attorney fees incurred by the lessor at the time of trial. It is clear that the cost of removing the center pivots is an element of damages that may properly be recovered. Inasmuch as paragraph 23 sets out a formula for determining the lessor's damages at the time of termination, the cost of storing these center pivots is not an element of damages properly recoverable under the lease. Furthermore, attorney fees are recoverable in Nebraska only where provided by statute or allowed by custom. *In re Estate of Reimer*, 229 Neb. 406, 427 N.W.2d 293 (1988); *McGuire v. McGuire*, 157 Neb. 226, 59 N.W.2d 336 (1953). Thus, a contractual provision that in the event of any dispute or litigation involving the contract, the prevailing party shall be entitled to recover all costs of suit, including reasonable attorney fees, is contrary to public policy and void. *Quinn v. Godfather's Investments*, 217 Neb. 441, 348 N.W.2d 893 (1984). Plaintiff's total possible recovery under this paragraph, then, amounted to $3,268.47.

Instruction No. 18 did not properly delineate for the jury's consideration the elements of damages under the lease, and at what point of time these damages were to be determined. The language of this instruction allowed the jury to consider a total damages figure before any credits were given for the "reasonable sales value" of the equipment, it allowed the jury to consider storage fees which were not recoverable under the lease, and it allowed the jury to consider the attorney fees expended by the plaintiff when such fees are not recoverable under the laws of the State of Nebraska. We recognize that all of this evidence came in without objection, and we are not suggesting that a trial judge must interpose objections to inadmissible evidence in every case. However, in this case the bill of exceptions discloses a pretrial conference where at least one of these matters—attorney fees—was discussed between counsel and the court, and it was apparent that this evidence was going to be offered on behalf of the plaintiff without

objection by the defense. Under these circumstances, a trial judge has a duty to point out the obvious error which will take place.

That these errors caused, or contributed to, a prejudicial conclusion is obvious when one considers the jury verdict of $73,275.49, as compared to the maximum possible damages as a matter of law of $30,710.64. Under the evidence, the minimum amount of damages sustained by plaintiff is $28,710.64. Thus, a remittitur of $44,564.85 is awarded.

The cause is remanded, and the plaintiff shall have 10 days after the filing of the mandate of this court in the district court in which to file an acceptance of the remittitur. The judgment shall draw interest from the date the remittitur is accepted. In the event the plaintiff fails to accept the remittitur, the defendant is granted a new trial as to the issue of damages only.

REMANDED FOR FURTHER PROCEEDINGS.

FIVE POINTS BANK, A NEBRASKA BANKING CORPORATION, APPELLEE, V. VAN H. WHITE ET AL., APPELLEES, WILLIAM G. WHITE, APPELLANT.

437 N.W.2d 460

Filed March 24, 1989. No. 87-327.

1. **Summary Judgment.** Summary judgment is an extreme remedy that should be awarded only when an issue is clear beyond all doubt. It 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 the 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. **Parol Evidence: Contracts.** The parol evidence rule renders ineffective proof of a prior or contemporaneous oral agreement which alters, varies, or contradicts the terms of a written agreement.
4. _____: _____. A note in the usual commercial form is a complete contract in itself, and its terms cannot be varied or contradicted by parol evidence.

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

Douglas Pauley, of Conway, Connolly and Pauley, P.C., for appellant.

Daniel M. Placzek, of Luebs, Dowding, Beltzer, Leininger, Smith & Busick, for appellee Bank.

HASTINGS, C.J., GRANT, and FAHRNBRUCH, JJ., and HENDRIX and OLBERDING, D. JJ.

OLBERDING, D.J.

Five Points Bank, plaintiff, brought suit to collect on a note signed by Van H. White, Bette A. White, and William G. White, defendants. The Hall County District Court granted summary judgment in favor of the bank in the amount of $48,000 plus interest. William White appeals. We affirm.

Summary judgment is an extreme remedy that should be awarded only when an issue is clear beyond all doubt. It 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 the material facts, and when the moving party is entitled to judgment as a matter of law. *West Town Homeowners Assn. v. Schneider, ante* p. 100, 435 N.W.2d 645 (1989). 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. *Renner v. Wurdeman, ante* p. 8, 434 N.W.2d 536 (1989).

On February 28, 1985, Van and Bette White signed a chattel mortgage note to Five Points Bank in the principal amount of $51,000. This note consolidated past loans of approximately $38,000, plus established credit to allow Van White to continue to make payments to William Desch on a contract for the purchase of a 50-percent interest in two businesses, Desch-Paine Monument Company and Scheffels, Inc. The principal sum was advanced as the payments on the Desch-White contract became due. The note was due on August

27, 1985, set up to coincide with distributions from Van White's businesses.

During the spring of 1985, Van White apparently decided he would not be able to meet his commitments and determined to get out of both businesses because of poor cash-flows. William White began to negotiate with Van White's business partner, Robert Fox, and Desch to try to work out an arrangement for William White to take Van White's place in the businesses and take over Van White's obligation to Desch.

Sometime in June 1985, William and Van White went to see Jon Luebs at the bank. William White offered to sign the promissory note to keep the bank from pressuring Van White for payment while negotiations were proceeding. At the time William White signed the note, it was not yet due and there had been no default on the note.

William White never completed the negotiations. In the fall of 1985, Van White defaulted on the bank note and returned the interest in the businesses to Desch.

The bank sued Van, Bette, and William White on the defaulted note. In his answer, William White alleged he had an oral agreement with the bank to be obligated only for amounts advanced in excess of $45,765, up to the face value of the note ($51,000). The bank filed a motion for summary judgment. The district court granted the motion and entered judgment against all three defendants in the principal sum of $48,000, plus prejudgment interest to December 29, 1986 (the date of judgment), in the sum of $7,830.22, plus interest at the highest legal rate from and after judgment. Costs of $285.91 were taxed to the defendants. Only William White appeals.

William White claims the trial court erred in granting the summary judgment because an issue of material fact still exists as to whether he obligated himself for the full value of the note.

William White relies upon an alleged conversation between himself and Luebs of the bank prior to William White's signing the note. During this conversation, William White claims he agreed to be obligated only for amounts advanced in excess of $45,765, the amount advanced as of the date he signed the note, up to $51,000, the face value of the note. He admits this agreement was never reduced to writing in any fashion. He also

admits he did not read the note before he signed, but relied on his past relationship with the bank to seek payment only to the extent of his oral agreement. Lastly, he admits there was consideration for his signature.

The parol evidence rule renders ineffective proof of a prior or contemporaneous oral agreement which alters, varies, or contradicts the terms of a written agreement. *Perry v. Gross*, 155 Neb. 662, 53 N.W.2d 73 (1952). The parol evidence rule is ordinarily applied in absence of fraud, mistake, or ambiguity. *Johnson v. Stover*, 218 Neb. 250, 354 N.W.2d 142 (1984). William White does not claim Five Points Bank is guilty of fraud in connection with his signing the note.

> If negotiations between the parties result in an agreement which is reduced to writing, the written agreement is the only competent evidence of the contract in the absence of fraud, mistake, or ambiguity. . . . Oral testimony is not admissible under the ambiguity exception to the parol evidence rule to establish an understanding at variance with the plain terms of the written instrument.

(Citations omitted.) *Sederstrom v. Burge*, 216 Neb. 512, 515, 343 N.W.2d 770, 771 (1984). A note in the usual commercial form is a complete contract in itself, and its terms cannot be varied or contradicted by parol evidence. *Schuett v. Hargens*, 173 Neb. 663, 114 N.W.2d 508 (1962).

Under the unambiguous language in the note, William White obligated himself in the amount of $51,000. The conversation relating to the oral agreement on his obligation took place prior to his signing the note. He seeks to alter the language of the note with evidence of prior oral negotiations. The parol evidence rule expressly bars such evidence.

A simple reading of the document before he signed it would have shown him he was assuming liability on the entire amount loaned to his brother. He admits he had the opportunity to read the note, but did not because he wanted to "get it done." 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).

William White also claims a factual issue exists as to whether the bank made a promise to advance $51,000 under the note. William White, in his deposition, admits the entire face value of the note was advanced. Therefore, it is irrelevant whether the bank promised to advance $51,000; the promise was satisfied when the entire amount was advanced. Therefore, there is no question of fact raised by this issue.

For the foregoing reasons, the order of the district court granting summary judgment in favor of Five Points Bank is affirmed.

AFFIRMED.

FARMERS STATE BANK OF PLYMOUTH, NEBRASKA, APPELLEE, V. GERALD L. GERMER ET AL., APPELLANTS.

437 N.W.2d 463

Filed March 24, 1989. No. 87-628.

1. **Actions: Plea in Abatement.** Generally, the pendency of a former action for the same cause between the same parties and in the same court constitutes a good plea in abatement.
2. **Judgments: Plea in Abatement.** As a general rule, where a judgment in a prior suit would be a bar to a judgment in the second suit brought in the same or another court of concurrent jurisdiction, the plea in abatement should be sustained.
3. **Actions.** Where two remedies exist, and the one in whose favor they exist elects to proceed for the enforcement of one and institutes a proceeding therefor, he cannot avail himself of the other while such proceeding is pending.
4. **Actions: Abatement.** The main purpose of abating a civil action is to prevent unnecessary or vexatious litigation.
5. **Actions.** The theory of our civil procedure is to avoid a multiplicity of suits.
6. **Res Judicata: Judgments: Actions.** A final judgment on the merits in a court of competent jurisdiction is conclusive upon the parties in any litigation involving the same cause of action.
7. **Res Judicata: Judgments: Collateral Attack.** A question of fact once litigated on its merits is settled as to the litigants and may not be relitigated directly or collaterally by the litigants or their privies.

8. **Res Judicata: Judgments.** The conclusiveness of a judicial determination is not affected by the kind of proceeding or form of action in which it was made or by a difference in form or object of the litigation in which the adjudication was made and that in which res judicata is pleaded.
9. _____: _____. Where a judgment on the merits is rendered in favor of one party in an action to enforce one of two or more alternative remedies, the other party cannot thereafter maintain an action to enforce another of the remedies.
10. _____: _____. Any right, fact, or matter in issue and directly adjudicated upon, or necessarily involved in, the determination of an action before a competent court 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 and privies, whether the claim or demand, purpose, or subject matter of the two suits is the same or not.
11. **Res Judicata: Actions.** The doctrine of res judicata applies when the same cause of action is sought to be litigated a second time. Whether the subsequent suit alleges the same cause of action as the prior suit is determined by whether the right sought to be vindicated rests upon the same operative facts. If so, the same cause of action has been alleged, even if different theories of recovery are relied upon.
12. **Res Judicata: Judgments: Actions.** Res judicata rests upon the principle that a final judgment on the merits by a court of competent jurisdiction is conclusive upon the parties in any later litigation involving the same cause of action.
13. **Res Judicata: Judgments.** The judgment of the district court in a former action is final as to every issue there decided and every other issue which could have been decided in the case. This rule of res judicata is grounded on public policy and necessity to end litigation and the hardship imposed on a person by being vexed twice for the same cause.
14. **Res Judicata: Judgments: Parties.** A judgment of a court of competent jurisdiction upon a question directly involved in one suit is conclusive as to that question in another suit between the same parties.
15. **Res Judicata: Courts: Parties.** Determination of the same issues between the same parties in different courts is unnecessary and vexatious.
16. **Res Judicata: Judgments.** The doctrine of res judicata is applicable to defenses, setoffs, and counterclaims, and an issue alleged as a defense and adjudicated in a prior action may not be interposed in a subsequent action as a cause of action or defense.

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

Robert R. Gibson, of Professional Legal Associates of Nebraska, P.C., and Jerald W. Kerl for appellants.

John M. Guthery and Gregory H. Perry, of Perry, Perry, Witthoff, Guthery, Haase & Gessford, P.C., for appellee.

BOSLAUGH, WHITE, SHANAHAN, and FAHRNBRUCH, JJ., and HANNON, D.J.

BOSLAUGH, J.

This is an appeal in an action in ejectment brought by the plaintiff, Farmers State Bank, against the defendants, Gerald L. and Eldora E. Germer. At the close of the evidence, the trial court sustained the plaintiff's motion for a directed verdict and rendered judgment for the plaintiff. The defendants have appealed.

The case arises out of a financing transaction which the defendants entered into on December 19, 1984. The defendants operated a farm in Jefferson County, Nebraska, for a number of years and financed their operations through the plaintiff bank. On December 19, 1984, the defendants executed a promissory note in the amount of $282,642.85, payable to the plaintiff, which was secured by a security agreement on their farm equipment and a deed of trust on a quarter section of farmland. The note by its terms was due and payable on December 31, 1985. When the defendants failed to pay the note, the plaintiff demanded return of the equipment pledged under the security agreement and commenced a replevin action on August 7, 1986. On January 15, 1987, the trial court sustained the plaintiff's motion for summary judgment in the replevin action and awarded possession of the property to the plaintiff. Thereafter, the defendants appealed to this court, but the appeal was dismissed on June 2, 1987, pursuant to the stipulation of the parties filed in this court on May 27, 1987.

Pursuant to the terms of the deed of trust, the land described therein was sold by the trustee to the plaintiff on April 22, 1986, and a deed delivered to the plaintiff. This action was commenced September 8, 1986, to recover possession of the property.

In their second amended answer and counterclaim, the defendants alleged that the deed of trust which they executed on December 19, 1984, was void because it had been obtained by the plaintiff through false representations made by the president of the plaintiff concerning the necessity for a real estate mortgage executed by the defendants on January 3, 1984;

through a false promise that the plaintiff would continue to extend a line of credit to the defendants; and through duress, by threatening to foreclose the January 3, 1984, mortgage and a security agreement if the defendants refused to execute the promissory note, deed of trust, and security agreement which they signed on December 19, 1984.

The defendants' first assignment of error is that the trial court erred in granting a partial summary judgment and finding that their defenses were barred under the doctrines of res judicata and collateral estoppel by reason of the judgment in the replevin action.

In the answer and counterclaim which the defendants filed in the replevin case, they alleged the same facts concerning fraud and economic duress as in their second amended answer and counterclaim in this case. In the replevin action, the plaintiff filed a plea in abatement which alleged that before the replevin suit had been commenced, the defendants had filed a complaint in the U.S. Bankruptcy Court as an adversary proceeding against the plaintiff in which the defendants sought the same relief on the same facts, and alleged that the proceeding was then pending in the bankruptcy court. The trial court sustained the plea in abatement and dismissed the defendants' counterclaim without prejudice on December 31, 1986.

Generally, the pendency of a former action for the same cause between the same parties and in the same court constitutes a good plea in abatement. *Miller v. Miller*, 213 Neb. 219, 328 N.W.2d 210 (1982). As a general rule, where a judgment in a prior suit would be a bar to a judgment in the second suit brought in the same or another court of concurrent jurisdiction, the plea in abatement should be sustained. *National Bank of Commerce T. & S. Assn. v. Shull*, 195 Neb. 590, 239 N.W.2d 505 (1976). Where two remedies exist, and the one in whose favor they exist elects to proceed for the enforcement of one and institutes a proceeding therefor, he cannot avail himself of the other while such proceeding is pending. *State, ex rel. Olson, v. Claney*, 97 Neb. 721, 151 N.W. 155 (1915). The main purpose of abating a civil action is to prevent unnecessary or vexatious litigation. *Cahoon v. First Nat. Bank*, 112 Neb. 462, 199 N.W. 830 (1924). The theory of

our civil procedure is to avoid a multiplicity of suits. *State, ex rel. Olson, v. Claney, supra.*

In both their original answer and counterclaim, filed November 18, 1986, and their amended answer, filed February 4, 1987, the defendants sought damages on the basis of the same allegations of fraud and duress made in their answer and counterclaim filed in the replevin action on November 10, 1986, for which they sought damages. On December 31, 1986, the trial court sustained the plaintiff's plea in abatement to the counterclaim filed November 18, 1986, upon the same grounds as the order in the replevin case made the same day.

On April 7, 1987, the trial court sustained a part of the plaintiff's motion to strike by striking the allegations relating to fraud and duress made in the amended answer filed February 4, 1987, and striking that part of the prayer seeking damages for the alleged fraud and duress.

On June 22, 1987, the trial court entered a partial summary judgment finding that the defendants' attempt to plead fraud and economic duress was barred by the judgment in the replevin case under the doctrines of res judicata and collateral estoppel.

A final judgment on the merits in a court of competent jurisdiction is conclusive upon the parties in any litigation involving the same cause of action. *Carroll v. Moore*, 228 Neb. 561, 423 N.W.2d 757 (1988).

A question of fact once litigated on its merits is settled as to the litigants and may not be relitigated directly or collaterally by the litigants or their privies. *Davis Management, Inc. v. Sanitary & Improvement Dist. No. 276*, 204 Neb. 316, 282 N.W.2d 576 (1979).

The conclusiveness of a judicial determination is not affected by the kind of proceeding or form of action in which it was made or by a difference in form or object of the litigation in which the adjudication was made and that in which res judicata is pleaded. *Kuhlman v. Cargile*, 206 Neb. 302, 292 N.W.2d 574 (1980).

Where a judgment on the merits is rendered in favor of one party in an action to enforce one of two or more alternative remedies, the other party cannot thereafter maintain an action to enforce another of the remedies. *Kuhlman v. Cargile, supra.*

Any right, fact, or matter in issue and directly adjudicated upon, or necessarily involved in, the determination of an action before a competent court 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 and privies, whether the claim or demand, purpose, or subject matter of the two suits is the same or not. *Kuhlman v. Cargile, supra.*

The doctrine of res judicata applies when the same cause of action is sought to be litigated a second time. Whether the subsequent suit alleges the same cause of action as the prior suit is determined by whether the right sought to be vindicated rests upon the same operative facts. If so, the same cause of action has been alleged, even if different theories of recovery are relied upon. *Graham v. Waggener*, 219 Neb. 907, 367 N.W.2d 707 (1985).

Res judicata rests upon the principle that a final judgment on the merits by a court of competent jurisdiction is conclusive upon the parties in any later litigation involving the same cause of action. *Graham v. Waggener, supra.*

The judgment of the district court in a former action is final as to every issue there decided and every other issue which could have been decided in the case. This rule of res judicata is grounded on public policy and necessity to end litigation and the hardship imposed on a person by being vexed twice for the same cause. *Caradori v. Hamilton*, 193 Neb. 500, 227 N.W.2d 850 (1975).

A judgment of a court of competent jurisdiction upon a question directly involved in one suit is conclusive as to that question in another suit between the same parties. *Coon v. O'Brien*, 107 Neb. 427, 186 N.W. 340 (1922).

The security agreement which was the basis for the replevin action and the deed of trust which is the basis for the plaintiff's title in this case were all part of one transaction, the financing transaction which the defendants entered into on December 19, 1984. If the deed of trust was void because of fraud and duress, as alleged in this case, then the security agreement involved in the replevin case was void for the same reason. The validity of the security agreement was established in the replevin case, and

the judgment in that case bars the defendants from attempting to litigate the validity of the deed of trust in this case upon the same grounds alleged in the replevin case.

Determination of the same issues between the same parties in different courts is unnecessary and vexatious. *Cahoon v. First Nat. Bank*, 112 Neb. 462, 199 N.W. 830 (1924).

Regardless of how the defendants attempt to describe or categorize their allegations in this case, the fact is that they attempt to succeed on the same basic facts that were alleged in the replevin case. The doctrine of res judicata is applicable to defenses, setoffs, and counterclaims, and an issue alleged as a defense and adjudicated in a prior action may not be interposed in a subsequent action as a cause of action or defense. *Simmons v. Mutual Benefit Health & Acc. Assn.*, 186 Neb. 26, 180 N.W.2d 672 (1970). The defendants' first assignment of error is without merit.

The second assignment of error relates to the plaintiff's motion for a directed verdict, which was sustained at the close of the evidence. As the trial court found, there was no dispute concerning any of the facts necessary for the plaintiff to succeed. The plaintiff had established that it had title to the land, that the defendants were in possession, and that they refused to surrender possession to the plaintiff. The plaintiff was entitled to a directed verdict, and there was no error in sustaining the plaintiff's motion.

The judgment is affirmed.

AFFIRMED.

HANNON, D.J., dissenting.

I respectfully dissent. Before the judgment in the replevin action was entered, the allegations of the affirmative defense and counterclaim that were founded upon fraud and economic duress were dismissed without prejudice, because these issues were then being litigated in an adversary proceeding in defendants' bankruptcy. I am of the opinion that the following from 46 Am. Jur. 2d *Judgments* § 490 (1969) is the correct rule:

> The general rule that a judgment "without prejudice" does not operate as res judicata applies to a judgment rendered without prejudice to the rights of the defendant. Such a judgment shows that the merits of affirmative

> matter set up by the defendant have not been determined, and that the defendant accordingly may adjudicate such matter in a subsequent action brought by him. This is true as to a judgment dismissing a cause as to one of the defendants "without prejudice" to the rights of such defendant against any of the other parties to the action. The rule also applies where the defendant interposes a counterclaim and a judgment is rendered in favor of the plaintiff "without prejudice" to the counterclaim asserted by the defendant. With respect to such matters, the defendant stands, in all respects, as if he had never been a party to the action.

The plaintiff made no showing that the issues of fraud and economic duress were actually litigated by a bankruptcy court, and the defendants have thus been denied a right to litigate these issues.

STATE OF NEBRASKA, APPELLEE, V. CHRIS ENGLEHART, APPELLANT.
STATE OF NEBRASKA, APPELLEE, V. VICKY ENGLEHART, APPELLANT.

437 N.W.2d 468

Filed March 24, 1989. Nos. 88-017, 88-018.

1. **Sentences: Probation and Parole: Final Orders: Convictions: Appeal and Error.** A probation order is a final, appealable order. If no appeal is taken from the original conviction, one cannot attack the validity of the underlying conviction on an appeal from a probation revocation.
2. **Constitutional Law: Effectiveness of Counsel: Attorney and Client: Conflict of Interest: Proof.** Permitting a single attorney to represent codefendants is not a per se violation of the constitutional guarantees of effective assistance of counsel. Multiple representation gives rise to a violation of the defendant's sixth amendment right to effective assistance of counsel only if an actual conflict of interest exists, and that conflict affects the performance of counsel. The mere possibility of a lawyer's conflict of interest is insufficient to impugn a criminal conviction; to demonstrate a violation of his sixth amendment rights, a defendant must establish an actual conflict of interest adversely affected his lawyer's performance.
3. **Effectiveness of Counsel: Proof.** To sustain a claim of ineffective assistance of counsel, the defendant must show that (1) counsel's performance was deficient

and (2) such deficient performance prejudiced the defense.

4. **Probation and Parole: Restitution.** Probation cannot be revoked for failing to make ordered restitution if the probationer made reasonable efforts to satisfy the restitution order.
5. **Probation and Parole: Sentences.** The sentencing court must find the probationer failed to make sufficient bona fide efforts to make required payments. If the failure is willful, probation can be revoked and a jail sentence imposed within the sentencing range allowed by law for the original offense. If the court finds the probationer made sufficient efforts to satisfy the probation conditions, the court can order imprisonment only if it finds alternative punishments are not adequate to satisfy the State's interests in punishment and deterrence.
6. **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. A 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 Dodge County: MARK J. FUHRMAN, Judge. Affirmed.

Calvin D. Hansen for appellants.

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

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

CARLSON, D.J.

Defendants, Chris and Vicky Englehart, appeal orders of the Dodge County District Court revoking probation, claiming (1) their guilty pleas to the welfare fraud charge and to the probation violation were not knowingly, voluntarily, and intelligently made; (2) they did not receive competent and effective assistance of counsel; (3) the probation revocations discriminated against them on the basis of poverty; and (4) the evidence was insufficient to support findings that they violated the probation orders. These cases involve identical questions of fact and law and were consolidated for argument. We affirm.

On December 1, 1986, the Engleharts were arraigned on the charges of welfare fraud. The informations alleged the Engleharts received $2,196 in welfare benefits between March 1

and June 30, 1985, to which they were not entitled. While receiving the benefits, the Engleharts filed periodic reports with the Department of Social Services stating that neither of them was employed, although Chris had been employed since shortly after they applied for benefits.

The Engleharts received a court-appointed attorney for the proceedings. The attorney did not appear at the arraignment. Each defendant waived the attorney's presence, after being informed the hearing could be continued if he or she wished, and entered a plea of guilty. The court accepted the guilty pleas as freely and voluntarily made and found the Engleharts guilty of welfare fraud.

On February 17, 1987, the judge sentenced both defendants to 3 years' probation. Under the orders of probation, each defendant was required to pay a $1,000 fine, restitution of half the welfare benefits received, court costs, and fees for the court-appointed attorney. Chris was ordered to pay $99.80 per month, and Vicky was ordered to pay $99.75 per month, beginning March 17, 1987, and continuing for 2 years. The court also ordered the Engleharts to sell their motorcycle, with an estimated value of $2,500, and apply the proceeds to the restitution orders.

The Engleharts made none of the monthly payments. The only money the court received was $450 in bond money, which was apparently turned over to be applied to the payments. Also, the parties never sold the motorcycle.

A hearing to revoke probation for violating conditions of probation was held on November 24, 1987. The Engleharts, with their attorney present, entered pleas of guilty to the probation violations. The court accepted the guilty pleas as freely and voluntarily made, and found the Engleharts had violated their probation.

The sentencing hearing was held on December 14, 1987. At the hearing, Vicky Englehart testified the couple had not made the payments because they could not afford to and the motorcycle was not sold because it needed repairs which the couple could not afford to make. She further testified that she needed to be available to take the couple's mentally handicapped child from school in the event of behavior

problems. The defendants introduced an itemization showing the family's income between February and November was $15,580.84 and the family's expenses were $15,580.

The court revoked the probation of the Engleharts and sentenced each of them to 1 to 3 years' imprisonment in the custody of the Nebraska Department of Correctional Services. Further, the court found $1,742 in restitution still owing and ordered the Engleharts to make monthly payments of $100 for 18 months, beginning within 2 months after their release from prison. The Engleharts appeal from the probation revocations.

The first and second assignments include alleged errors which occurred during the original proceedings. A probation order is a final, appealable order. *State v. Vernon*, 218 Neb. 539, 356 N.W.2d 887 (1984). The defendants did not appeal from the original convictions and, therefore, cannot attack the validity of the underlying convictions on appeals from probation revocations. *State v. Williams*, 194 Neb. 483, 233 N.W.2d 772 (1975). To the extent this appeal involves questions concerning the convictions for welfare fraud, the orders of the district court are affirmed.

Although the first assignment of error questions the voluntariness of the guilty pleas entered to the probation violations, the Engleharts do not specify how the proceedings were defective. The Engleharts were represented by counsel at the hearing. Further, the record shows the requirements of *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986), were satisfied. Therefore, the trial court did not err in accepting the guilty pleas.

Secondly, the Engleharts argue the representation they received was ineffective, first, because of a conflict in representing both defendants at one time and, second, because their attorney allowed them to enter guilty pleas when there was a question of willfulness of the nonpayment.

Permitting a single attorney to represent codefendants is not a per se violation of the constitutional guarantees of effective assistance of counsel. *State v. Pope*, 213 Neb. 645, 330 N.W.2d 747 (1983). Multiple representation gives rise to a violation of the defendant's sixth amendment right to effective assistance of counsel only if an actual conflict of interest exists, and that

conflict affects the performance of counsel. *State v. Wilson*, 224 Neb. 721, 400 N.W.2d 869 (1987). The mere possibility of a lawyer's conflict of interest is insufficient to impugn a criminal conviction; to demonstrate a violation of his sixth amendment rights, a defendant must establish an actual conflict of interest adversely affected his lawyer's performance. *State v. Pope*, 211 Neb. 425, 318 N.W.2d 883 (1982); *State v. Bishop*, 207 Neb. 10, 295 N.W.2d 698 (1980).

The defendants do not specify any conflict of interest which existed during the probation revocation proceedings, nor is any conflict apparent in the record. Therefore, the first portion of this assignment of error is without merit.

Further, the defendants argue their counsel was ineffective because he counseled them to plead guilty when they had a valid defense to the charges—the nonpayment was not willful but was the result of inability to pay. To sustain a claim of ineffective assistance of counsel, the defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense. *State v. Wakeman, ante* p. 66, 434 N.W.2d 549 (1989); *State v. Kitt, ante* p. 52, 434 N.W.2d 543 (1989).

Assuming the counsel's performance was deficient, the defendants were not prejudiced by such action. The defendants were allowed to present evidence at the sentencing hearing, which they did. Considering all the evidence, the trial court found the defendants willfully failed to comply with the probation orders. It is unlikely presenting the evidence at the revocation hearing rather than the sentencing hearing would have affected the judge's findings.

Third, the Engleharts argue revoking probation for not making the monthly payments violated the equal protection clause of the U.S. Constitution because the action discriminated against them on the basis of their ability to pay.

In *Bearden v. Georgia*, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983), the U.S. Supreme Court held probation could not be revoked for failing to make ordered restitution if the probationer made reasonable efforts to satisfy the restitution order. The court drew a distinction between a probationer who has made reasonable attempts to pay a fine or

restitution and one who has not.

> If the probationer has willfully refused to pay the fine or restitution when he has the means to pay, the State is perfectly justified in using imprisonment as a sanction to enforce collection. . . . But if the probationer has made all reasonable efforts to pay the fine or restitution, and yet cannot do so through no fault of his own, it is fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods of punishing the defendant are available.

461 U.S. at 668-69.

While poverty does not insulate a defendant from punishment, once probation is imposed, the defendant's ability to pay must be considered before a court can revoke the probation and impose a jail term for violating a probation condition requiring payments.

The sentencing court must find the probationer failed to make sufficient bona fide efforts to make the required payments. If the failure is willful, probation can be revoked and a jail sentence imposed within the sentencing range allowed by law for the original offense. If the court finds the probationer made sufficient efforts to satisfy the probation conditions, the court can order imprisonment only if it finds alternative punishments are not adequate to satisfy the State's interests in punishment and deterrence. *Bearden, supra*. See, also, *State v. Heaton*, 225 Neb. 702, 407 N.W.2d 780 (1987).

In the present case, the district court judge stated the defendants had not made any attempt to make any restitution payments, nor had they made any attempt to sell their motorcycle as ordered. The court found the failure to pay restitution was willful. Therefore, the court did not violate equal protection in revoking probation for failure to comply with court-ordered schedules of payments.

The Engleharts' fourth, and final, assignment of error questions the sufficiency of the evidence to support the finding that the Engleharts violated a condition of their probation. According to the Engleharts, the State did not sufficiently prove the Engleharts were not current on the monthly restitution payments. The portion of each defendant's monthly

payments attributable to restitution amounts to $45.66; the information in the presentence report indicates $450 in bond money was applied toward the monthly payments. Therefore, according to the Engleharts, the court should not have found the Engleharts were delinquent in their restitution payments because the $450 *might* have satisfied their restitution payments.

The argument of the Engleharts is flawed. In calculating the portion of the monthly payments attributable to the restitution, the Engleharts fail to take into account the fact that the amount of restitution was divided equally between the two Engleharts. *Each* defendant was ordered to pay $45.66 per month attributable to restitution, making a total restitution payment of $91.32. However, the record reveals only one payment of $450 between the Engleharts, but does not reveal how the $450 was divided. In this light, it is clear the Engleharts were not current on their restitution payments.

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. A verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Quiring*, 230 Neb. 535, 432 N.W.2d 243 (1988).

The evidence viewed in the light most favorable to the State supports the court's findings that the payments required under the probation orders were willfully not made.

For the foregoing reasons, we find the district court did not err in revoking the defendants' probation.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. PATRICK A. SARDESON, APPELLANT.

437 N.W.2d 473

Filed March 24, 1989. Nos. 88-382, 88-383.

1. **Constitutional Law: Statutes: Speedy Trial.** The constitutional right to a speedy trial and the statutory implementation of that right under Neb. Rev. Stat. § 29-1207 (Reissue 1985) exist independently of each other.
2. **Constitutional Law: Speedy Trial: Arrests: Indictments and Informations.** Any unreasonable delay occurring after arrest and prior to the filing of an information will be considered in determining whether a defendant has been denied the constitutional right to a speedy trial.
3. **Constitutional Law: Speedy Trial.** Determining whether a defendant's constitutional right to a speedy trial has been violated requires a balancing test in which courts must approach each case on an ad hoc basis. This balancing test involves four factors: length of delay, the reason for the delay, the defendant's assertion of the right, and prejudice to the defendant. None of these four factors are either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant.
4. _____: _____. Under the provisions of the U.S. and Nebraska Constitutions, the right to a speedy trial is relative and depends upon circumstances; it is not denied where the delay is satisfactorily explained by the government and the defendant was brought to trial as soon as was reasonably possible.
5. _____: _____. In the absence of prejudice, unexplained delay between arrest and arraignment or preliminary hearing does not demonstrate a violation of the right to a speedy trial.
6. **Convictions: Lesser-Included Offenses: Constitutional Law: Double Jeopardy.** When a defendant is convicted of both a greater and lesser-included offense, the conviction and sentence on the lesser charge must be vacated, for the constitutional prohibition against double jeopardy protects not only against a second prosecution for the same offense after acquittal or conviction, but also against multiple punishments for the same offense.
7. **Constitutional Law: Double Jeopardy.** The constitutional prohibition against double jeopardy has no application where two separate and distinct crimes are committed as the result of one act, because the constitutional proscription is directed to the identity of the offense and not to the act.
8. **Lesser-Included Offenses: Words and Phrases.** A lesser-included offense is one which is necessarily established by proof of the greater offense.
9. **Burglary: Intent.** One commits burglary in violation of Neb. Rev. Stat. § 28-507(1) (Reissue 1985) when one, in the proscribed manner, breaks and enters any real property or improvements thereon with the proscribed intent; no actual theft or asportation of property is required.
10. **Theft: Intent.** One commits theft by receiving stolen property if one receives, retains, or disposes of, in short, possesses, stolen movable property of another with the proscribed knowledge and intent.

11. **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.
12. _____: _____. In determining whether a trial court's findings on a motion to suppress are clearly erroneous, the Supreme Court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that the trial court has observed witnesses testifying in regard to such motions.
13. **Constitutional Law: Search and Seizure.** Under both the fourth amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution, whether a search by a private person 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.
14. _____: _____. A private person's status as a state agent in a search is not restricted to a search ordered, requested, or initiated by a state official, but may include a search which is a joint endeavor between a private person and a state official.
15. **Constitutional Law: Police Officers and Sheriffs: Search and Seizure: Proof.** Some conduct by the police in advancement or inducement of a search by a private person must be proven to make out a joint endeavor.
16. **Criminal Law: Identification Procedures.** Whether identification procedures were unduly suggestive and conducive to a substantial likelihood of irreparable mistaken identification is to be determined by a consideration of the totality of the circumstances surrounding the procedures.
17. **Criminal Law: Evidence: Identification Procedures.** Evidence of an extrajudicial identification is admissible when made under circumstances precluding the suspicion of unfairness or unreliability and where the out-of-court declarant is present at the trial and subject to cross-examination, whether or not the out-of-court declarant made a positive in-court identification.
18. **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.
19. **Expert Witnesses: Juries.** It is not for an expert to suggest to a jury how a witness' testimony shall be weighed or evaluated.
20. **Evidence: Hearsay.** Evidence which is not offered to prove the truth of the matter asserted is not hearsay.
21. **Motions for Mistrial: Appeal and Error.** The decision to grant a motion for mistrial is within the discretion of the trial court and will be upheld on appeal absent a showing of abuse of discretion.
22. **Trial: Evidence: Motions for Mistrial.** To prevent defeat of justice or to further justice during a jury trial, a mistrial is generally granted at the occurrence of a fundamental failure preventing a fair trial in the adversary process.
23. **Habitual Criminals: Records: Names.** An authenticated record establishing a prior conviction of a defendant with the same name is prima facie sufficient to establish identity for the purpose of enhancing punishment under the provisions

of Neb. Rev. Stat. § 29-2222 (Reissue 1985) and, in the absence of any denial or contradictory evidence, is sufficient to support a finding by the court that the accused has been convicted prior thereto.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT and ROBERT R. MORAN, Judges. Affirmed.

Roger C. Lott for appellant.

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

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

CAPORALE, J.

Following a consolidated jury trial, defendant-appellant, Patrick A. Sardeson, was convicted, in case No. 88-382, of burglary in violation of Neb. Rev. Stat. § 28-507(1) (Reissue 1985), and, in case No. 88-383, of possessing the property stolen during the aforesaid burglary in violation of Neb. Rev. Stat. § 28-517 (Reissue 1985). Having thereafter been found to be a habitual criminal, Sardeson was sentenced to imprisonment for a period of not less than 10 nor more than 20 years on each conviction, the sentences to be served concurrently, with credit for the 375 days Sardeson was incarcerated pending trial of these cases. In this consolidated appeal, Sardeson assigns errors which meld to claim the district court wrongly (1) failed to dismiss the two informations because of excessive delay, (2) failed to require the State to dismiss one charge or the other, (3) failed to suppress certain evidence, (4) excluded certain other evidence, (5) admitted certain evidence, (6) failed to grant a mistrial, and (7) found Sardeson to be a habitual criminal. We affirm.

I. BACKGROUND

On the morning of March 9, 1987, David and Paula Hubertus left their Lancaster County residence for work. Mr. Hubertus returned at 5:30 that afternoon to find that someone had entered the house by breaking open a locked door, had ransacked the house, and had taken several items. The missing items included a videocassette recorder, several rings including

Mrs. Hubertus' very distinctive $2,250 wedding ring, a bracelet, and a metal box containing Mr. Hubertus' coin and currency collection.

Following the investigations detailed below, searches made pursuant to warrant resulted in recovery of the coinbox taken in the Hubertus burglary, which proved to bear Sardeson's fingerprints. Additional facts of record will be discussed as necessary in part II, which analyzes in turn each of Sardeson's summarized assignments of error.

II. ANALYSIS

1. Delay Claim

Sardeson cites as his first assignment of error the district court's refusal to dismiss both informations for excessive delay. Sardeson was arrested on March 12, 1987; bail was set and subsequently reduced, but Sardeson nevertheless remained incarcerated thereafter. He was initially charged with forgery; the charge of burglary was brought on June 19, 1987. On September 23, 1987, the State dismissed the forgery charges; possession of stolen property was charged on October 9, 1987. On November 23, 1987, Sardeson, through his attorney, expressly waived his right to a speedy trial in both cases and requested continuance of both to the January 18, 1988, jury term. The district court accepted this waiver, granted the requested continuance, and ordered the two cases consolidated for trial. Sardeson at no time thereafter questioned the validity of this waiver nor sought to withdraw it but, on December 21, 1987, filed motions to dismiss both cases, arguing, in relevant part, that the State, by actively trying to keep him in custody, violated his rights to a speedy trial and reasonable bail guaranteed him by the sixth and eighth amendments to the U.S. Constitution and article I, §§ 9 and 11, of the Nebraska Constitution. Sardeson now characterizes his earlier abandonment of a timely disposition of the charges against him as a waiver only of his statutory right to a speedy trial, preserving his rights pursuant to constitutional guarantees.

This State's statutory speedy trial guarantee is found at Neb. Rev. Stat. §§ 29-1207 to 29-1209 (Reissue 1985). Section 29-1207 provides in relevant part: "(1) Every person indicted or informed against for any offense shall be brought to trial within

six months, and such time shall be computed as provided in this section. (2) Such six-month period shall commence to run from the date the indictment is returned or the information filed."

This court has noted that

> "[t]he constitutional right to a speedy trial and the statutory implementation of that right under section 29-1207, R.R.S. 1943 . . . exist independently of each other. . . . Any unreasonable delay occurring *prior* to the filing of an information will be considered . . . in determining whether or not a defendant has been denied the *constitutional* right to a speedy trial."

(Emphasis supplied.) *State v. Gingrich*, 211 Neb. 786, 789, 320 N.W.2d 445, 447 (1982) (quoting *State v. Costello*, 199 Neb. 43, 256 N.W.2d 97 (1977)). See, also, *State v. Lafler*, 225 Neb. 362, 405 N.W.2d 576 (1987). Clearly, the theoretical distinction between statutory and constitutional rights to speedy trial is fully supported in this state's case law. It therefore seems theoretically possible for a criminal defendant to waive statutory speedy trial rights while preserving rights under constitutional speedy trial guarantees.

Assuming for the purposes of analysis, but not deciding, that Sardeson's unlimited waiver of a speedy trial somehow nonetheless preserved his constitutional guarantees, the question becomes whether the time elapsing between Sardeson's arrest and filing of the informations, a period of just over 3 months in the burglary case and just under 7 months in the possessing stolen property case, impermissibly infringed upon Sardeson's constitutional rights to a speedy trial.

The cases before us grew out of investigative efforts following the burglary of the Hubertus home on March 9, 1987. Pursuant to warrant, searches were conducted in Eagle and Lincoln on March 12, 1987, and Sardeson was arrested later that same day. Lincoln Police Sgt. Charles Hennessey testified that "[t]here was a lot of follow-up work that was done afterwards," although in his estimation the investigation "was probably pretty well wrapped up at the end of the month." As Sardeson's attorney noted in arguing another matter to the trial court, "the police were investigating a number of crimes that don't have anything to do with the two Informations that we're

dealing with. There were a couple of other burglaries, there was a robbery and some other things that were being investigated, forgeries . . . ." The records in the two cases now under consideration establish that police investigations subsequent to Sardeson's arrest included attempts, ultimately successful, to locate stolen property in the hands of an innocent purchaser, and to locate the vehicle used in the burglary, which had been traded shortly thereafter to a used car dealer.

Sardeson complains that his pretrial incarceration interfered with his ability to assist in the preparation of his defense by preventing him from locating potential alibi witnesses. At the hearing on his pretrial motion to dismiss, Sardeson testified:

> I was hired at Snyder's Industries and was supposed to start on the 12th, and I couldn't get no witnesses together for that to prove that I was hired there.
>
> Q. All right. When were you at Snyder Industries? What date?
>
> [Sardeson] On the 9th.
>
> Q. Of March?
>
> [Sardeson] Yes.
>
> Q. Of 1987?
>
> [Sardeson] Yes.
>
> Q. And do you know who you talked to there?
>
> [Sardeson] I talked to two people. One was — I guess he's the guy that hires, and then one was a foreman that showed me around.
>
> Q. But you don't know what their names were?
>
> [Sardeson] It's been a while. I don't remember what —
>
> Q. All right. Had you been on bail, could you have gone out there?
>
> [Sardeson] Yes.
>
> Q. Were you anywhere else on March 9th?
>
> [Sardeson] Yes. I was at Welfare. I was receiving food stamps because I was not working at the time, and then I had to — in order to receive food stamps, you have to report to a job service downstairs, which you look through a viewer and they schedule you to, you know, go for a job interview.
>
> Q. Did you see people there at the Department of Social

Services or Welfare?

[Sardeson] Yes, I did.

Q. And do you know what their names were?

[Sardeson] No, I don't.

Sardeson subpoenaed Paul Kearney, operations administrator and custodian of records with the Department of Social Services, who testified that records indicated that someone named Pat Sardeson had visited that office sometime on March 9, 1987.

As this court noted in *State v. Brown*, 214 Neb. 665, 670-71, 335 N.W.2d 542, 546 (1983), concerning constitutional guarantees of the right to a speedy trial,

> [*Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972)] recites a "balancing test" which requires courts to approach each case on an ad hoc basis. This "balancing test" involves four factors bearing upon questions of speedy trial, namely, "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." . . . As further stated in *Barker* . . . "We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process."

(Citations omitted.) See, also, *State v. Gingrich*, 211 Neb. 786, 320 N.W.2d 445 (1982).

Under the provisions of the U.S. and Nebraska Constitutions, the right to a speedy trial is relative and depends upon circumstances; it is not denied where the delay is satisfactorily explained by the government and the defendant was brought to trial as soon as was reasonably possible. *State v. McNitt*, 216 Neb. 837, 346 N.W.2d 259 (1984) (construing U.S. Const. amend. VI and Neb. Const. art. I, § 13). Moreover, even "unexplained delay between arrest and arraignment or preliminary hearing does not demonstrate a violation of the right of speedy trial in the absence of prejudice." *SapaNajin v.*

Johnson, 219 Neb. 40, 41-42, 360 N.W.2d 500, 501 (1985), citing *State v. Ellis*, 184 Neb. 523, 169 N.W.2d 267 (1969), which, predating this State's speedy trial statute, considered the question solely in the context of constitutional guarantees.

In the cases now before us, the delays complained of were neither excessive under the circumstances, unexplained, nor prejudicial. The record establishes that at least two police agencies were involved in investigating many crimes other than those charged in these cases. Given the complexity of these investigations, exploring as they did apparent forgery, burglary, and weapons crimes, the duration of the delay which resulted is clearly not so great as to constitute an infringement of Sardeson's constitutional right to a speedy trial.

Moreover, the delay complained of clearly did not prejudice Sardeson in the preparation of his case. Sardeson identified the two persons he wished to contact at his prospective employer's with sufficient particularity that it would have been a simple matter to locate and interview them. Similarly, having subpoenaed the Department of Social Services records officer, it would have been a simple matter to research the records within that officer's control to discover precisely to whom Sardeson had spoken, or at least likely had spoken to, and to conduct appropriate discovery regarding the time of Sardeson's visit.

Absent any showing that preindictment delay caused substantial prejudice to Sardeson's right to a fair trial or that it was an intentional device to gain a tactical advantage over him, the delay did not violate Sardeson's fifth or sixth amendment rights. *United States v. Hardrich*, 707 F.2d 992 (8th Cir. 1983), *cert. denied* 464 U.S. 991, 104 S. Ct. 481, 78 L. Ed. 2d 679. Sardeson's first assignment of error thus is without merit.

2. Prosecution for Two Crimes

Sardeson next urges the view that the district court erred in overruling his motion to dismiss either the burglary charge or the possession charge; he argues that one cannot commit both the crimes of burglary and theft by receiving stolen property when the same property and incident form the substance of both charges.

Although he declines to phrase it thus, Sardeson's argument

is essentially that he may not be convicted both of a crime and of a lesser offense included within that crime. In this, he is correct. This court has recently reaffirmed that when a defendant is convicted of both a greater and lesser-included offense, the conviction and sentence on the lesser charge must be vacated, *State v. Olsan, ante* p. 214, 436 N.W.2d 128 (1989), for the constitutional prohibition against double jeopardy protects not only against a second prosecution for the same offense after acquittal or conviction, but also against multiple punishments for the same offense. *State v. Olsan, supra*. It is equally clear, however, that the constitutional prohibition against double jeopardy has no application where two separate and distinct crimes are committed as the result of one act, because the constitutional proscription is directed to the identity of the offense and not to the act. *State v. Rice, ante* p. 202, 435 N.W.2d 889 (1989).

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."

Section 28-517 provides: "A person commits theft if he receives, retains, or disposes of stolen movable property of another knowing that it has been stolen, or believing that it has been stolen, unless the property is received, retained, or disposed with intention to restore it to the owner."

A lesser-included offense is one which is necessarily established by proof of the greater offense. *State v. Rice, supra*; *State v. Arthaloney*, 230 Neb. 819, 433 N.W.2d 545 (1989); *State v. Olsan, supra*. One commits burglary in violation of § 28-507(1) when one, in the proscribed manner, breaks and enters any real property or improvements thereon with the proscribed intent; no actual theft or asportation of property is required. *State v. Zemunski*, 230 Neb. 613, 433 N.W.2d 170 (1988); *State v. Vaughn*, 225 Neb. 38, 402 N.W.2d 300 (1987). In stark contrast, one commits theft by receiving stolen property only if one "receives, retains, or disposes" of, in short, possesses, stolen movable property of another with the proscribed knowledge and intent. Clearly, burglary is not a

lesser-included offense of theft by receiving stolen property, nor is theft by receiving stolen property a lesser-included offense of burglary.

Sardeson seeks to buttress his position by citation to *Milanovich v. United States*, 365 U.S. 551, 81 S. Ct. 728, 5 L. Ed. 2d 773 (1961). *Milanovich* relied upon *Heflin v. United States*, 358 U.S. 415, 79 S. Ct. 451, 3 L. Ed. 2d 407 (1959), in which the defendant was charged under 18 U.S.C. § 2113(c) and (d) (1958). Under subsection (d), Heflin was charged with taking property by force and violence, and under subsection (c) it was alleged that Heflin did " 'receive, possess, conceal, store, and dispose' " of the same property. 358 U.S. at 416. Following conviction, consecutive sentences were imposed. The Supreme Court, after a brief review of what it characterized as "meagre" legislative history, concluded:

> From these [House and Senate] Reports it seems clear that subsection (c) was not designed to increase the punishment for him who robs a bank but only to provide punishment for those who receive the loot from the robber. We find no purpose of Congress to pyramid penalties for lesser offenses following the robbery. . . . [I]n view of the legislative history of subsection (c) we think Congress was trying to reach a new group of wrongdoers, not to multiply the offense of the bank robbers themselves.

358 U.S. at 419-20.

In *Milanovich, supra*, defendants Milanovich, husband and wife, were found guilty of "stealing several thousand dollars in currency from a commissary store at a United States Naval Base," 365 U.S. at 552; in addition, the wife was found guilty of "receiving and concealing the stolen currency," *id.*, all of these acts being crimes under 18 U.S.C. § 641 (1982). Concurrent sentences were imposed on the wife. The Supreme Court, citing *Heflin, supra*, reversed, observing: "We find nothing in the language or history of the present statute which leads to a different conclusion here." 365 U.S. at 554.

The results of *Heflin* and *Milanovich* are grounded in principles of federal statutory construction, not of constitutional jurisprudence. As the *Milanovich* Court itself noted, "the question is one of statutory construction, not of

common law distinctions." 365 U.S. at 554. See, also, *United States v. Tyler*, 466 F.2d 920 (9th Cir. 1972), *cert. denied* 409 U.S. 1045, 93 S. Ct. 544, 34 L. Ed. 2d 497, declining to apply the *Milanovich* rule to convictions for larceny and possession of the same stolen goods under § 2113(b) and (c) (1982). We are here concerned with the construction of state statutes, to which neither *Heflin* nor *Milanovich* has any relevance. Sardeson's second summarized assignment of error is without merit.

3. Nonsuppression of Evidence

As his third assignment of error, Sardeson takes issue with the overruling of his motions to suppress the evidence turned over to police by Tom Lillibridge and to suppress Todd Zeilinger's identification of Sardeson. In beginning the analysis of these claims, we recall that 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. Hoer, ante* p. 336, 436 N.W.2d 179 (1989); *State v. Jolitz, ante* p. 254, 435 N.W.2d 907 (1989); *State v. Abdouch*, 230 Neb. 929, 434 N.W.2d 317 (1989). Further, in determining whether a trial court's findings on a motion to suppress are clearly erroneous, the Supreme Court does not reweigh the evidence or resolve conflicts in the evidence, *State v. Jolitz, supra*, but, rather, recognizes the trial court as the finder of fact and takes into consideration that the trial court has observed witnesses testifying in regard to such motions. *State v. Abdouch, supra*.

a. *Lillibridge Evidence*

On March 11, 1987, Hennessey contacted Lillibridge at his place of employment, an enterprise of which Mr. Hubertus is part owner. Lillibridge accompanied Hennessey to the sheriff's office, where he spoke with several other police officers about various crimes, including the Hubertus burglary. In the course of these conversations, Lillibridge implicated Sardeson in several crimes, and, further, in Hennessey's words,

> Mr. Lillibridge had indicated to me that he had in his possession stolen property that he was not totally aware at first that it was stolen, and that he did not want to be prosecuted for possession of stolen property, at which time I referred this to [an assistant Lancaster County

> attorney], and he agreed that if Mr. Lillibridge was to bring the property forward and to give information to what knowledge he had, he would not be charged.

Hennessey relayed the assistant county attorney's comments to Lillibridge, who then left the sheriff's office. At this time, it was Hennessey's understanding that Lillibridge "was going to his residence to gather up the stolen property that he had in his possession and bring [it] back in at 8:15 in the morning."

Lillibridge did in fact return to the sheriff's office the following morning with several items of property, including a bracelet later identified as belonging to Mrs. Hubertus, a videocassette recorder, and several other items, including a ski mask, a pair of green coveralls, and a BB pistol. When he brought them in, Lillibridge told police officers where he had gotten some of these items. Sardeson objected to Hennessey's testimony regarding the substance of Lillibridge's statements in this connection, and the record does not disclose precisely where, when, or under what circumstances Lillibridge acquired possession of these items. According to Hennessey, Lillibridge was neither paid nor instructed by police officers to recover evidence from Sardeson's home.

In the suppression hearing, Sardeson testified that he had invited Lillibridge into his home on the evening of March 11, 1987, that Lillibridge had been "in and out" of Sardeson's home that evening, that he did not recall Lillibridge's removing any items from the residence but that Lillibridge might have done so, and that Sardeson had never given Lillibridge a videocassette recorder or a bracelet. According to Sardeson, Lillibridge told him that he had spoken with the police earlier that day, but did not inform Sardeson that he would report back to them the next morning. Lillibridge showed Sardeson no search warrant, nor did he ask Sardeson's permission to look around. Police searches pursuant to warrant were conducted in Eagle and Lincoln on March 12, 1987, and Sardeson was arrested on the same day.

Sardeson argues that "the police recruited Mr. Lillibridge to search Mr. Sardeson's home and use the fruits of that search to get a search warrant. Evidence from that search was used in the trial against Mr. Sardeson, and all of that evidence should have

been suppressed." Brief for appellant at 20. Sardeson's argument fails for at least two reasons. In the first instance, there is nothing of record to establish that Lillibridge turned over to police on March 12, 1987, any item he had not had in his possession prior to his encounter with them on March 11. Sardeson denies that he gave Lillibridge a videocassette recorder or Mrs. Hubertus' bracelet, but this denial alone does not establish that Lillibridge acquired these items surreptitiously in the course of a visit to Sardeson's home.

More importantly, under both the fourth amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution, whether a search by a private person 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. *State v. Abdouch*, 230 Neb. 929, 434 N.W.2d 317 (1989). The record clearly supports the district court's implicit finding that Lillibridge was not expressly recruited by police investigators to act as their agent for purposes of conducting a warrantless search of Sardeson's residence.

Sardeson urges the view that "by talking to Lillibridge about the possibility of him being charged, and giving him a way to get out of that charge, that is by bringing good fresh evidence to the police, they made him a police agent." Brief for appellant at 20. It is true that a private person's status as a state agent in a search is not restricted to a search ordered, requested, or initiated by a state official, but may include a search which is a joint endeavor between a private person and a state official. *State v. Abdouch, supra*. It is also true, however, that some conduct by the police in advancement or inducement of the search must be proven to make out a "joint endeavor." See *State v. Abdouch, supra*. See, also, *State v. Jolitz, ante* p. 254, 435 N.W.2d 907 (1989). On these facts, the district court was not clearly erroneous in its implicit finding that any search Lillibridge may have conducted of Sardeson's residence was not conducted as a joint endeavor with police officials.

b. *Zeilinger Identification*

At the suppression hearing, Zeilinger, a neighbor of the Hubertuses', testified that on March 9, 1987, a man arrived at his residence seeking help in starting an automobile. Zeilinger

spent about 10 minutes helping this man start the automobile, using jumper cables and Zeilinger's own vehicle; this was the only time Zeilinger saw the man in question. Zeilinger testified to the same general effect at trial, adding that Sardeson's automobile was parked on a little-used path 50 to 75 yards from the Hubertuses' house, facing away from it.

Sardeson contends that Zeilinger's identification was the result of procedures which were unduly suggestive such as to lead to an irreparably mistaken identification.

Zeilinger was interviewed by Lancaster County Sheriff's Deputy Kirk Price the day after the burglary, and Zeilinger agreed to work with Lincoln Police Officer James Spanel to develop a composite sketch of the man he had seen, a task which Zeilinger accomplished later that day and in which he was not coached in any way. At the time, Spanel did not know what the investigation was about, who, if anyone, was suspected, nor that Sardeson was then involved in burglaries in general or the Hubertus burglary in particular. Price stated that before he spoke with Zeilinger, Sardeson had not been a suspect in the Hubertus burglary and that he did not know Sardeson at that time.

After completion of the composite sketch, Zeilinger was asked to pick out the man he had seen from a set of six black-and-white photographs and to do so again sometime later, using a different set of color photos. Zeilinger was asked to examine the second set of photos "due to the fact the first set of photos had such a small picture of the face and the facial features wouldn't show up quite as well in that picture [police investigators] decided to see if [they] had some better photos of close-ups of the face." According to Zeilinger, "I picked the person in each set that I thought pretty much resembled him." Although Zeilinger was "pretty sure" the man in the photos he selected was the same man who had sought his help on March 9, 1987, he was not able to say so positively, and at one point in the investigation may have indicated to police that there was only a 50-50 chance that the photos portrayed the man he had seen. However, in court during the suppression hearing, Zeilinger positively identified Sardeson, in person, as the man in question, although he indicated he was not "[a] hundred

percent sure."

Sardeson was the only person represented in both the first and second photo arrays. When Zeilinger was asked in the suppression hearing if anyone other than Sardeson was represented in both photo arrays, Zeilinger indicated that he had never before noticed one way or the other.

On April 7, 1987, Zeilinger was again asked by Price to examine a photo array, one not containing a photo of Sardeson. At this time, Zeilinger did not recognize a photo of Sardeson's roommate, Russell Harris, also considered a suspect in the Hubertus burglary.

With regard to the use of photographic arrays, this court has held that whether identification procedures were unduly suggestive and conducive to a substantial likelihood of irreparable mistaken identification is to be determined by a consideration of the totality of the circumstances surrounding the procedures. *State v. Price*, 229 Neb. 448, 427 N.W.2d 81 (1988), citing *State v. Swoopes*, 223 Neb. 914, 395 N.W.2d 500 (1986), which was overruled on other grounds in *State v. Jackson*, 225 Neb. 843, 408 N.W.2d 720 (1987) (concerning lesser offenses included in attempted crimes). Evidence of an extrajudicial identification is admissible when made under circumstances precluding the suspicion of unfairness or unreliability and where the out-of-court declarant is present at the trial and subject to cross-examination, whether or not the out-of-court declarant made a positive in-court identification. *State v. Richard*, 228 Neb. 872, 424 N.W.2d 859 (1988). See, also, *State v. Trevino*, 230 Neb. 494, 432 N.W.2d 503 (1988), applying the *Richard* rule to an extrajudicial in-person identification.

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. Trevino, supra*; *State v. Richard, supra*.

Sardeson is correct in stating that the facts of his case present

a closer question than have those of several cases challenging the validity of extrajudicial identification procedures recently faced by this court. See, e.g., *State v. Trevino, supra*; *State v. Price, supra*; *State v. Richard, supra*. But see, *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986); *State v. Swoopes, supra*. Nevertheless, a review of the facts in light of the *Richard* standards demonstrates that the district court's ruling on Sardeson's suppression motion was not clearly erroneous. Zeilinger had 10 minutes in which to observe the man whose automobile he helped start, ample opportunity to commit his appearance to memory. Although Zeilinger was not as motivated to remember the man's face as were, for example, several of the eyewitnesses in *State v. Trevino, supra*, the record discloses a face-to-face conversation between the two men followed by Zeilinger's effort to render the man assistance at some inconvenience to himself. This is sufficient evidence of interested attentiveness to support the district court's determination. Zeilinger, the day following his encounter with the stalled motorist, produced a composite sketch of the man of sufficient accuracy that police personnel only tangentially involved in the case immediately recognized the person depicted as Sardeson; photographs entered into evidence independently confirm the striking resemblance the composite bears to its model. Although Zeilinger declined to represent himself as 100 percent confident of his own identification, the degree of confidence he did express was clearly sufficient to warrant submission of his evidence to the jury, particularly in light of all attendant circumstances, including the brevity of the interval between Zeilinger's observation of the man and his production of the composite sketch. In sum, the record clearly establishes satisfaction of the first branch of the *Richard* test.

Concerning the second branch of the *Richard* test, the record demonstrates that Zeilinger was present at trial and was not only "subject to" cross-examination, but was, in fact, vigorously cross-examined.

The district court's determination of Sardeson's motions to suppress the evidence taken from Lillibridge and Zeilinger's identification testimony is thus not clearly erroneous; this third summarized assignment of error is therefore also without merit.

4. Exclusion of Evidence

Sardeson next assigns as error the district court's refusal to admit his expert's testimony regarding the reliability of eyewitness identifications. 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. Olsan, ante* p. 214, 436 N.W.2d 128 (1989); *State v. Wakeman, ante* p. 66, 434 N.W.2d 549 (1989); *State v. Wilson*, 225 Neb. 466, 406 N.W.2d 123 (1987).

In an offer of proof outside the presence of the jury, Sardeson stated that if allowed to testify, his expert witness, a psychologist, "would testify about experiments where persons were shown a picture twice among many other pictures." In the words of Sardeson's attorney,

> I think that his expert opinion would be . . . that under the circumstances of this case, that is, a situation where Todd Zeilinger was shown two photographs of one person in two different photo arrays, that his identification of Mr. Sardeson at the hearing on January 4th and in this courtroom today was really an identification of the photographs that he was shown from March 10th, 1987, to today . . . as apart from and independent of and perhaps probably different than any person that he saw on March 9th, 1987, near his home.

Recently, in *State v. Trevino*, 230 Neb. 494, 432 N.W.2d 503 (1988), this court reaffirmed the rule of *State v. Ammons*, 208 Neb. 812, 305 N.W.2d 812 (1981), that it is not for an expert to suggest to a jury how a witness' testimony shall be weighed or evaluated. (See, also, *State v. Beermann, ante* p. 380, 436 N.W.2d 499 (1989), concerning the general impropriety of one witness' testifying about the weight to be given another's testimony.) The district court's determination not to admit Sardeson's proffered evidence therefore having been, far from an abuse of discretion, the only correct ruling possible, Sardeson's fourth assignment of error is clearly without merit.

5. Admission of Evidence

Sardeson's fifth summarized assignment of error raises the argument that the district court erred in admitting Deputy Price's testimony concerning out-of-court statements made by

Zeilinger.

In his opening remarks to the jury, Sardeson's counsel stated:

> The piece of evidence that we're going to challenge very strongly is Mr. Zeilinger. . . .
>
> . . . [T]he evidence will show that before a composite drawing was done, Mr. Sardeson was already a suspect in this burglary because of his relation to a man named Tom Lillibridge . . . . I think the evidence will show that the people that did the composite knew that Mr. Sardeson was a suspect. . . .
>
> . . . .
>
> . . . [W]e will submit to you at the end of the evidence that what Mr. Zeilinger was doing was not identifying Mr. Sardeson but identifying Mr. Sardeson's picture that he had seen quite a number of times.

During the trial, Price, over Sardeson's continuing objection, was permitted to testify regarding the conversations he had with Zeilinger on March 10, 1987, as detailed in part II(3)b above, "[n]ot . . . for the truth of what was said but for the purpose of explaining conduct of this witness at a later time." Price further testified that at the conclusion of the interview, he asked Zeilinger to accompany him to the police station and to assist in the preparation of a composite sketch of the person whose vehicle Zeilinger had helped start. Zeilinger did so, and a sketch of a suspect in the Hubertus burglary was subsequently prepared. According to Price, once the composite was finished, Officer Spanel, who had assisted Zeilinger in creating the composite sketch, remarked, outside of Zeilinger's hearing, that the sketch resembled Sardeson. Price subsequently composed a photo array using six black-and-white photographs from sheriff's department files and showed them to Zeilinger, who picked Sardeson's photo as one that "he said was the closest to the individual he saw the day before, that he was probably 50-50 with that individual." Ten minutes later, Price constructed a second photo array, using color photos with larger face sizes, and Zeilinger again picked Sardeson's photo as resembling the man he had helped.

Neb. Rev. Stat. § 27-801 (Reissue 1985) sets forth the classical definition of "hearsay" as "a statement, other than

one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." It is a legal commonplace that that which is not offered "to prove the truth of the matter asserted" is not hearsay. See *State v. Wilson*, 225 Neb. 466, 406 N.W.2d 123 (1987).

In his opening remarks, Sardeson's attorney placed the investigating officers' knowledge, and by implication their motives, at issue. The district court properly received Price's testimony, not for the truth of the statements made by Zeilinger to Price but, rather, to show how the investigation evolved, in rebuttal of Sardeson's implicit allegation that the police somehow manipulated Zeilinger into identifying Sardeson. Received for this purpose, Price's testimony was not within the definition of hearsay, and the district court clearly was not in error so to conclude. Sardeson's fifth assignment of error is without merit.

6. No Mistrial

Sardeson's sixth summarized assignment of error takes issue with the district court's refusal to grant a mistrial based on the State's conduct in interrogating Heinz Matthiesen. The decision to grant a motion for mistrial is within the discretion of the trial court and will be upheld on appeal absent a showing of abuse of discretion. *State v. Byrd, ante* p. 231, 435 N.W.2d 898 (1989); *State v. Jackson, ante* p. 207, 435 N.W.2d 893 (1989); *State v. Fraser*, 230 Neb. 157, 430 N.W.2d 512 (1988).

Matthiesen, a retired maintenance supervisor and amateur collector of and dealer in coins and precious metals, testified that over a period of several days following the Hubertus burglary, Sardeson sold him several items, principally rings, rare coins, some rare currency, and jewelry, later identified as taken in that burglary. The colloquy to which Sardeson now objects took place as Matthiesen was describing the conclusion of his second meeting with Sardeson, at which Matthiesen purchased, among other things, Mrs. Hubertus' wedding ring:

> [Matthiesen] I paid him the money, and he left. And when he left I walked outside, and I saw — I have an alley with a six-foot redwood fence, and I saw the tail end of a reddish maroon [Camaro] taking off down the alley. I

couldn't —

Q. Are you sure it's a [Camaro]?

[Matthiesen] To the best of my knowledge.

Q. And it wasn't a Monte Carlo?

[Matthiesen] A Monte Carlo, I mean. I'm sorry.

Although this is the only portion of the exchange Sardeson notes in his brief in this court, the record shows that the colloquy continued as follows:

> [Sardeson's attorney] Your Honor, he's testified that it was a [Camaro], and now the prosecutor is trying to get him to change his testimony to another kind of automobile.
>
> [State's attorney] Your Honor, I'm trying to see whether or not he's sure of what he said.
>
> THE COURT: Well, you don't need to do it that way.
>
> [Matthiesen] Sir, I made a mistake. I meant a Monte Carlo.
>
> THE COURT: All right.
>
> [State's attorney] Are you sure of that? It was a Monte Carlo?
>
> [Matthiesen] I'm not sure, but in my opinion it was a Monte Carlo.

Immediately following this exchange, Sardeson moved for a mistrial, which motion the district court overruled.

Recently, in *State v. DeGroot*, 230 Neb. 101, 430 N.W.2d 290 (1988), this court stated the standard for determining whether declaration of a mistrial is appropriate: " 'In order to prevent defeat of justice or to further justice during a jury trial, a mistrial is generally granted at the occurrence of a fundamental failure preventing a fair trial in the adversarial process. Some examples are an egregiously prejudicial statement by counsel . . . .' " *Id.* at 105, 430 N.W.2d at 293 (quoting *State v. Archbold*, 217 Neb. 345, 350 N.W.2d 500 (1984)). See, also, *State v. Byrd, supra*; *State v. Jackson, supra*. The conduct by the prosecutor of which Sardeson now complains hardly rises to the level of "fundamental failure preventing a fair trial." Indeed, the prosecutor's effort to correct his witness' misdescription by leading questions is clearly, on this record, inconsequential. Although the description of Sardeson's automobile was

apparently intended by the prosecutor to serve, howsoever weakly, as circumstantial evidence of Sardeson's identity, the fact is that Sardeson's identity was more than adequately proven by in-court eyewitness identifications by Matthiesen and Zeilinger. The model of automobile Matthiesen observed mattered not one whit, and the district court was well within its discretion so to conclude. Sardeson's sixth summarized assignment of error is without merit.

7. Proof of Habitual Criminal Status

Finally, Sardeson urges the view that the district court erred in finding that the State had borne its burden to prove, for enhancement of sentence pursuant to Neb. Rev. Stat. § 29-2221 (Reissue 1985), this state's habitual criminal statute, that he is the same Patrick A. Sardeson who had been previously convicted of felonies. In the absence of a sentencing court's abuse of discretion, the sentencing court's procedure utilized for presentation of information at a hearing for imposition of the habitual criminal penalty prescribed by § 29-2221 will be sustained on appeal. *State v. Jackson*, 225 Neb. 843, 408 N.W.2d 720 (1987).

In the pretrial suppression hearing of January 4, 1988, Sardeson testified on cross-examination as follows: "Q. Sir, have you ever been convicted of a felony within the last ten years? [Sardeson] The last ten years? Q. Yes. [Sardeson] Yes. Q. And how many? [Sardeson] Three." Following trial, in a hearing to determine the applicability of § 29-2221 to Sardeson's sentencing in these cases, the State offered three authenticated records of prior felony convictions in the name of "Patrick Sardeson." Sardeson objected, as he does in this court, "to their being introduced until there's some connection between the person named in those exhibits and the defendant." The State asked the district court to note that Sardeson had identified himself as "Patrick Sardeson" in testimony in the suppression hearing; with no objection by Sardeson, the district court did so. Neither side offered any additional evidence. On this basis, the district court announced its specific finding that "defendant has been twice previously convicted of felonies and sentenced and committed by courts of this state. Therefore, defendant is deemed to be an habitual criminal and shall be

sentenced in both cases accordingly."

Neb. Rev. Stat. § 29-2222 (Reissue 1985) provides as follows:

> At the hearing of any person charged with being an habitual criminal, a duly authenticated copy of the former judgment and commitment, from any court in which such judgment and commitment was had, for any of such crimes formerly committed by the party so charged, shall be competent and prima facie evidence of such former judgment and commitment.

This court has previously held that under § 29-2222, an authenticated record establishing a prior conviction of a defendant with the same name is prima facie sufficient to establish identity for the purpose of enhancing punishment and, in the absence of any denial or contradictory evidence, is sufficient to support a finding by the court that the accused has been convicted prior thereto. *State v. Jackson, supra.* See, also, *State v. Wakeman, ante* p. 66, 434 N.W.2d 549 (1989). Sardeson neither denied that he was the person sentenced for the prior felonies alleged, nor did he seek to establish by contradictory evidence that he was not the person so named. Rather, Sardeson contends that the State failed to meet its burden of proof in this regard, a contention in which he is clearly mistaken. We need not, and do not, consider the implication of Sardeson's express admission in the suppression hearing to conclude that the trial court committed no abuse of discretion. Sardeson's seventh and final summarized assignment of error is, like those which have preceded it, without merit.

III. DECISION

The record sustaining none of Sardeson's summarized assignments of error, the judgment of the district court is affirmed.

AFFIRMED.

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

437 N.W.2d 156

Filed March 24, 1989. No. 88-478.

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. **Rules of Evidence: Parental Rights: Juvenile Courts: Due Process: Evidence: Proof.** Nebraska Evidence Rules, Neb. Rev. Stat. §§ 27-101 to 27-1103 (Reissue 1985), do not apply in juvenile court dispositional hearings such as one to terminate parental rights. The requirements of due process control a proceeding to terminate parental rights and the type of evidence which may be used by the State in an attempt to prove that parental rights should be terminated.
3. **Parental Rights: Juvenile Courts: Due Process: Witnesses: Evidence.** In proceedings to terminate parental rights under the Nebraska Juvenile Code, a parent has the due process right to cross-examine an adverse witness. Without the test of cross-examination, a hearsay report is unreliable evidence for termination of parental rights.
4. **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.
5. **Parental Rights: Juvenile Courts.** While there is no requirement that a juvenile court must institute a plan for rehabilitation of a parent, where the failure of a parent to comply with a rehabilitation plan is an independent ground for termination of parental rights, the rehabilitation plan must be reasonable and conducted under the direction of the juvenile court.
6. **Parental Rights: Proof.** A parent's failure to make reasonable efforts to comply with a court-ordered plan of rehabilitation designed to reunite the parent and child presents an independent reason justifying termination of parental rights under Neb. Rev. Stat. § 43-292(6) (Reissue 1988). The State must prove this failure by clear and convincing evidence.
7. **Parental Rights.** 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 County Court for Adams County: JACK ROBERT OTT, Judge. Affirmed.

Susan K. Alexander, of Alexander, Alexander & Alexander, for appellant.

Donna S. Fegler, Deputy Adams County Attorney, for appellee.

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

FAHRNBRUCH, J.

C.D.C., who admitted that her daughter, P.D., lacked proper parental care by reason of the fault or habits of C.D.C., appeals the termination of her parental rights.

The Adams County Court, sitting as a juvenile court, entered the termination order after C.D.C. failed to comply with conditions of court-ordered plans to reunite P.D. with her mother. We affirm the juvenile court's termination order.

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 A.G.G.*, 230 Neb. 707, 433 N.W.2d 185 (1988); *In re Interest of E.R., J.R., and A.R.*, 230 Neb. 646, 432 N.W.2d 834 (1988).

On September 18, 1985, upon receipt of a court order, the Nebraska Department of Social Services (DSS) took P.D. into protective custody. P.D. was 4 months old at the time. At the protective custody hearing, a Hastings police sergeant testified that C.D.C. had left P.D. with a babysitter. When C.D.C. failed to return for her daughter after several hours, the babysitter was concerned and called DSS. The child was suffering from a fever and had been left without sufficient diapers and formula. The babysitter, knowing where the mother was, went to get C.D.C. and found her so "high" on marijuana that she was unable to comprehend her daughter's problems. The child had had but one bath in 2 weeks, and that was supplied by the babysitter. For about a week and a half prior to September 18, C.D.C. "had been going out and comin' home stoned about every night." When the child was placed in protective custody,

she "could have used a bath and (she) did have some bites about the face, several red spots. Could have been mosquito bites . . . ."

The petition filed on September 18, 1985, alleged P.D. to be a child as described in Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1984), in that P.D. was a child

> "1. whose parent, guardian or custodian neglects or refuses to provide proper or necessary subsistence, education or other care necessary for the health, morals" or "well-being of such juvenile; [and]
>
> 2. who is in a situation or engages in an occupation dangerous to life or limb or injurious to the health or morals of such juvenile . . . ."

At a hearing on September 20, 1985, P.D. was placed in the temporary care and custody of DSS. C.D.C. did not attend that hearing, even though she had been personally notified by a caseworker. The mother moved from Hastings, Nebraska, to Arapahoe, Nebraska, after P.D. was removed from her custody. She told the caseworker that there were "no guarantees" that she would attend the hearing. C.D.C. did not visit the child until October 28, 1985.

C.D.C. was present with her court-appointed attorney at an adjudication hearing on December 13, 1985. At that hearing, C.D.C. admitted allegations in an amended petition that P.D. was a child who lacked proper parental care through the fault or habits of her parent. The court ordered that the child remain in the temporary care and custody of DSS pending a return to her mother as soon as possible. As a factual basis for this order, the court found that C.D.C. was involved in heavy use of marijuana and was under the influence of marijuana on numerous occasions in the presence of P.D. and that on September 18, 1985, C.D.C. had absented herself from P.D. for several hours beyond her scheduled return, that C.D.C. refused to attend to the needs of her child when specifically requested, and that she was under the influence of marijuana at that time.

P.D. was returned to her mother on December 31, 1985. On that date, C.D.C. voluntarily agreed to a reunification plan designed by DSS. The plan was neither approved nor ordered by the court.

C.D.C. made acceptable progress and was in compliance with the plan until April 22, 1986. At that time, C.D.C. moved to Alabama. DSS refused to allow P.D. to move with C.D.C. until a home study was completed by the Alabama department of social services. The child was placed at an emergency shelter for children and in a foster home in June of 1986. C.D.C. returned to Nebraska in September of 1986, but did not contact DSS until at least 2 weeks after her return. Between April 22 and October 1 of 1986, C.D.C. did not attempt to communicate with her child in any way.

The court entered the first of three court-approved rehabilitation plans at a review hearing on December 12, 1986. That plan required C.D.C. to (1) secure and maintain adequate housing for at least 6 months, (2) maintain employment for 6 months or enroll in a school program and have regular attendance, (3) complete a parenting class, (4) maintain weekly visits with P.D., and (5) cooperate with the family support provider. Originally, the plan required C.D.C. to provide transportation and a baby car seat for her visits with P.D. However, C.D.C. refused to provide transportation even though she owned a car. The plan was amended by the court so that DSS transported the child for visitation.

C.D.C. failed to successfully comply with this plan. In September of 1986, C.D.C. was living with her boyfriend in Juniata, Nebraska. In November, she moved in with J.S. in Harvard, Nebraska. C.D.C. claimed that J.S. was P.D.'s father. Both C.D.C. and J.S. moved to the home of J.S.' parents in Glenvil, Nebraska, in March of 1987. They returned to Harvard in April. At no time did C.D.C. live in her own home or provide financial maintenance for the home in which she did live.

C.D.C. did not seek employment. She did register for classes at a local community college and obtained $1,738 in federal financial aid. However, C.D.C. attended only two classes. A television, stereo, and other furniture were purchased with the financial aid. Scheduled weekly visits with P.D. were maintained. The parenting class was completed, and C.D.C. did cooperate with DSS workers.

Another case plan was ordered by the court in June of 1987.

The second plan again required C.D.C. to maintain her own home, obtain employment, and cooperate with DSS. C.D.C. was required to undergo a drug and alcohol evaluation and pay $15 per month in child support. Visits with P.D. were increased to four per week. C.D.C. was to provide transportation and a child car seat for two of the visits and DSS for two visits. The visits were scheduled to last from 10 a.m. until 4 p.m. A DSS worker was to supervise the Friday afternoon visitations.

C.D.C. failed to comply with the second plan. In June, C.D.C. and J.S. moved back to Glenvil and lived with J.S.' parents. In September of 1987, both C.D.C. and J.S. returned to Harvard. In December, C.D.C. moved to the residence of a friend in Hastings. C.D.C. did not seek employment and did not contribute to the maintenance of a residence. The drug and alcohol evaluation was not completed by the time of the next review hearing.

C.D.C. did maintain her visits with P.D. However, she again failed to provide transportation. Sometime in June of 1987, C.D.C. underwent surgery. She told DSS workers that she was not allowed to drive. A caseworker learned that C.D.C. was not to drive for 3 weeks. After the 3-week period, C.D.C. still refused to transport P.D. for visits. However, she was seen driving. She returned P.D. from her visits early several times. A child car seat was not provided by C.D.C.

Another review hearing was held in September of 1987. The court again ordered compliance with a rehabilitation plan prepared by DSS. This third plan again required C.D.C. to maintain her own residence and obtain employment. C.D.C. was also required to pay child support and submit a budget to DSS. The plan again included the drug and alcohol evaluation and ordered C.D.C. to follow recommendations of the counselor, and ordered family counseling with C.D.C. and P.D. attending together. Visits with P.D. were reduced to one per week and were to be supervised. The reduction was the result of P.D.'s illness, C.D.C.'s failure to administer medication, a bruise that appeared on P.D.'s neck after one visitation, and the fact that the child became "real stressed" when there were four visits per week. In addition, the lack of bonding between mother and child did not improve with four visits per week.

C.D.C. was required to provide transportation and a car seat.

In September of 1987, C.D.C. was still living with J.S. in Harvard. She moved to Hastings in December and lived with a friend. In February of 1988, C.D.C. moved to the residence of other friends in Hastings. C.D.C. did obtain employment but only worked for 2 days. A budget was not submitted and child support was never paid. C.D.C. canceled a scheduled appointment with the family counselor and did not reschedule it. Weekly visits with P.D. were maintained, but C.D.C. refused to provide transportation.

The drug and alcohol evaluation of C.D.C. was eventually completed. Counseling was recommended, but C.D.C. did not follow through with that recommendation.

A supplemental petition requesting termination of C.D.C.'s parental rights in P.D. was filed September 17, 1987. A hearing was held in March of 1988. At that hearing, in addition to the facts heretofore set forth, those reports properly received in evidence and other admissible competent and relevant evidence of witnesses may be summarized as follows:

From the time of the adjudication hearing until she left the state to go to Alabama, C.D.C. made acceptable progress. Upon her return from Alabama, C.D.C. said she had been back in the state for "several weeks" before contacting DSS in September 1986. Upon C.D.C.'s return to Nebraska, her first visit with P.D. was October 1, 1986. C.D.C. failed to keep the second visit scheduled for October 10 and, in fact, did not again contact DSS until November 19 to schedule visits. In the interim, DSS could not locate C.D.C. On November 19, visits were scheduled to resume November 26, 1986. C.D.C. did not always provide diapers or food for P.D., and the mother was insensitive to P.D.'s crying.

P.D.'s visits with her mother were regularly scheduled to begin at 10:30 a.m. C.D.C. remained in her nightgown on one visit, did not answer the door on another visit because everyone was asleep, and was asleep when P.D. arrived for other visits. On one occasion, at 12:30 p.m., a worker found that P.D., who was 28 months old at the time, had been on her own while C.D.C. slept. C.D.C. ended visits early without giving a reason.

One DSS employee testified that while she supervised P.D.'s

visits with her mother, she observed very little contact between mother and daughter. P.D. was not given lunch until late in the afternoon and had no nap. The baby had only iced tea to drink, even in her bottle. Another DSS employee, who had supervised most of C.D.C.'s visits with P.D. beginning in November of 1985, testified that C.D.C. failed to give P.D. required medication; that there was little contact between the mother and daughter; and that although C.D.C. fed nutritious solids to P.D., pop and Kool-Aid were the only beverages she saw offered. Snacks for the child consisted of only candy.

The family support provider who supervised the visits reported that J.S. was verbally abusive to her and to P.D. on several occasions. P.D.'s foster mother complained that P.D. returned from visits dirty and with small red bumps (like chigger bites) on her arms, legs, and stomach. This information was received by way of a report. However, the foster mother was sworn as a witness and thus was available for cross-examination concerning her observations. See *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 417 N.W.2d 147 (1987). On appeal, C.D.C. did not assign error to the reception of this evidence.

C.D.C. and J.S. were advised that they needed to review the case plan with DSS prior to the review hearing. They missed three appointments but kept the fourth. At that appointment, C.D.C. and J.S. were defensive. J.S., although living in the home, refused to complete a parenting course or to follow a case plan. They both insisted they could support P.D., even though neither had a job. C.D.C., who had by this time completed the court-ordered parenting class, agreed to the proposed case plan.

P.D. battled ear infections during the course of one summer and was ill at various times. C.D.C. insisted that she could care for the child, and the visits continued in spite of P.D.'s illness. Prescribed medication was placed in two bottles, one for the foster mother and one for C.D.C. C.D.C. consistently failed to give P.D. the medication. On one occasion, P.D. vomited when she arrived for her visit. The child was cared for by the family support provider and J.S.' mother because C.D.C. was still in bed. C.D.C. had been advised that the child was ill and would

need medication for her fever. The DSS worker observed C.D.C. ask J.S.' mother to go to the store for pop and cigarettes, but she made no mention of medication for the child. When P.D. was returned from the visit, she had not been medicated and was still suffering from her fever.

Finally, the State presented the testimony of Heidi Parker. Parker is the family support provider who supervised most of C.D.C.'s visits with P.D., beginning in November of 1985. Parker was present at the visits where C.D.C. failed to medicate P.D. She also was the worker who observed J.S.' verbal abuse. Parker testified that she saw little contact between C.D.C. and P.D. and that C.D.C. at times used inappropriate discipline measures. Parker had seen C.D.C. feed P.D. soup, spaghetti, goulash, and other nutritious foods for lunch. However, pop and Kool-Aid were the only beverages she saw offered. Parker had heard P.D. ask for juice, only to be told there was none. Later that day C.D.C. went to the store to purchase cigarettes, but did not get juice for P.D.

Only one witness testified on C.D.C.'s behalf. Vicky Todd testified that she was C.D.C.'s sister and had been at C.D.C.'s home when P.D. visited. Todd stated that the relationship between C.D.C. and P.D. was positive and that their interaction was good. She had observed C.D.C. and P.D. play peekaboo and patty-cake and had seen C.D.C. tickle and giggle with P.D.

On May 2, 1988, the Adams County Court, acting as a juvenile court, issued its order terminating C.D.C.'s parental rights in P.D. The court found that C.D.C. had "failed to demonstrate a positive caring attempt, as compared to any reasonable standard, to comply with the case plan and to regain physical custody of her daughter. She [C.D.C.], as shown by the evidence, still lacks necessary parenting skills and continues to neglect her child's needs."

C.D.C. claims the trial court erred: (1) in receiving into evidence the home study report from Alabama, (2) in receiving into evidence a written therapist's report, (3) in considering evidence of noncompliance with a case plan not under the court's direction, (4) in finding that the State met its burden of proof by clear and convincing evidence, and (5) in finding that termination of C.D.C.'s parental rights was in the best interests

of the child.

We begin our consideration of the first two assigned errors by remembering that the Nebraska Evidence Rules, Neb. Rev. Stat. §§ 27-101 to 27-1103 (Reissue 1985), do not apply in juvenile court dispositional hearings such as one to terminate parental rights. The requirements of due process control a proceeding to terminate parental rights and the type of evidence which may be used by the State in an attempt to prove that parental rights should be terminated. *In re Interest of D.L.S.*, 230 Neb. 435, 432 N.W.2d 31 (1988); *In re Interest of J.S., A.C., and C.S., supra.*

C.D.C. first argues that the home study report conducted by the Alabama department of social services was inadmissible hearsay. She points to *In re Interest of J.S., A.C., and C.S., supra*, in which we found a DSS report to be inadmissible hearsay because the authors of the report were not available for cross-examination. We stated, "In proceedings to terminate parental rights under the Nebraska Juvenile Code, a parent has the due process right to cross-examine an adverse witness. . . . Without the test of cross-examination, the hearsay report was unreliable evidence for termination of parental rights." (Citations omitted.) *Id.* at 265-66, 417 N.W.2d at 157.

The Alabama report at issue was offered to prove the matter asserted therein and, therefore, constituted hearsay evidence. See Neb. Evid. R. 801 (definition of hearsay) (§ 27-801). The author of the report was not in court to be cross-examined by C.D.C. The report was not admissible, and the court erred in receiving it into evidence.

Next, C.D.C. argues that a written report by a family therapist should not have been received by the trial court because the therapist was not qualified to give the opinion contained in the report. The county judge ruled there was insufficient foundation for the therapist to orally testify as an expert. Rather than lay additional foundation, the county attorney questioned the therapist only as to her observations. The therapist's opinion contained in her written report should not have been received in evidence without further foundation.

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. *In re Interest of E.R., J.R., and A.R.*, 230 Neb. 646, 432 N.W.2d 834 (1988); *In re Interest of A.Z., B.Z., and R.Z.*, 230 Neb. 291, 430 N.W.2d 901 (1988).

Because the Alabama report and the therapist's opinion were inadmissible, they have not been considered in deciding this appeal.

C.D.C.'s third assigned error is that the trial court erred in considering noncompliance with a rehabilitation plan not under the court's direction. In her brief, C.D.C. presents the novel argument that, since the trial court did not order a plan until December of 1986, it should not consider evidence of events happening prior to that time. C.D.C. points to the following language from *In re Interest of L.J., J.J., and J.N.J.*, 220 Neb. 102, 110, 368 N.W.2d 474, 480 (1985), in support of her contention:

> While there is no requirement that a juvenile court must institute a plan for rehabilitation of a parent, where the failure of a parent to comply with a rehabilitation plan is an independent ground for termination of parental rights, the rehabilitation plan must be reasonable and conducted under the direction of the juvenile court.

From this language, it does not follow that, once a court orders a rehabilitation plan, it is prohibited from considering prior events when deciding whether to terminate parental rights. As the quote indicates, it is often necessary for a court to determine the reasonableness of a plan or its individual provisions. It is impossible to determine whether a plan to reunite a parent and child is reasonable without considering whether the plan is designed to correct problems which required the State's intervention in the first place. Review of prior events is essential to this determination. See, *In re Interest of L.J., J.J., and J.N.J., supra*; *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 417 N.W.2d 147 (1987).

In our de novo review, we do not consider as a basis for any termination order whether C.D.C. violated the terms of the

voluntary rehabilitation plan agreed upon by C.D.C. and DSS. It was not court approved or ordered. Further, we find no basis in the record to support a claim that the trial court based its termination order upon any alleged violation of the voluntary agreement. C.D.C.'s third assignment of error is meritless.

C.D.C.'s fourth assignment of error claims the trial court erred in finding that the State proved its case by clear and convincing evidence. A parent's failure to make reasonable efforts to comply with a court-ordered plan of rehabilitation designed to reunite the parent and child presents an independent reason justifying termination of parental rights under Neb. Rev. Stat. § 43-292(6) (Reissue 1988). The State must prove this failure by clear and convincing evidence. See, *In re Interest of D.L.S.*, 230 Neb. 435, 432 N.W.2d 31 (1988); *In re Interest of L.O. and B.O.*, 229 Neb. 889, 429 N.W.2d 388 (1988).

All three of the court-ordered plans C.D.C. was to comply with required that she obtain employment, maintain a residence, visit with P.D. regularly, and cooperate with the family support provider. She was, at some time, also expected to attend a parenting class and family therapy, submit a budget to DSS, pay child support, and obtain a drug and alcohol evaluation and follow the counselor's recommendations. In the first plan, C.D.C. was given the option of attending school rather than obtaining employment.

C.D.C. never made a serious effort to become employed. Other than the few weeks she was recovering from surgery, C.D.C. had no excuse for not working. Registering for school and attending two classes cannot be considered compliance with that particular plan's provision. C.D.C. made no effort to maintain her own permanent home. The record shows a very clear pattern of moving from friend to friend and taking advantage of their hospitality. C.D.C. did not submit a budget to DSS. She never paid child support. She did not go to the scheduled family therapy sessions. She eventually submitted to a drug and alcohol evaluation, but did not follow the counselor's recommendations. C.D.C. did visit with P.D. regularly, but only so long as someone else made the effort to bring the child to her. The evidence shows that even then

C.D.C. was neither ready nor eager to see her child. C.D.C.'s care of P.D. during visitations shows a pattern of a lack of concern for the child's welfare. The only plan provisions with which C.D.C. successfully complied were completion of the parenting class and cooperation with the family support provider.

The evidence is clear and convincing that C.D.C. failed to fully comply with any of the court-ordered rehabilitation plans. The trial court was correct in so finding.

Finally, C.D.C. assigns as error the trial court's finding that termination of her parental rights was in the best interests of the child. 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. *In re Interest of A.G.G.*, 230 Neb. 707, 433 N.W.2d 185 (1988); *In re Interest of Z.D.D. and N.J.D.*, 230 Neb. 236, 430 N.W.2d 552 (1988).

The evidence in this case underscores three glaring concerns with C.D.C.'s ability to parent P.D.: (1) use of drugs, (2) failure to provide a stable home, and (3) lack of interest and concern for the welfare of P.D. The rehabilitation plans reflect the court's and DSS' attempts to eliminate, or at least reduce, these problems. After missing several scheduled appointments and after being twice ordered by the court, C.D.C. did complete the drug and alcohol evaluation, but refused to follow the recommendations for ending her dependence. C.D.C. made no effort to provide a suitable, stable, permanent home for P.D. Between September 1985 and the trial in the spring of 1988, a period of 2 1/2 years, C.D.C. had 14 separate addresses. The only reasonable conclusion is that C.D.C. is unwilling to alter these two deficiencies.

It may be argued that C.D.C. has shown interested concern for P.D. by keeping scheduled visits. Close examination of the facts indicates otherwise. C.D.C. was usually still in bed when P.D. arrived for visits, and on at least one occasion the child was left alone while her mother slept. When P.D. was originally removed, it was several weeks before C.D.C. was interested in seeing the child. The same is true of the time C.D.C. returned from Alabama. She also missed scheduled visits. Obviously, C.D.C. prefers to let others care for P.D. or to leave the child

alone, when caring for P.D. is inconvenient.

C.D.C. did not meet the basic needs of a small child. Lunch, though usually nutritious, was served late in the afternoon, sometimes by someone other than C.D.C. There was no milk or juice. P.D. always drank Kool-Aid or pop, and, as a baby, her bottle was filled with iced tea. C.D.C. purchased cigarettes for herself, but not juice or needed medication for her child, even when asked. Also troubling is C.D.C.'s failure to medicate P.D. when the child was ill. Finally, C.D.C. was not willing to spend time with P.D. if she had to provide transportation. C.D.C. likes having P.D. around, but only when it is convenient and requires little effort.

P.D. needs a stable home where her basic needs are consistently met. The evidence shows, clearly and convincingly, that C.D.C. has willfully neglected P.D. and that C.D.C. has willfully failed and neglected to provide P.D. a stable home where the child's basic needs are consistently met.

We find that all three court-ordered rehabilitation plans were designed to reunite C.D.C. with her daughter, and the plans' provisions are in all respects reasonable. C.D.C.'s indifference toward her child, C.D.C.'s lack of interest in being a mother concerned with P.D.'s welfare, and C.D.C.'s pattern of self-indulgence, all as reflected in the record, militate against any reasonable chance of reunification of mother and child. The only alternative to termination of C.D.C.'s parental rights is continued efforts to rehabilitate by the DSS, while P.D. remains in foster homes. A child cannot, and should not, be suspended in foster care, nor be made to await uncertain parental maturity. *In re Interest of A.G.G., supra.*

P.D. was 4 months old when she was removed from her mother. On May 10, 1989, P.D. would be 4 years old and still in a foster home. P.D.'s best interests require termination of her mother's parental rights.

The order of the trial court terminating C.D.C.'s parental rights in P.D. is correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DAVID M. DYKE, APPELLANT.

437 N.W.2d 164

Filed March 24, 1989. No. 88-531.

1. **Right to Counsel.** Once a defendant has been informed of his right to retained or appointed counsel, there is no requirement that the court advise the defendant, on each subsequent court appearance, of the same right.
2. **Prior Convictions: Right to Counsel: Waiver: Proof.** The State establishes a prima facie case for proving a prior, counseled conviction by producing appropriate record evidence of a conviction which discloses that at a critical point in the proceedings—arraignment, trial, conviction, or sentencing—the defendant had either intelligently and voluntarily waived counsel or in fact was represented by counsel at one of those times. The defendant then has the burden of coming forward with evidence that in fact his prior conviction was uncounseled.

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

Emily R. Scherr for appellant.

Robert M. Spire, Attorney General, Gary P. Bucchino, Omaha City Prosecutor, and J. Michael Tesar for appellee.

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

WHITE, J.

David M. Dyke appeals from a conviction in the county court for Douglas County for driving while intoxicated, third offense. We affirm.

Appellant was charged with driving while intoxicated, third offense. After he entered a plea of no contest, an enhancement hearing was held to determine the validity of his two prior convictions for driving while intoxicated. The two prior convictions were marked and offered by the State as exhibits 1 and 2. Appellant did not object to exhibit 2, but did object to exhibit 1, a 1984 conviction in the Omaha Municipal Court, on the grounds that the record of the conviction did not affirmatively show that appellant was represented by counsel or that he had waived his right to counsel. The county court found that the prior convictions were valid and enhanced the appellant's conviction. Appellant was sentenced in accordance

with the statutory penalties for driving while intoxicated, third offense. On appeal, the district court for Douglas County affirmed the county court's findings.

Appellant claims the district court erred in affirming the appellant's conviction for driving while intoxicated, third offense, and affirming the penalties imposed.

The thrust of appellant's appeal centers on the validity, for enhancement purposes, of exhibit 1, the 1984 Omaha Municipal Court conviction. An examination of this exhibit shows that on July 27, 1983, appellant appeared at an arraignment hearing which was continued to August 5. At that time, the appellant was advised of his right to counsel, and he waived that right. On August 5, the arraignment hearing was held. The appellant was again advised of his right to counsel, and the judge noted on the docket sheet that the appellant "will have an [attorney]." The appellant entered a plea of not guilty, and a trial date was set. Trial was held on January 3, 1984, and the appellant was found guilty. A notation made by the judge on the docket sheet states that the appellant appeared pro se.

It is this docket sheet and notation on which the appellant bases his contention that this prior conviction was invalid for purposes of enhancement. Specifically, he argues that the docket sheet evidencing the trial proceedings does not affirmatively indicate that the defendant was represented by counsel or waived his right to counsel at the time of conviction. In support, appellant cites *State v. Fraser*, 222 Neb. 862, 387 N.W.2d 695 (1986), and *State v. Ziemba*, 216 Neb. 612, 346 N.W.2d 208 (1984), for the proposition that a record of a prior conviction is inadmissible for enhancement purposes unless *at the time of the conviction* the defendant was represented by counsel or waived his or her right to counsel. Without addressing the applicability of these cases, we note that appellant's proposition is correct. See *State v. Sherrod*, 229 Neb. 128, 425 N.W.2d 616 (1988). However, appellant's narrow interpretation of that proposition would require the court, in addition to advising the defendant of his or her right to counsel at prior critical stages of the proceeding, to also advise the defendant of his or her right to counsel at the time of conviction.

This court has held that " '[o]nce a defendant has been informed of his right to retained or appointed counsel, there is no requirement that the court advise the defendant, on each subsequent court appearance, of the same right.' " *State v. Kennedy*, 224 Neb. 164, 170, 396 N.W.2d 722, 726 (1986). Further,

> the State establishes a prima facie case for proving a prior, counseled conviction by producing appropriate record evidence of a conviction which discloses that at a critical point in the proceedings—arraignment, trial, conviction, or sentencing—the defendant had either intelligently and voluntarily waived counsel or in fact was represented by counsel at one of those times. The defendant then has the burden of coming forward with evidence that in fact his prior conviction was uncounseled.

State v. Sherrod, supra at 134, 425 N.W.2d at 621. Exhibit 1 clearly shows that the appellant was informed of his right to counsel twice at arraignment hearings and waived that right. Under the facts, the municipal court was not obligated to advise the appellant of his right to counsel at the proceeding where he was convicted.

In the case at bar, the State met its burden to prove prior convictions, *State v. Sherrod, supra*, and the burden shifted to the appellant to produce evidence that in fact his prior conviction was uncounseled. The appellant has not produced any evidence showing that his waiver was anything other than intelligent and voluntary, nor does he challenge the validity of the prior conviction on that ground. The 1984 Omaha Municipal Court conviction was valid for enhancement purposes.

Accordingly, the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. TRACY L. SITES, APPELLANT.

437 N.W.2d 166

Filed March 24, 1989. No. 88-653.

1. **Constitutional Law: Criminal Law: Self-Incrimination.** The right to remain silent, that is, the privilege against self-incrimination guaranteed by the 5th and 14th amendments to the U.S. Constitution and article I, § 12, of the Nebraska Constitution, prevents the State's compelling a defendant to testify in his or her own prosecution on a criminal charge and prohibits an individual's compulsory answer to an official question in any proceeding, civil or criminal, formal or informal, when the answer might incriminate the individual in a future criminal proceeding.
2. **Constitutional Law: Criminal Law: Probation and Parole: Self-Incrimination.** If the State calls a defendant as a witness at a hearing for revocation of the defendant's probation, the defendant's constitutional right to remain silent is not violated, since a revocation of probation is not a stage of prosecuting a defendant on a criminal charge and because the defendant's admission of a probation violation is not necessarily an admission of a crime committed by the defendant.
3. _____: _____: _____: _____. At a hearing for revocation of probation, the State may call the defendant probationer to testify regarding a probation violation so long as the State does not compel the probationer to incriminate himself or herself concerning a separate criminal offense.

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

Arthur C. Toogood, Adams County Public Defender, for appellant.

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

BOSLAUGH, SHANAHAN, and GRANT, JJ., and KNAPP and ROWLANDS, D. JJ.

SHANAHAN, J.

Tracy L. Sites appeals from the judgment of the district court for Adams County, which affirmed the judgment of the county court for Adams County, revoking Sites' probation. Sites claims that the State violated his right to remain silent and compelled him to testify at the revocation hearing concerning probation violations.

On October 14, 1983, in the county court for Adams County, Sites pled guilty to drunk driving, acknowledging two prior

convictions for drunk driving, see Neb. Rev. Stat. § 39-669.07 (Reissue 1988), and also pled guilty to operating a motor vehicle during the period when his operator's license was suspended, see Neb. Rev. Stat. § 60-430.01 (Reissue 1988). After Sites' convictions for DWI and driving under suspension, the court, on January 5, 1984, sentenced Sites to 5 years' probation and ordered that Sites obtain and maintain Antabuse therapy administered at the South Central Community Mental Health Center. The probation order also required Sites' attendance at weekly "AA" meetings and proof of attendance delivered to Sites' probation officer. By its information filed on February 20, 1987, the State charged that Sites failed to maintain the Antabuse therapy and failed to attend the AA meetings and supply his probation officer with proof of attendance at the meetings.

At the revocation hearing, the State called Sites as a witness to establish his noncompliance with the probation order concerning Antabuse and the AA meetings. Over Sites' objection that his compelled testimony violated his constitutional right to remain silent, the State interrogated Sites about his failure to fulfill the probation conditions pertaining to Antabuse and AA meetings. Immediately after Sites testified, the State called Sites' probation officer, who testified that Sites had not attended AA meetings for the period from January through July in 1987 and that Sites admitted his failure to maintain Antabuse therapy as required by the probation order. The court found that Sites had violated the probation order and sentenced Sites to imprisonment in the county jail as the result of the convictions for DWI and driving under suspension.

The right to remain silent, that is, the privilege against self-incrimination guaranteed by the 5th and 14th amendments to the U.S. Constitution and article I, § 12, of the Nebraska Constitution, prevents the State's compelling a defendant to testify in his or her own prosecution on a criminal charge and prohibits an individual's compulsory answer to an official question in any proceeding, civil or criminal, formal or informal, when the answer might incriminate the individual in a future criminal proceeding. *Lefkowitz v. Turley*, 414 U.S. 70,

94 S. Ct. 316, 38 L. Ed. 2d 274 (1973).

If the State calls a defendant as a witness at a hearing for revocation of the defendant's probation, the defendant's constitutional right to remain silent is not violated, since a revocation of probation is not a stage of prosecuting a defendant on a criminal charge and because the defendant's admission of a probation violation is not necessarily an admission of a crime committed by the defendant. *State v. Burow*, 223 Neb. 867, 394 N.W.2d 665 (1986); *Minnesota v. Murphy*, 465 U.S. 420, 104 S. Ct. 1136, 79 L. Ed. 2d 409 (1984); *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973). At a hearing for revocation of probation, the State may call the defendant probationer to testify regarding a probation violation so long as the State does not compel the probationer to incriminate himself or herself concerning a separate criminal offense. *State v. Heath*, 343 So. 2d 13 (Fla. 1977); *Wilson v. State*, 621 P.2d 1173 (Okla. Crim. 1980); *Beller v. State*, 597 P.2d 338 (Okla. Crim. 1979).

Sites' failure to take Antabuse and failure to attend AA meetings were not separate crimes, but violations of the conditions under which Sites was sentenced to probation. Calling Sites to testify regarding the probation violations did not violate his privilege against self-incrimination guaranteed by the 5th and 14th amendments to the U.S. Constitution, or article I, § 12, of the Nebraska Constitution.

AFFIRMED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. PAUL J. GERDES, RESPONDENT.

437 N.W.2d 169

Filed March 24, 1989. No. 89-144.

Original action. Judgment of suspension.

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

PER CURIAM.

On February 24, 1989, Counsel for Discipline of the Nebraska State Bar Association filed a motion for reciprocal discipline pursuant to Neb. Ct. R. of Discipline 21A (rev. 1986), and moved this court to enter an order temporarily suspending respondent, Paul J. Gerdes, from the practice of law in the State of Nebraska.

Rule 21A provides: "Upon receipt by the Court of appropriate notice that a member has been disbarred or suspended in another jurisdiction, the Court shall enter an order imposing the identical discipline, or, in its discretion, suspend the member pending the imposition of final discipline in such other jurisdiction." The record indicates that on September 12, 1988, the Supreme Court of the State of Colorado suspended respondent from the practice of law in that state for an indefinite period of time during the pendency of disciplinary proceedings against him.

On February 27, 1989, respondent was ordered to show cause on or before March 14 why the motion for reciprocal discipline should not be sustained. Respondent filed a response on March 8, 1989, consenting to an order of this court suspending him from practice.

Therefore, pursuant to rule 21A, it is the order of this court that the respondent, Paul J. Gerdes, be, and hereby is, suspended from the practice of law pending imposition of final discipline in the State of Colorado, effective immediately.

JUDGMENT OF SUSPENSION.

WHITE, J., not participating.

GEORGE T. BLANCHETTE, APPELLEE, V. KEITH COUNTY BANK & TRUST COMPANY, A NEBRASKA BANKING CORPORATION, APPELLANT.

437 N.W.2d 488

Filed March 31, 1989. No. 87-515.

1. **Banks and Banking: Debtors and Creditors.** A bank may not set off funds in a depositor's account in payment of the depositor's indebtedness to the bank when the bank knows or should know that the funds being set off belong to another.
2. **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.
3. _____: _____. A civil verdict will not be disturbed unless clearly wrong.
4. _____: _____. A civil 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.
5. **Trial: Evidence: Appeal and Error.** The appropriate standard of review for an assignment of error directed at the exclusion or admission of evidence is one of abuse of discretion.
6. **Evidence.** Evidence is relevant if it has any tendency to make the existence of any fact of consequence to the determination of the action more probable or less probable than it would be without the evidence, or the evidence tends to establish a fact from which the existence or nonexistence of a fact in issue can be directly inferred.
7. **Security Interests: Pleadings.** A defense which rests on the priority status of a security interest is an affirmative one which must be pled as well as proved.
8. **Jury Instructions.** It is the duty of a trial court to instruct the jury only on issues which are pled and find support in the evidence.

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

Neil E. Williams and Tanya L. Dillow, of McGinley, Lane, Mueller, O'Donnell & Williams, P.C., for appellant.

David T. Schroeder for appellee.

William B. Brandt and Robert J. Hallstrom, of Brandt, Horan, Hallstrom and Sedlacek, for amicus curiae Nebraska Bankers Association, Inc.

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

CAPORALE, J.

In this action for conversion, the defendant, Keith County Bank & Trust Company, appeals the $11,134 judgment entered against it pursuant to the verdict in favor of plaintiff-appellee, George T. Blanchette. Defendant bank assigns as error the district court's (1) finding that the evidence supports the verdict, (2) overruling of its motion in limine, and (3) refusal to charge the jury with an instruction it requested. We affirm.

I. THE EVIDENCE

Blanchette is the sole shareholder and president of Consumers Protective Insurance Agency Limited, a corporation through which he sells insurance. He is also the assignee of Consumers' interests in the subject matter of this litigation. In 1985, Consumers consigned a 1983 Cadillac automobile it owned to Fuller Motor Company, Inc., for sale. Fuller Motor sold the automobile, and the buyer financed the purchase through General Motors Acceptance Corporation. As a result, General Motors wrote a check to Fuller Motor in the sum of $11,134, which Fuller Motor, on April 8, 1985, placed in its checking account with defendant bank as part of a $17,693.55 deposit.

Blanchette in turn went to the First National Bank of Ogallala, which held a lien on Consumers' automobile, to retrieve the title and deliver it to Fuller Motor. First National agreed, through its employee Doug Teaford, to release the lien noted on the certificate of title to the automobile in exchange for the money Blanchette was to receive from Fuller Motor. On April 5, 1985, Blanchette took the title to Fuller Motor and received a check in the sum of $11,600 drawn on Fuller Motor's account with defendant bank payable to Blanchette's order. Blanchette then endorsed the check over to First National to apply on Consumers' indebtedness on the lien.

First National presented the check for payment, which was returned to it unpaid by defendant bank on April 9, 1985, with the notation "refer to maker." On April 10, defendant bank debited the full amount in Fuller Motor's account, $39,695.96, and applied that sum to the two notes payable executed by Fuller Motor in favor of defendant bank. Defendant bank's answer admits that on April 9, 1985, Fuller Motor's account

contained funds sufficient to cover its check to Blanchette. Nonetheless, defendant bank's officers decided during the course of that morning to dishonor the check, but did not actually set off against Fuller Motor's account until sometime the next day.

On April 9, First National called Blanchette and informed him the check had been returned. Sometime that same week, Blanchette called defendant bank and was told that "they had returned the check because there was no longer any, going to be any money in [Fuller Motor's] account . . . ." Defendant bank further told Blanchette "[t]hey were going to offset all of [Fuller Motor's] account balance against debt that Fuller [Motor] owed the [defendant bank]." In that telephone conversation, Blanchette told David L. Christensen, defendant bank's president, and two other defendant bank employees, Steve Krause and Dave Doll, that some of the funds in Fuller Motor's account were moneys from the sale of Consumers' automobile, and demanded that defendant bank pay the check at issue, but the request was refused. Blanchette paid First National by obtaining a loan.

Christensen testified that defendant bank and Fuller Motor had a "floor plan financing arrangement" whereby defendant bank took a security interest in vehicles owned by Fuller Motor and noted liens on each of the vehicles. According to Christensen, as each vehicle was sold

> the dollars that were borrowed against those vehicles were supposed to be brought back into the bank and reduced or paid-down on that note. And at that time then the title would be released and given back to Fuller [Motor] so that he could present that title to the purchaser . . . .

Defendant bank released each lien individually. Contrarily, Norman K. Fuller, the president and owner of all the stock of Fuller Motor, testified that defendant bank did not begin requiring a lien release as each automobile was sold until the Blanchette incident. Mr. Fuller claimed nothing existed in writing between defendant bank and Fuller Motor requiring that when Fuller Motor sold an automobile, a certain amount of the money was to be applied against the debt with defendant bank. However, the various security agreements Fuller Motor

executed in connection with the floor-planned vehicles provide that sale of the vehicles specified as collateral in the security agreements constitutes an act of default.

The record further reveals that on April 8, 1985, Fuller Motor was indebted to defendant bank on two notes which incorporated various security agreements between the parties and were payable "on demand, or if no demand be made, then from time to time hereafter until maturity date." One note, authorizing a loan of up to $200,000, had a maturity date of June 4, 1985; the other note, authorizing a loan of up to $29,229.47, had a maturity date of August 21, 1985. The notes also provided that upon "demand for payment or upon the occurance [sic] of an Event of Default," the outstanding principal and accrued interest "shall, at the option of [defendant bank], become immediately due and payable . . . and [defendant bank] shall have the right to set-off any and all amounts due hereunder . . . against any indebtedness or obligation of" defendant bank to Fuller Motor. The notes defined six events of default, including the failure to pay amounts due, making false or misleading representations, a change in Fuller Motor's financial or other condition resulting in an impairment of defendant bank's security interest or in increasing defendant bank's risk, and a default under any related security agreement.

According to Christensen, defendant bank deemed itself insecure because seven of the Fuller vehicles, valued at $40,000, in which defendant bank had a security interest, were "out of trust"; that is, Fuller Motor sold the seven vehicles without turning the proceeds of the sale over to defendant bank to pay off the notes secured by those vehicles and thereby obtain a release of defendant bank's liens on them. Christensen also claimed defendant bank was insecure because Fuller Motor was using various techniques to improperly obtain cash from the bank. Accordingly, defendant bank made oral demand for payment of the notes on April 2, 1985, giving Fuller Motor 15 days to pay. However, defendant bank offset Fuller Motor's account on April 10, before the promised 15 days elapsed, because several vehicles remained out of trust; thus, according to Christensen, Fuller Motor had made false representations

and was, for this additional reason, in breach of its obligations under the note. Christensen testified that defendant bank's usual practice was to set off a debtor's account if it deemed itself insecure.

In the 30 days prior to Fuller Motor's issuance of the check to Blanchette, various defendant bank officials periodically, every 3 or 4 days, went to the Fuller Motor automobile lot to check on its inventory. Harold Ford, a salesman for Fuller Motor, testified that on these inspections he would point out to the defendant bank employees if a vehicle was on consignment to Fuller Motor, saying, "That's not on your list. That belongs to somebody else." According to Ford, defendant bank personnel would occasionally ask Ford if particular vehicles belonged to Fuller Motor. During this 30-day time period, Ford pointed out consignment vehicles "quite a few times." However, he could not "positively say" that he told them Consumers' automobile was a consigned vehicle, although Ford did say that defendant bank employees made inspections "two or three times, or more" during the 2 or 3 weeks that the automobile was on the lot. Christensen and other defendant bank employees denied that Ford ever pointed out consigned vehicles.

Christensen testified that because of its experience with Fuller Motor, its account was considered to be a "control account," meaning that it was examined by defendant bank's officers on an almost daily basis for the 20 days before defendant bank offset Fuller Motor's account. He further testified defendant bank was aware that Fuller Motor had consigned some vehicles to other dealers to sell, but was not aware that vehicles were consigned to Fuller Motor nor that Consumers specifically had an interest in the proceeds of the sale of its automobile by Fuller Motor. Other defendant bank employees also stated they knew nothing about the consignment of Blanchette's automobile to Fuller Motor nor of Consumers' interest in the proceeds until after defendant bank returned the check. Mr. Fuller did not remember having a conversation with defendant bank concerning the consignment of vehicles.

According to Christensen, nothing on the General Motors check or on the deposit slip Fuller Motor used to deposit the

check in its account indicated that Blanchette or Consumers had an interest in the funds represented by the General Motors check. Christensen further stated that nothing on Fuller Motor's signature card indicated that Fuller Motor was opening a special account. The card identified the account as one for business and designated no special instructions other than to make reference to the existence of a will. To Christensen's knowledge, defendant bank at no time asked anyone depositing money into Fuller Motor's account what the moneys were for.

Although Blanchette, in answering a compound question propounded by defendant bank, acquiesced in the conclusion that he did not tell defendant bank of Consumers' interest in the automobile until after Fuller Motor's account had been offset, the record, however, otherwise reflects that Blanchette did not know whether his telephone conversation with the bank, after his check was returned, took place before or after the offset was actually made. Blanchette agreed that until the telephone conversation, he did not tell defendant bank that Consumers had sold the automobile or had an interest in the check from General Motors to Fuller Motor, and that he did not post a sign on the vehicle saying it was on consignment. Mr. Fuller and Ford also testified that they did not place a consignment notice on Consumers' automobile.

Among Fuller Motor's records kept on file at defendant bank was an undated document, not generated by the bank, describing the Fuller Motor vehicles in which the bank had interests. Attached to it is a list of vehicles consigned to Fuller Motor and subsequently sold, on which the owners never received their money. Consumers' automobile appears on the list with a sale price of $11,600 and Potts as buyer. Christensen claimed that the document was created after the Fuller Motor check to Blanchette was returned, but Mr. Fuller said it was "very possible" that he gave the information in this document to the bank on April 2, 1985, although the automobile was not sold until April 5.

Mr. Fuller testified that possibly 10 percent of Fuller Motor's business involved the consignment of vehicles and that the general practice in the automobile dealership business in small communities was to sell customers' automobiles for them.

II. ANALYSIS

It is appropriate that we begin our analysis of the issues presented by the assignments of error with a review of the law applicable to bank setoffs. In our most recent case on the subject, *Miracle Hills Ctr. Ltd. Part. v. Nebraska Nat. Bank*, 230 Neb. 899, 434 N.W.2d 304 (1989), the plaintiff sought an accounting, claiming the bank had wrongfully converted funds deposited to the account of the general contractor on plaintiff's construction project, and asked the court to impose an implied trust on the deposit for the benefit of the plaintiff and the subcontractors and materialmen on the project. The plaintiff claimed 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." *Id.* at 902, 434 N.W.2d at 306. In reversing the summary judgment entered in favor of the plaintiff and directing that the bank's motion for summary judgment be sustained, we concluded, on a de novo review, as the matter was brought in equity, that the evidence established neither that the bank had actual knowledge of any special ownership in the funds nor notice of facts sufficient to put the bank on inquiry as to such special ownership. In so ruling, it was noted that 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 . . . 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."

Id. We further stated:

> 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.

(Citation omitted.) *Id.*

In *Globe Savings Bank v. National Bank of Commerce*, 64 Neb. 413, 89 N.W. 1030 (1902), the National Bank of Commerce brought an action against Globe Savings Bank,

alleging that Globe Savings improperly appropriated funds from the account of its depositor, Globe Loan & Trust Company, which funds were actually trust funds belonging to the National Bank of Commerce. The court determined that Globe Savings was "chargeable with knowledge that the check taken by the Globe Loan & Trust Company in payment of the warrants of [National Bank of Commerce] was a trust fund" because

> [t]he Globe Loan & Trust Company and the Globe Savings Bank transacted business in the same building and used the same vault, and both corporations were largely composed of the same stockholders and officers. The same person was president of both corporations, and the cashier of the Globe Savings Bank, who indorsed the check in question for deposit in the Commercial National Bank to the credit of his own bank, was secretary and treasurer of the Globe Loan & Trust Company, and other officers of the Globe Savings Bank were trustees and officers of the Globe Loan & Trust Company . . . .

Id. at 417, 89 N.W. at 1032.

We discussed the rules applicable thusly:

> There can be no question that a bank has a lien on the deposits of its customers for any debt due, and that it may apply a deposit made by a customer indebted to it in payment of an overdraft or any indebtedness which the bank may hold against him. This is the general rule; but, like all general rules, it has its exceptions. A bank can not apply money paid in by a customer and held by him as trustee for another to the payment of its own debt. If the bank has knowledge of the trust relation it will be liable for a conversion of the fund in case it applies it in satisfaction of its own indebtedness.

Id. at 416, 89 N.W. at 1032.

In *Allen Dudley & Co. v. First Nat. Bank*, 122 Neb. 443, 240 N.W. 522 (1932), we considered a situation in which a customer of the First National Bank, Herrick, purchased some cattle on a consignment basis for the plaintiff. Herrick paid for the cattle with a check, and then drew two sight drafts on the plaintiff's account and placed the proceeds therefrom in his own account.

The bank then set off a portion of those funds against Herrick's indebtedness to the bank. The sellers of the cattle presented Herrick's check for payment, but the bank refused to honor it. In holding that the setoff was improper, the court based its decision primarily on evidence that Herrick had bought and sold cattle the same way for 2 years through the bank. The court concluded:

> In the light of this testimony, it cannot be said that the appellant bank did not have knowledge of Herrick's manner of doing business, and when the two sight drafts were received on Sunday, November 17, 1929, it knew or should have known that these sight drafts were drawn on [plaintiff] against shipments of cattle which Herrick had made, and that Herrick had bought these cattle from various parties, as the record shows he had been in the habit of doing for a year or more, and that undoubtedly there were checks outstanding, representing the purchase price of these cattle, which were to be paid out of the proceeds of these drafts.

Id. at 448, 240 N.W. at 524. Accord, *State, ex rel. Sorensen, v. Bank of Otoe*, 125 Neb. 530, 251 N.W. 111 (1933); *State, ex rel. Sorensen, v. Farmers & Merchants Bank*, 125 Neb. 800, 252 N.W. 316 (1934).

Thus, a bank may not set off funds in a depositor's account in payment of the depositor's indebtedness to the bank when the bank knows or should know that the funds being set off belong to another. Having reviewed the law, we turn our attention to defendant bank's assignments of error.

1. Sufficiency of Evidence

In considering the first assignment of error, we remind ourselves that 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. A civil verdict will not be disturbed unless clearly wrong. Such 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. *Fisher Corp. v. Consolidated Freightways*, 230 Neb. 832, 434 N.W.2d 17 (1989). So considered, the evidence is sufficient to support the jury's implied conclusion that defendant bank either knew or should have known that the funds represented by the General Motors check belonged to someone other than Fuller Motor.

Notwithstanding the denial of defendant bank's president and other employees that they had not known of Fuller Motor's practice of selling automobiles consigned to it, there is evidence from which the jury could find that the bank should have known both that such was a common practice among automobile dealers and that Fuller Motor engaged in such practice. The jury could have believed Ford's testimony that on many occasions he pointed out to defendant bank employees, who were making routine checks of Fuller Motor's lot, that several automobiles on the lot had been consigned to Fuller Motor for sale. The jury could also have believed that Blanchette telephoned defendant bank and told the bank about his interest in the funds before the setoff was actually completed, particularly in view of defendant bank's use of the future tense when explaining to Blanchette why his check had been dishonored.

2. Motion in Limine

The second assignment of error claims the trial court should not have overruled defendant bank's motion in limine, which sought the exclusion of evidence concerning "the colloquy between Doug Teaford of The First National Bank in Ogallala and the agent of [defendant bank]" relating to Teaford's inquiries as to whether there were sufficient funds in Fuller Motor's account to cover its check, because of the "prejudicial effect" of such testimony.

While the district court overruled the motion in limine, Teaford's testimony as to the conversation he had with an unknown employee of defendant bank was excluded at trial as irrelevant. Nevertheless, defendant bank claims there was error because Blanchette made reference to the conversation in his testimony as follows:

> Q. . . . While you were at the bank did anybody make a phone call concerning this check that you know of?

. . . .

A. I believe Doug Teaford called the Keith County Bank.

Q. And that was in your presence?

A. Apparently it was in my presence; however, I was not a part of it at the moment.

Defendant bank objected to this testimony on the ground it was not relevant, but did not preserve the ground of its motion in limine that the evidence was prejudicial. This court therefore reviews the evidence only on the basis of relevance. *State v. Cox, ante* p. 495, 437 N.W.2d 134 (1989). See, also, *Maricle v. Spiegel*, 213 Neb. 223, 329 N.W.2d 80 (1983) (generally, a proper objection to the receipt of evidence is required to preserve for review any error in overruling of motion in limine).

The appropriate standard of review for an assignment of error directed at the exclusion or admission of evidence is one of abuse of discretion. *Turner v. Welliver*, 226 Neb. 275, 411 N.W.2d 298 (1987).

Evidence is relevant if it has any tendency to make the existence of any fact of consequence to the determination of the action more probable or less probable than it would be without the evidence, *In re Interest of Adams*, 230 Neb. 109, 430 N.W.2d 295 (1988), and Neb. Rev. Stat. § 27-401 (Reissue 1985), or the evidence tends to establish a fact from which the existence or nonexistence of a fact in issue can be directly inferred, *Nixon v. Harkins*, 220 Neb. 286, 369 N.W.2d 625 (1985).

Blanchette's testimony that Teaford called defendant bank is relevant to the question of whether defendant bank converted his funds, in that the testimony related to the state of defendant bank's knowledge of Blanchette's interest in the proceeds of the General Motors check at the time of the setoff. Accordingly, it cannot be said the district court abused its discretion in receiving the disputed testimony.

3. Requested Instruction

Finally, the third assignment of error complains that the district court refused defendant bank's request to inform the jury of the entire contents of Neb. U.C.C. §§ 2-326 and 9-114 (Reissue 1980). Even if it could be said that advising the jury of

all that these multifaceted statutes contain without relating any portion of that language to the evidence would have properly instructed the jury, a matter we do not decide, there are other reasons which make the district court's ruling correct.

a. *Section 2-326*

Section 2-326 concerns itself with when a transaction involving consigned goods is a "sale on approval" or a "sale or return." So far as is relevant to our inquiry, the statute provides that unless a consignor makes known his interest in goods he or she delivers for sale to a consignee who maintains a place of business at which the consignee deals in goods of the kind involved, then with respect to claims of such consignee's creditors, the goods are deemed to be a sale or return.

The situation is, however, that no dispute exists as to whether the delivery of the automobile to Fuller Motor was to be considered a sale on approval or a sale or return. The statute has nothing to do with determining whether defendant bank knew or had notice of facts sufficient to put it on notice that Blanchette had an interest in the General Motors check and thus converted Blanchette's funds. As a consequence, the instruction is not applicable to the evidence in this case and could play no proper role in the jury's deliberations. See, *Zeeb v. Delicious Foods, ante* p. 358, 436 N.W.2d 190 (1989); *Fisher Corp. v. Consolidated Freightways*, 230 Neb. 832, 434 N.W.2d 17 (1989).

b. *Section 9-114*

Section 9-114 concerns itself with the priority of rights between a consignee's creditors and those of a consignor. Defendant bank argues that because it had a perfected security interest in all the present and after-acquired inventory of Fuller Motor, it acquired a priority interest superior to that of Blanchette in the subject automobile and thus was entitled to the funds generated by the General Motors check.

However, a defense which rests on the priority status of a security interest is an affirmative one which must be pled as well as proved. See *Omaha Loan & Bldg. Assn. v. Turk*, 146 Neb. 859, 21 N.W.2d 865 (1946). Defendant bank fails to allege facts which can be said to support an inference that if the automobile were the property of Fuller Motor, defendant bank would have

a perfected security interest in the automobile which was superior to any interest Blanchette might have had in it. It is the duty of a trial court to instruct the jury only on issues which are pled and find support in the evidence. *Maloney v. Kaminski*, 220 Neb. 55, 368 N.W.2d 447 (1985). Since the claimed superiority of defendant bank's interest was not placed in issue by its answer, the district court properly refused to instruct the jury with regard to the provisions of § 9-114.

III. DECISION

Inasmuch as the record fails to sustain any of defendant bank's assignments of error, the judgment of the district court is affirmed.

AFFIRMED.

CENTRAL WASTE SYSTEMS, INC., APPELLEE, V. GRANITE STATE INSURANCE COMPANY, APPELLANT, NEBRASKA PROPERTY AND LIABILITY INSURANCE GUARANTEE ASSOCIATION ET AL., APPELLEES.

437 N.W.2d 496

Filed March 31, 1989. No. 87-542.

1. **Insurance: Contracts.** In construing an insurance contract, the court must give effect to the instrument as a whole and, if possible, to every part thereof.
2. _____: _____. An insurance policy is to be construed as any other contract and, if its terms are clear, they are to be applied according to their plain and ordinary meaning.
3. _____: _____. The parties to an insurance contract may contract for any lawful coverage, and the insurer may limit its liability and impose restrictions and conditions upon its obligation under the contract not inconsistent with public policy or statute.
4. _____: _____. Insurance contracts will be interpreted in accordance with the reasonable expectations of the insured at the time of the contract, and a reasonable construction should be given so as to effectuate the purpose for which it was made. In cases of doubt, the policy is to be liberally construed in favor of the insured.
5. _____: _____. Ambiguities must be construed against the insurer, and if a policy is fairly susceptible of two constructions and one affords coverage and the other does not, then the construction which affords coverage must be adopted. Complexity is not the same as ambiguity.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Reversed and remanded with directions.

Martin A. Cannon, of Matthews & Cannon, P.C., for appellant.

Thomas A. Otepka, of Gross, Welch, Vinardi, Kauffman & Day, P.C., for appellee Central Waste Systems.

BOSLAUGH, WHITE, SHANAHAN, and FAHRNBRUCH, JJ., and WITTHOFF, D.J.

BOSLAUGH, J.

This is an action for a declaratory judgment to determine the liability of the defendant Granite State Insurance Company to the plaintiff, Central Waste Systems, Inc., under an excess, or "umbrella," liability insurance policy issued to the plaintiff by the defendant.

On September 12, 1983, Susanne Kosiski was injured as a result of a collision between an automobile she was operating and a truck owned by the plaintiff and operated by Bernie Hathaway, an employee of the plaintiff. On November 14, 1984, Kosiski commenced an action against the plaintiff and its employee to recover damages resulting from the accident.

The defendant's policy issued to the plaintiff insured against liability for property damage and personal injury damages over $500,000, up to a limit of $10 million. Ideal Mutual Insurance Company was the underlying insurer for the plaintiff's liability coverage. The Ideal policy insured against liability for injury and property damage up to $500,000 for any one accident or loss. Ideal Mutual Insurance Company was adjudged to be insolvent on December 26, 1984, and its liquidation was ordered on February 7, 1985. The plaintiff contends that the terms of the defendant's policy require that it "drop down" to provide primary liability coverage in the Kosiski suit.

Both parties filed motions for summary judgment. The trial court found that the plaintiff was entitled to judgment as a matter of law, sustained the plaintiff's motion for summary judgment, and overruled the defendant's motion. The defendant Granite State has appealed.

The issue upon the appeal is purely one of law and involves

the construction of the insurance contract. See *Roth v. Farmers Mut. Ins. Co.*, 220 Neb. 612, 371 N.W.2d 289 (1985). "In construing an insurance contract, the court must give effect to the instrument as a whole and, if possible, to every part thereof." *Cordes v. Prudential Ins. Co.*, 181 Neb. 794, 798, 150 N.W.2d 905, 908 (1967). "[A]n insurance policy is to be construed as any other contract; if its terms are clear, they are to be applied according to their plain and ordinary meaning." *Lumbard v. Western Fire Ins. Co.*, 221 Neb. 804, 807, 381 N.W.2d 117, 119 (1986). "An insurance policy should be considered as any other contract and be given effect according to the ordinary sense of the terms used, and if they are clear they will be applied according to their plain and ordinary meaning." *Pettid v. Edwards*, 195 Neb. 713, 716, 240 N.W.2d 344, 346 (1976).

"The parties to an insurance contract may contract for any lawful coverage and the insurer may limit its liability and impose restrictions and conditions upon its obligation under the contract not inconsistent with public policy or statute." *Id.*

> Insurance contracts will be interpreted in accordance with the reasonable expectations of the insured at the time of the contract, and a reasonable construction should be given so as to effectuate the purpose for which it was made. In cases of doubt, the policy is to be liberally construed in favor of the insured.

Dale Electronics, Inc. v. Federal Ins. Co., 205 Neb. 115, 119-20, 286 N.W.2d 437, 441 (1979). "In resolving any ambiguity in an insurance policy the principle or test is not what the insurer intended the words to mean, but what a reasonable person in the position of the insured would have understood them to mean." *Denis v. Woodmen Acc. & Life Co.*, 214 Neb. 495, 497, 334 N.W.2d 463, 465 (1983).

" '[A]mbiguities must be construed against the insurer and if a policy is fairly susceptible of two constructions and one affords coverage and the other does not then the construction which affords coverage must be adopted. . . . *Complexity is not the same as ambiguity.*' " (Emphasis in original.) *Great Plains Ins. Co., Inc. v. Kalhorn*, 203 Neb. 799, 803, 280 N.W.2d 642, 645 (1979).

The policy issued by the defendant to the plaintiff provided as follows:

INSURING AGREEMENTS

1. COVERAGE. The Company hereby agrees, according to the terms and conditions but subject to the limitations hereinafter mentioned, to indemnify the Assured for all sums which the Assured shall be obligated to pay by reason of the liability

(a) Imposed upon the Assured by law, or

(b) Assumed under contract or agreement by the Named Assured and/or any officer, director, stockholder, partner or employee of the Named Assured, while acting in his capacity as such,

for damages, direct or consequential, and expenses, all as more fully defined by the term "ultimate net loss" on account of:

(i) Personal injuries including death at any time resulting therefrom,

(ii) Property Damage,

(iii) Advertising liability,

caused by or arising out of each occurrence happening anywhere in the world.

II. LIMIT OF LIABILITY. The Company shall only be liable for the ultimate net loss, the excess of either:

(a) The limits of the underlying insurances as set out in the schedule in respect of each occurrence covered by said underlying insurances, or

(b) the amount as set out in the declarations as the self-insured retention in respect of each occurrence not covered by said underlying insurances,

(hereinafter called the "Underlying Limits"): . . .

In the event of reduction or exhaustion of the aggregate limits of liability under said underlying insurances by reason of losses paid thereunder, this policy shall

(1) in the event of reduction pay the excess of the reduced underlying limit

(2) in the event of exhaustion continue in force as underlying insurance, subject to all the terms and conditions of this policy. . . .

> . . . .
>
> THIS POLICY IS SUBJECT TO THE FOLLOWING CONDITIONS
>
> . . . .
>
> J. LOSS PAYABLE. Liability under this policy with respect to any occurrence shall not attach unless and until the Assured, or the Assured's underlying insurer, shall have paid the amount of the underlying limits on account of such occurrence. . . .
>
> . . . .
>
> S. MAINTENANCE OF UNDERLYING INSURANCES. It is a condition of this policy that the policy or policies referred to in the attached "Schedule of Underlying Insurances" shall be maintained in full force during the currency of this policy except for any reduction of the aggregate limit or limits contained therein, solely by payment of claims in respect of accidents and/or occurrences during the period of this policy. Failure of the Assured to comply with the foregoing shall not invalidate this policy; but in the event of such failure, the Company shall only be liable to the same extent as they would have been had the Assured complied with the said condition.

It is abundantly clear that if the underlying insurer, Ideal Mutual, were not insolvent, the defendant would have no liability until Ideal Mutual's limit of liability was exhausted. The issue is whether upon the insolvency of the underlying insurer, the defendant becomes the primary rather than the excess carrier.

The plaintiff contends that the term "coverage" is not defined in the policy; that the term is ambiguous; and that the policy should be construed to mean that if the underlying insurer is insolvent, then the occurrence was not covered by the underlying policy.

Contrary to the plaintiff's contention, the term "coverage" is defined in paragraph 1 of the insuring agreements. Paragraph 1, which is entitled "COVERAGE," describes the *risks* that the defendant assumes under the policy. Paragraph II, which is entitled "LIMIT OF LIABILITY," restricts the defendant's exposure to the excess of (a) the limits of the underlying

insurances set out in the schedule or (b) the amount of self-insured retention as set out in the declarations. Under the facts in this case, the latter refers only to advertising liability. The former refers to amounts in excess of $500,000. The language of the policy is clear, and it must be given effect in accordance with its plain and ordinary meaning.

This case is similar to *Mission Nat. Ins. Co. v. Duke Transp. Co., Inc.*, 792 F.2d 550 (5th Cir. 1986). In the *Mission* case, the excess policy provided:

> "The Company shall only be liable for ultimate net loss the excess of either (a) the limits of the underlying insurance as set out in the attached schedule [$300,000] in respect of each occurrence covered by said underlying insurance, or (b) the amount as set out in item 2(c) of the Declarations [$10,000] ultimate net loss in respect of each occurrence not covered by said underlying insurance, (hereinafter called the "underlying limits") . . . ."

(Emphasis omitted.) 792 F.2d at 551.

In holding that the insolvency of Northwest, the underlying insurer, did not cause Mission to become the primary carrier, the court said at 552-53:

> "Under the plain language of Mission's policy there is no obligation to pay for any loss which is within the limits of the Northwest policy, that is, until the loss exceeds $300,000. The occurrences involved in these cases were covered by the underlying insurance. Further reduction or exhaustion of the limits of the underlying insurance can only be accomplished under the terms of umbrella policy by payment of losses under the underlying insurance and not by the insolvency of Northwest. See, *Molina v. U.S. Fire Ins. Co.*, 574 F.2d 1176, 1178 (4th Cir. 1978). . . ." . . .
>
> Duke argues that the district court erred in its interpretation of the insurance contract. Duke reads the limitation of liability section as limiting Mission's liability to amounts over the primary coverage only when the primary coverage remains collectible. In the case where the primary insurer collapses, Duke reads the policy as providing "drop down" coverage, i.e., the excess insurer drops down and assumes the primary insurer's

responsibilities.

Duke bases its argument on its interpretation of the words "covered" and "not covered" in subsections (a) and (b) of the limitation of liability section of the Mission policy. Duke interprets "covered" to mean covered by the coverage terms of an underlying policy on which the insured can collect. Mission, and the district court, interpret "covered" to mean covered by an underlying policy without regard to whether the insured can collect from the primary insurer.

. . . .

We believe the term "covered" provides at least as narrow, if not narrower, excess coverage than does the term "inapplicable." Just as the primary insurance coverage in *Continental Marble* remained applicable to the insured so to [sic] does the primary insurance coverage in the instant case cover the occurrences Duke claims that Mission should provide primary coverage for and defend Duke against. The terms of the Northwest policy specifically provide coverage for all of the claims that Duke asserts Mission should provide primary coverage for and defend Duke against.

The cases from outside Louisiana also support this interpretation. The only cases where the courts have found that the excess insurer drops down involve policies where the excess insurer used the terms "inapplicable," "collectible," or "recoverable." *E.g. Reserve Insurance Co. v. Pisciotta*, 30 Cal.3d 800, 180 Cal.Rptr. 628, 640 P.2d 764, 772 (1982) ("recoverable"); *Gros v. Houston Fire & Casualty Insurance Co.*, 195 So.2d 674, 676 (La.Ct.App.1967) ("collectible"); *Macalco, Inc. v. Gulf Insurance Co.*, 550 S.W.2d 883, 896 (Mo.Ct.App.1977) ("inapplicable"). Of course, our ruling in *Continental Marble* establishes, at least until the Louisiana courts advise us otherwise, the interpretation to be given to the term "inapplicable." And the terms "collectible" and "recoverable" are clearly distinguishable from the term "covered." When an excess insurer uses the term "collectible" or "recoverable" it is agreeing to drop down

> in the event the primary coverage becomes uncollectible or unrecoverable; on the other hand, when an excess insurer uses the term "covered" or "not covered," it is agreeing to drop down only in the event that the terms of the underlying policy do not provide coverage for the occurrence or occurrences in question.

(Emphasis omitted.)

The plaintiff has cited *Donald B. MacNeal, Inc. v. Int. Fire & Cas. Co.*, 132 Ill. App. 3d 564, 477 N.E.2d 1322 (1985), and other cases which involved policies which used the words "recoverable" or "collectible" in referring to the underlying insurance. These cases are distinguishable and not applicable here.

The plaintiff argues that the defendant could have made its policy more clear by stating that it would not pay anything until the first $500,000 was paid. The language in paragraph J of the conditions does just that. It provides: "*Liability under this policy* with respect to any occurrence *shall not attach unless and until* the Assured, or *the Assured's underlying insurer, shall have paid the amount of the underlying limits* on account of such occurrence." (Emphasis supplied.)

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

REVERSED AND REMANDED WITH DIRECTIONS.

COMMERCIAL FEDERAL SAVINGS AND LOAN ASSOCIATION, A CORPORATION, APPELLEE, V. CHRISTIAN E. GRABENSTEIN ET AL., APPELLEES, WOODS INVESTMENT COMPANY, APPELLANT.

437 N.W.2d 775

Filed March 31, 1989. No. 87-582.

1. **Actions: Promissory Notes: Pleadings.** In an action founded on a note, objection to the failure to attach a copy of the note to the petition must be raised by motion.
2. **Actions: Promissory Notes: Pleadings: Debtors and Creditors.** Neb. Rev. Stat.

§ 25-832 (Reissue 1985), which requires that a copy of a note be attached to the pleading, is intended for the protection of the debtor, and its purpose is to prevent a second action on the note by a third party.

3. **Promissory Notes: Foreclosure.** The possession and production of a note for cancellation is not an absolute requirement as a basis for a decree of foreclosure.
4. **Mortgages: Liens: Intent.** Entering satisfaction of a mortgage and taking a new one, when designed by the parties to be merely a continuation of the first mortgage, and when the two acts are practically simultaneous or parts of the same transaction, are not an extinguishment of the mortgage, but a renewal thereof, and do not give priority to an intervening lien, especially where it is done in good faith and without any intention to release the lien of the mortgage.
5. **Mortgages: Presumptions: Intent.** Ordinarily, it is presumed that one must have intended to keep alive his mortgage title, where it was essential to his security against an intervening title; and this presumption applies although the party through ignorance of such intervening title may have actually discharged the mortgage and canceled the notes, and really intended to extinguish them.
6. **Mortgages: Liens: Intent.** The rule that a release and new mortgage continue the original mortgage applies especially where the transaction is done in good faith, in ignorance of the intervening lien, and without any intention to release the lien of the mortgage.

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

John R. Doyle, of Doyle & Doyle Law Offices, for appellant.

Thomas M. White and Pamela S. Bloch, of Fitzgerald & Brown, for appellee Commercial Federal.

BOSLAUGH, SHANAHAN, and GRANT, JJ., and KNAPP and ROWLANDS, D. JJ.

BOSLAUGH, J.

This is a mortgage foreclosure case in which the issue is whether the mortgage of the plaintiff, Commercial Federal Savings and Loan Association, is prior to the mortgage of the defendant Woods Investment Company.

The record shows that on March 14, 1979, the mortgagors, Christian E. Grabenstein and Janet C. Grabenstein, executed a note and mortgage to the plaintiff to secure a loan of $84,800. This mortgage was recorded on March 15, 1979.

On February 26, 1979, the mortgagors had executed a note and mortgage to the defendant Woods Investment to secure a loan of $15,000. This mortgage was not recorded until May 1,

1979.

On September 2, 1980, the mortgagors executed a new note and mortgage to the plaintiff to secure a loan of $98,400. That mortgage was recorded on September 8, 1980, and a release of the March 14, 1979, mortgage was recorded the same day.

On August 4, 1986, the plaintiff commenced this action to foreclose the September 2, 1980, mortgage. The defendant Woods Investment's answer and cross-petition alleged that its mortgage recorded May 1, 1979, was a lien prior to that of the plaintiff's mortgage.

The plaintiff filed an amended petition which alleged that the plaintiff intended the September 2, 1980, mortgage to continue the original March 14, 1979, mortgage and that the lien of its mortgage was prior to that of the defendant Woods Investment.

The trial court found that the plaintiff's mortgage was a first lien and that the defendant Woods Investment's mortgage was a second lien, and granted foreclosure. The defendant Woods Investment has appealed and contends that the trial court erred in finding that the plaintiff's mortgage was the first lien and in finding that the allegations of the amended petition were true, when the plaintiff failed to offer or prove the original of the March 14, 1979, note.

With respect to the second assignment of error, Neb. Rev. Stat. § 25-832 (Reissue 1985) provides that in an action founded on a note, "a copy thereof must be attached to and filed with the pleading . . . ." An objection to the failure to attach a copy of the note to the petition must be raised by motion. *First Nat. Bank of Chadron v. Engelbercht*, 58 Neb. 639, 79 N.W. 556 (1899). The record fails to show that the defendant filed such a motion in the trial court.

The statute is intended for the protection of the debtor, and its purpose is to prevent a second action on the note by a third party. James C. Palmer, a vice president of plaintiff in charge of residential loan processing, testified that the plaintiff had been unable to find the original copy of the March 14, 1979, note and that it may have been returned to the borrowers. The evidence established that the original note was paid by the second note, and there is little danger of a suit by a third party on the first note. In any event, in *Boehmer v. Heinen*, 138 Neb. 376, 379,

293 N.W. 237, 239 (1940), we said, "The possession and production of the note for cancelation is not an absolute requirement as a basis for a decree."

The evidence supports the plaintiff's claim that the September 2, 1980, mortgage was intended to be a continuation mortgage. The loan to the Grabensteins was a construction loan, and the plaintiff only makes such loans if they are secured by a first mortgage. The additional funds advanced under the September 2, 1980, mortgage all could have been advanced under the terms of the March 14, 1979, mortgage. An origination fee was charged only as to the "new money." Before closing the loan, the plaintiff obtained title opinions. The title opinion dated August 4, 1980, shows the March 14, 1979, mortgage as the only unreleased mortgage of record. The reexamination opinion dated September 22, 1980, shows the September 2, 1980, mortgage as the only unreleased mortgage of record.

Palmer testified that if the plaintiff had known of the defendant Woods Investment's mortgage, the debt would have been paid from the proceeds of the loan or the mortgagors would have been required to produce evidence that it had been paid before the loan would have been closed.

Entering satisfaction of a mortgage and taking a new one, when designed by the parties to be merely a continuation of the first mortgage, and when the two acts are practically simultaneous or parts of the same transaction, are not an extinguishment of the mortgage, but a renewal thereof, and do not give priority to an intervening lien, especially where it is done in good faith and without any intention to release the lien of the mortgage. *Hadley v. Schow*, 146 Neb. 163, 18 N.W.2d 923 (1945).

Ordinarily, it is presumed that one must have intended to keep alive his mortgage title, where it was essential to his security against an intervening title; and this presumption applies although the party through ignorance of such intervening title may have actually discharged the mortgage and canceled the notes, and really intended to extinguish them. *Edney v. Jensen*, 116 Neb. 242, 216 N.W. 812 (1927). See, also, *Wyatt-Bullard Lumber Co. v. Bourke*, 55 Neb. 9, 75 N.W. 241

(1898).

In *Peoples Bank v. Trowbridge*, 123 Neb. 312, 315, 242 N.W. 647, 648 (1932), we stated:

> "Entering satisfaction of a mortgage and taking a new one, when designed by the parties to be merely a continuation of the first mortgage, and when the two acts are practically simultaneous or parts of the same transaction, [are] not an extinguishment of the mortgage, but a renewal thereof, and [do] not give priority to an intervening judgment or mortgage creditor of the mortgagor, especially where it is done in good faith, in ignorance of the existence of the intervening lien, and without any intention to release the lien of the mortgage."

See, also, *Union Loan & Savings Ass'n v. Simmons*, 131 Neb. 260, 267 N.W. 449 (1936).

In *Larson Cement Stone Co. v. Redlim Realty Co.*, 179 Neb. 134, 137 N.W.2d 241 (1965), the release and substitute mortgage were recorded on the same day. We held that the senior mortgage holder had not subordinated his security to an intervening lien unless the circumstances of the transaction indicated this was his intention or such intention was shown by extrinsic evidence. We said at 137-38, 137 N.W.2d at 244:

> " 'It is a general rule that the cancellation of a mortgage on the record is not conclusive as to its discharge, or as to the payment of the indebtedness secured thereby. And where the holder of a senior mortgage discharges it of record, and contemporaneously therewith takes a new mortgage, he will not, in the absence of paramount equities, be held to have subordinated his security to an intervening lien . . . .' "
>
> . . . .
>
> . . . " 'A mortgage is a mere security. It has no efficacy if unaccompanied by a debt or obligation. . . .' "

In *Commerce Savings Lincoln v. Robinson*, 213 Neb. 596, 331 N.W.2d 495 (1983), we held that the rule of the *Larson Cement Stone Co.* case applies where the substitute mortgage secured additional indebtedness. We said at 601-02, 331 N.W.2d at 498-99:

> The present case satisfies the elements necessary for the

second mortgage to assume the status of the first. The parties intended the second mortgage to be a continuation of the first one. The real estate broker in charge of the transaction, William King, testified that both he and the loan officer intended that the new mortgage would keep the original mortgage on record. The release and the new mortgage were part of the same transaction. The substitute mortgage was executed September 8, 1978, the release September 11, 1978, and both were filed on September 12, 1978.

The rule that a release and new mortgage continue the original mortgage applies especially where the transaction "is done in good faith, in ignorance of the intervening lien, and without any intention to release the lien of the mortgage . . . ." 59 C.J.S. *Mortgages* § 281 (1949). King testified that Mutual Savings inadvertently released the mortgage and did not intend to release it. There is also no evidence that Mutual Savings knew of the child support judgment lien. Further, where the interest arose prior to the original mortgage, as did this lien, no reliance existed, and consequently the original mortgage will continue despite the accident or mistake. 59 C.J.S. *Mortgages* § 282 (1949).

The appellants argue that the recorded release is controlling. The cases cited by the appellants do not involve the release and renewal of a mortgage but only a legal effect of filing a release. Nebraska case law states that not the recorded release but rather the intent of the parties controls. *Larson Cement Stone Co. v. Redlim Realty Co.*, 179 Neb. 134, 137 N.W.2d 241 (1965).

Appellants also argue that since there was an additional debt, the rule of *Larson Cement* should not apply. However, an additional debt will discontinue the old mortgage only if the parties intended that.

The judgment of the district court was correct, and it is affirmed.

AFFIRMED.

IDEAL BASIC INDUSTRIES, INC., APPELLANT, V. NUCKOLLS COUNTY BOARD OF EQUALIZATION, APPELLEE.

437 N.W.2d 501

Filed March 31, 1989. No. 87-762.

1. **Taxation: Valuation: Appeal and Error.** On appeal to the Supreme Court, an equity case involving an action by a county board of equalization is a trial of factual questions de novo on the record, requiring the Supreme Court to reach a conclusion independent of the findings of the trial court.
2. **Taxation: Valuation: Presumptions: Proof: Appeal and Error.** There is a presumption that a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action. That presumption remains until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence on appeal to the contrary. From that point forward, the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon all the evidence presented. The burden of showing such valuation to be unreasonable rests upon the taxpayer on appeal from the action of the board.
3. **Taxation: Valuation: Presumptions: Appeal and Error.** Once the presumption in favor of a board of equalization has been successfully rebutted, the reasonableness of a board's valuation becomes a question of fact for this court to determine from the evidence in the record.

Appeal from the District Court for Nuckolls County: ORVILLE L. COADY, Judge. Reversed and remanded with directions.

Donn E. Davis and Rocky C. Weber, of Crosby, Guenzel, Davis, Kessner & Kuester, for appellant.

Timothy S. Schmidt, Nuckolls County Attorney, for appellee.

BOSLAUGH, SHANAHAN, and GRANT, JJ., and KNAPP and ROWLANDS, D. JJ.

GRANT, J.

This is an appeal from the Nuckolls County District Court's review of a tax valuation made by the Nuckolls County assessor (Assessor) and affirmed by the Nuckolls County Board of Equalization (Board).

Ideal Basic Industries, Inc. (Ideal), plaintiff-appellant, is a foreign corporation which operated a cement plant near

Superior. For the 1985 tax year the Assessor issued a real estate tax valuation statement fixing the value of Ideal's plant at $5,499,640.

On April 30, 1986, Ideal filed a property valuation protest with the Nuckolls County clerk. On May 30, 1986, Ideal's protest was heard before the Board. At this hearing Ideal presented evidence tending to show that the cement plant's actual value was $1,200,000. The Assessor did not present any evidence to the Board in support of his valuation, but did take issue with Ideal's $1,200,000 valuation.

On May 30, 1986, the Board recommended that the property value be maintained at $5,499,640. In support of its recommendation the Board stated: "[T]he requested $1,200,000 valuation was unacceptable and . . . the testimony and evidence presented by the representatives for Ideal . . . did not warrant a change."

Pursuant to Neb. Rev. Stat. § 77-1510 (Reissue 1981), Ideal appealed the Board's decision to the Nuckolls County District Court, and requested that the district court fix the 1985 tax value of the plant at $2,100,000. On April 30, 1987, the matter was tried de novo before the district court, and in an order filed August 6, 1987, the district court found the value of Ideal's plant to be $4,600,000.

Ideal appeals to this court and assigns as error the actions of the district court (1) in establishing a value unsupported by the record and failing to consider the evidence offered by Ideal and (2) in establishing the value of Ideal's plant at $4,600,000.

An appeal from a county board of equalization, both to the district court and to this court, is heard de novo on the record as an equity proceeding. In its review, this court must reach a conclusion independent of the findings of the trial court. *Gordman Properties Co. v. Board of Equal.*, 225 Neb. 169, 403 N.W.2d 366 (1987); *Kearney Convention Center v. Board of Equal.*, 216 Neb. 292, 344 N.W.2d 620 (1984).

There is a presumption that a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action. That presumption remains until there is competent evidence to the contrary presented, and the presumption

disappears when there is competent evidence adduced on appeal to the contrary. From that point forward, the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon all the evidence presented. The burden of showing such valuation to be unreasonable rests upon the taxpayer on appeal from the action of the board. *Hastings Building Co. v. Board of Equalization*, 212 Neb. 847, 326 N.W.2d 670 (1982); *Richman Gordman v. Board of Equalization*, 215 Neb. 379, 338 N.W.2d 761 (1983).

During the trial, a registered engineer with 17 years of appraisal experience, including the appraisal of over 26 cement plants in the United States and Europe, testified on behalf of Ideal. This engineer testified that in completing his appraisal of the plant, he conducted a personal inspection. He considered the plant's age and condition, production levels and capacity, quality of cement produced, and production process; the plant's layout, size, and location; the plant's distance from raw materials; the competition in Nebraska and the area; the income-producing power of the plant; the remaining physical and economic life of the plant; and the plant's operating cost.

Testimony showed that production of cement began in 1913. The plant uses a wet process, as distinguished from the more efficient dry process used in all plants built since 1981. In the wet process the plant uses to produce Portland cement, limestone, cement rock, and shale are quarried, crushed, and transported by private railroad 3 miles to the plant. These raw materials are then crushed and mixed in mills. This material is then mixed with water in slurry tanks. The slurry is then fed into one of two kilns, where it is heated to 2700 °F. The chemical reaction driven by this heat results in a product called clinker. This clinker is then ground together with additives to make Portland cement. The dry process differs from the wet process in that the kiln temperature need only reach 1600 °F, since the raw materials are preheated before entering the kiln. The engineer testified that the dry process is much more energy efficient than the wet process and is also much less labor intensive.

The engineer determined that the kiln capacity of the Superior plant ranked 122d and its finish grinding plant ranked

112th out of 125 cement plants in this country, and concluded that the plant was one of the oldest and smallest operating cement plants in the United States.

Based on this information, three approaches were employed by this engineer in order to determine the actual value of Ideal's cement plant. This engineer went on to testify that using a fair market value approach the plant had a value of $2,174,000, using an income approach the plant had a value of $2,046,000, and using a market approach the plant had a value of $2,190,000. This engineer concluded that Ideal's cement plant had an actual market value of $2,100,000.

This testimony was sufficient to rebut the presumption of reasonableness recognized by this court in favor of an assessment made by a county board of equalization. Once the presumption in favor of a board of equalization has been successfully rebutted, the reasonableness of a board's valuation becomes a question of fact for this court to determine from the evidence in the record. *Otradovsky v. Board of Equalization*, 206 Neb. 559, 294 N.W.2d 334 (1980); *Richman Gordman v. Board of Equalization, supra.*

We must now determine the reasonableness of the Board's valuation in light of the evidence before us. The record shows that the county assessor was called as a witness by Ideal. He was not an appraiser and had never conducted an appraisal of Ideal's plant. The Assessor testified that Ideal's plant was last appraised by Nuckolls County in 1968; that he did not know what methodology had been employed during this appraisal; that he had used the 1968 appraisal in fixing the plant's 1985 tax value; and that he had not applied a depreciation factor in his valuation since 1975.

As we view the record, the only satisfactory evidence of the actual value of the plant in 1985 came from the testimony of the expert witness called by Ideal. We conclude that the judgment of the district court is not supported by the evidence and that the evidence supports a valuation of $2,100,000.

The judgment of the district court is reversed and the cause remanded, with directions to fix the actual value of the appellant's property in question for the 1985 tax year at $2,100,000.

REVERSED AND REMANDED WITH DIRECTIONS.

H.L. JELSMA AND TOMMY JELSMA, DOING BUSINESS AS SPA, INC., APPELLEES, V. SCOTTSDALE INSURANCE COMPANY, APPELLANT.

437 N.W.2d 778

Filed March 31, 1989. No. 87-794.

1. **Declaratory Judgments.** A suit for declaratory judgment is an action sui generis and may involve questions of law or equity or both.
2. _____. Whether a declaratory judgment action is treated as an action at law or one in equity is to be determined by the nature of the dispute.
3. **Declaratory Judgments: Appeal and Error.** The determination of factual issues in a declaratory judgment action which would otherwise be an action at law will not be disturbed on appeal unless they are clearly wrong.
4. _____: _____. In an appeal from a declaratory judgment, this court, regarding questions of law, has an obligation to reach its conclusion independent from the conclusion reached by the trial court.
5. **Insurance: Contracts: Notice.** The burden of establishing an effective cancellation before a loss is on the insurer, and notice of cancellation must be in accord, and in substantial compliance, with the provisions of the policy relating thereto, and peremptorily explicit and unconditional.
6. **Insurance: Brokers: Agents.** An insurance broker is not, as a matter of law, the insured's agent for receipt of a premium refund upon cancellation of the insurance policy.
7. _____: _____: _____. Whether an insurance broker is the insured's agent for receipt of a premium refund upon cancellation is a question of fact.
8. _____: _____: _____. An insurance broker does not become the agent of the insured for the purpose of accepting a cancellation of the policy by the mere fact that he or she acted as the agent of the insured in procuring the insurance.
9. **Insurance: Brokers.** Payment of the unearned premium to a broker, who had authority merely to buy insurance for the insured, does not, as a general rule, constitute payment of the unearned premium to the insured.
10. _____: _____. As a general rule, where the insured negotiates a cancellation through his broker who procured the policy, return of the unearned premium to such broker constitutes a return to the insured.
11. **Breach of Contract: Damages.** Generally, one who fails to perform a duty to mitigate his or her damages may not recover from the party breaching the contract the damages which would have been avoided had the duty to mitigate been performed.
12. **Waiver: Words and Phrases.** Waiver is a voluntary and intentional relinquishment or abandonment of a known existing legal right or such conduct as warrants an inference of the relinquishment of such right.
13. **Waiver: Estoppel.** In order to establish a waiver of a legal right, there must be clear, unequivocal, and decisive action of a party showing such purpose, or acts amounting to estoppel on his or her part.
14. **Contracts: Waiver: Proof.** A written contract may be waived in whole or in part, either directly or inferentially, and the waiver may be proved by express declarations manifesting the intent not to claim the advantage, or by so

neglecting and failing to act as to induce the belief that it was the intention to waive.

15. **Insurance: Contracts: Notice: Estoppel.** Acquiescence in a cancellation notice will operate to cancel an insurance policy and will work an estoppel to assert that the policy is still in force.
16. **Insurance: Contracts.** Merely exploring the possibility of obtaining replacement insurance does not necessarily constitute acquiescence in a defective cancellation of the old insurance.

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

Thomas J. Walsh, Jr., of Walsh, Fullenkamp & Doyle, for appellant.

Hal Bauer, of Bauer, Galter & O'Brien, for appellees.

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

HASTINGS, C.J.

Appellees, H.L. and Tommy Jelsma, brought this declaratory judgment action against the appellant, Scottsdale Insurance Company, seeking a determination in the district court as to whether Scottsdale's cancellation of an insurance policy was effective prior to a fire loss which occurred on July 29, 1986, and whether the policy was in effect as to the loss. From a judgment of the trial court declaring that the cancellation was not effective and that the policy was in effect on the date of the loss, Scottsdale has appealed. We affirm.

A suit for declaratory judgment is an action sui generis and may involve questions of law or equity or both. *Beatrice Nat. Bank v. Southeast Neb. Co-op*, 230 Neb. 671, 432 N.W.2d 842 (1988).

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. *Gard v. Pelican Publishing Co.*, 230 Neb. 656, 433 N.W.2d 175 (1988).

The determination of factual issues in a declaratory judgment action which would otherwise be an action at law will not be disturbed on appeal unless they are clearly wrong. *Gard v. Pelican Publishing Co., supra*; *Beatrice Nat. Bank v. Southeast Neb. Co-op, supra*.

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*, 230 Neb. 403, 432 N.W.2d 215 (1988).

Prior to September 10, 1985, the Jelsmas contacted Alexander & Alexander, Inc., a Lincoln insurance agency, seeking fire insurance coverage for their business, the Royal Grove. Alexander & Alexander requested appropriate coverage through River City Underwriters, Inc., an Omaha business entity which acted as a managing general agent for several insurance companies, including Scottsdale. River City Underwriters arranged for coverage to be provided by six insurers, one of which was Scottsdale, and issued policies insuring the Royal Grove for a period of 1 year, commencing September 10, 1985.

River City Underwriters, on behalf of Scottsdale, issued a notice of cancellation of the Scottsdale policy, dated April 18, 1986, and mailed it to the Jelsmas. At the Jelsmas' request, Alexander & Alexander obtained bids for replacement insurance coverage on the Royal Grove. However, the Jelsmas decided not to replace the canceled policy because the premium was too high. Alexander & Alexander advised the Jelsmas of the effect of the potential coinsurance penalty in the event a loss occurred and the canceled coverage was not replaced.

After the Jelsmas' policy was canceled, Scottsdale refunded the unearned premium of $546 to River City Underwriters through the monthly statement sent to River City Underwriters for the month ending April 30, 1986. River City Underwriters, in turn, refunded the unearned premium to Alexander & Alexander for the month ending June 30, 1986. There was evidence that refunding unearned premiums in this manner is standard procedure in the industry. Alexander & Alexander sent a check to the Jelsmas dated December 12, 1986, which included the premium refund Alexander & Alexander had received from River City Underwriters for the canceled Scottsdale policy. The Jelsmas have not cashed the check.

Scottsdale assigns as error: (1) The trial court erred in finding that the cancellation was not in accordance with the provisions

of the policy; (2) the trial court erred in failing to find that the return of the unearned premium by Scottsdale to Alexander & Alexander constituted a return of the unearned premium to the Jelsmas and cured any breach of contract which otherwise might have existed in connection with the cancellation notice issued by Scottsdale; (3) the trial court erred in failing to find that the Jelsmas' claim was barred because they failed to mitigate their damages; and (4) the trial court erred in failing to find that the Jelsmas' conduct after receiving the notice of cancellation and before the fire loss constituted a waiver of any breach of the insurance contract by Scottsdale.

CANCELLATION OF THE POLICY

The Scottsdale policy provided in part as follows:

> This policy may be cancelled at any time by this Company by giving the insured a five days' written notice of cancellation with or without tender of the excess of paid premium above the pro rata premium for the expired time, which excess, if not tendered, shall be refunded on demand. *Notice of cancellation shall state that said excess premium (if not tendered) will be refunded on demand.*

(Emphasis supplied.)

Below a legend stating "(Applicable item marked [X])," the body of the cancellation notice sent to the Jelsmas contains several general purpose statements. Within the "Cancellation" section is the information that the effective date of cancellation is "4-30-86." Also within the general purpose portion of the notice is a section entitled "Premium Adjustment" containing four sentences, each preceded by a box, the last two of which are set forth as follows:

> [ ] Enclosed is $____, being amount of return premium at pro rata rate for the unexpired term of this policy.
>
> [ ] The excess of paid premium, if any, above the pro rata premium for the expired time, (if not tendered) will be refunded upon demand. (The words "upon demand" do not apply in Kansas.)

(Emphasis omitted.) None of the boxes were marked on the notice of cancellation or nonrenewal sent to the Jelsmas.

The burden of establishing an effective cancellation before a loss is on the insurer, and notice of cancellation must be in

accord, and in substantial compliance, with the provisions of the policy relating thereto, and peremptorily explicit and unconditional. *Stilen v. Cavalier Ins. Corp.*, 194 Neb. 824, 236 N.W.2d 178 (1975). Scottsdale argues in its brief that cancellation was in substantial compliance with the provisions of the policy because "the Jelsmas could have and should have been able to glean that information [relating to demand of the refund] without that 'X' being in that box." Brief for appellant at 9.

Although Nebraska has no case directly on point, the case of *Walls v. Goshen Cent. Dispatch Co., Inc.*, 128 Misc. 2d 959, 491 N.Y.S.2d 925 (1985), addresses the issue of the effectiveness of a notice of cancellation when the insurer fails to mark an applicable provision. In *Walls*, the insurer argued that the notice of cancellation complied with regulations since the required language, although not marked with an "x," appeared on the notice. The court said:

> This court cannot concur with the position taken by defendant Tokio. The notice of cancellation contains a legend stating "Applicable item marked X". *The implication of that language is that items not marked with an "X" are not applicable to the insured and should be ignored.* Thus, the insured is informed it does not have the right to seek any relief found in those paragraphs not marked with an "X". *The failure to mark the paragraphs with an "X" has the same effect as if defendant Tokio had never printed those paragraphs.*

(Emphasis supplied.) 491 N.Y.S.2d at 928. Furthermore, "the failure to properly mark the notice of cancellation, instructed the recipient of the notice to ignore the paragraph containing such notice. Thus, this cancellation notice cannot be said to be in substantial compliance with § 19, par. 1." 491 N.Y.S.2d at 928. See, also, *K & G Feathered Pets, Inc. v. Lo Presti*, 100 A.D.2d 894, 474 N.Y.S.2d 581 (1984); *Federal Ins. Co. v. Rivera*, 122 Misc. 2d 506, 471 N.Y.S.2d 232 (1984); *Civil Service Employees Ins. Co. v. Rodriquez*, 25 Ariz. App. 534, 544 P.2d 1135 (1976).

We agree with the reasoning of the New York court. The burden should not be on the insureds in this case to read the

four sentences under the premium adjustment section and to determine which were applicable to them. Since the sentence stating that the excess of paid premium (if not tendered) would be refunded upon demand was not marked, the Jelsmas could ignore it. Scottsdale chose the language of its notice, voluntarily employed that means to attempt cancellation, and must be bound by that choice. The notice of cancellation or nonrenewal as tendered failed to substantially comply with the cancellation provision of the policy.

PAYMENT OF THE UNEARNED PREMIUM TO ALEXANDER & ALEXANDER

Scottsdale argues that even if the cancellation notice was defective, the breach was cured by actual refund of the unearned premium to the Jelsmas, albeit to Alexander & Alexander rather than to the insureds themselves. According to Scottsdale, Alexander & Alexander was acting as an insurance broker for the Jelsmas, and payment to an insured's insurance broker is considered payment to the insured.

Contrary to Scottsdale's assertion, payment to an insured's insurance broker is considered payment to the insured only under certain circumstances.

> To render a tender of the unearned premium to an alleged agent of the insured effective for the purpose of terminating a policy of insurance which provides that it may be terminated by refunding a ratable proportion of the premium for the unexpired term of the policy, it must be shown that the one to whom the tender was made was, at the time, the authorized agent of the insured for the purpose of the cancellation of the policy, or that the act was subsequently ratified by the insured.

17 G. Couch, Couch on Insurance 2d § 67:235 at 689-90 (rev. ed. 1983). See, also, 43 Am. Jur. 2d *Insurance* § 404 (1982).

An insurance broker is not, as a matter of law, the insured's agent for receipt of a premium refund upon cancellation of the insurance policy. *Chesapeake House, Inc. v. Lee Mut. Ins. Agency, Inc.*, 239 So. 2d 602 (Fla. 1970). Whether the insurance broker was the insured's agent for receipt of the premium refund upon cancellation is a question of fact. *Id.*

An insurance broker does not become the agent of the

insured for the purpose of accepting a cancellation of the policy by the mere fact that he acted as the agent of the insured in procuring the insurance. *Quong Tue Sing v. Assurance Corp.*, 86 Cal. 566, 25 P. 58 (1890). Payment of the unearned premium to a broker, who had authority merely to buy insurance for the insured, does not constitute payment of the unearned premium to the insured. 17 G. Couch, *supra*.

In cases in which the court found that payment of a premium refund to the insurance broker constituted payment to the insured so that cancellation of the policy was effective, the facts supported a conclusion that the broker was acting as the agent of the insured for the purpose of accepting cancellation of the policy. Generally, in such cases it was the insured and not the insurance company canceling the policy. The courts found the broker to be the insured's agent for cancellation because the insured requested the broker to contact the insurer to cancel the insurance. See, *White v. United States Fidelity and Guaranty Co.*, 382 F.2d 978 (1st Cir. 1967); *Middle Western Tel. Co. v. U. S. Fire Ins. Co.*, 296 Ill. App. 260, 16 N.E.2d 188 (1938); *Commercial Credit Corp. v. Standard Marine Ins. Co.*, 221 So. 2d 232 (Fla. 1969); *Kaufman v. McLaughlin Company*, 357 F.2d 283 (D.C. 1966). The general rule has been articulated in the following manner: "Where the insured negotiates a cancellation through his broker who procured the policy, return of the unearned premium to such broker constitutes a return to the insured." 6 G. Couch, Couch on Insurance 2d § 34:102 at 952 (rev. ed. 1985).

Scottsdale cites 17 G. Couch, *supra*, § 67:237, and *Commercial Credit Corp. v. Standard Marine Ins. Co., supra*, for the proposition that the fact that an unearned premium is returned to the wrong person does not necessarily require a holding that there was no effective cancellation. Therefore, according to Scottsdale, even if this court determines that the refund of the unearned premium to Alexander & Alexander does not constitute a refund of the unearned premium to the appellees, it does not follow that the cancellation of the policy was not effective.

Scottsdale's reasoning is not sound. The court in *Commercial Credit, supra*, found that the insurance company's

mistake in crediting the broker's account with the unearned premium, rather than returning it to the insured as directed by the broker, did not invalidate the cancellation of the policy. The case is really just another case in which the insured requested the cancellation of the insurance policy through its broker, so that the broker was acting as the insured's agent for the purpose of the cancellation. The only difference in the case is that the insured, through its broker, specifically requested that the unearned premium be returned directly to it.

In the case at bar, Scottsdale, the insurance company, not the Jelsmas, the insureds, canceled the policy. In its order, the trial court stated:

> There is no evidence that plaintiffs gave Alexander & Alexander specific agency authority to accept cancellation of the policy or accept tender of the return premium in the event of cancellation by the defendant company. Plaintiffs did give Alexander & Alexander authority to arrange purchase of the insurance, but only after plaintiffs had been informed of the coverage and the premium cost. . . .
>
> The evidence is that Alexander & Alexander was the agent of plaintiffs for securing insurance, but not for all times and not for all matters connected with the insurance that it procured.

These factual findings of the trial court are not clearly wrong. The return of the unearned premium to Alexander & Alexander did not constitute return to the Jelsmas and therefore did not cure the defect in the notice of cancellation.

MITIGATION OF DAMAGES

It is a well-established rule in Nebraska that when there has been a breach of contract by one party resulting in a loss to the other, it is the duty of such other party to take all reasonable steps to reduce the amount of his damages. Furthermore, one who fails to perform his duty to mitigate his damages may not recover from the party breaching the contract the damages which would have been avoided had the duty to mitigate been performed. See *Smith v. Erftmier*, 210 Neb. 486, 315 N.W.2d 445 (1982).

Scottsdale contends that the Jelsmas were under a duty to mitigate their damages by obtaining replacement insurance

coverage after receiving the notice of cancellation or nonrenewal. Since Jelsmas failed to replace the canceled coverage, Scottsdale claims, their conduct constitutes a failure to mitigate their damages sufficient to bar their claim.

The flaw in Scottsdale's argument is that this is not a breach of contract action for wrongful cancellation of appellees' insurance. Rather, this is a declaratory judgment action to determine whether the purported cancellation of the Jelsmas' insurance was effective. Therefore, the doctrine of mitigation of damages is inapplicable to the case.

The two cases cited by Scottsdale in support of its mitigation of damages argument are distinguishable from the case at bar. The insured in *Taylor v. U. S. Casualty Co.*, 229 S.C. 230, 92 S.E.2d 647 (1956), brought an action for fraudulent breach of contract against the insurer. Involved in *Johnson v. General Mut. Ins. Co.*, 24 N.Y.2d 42, 298 N.Y.S.2d 937, 246 N.E.2d 713 (1969), were declaratory judgment actions arising out of an automobile accident and the insurer's failure to defend the tort action. The insured cross-appealed against the insurer for consequential damages resulting from the wrongful cancellation of his liability insurance. The insured's cross-claim was dismissed without prejudice to his maintaining a separate action at law for that purpose, in which action the issue of mitigation of damages would be relevant.

WAIVER OF DEFECTIVE CANCELLATION

Waiver is a voluntary and intentional relinquishment or abandonment of a known existing legal right or such conduct as warrants an inference of the relinquishment of such right. *Farmers State Bank v. Farmland Foods*, 225 Neb. 1, 402 N.W.2d 277 (1987). In order to establish a waiver of a legal right, there must be clear, unequivocal, and decisive action of a party showing such a purpose, or acts amounting to estoppel on his part. *Jones v. Burr*, 223 Neb. 291, 389 N.W.2d 289 (1986).

A written contract may be waived in whole or in part, either directly or inferentially, and the waiver may be proved by express declarations manifesting the intent not to claim the advantage, or by so neglecting and failing to act as to induce the belief that it was the intention to waive. *Pearce v. ELIC Corp.*, 213 Neb. 193, 329 N.W.2d 74 (1982).

Scottsdale contends that the Jelsmas were under a duty to notify Scottsdale that the cancellation notice was defective and that their failure to so notify Scottsdale until after the loss constitutes a waiver of their rights.

There are only two Nebraska cases applicable to the issue. In *Sanks v. St. Paul Fire & Marine Ins. Co.*, 131 Neb. 266, 267 N.W. 454 (1936), cancellation of policies by the insurer through notice to the agent, authorized by the insureds to handle all of their insurance, without notice to the insureds, was ratified when the insureds accepted the benefit of the unearned premium, which was used by the agent to purchase substitute policies.

The insureds in *McRae v. Mercury Ins. Co.*, 126 Neb. 469, 253 N.W. 645 (1934), brought an action to recover on an automobile fire insurance policy. The policy was purportedly canceled November 25, 1929. The unearned premium was returned to the finance corporation which had obtained the insurance on the insureds' automobile. The finance corporation then credited the unearned premium to the insureds' account on its own books. After obtaining other insurance, the corporation charged the insureds' account for the premium.

Although they received notice November 25, 1929, that the first policy had been canceled, it was not until January 1930 that the insureds complained about not receiving the unearned premium. The finance corporation explained how the unearned premium was used to obtain new insurance. The car was destroyed by fire on July 4, 1930. Thereafter, the insureds challenged the effectiveness of the cancellation of the policy.

The court stated, "Acquiescence in a cancelation notice will operate to cancel the policy and will work an estoppel to assert that the policy is still in force." *Id.* at 473, 253 N.W. at 646. Since the insureds appeared to be satisfied with the finance corporation's adjustment of the return premium and never notified the insurer that they repudiated the cancellation, the court found that they had acquiesced in the fact of cancellation.

Unlike the insureds in *Sanks* and *McRae*, the Jelsmas did not acquiesce in the cancellation of their policy by allowing the unearned premium to be used to purchase replacement

insurance. Although Tommy Jelsma did ask Alexander & Alexander to obtain bids for replacement insurance, merely exploring the possibility of obtaining replacement insurance does not necessarily constitute acquiescence in a defective cancellation of the old insurance. See, *Republic National Life Insurance Company v. Blain*, 425 S.W.2d 347 (Tex. 1968) (neither insured nor the beneficiary was estopped from claiming under the purportedly canceled policy simply because they attempted to obtain other insurance after they received notice from the insurer that the insured was no longer covered); 17 G. Couch, Couch on Insurance 2d § 67:418 (rev. ed. 1983).

Scottsdale bases its waiver argument on the facts that the Jelsmas never gave notice prior to the loss that they felt the cancellation was ineffective and that they never requested the return of the unearned premium. However, Tommy Jelsma testified at trial that he never received the policy. Therefore, it is unlikely that the Jelsmas knew that they would have to demand the unearned premium if it had not been tendered along with the notice of cancellation.

Although the issue of waiver was not addressed by the trial court in its order, implicit in the finding that the cancellation was not effective and that the policy was in effect on the date of loss is a finding that the Jelsmas had not waived the defect. The record supports a finding that the Jelsmas never received a copy of the Scottsdale policy and hence would not have known of the policy provisions regarding cancellation and return of unearned premium. Without such knowledge, the Jelsmas could not waive the defect in the notice.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MARK W. VEJVODA, APPELLANT.

438 N.W.2d 461

Filed March 31, 1989. No. 88-145.

1. **Convictions: Appeal and Error.** In determining whether evidence is sufficient to sustain a conviction in a bench trial, the Supreme Court does not resolve conflicts of evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented, which are within a fact finder's province for disposition. A conviction in a bench trial of a criminal case is sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that conviction.
2. **Constitutional Law: Criminal Law: Speedy Trial: Jury Trials: Venue.** Article I, § 11, of the Nebraska Constitution grants to a criminal defendant the right to a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed. Article I, § 11, of the Nebraska Constitution relates to an impartial jury in a criminal case for which a jury trial is constitutionally guaranteed, but does not grant a defendant a constitutional right to be tried in a particular county.
3. **Criminal Law: Venue: Circumstantial Evidence: Proof.** While proper venue in a criminal case may be established by circumstantial evidence, the State must prove proper venue beyond a reasonable doubt.
4. **Criminal Law: Venue: Waiver: Trial.** A statutorily designated venue in a criminal case may not be waived by a defendant's failure to raise the venue issue before or at trial.
5. _____: _____: _____: _____. A defendant in a criminal case may waive the issue of a statutorily designated venue by requesting a change of venue in accordance with Neb. Rev. Stat. § 29-1301 (Reissue 1985), but a defendant does not waive the venue issue by failure to raise the issue before or during trial.
6. **Criminal Law: Arrests: Venue: Police Officers and Sheriffs.** A defendant's arrest by a law enforcement officer of a particular political subdivision does not identify or establish the political subdivision as the proper venue in a criminal case.
7. **Rules of Evidence: Judicial Notice: Trial.** Pursuant to Neb. Evid. R. 201(2), Neb. Rev. Stat. § 27-201(2) (Reissue 1985), pertaining to judicial notice of an adjudicative fact, a judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
8. _____: _____: _____. A fact is adjudicative if the fact affects the determination of a controverted issue in litigation.
9. _____: _____: _____. When neither of the alternative tests prescribed in Neb. Evid. R. 201(2) is satisfied, judicial notice of an adjudicative fact is improper.
10. **Judicial Notice.** A judge or court may take judicial notice, whether requested or not.
11. _____. Judicial notice of an adjudicative fact may be taken at any stage of the

proceedings.

12. **Judicial Notice: Evidence: Rules of Evidence: Proof.** Judicial notice of an adjudicative fact is a species of evidence, which, if relevant as an ultimate fact or a fact from which an ultimate fact may be inferred, is received without adherence to the Nebraska Evidence Rules otherwise applicable to admissibility of evidence and establishes a fact without formal evidentiary proof.
13. **Judicial Notice: Rules of Evidence.** Although Neb. Evid. R. 201 does not expressly require relevance for judicial notice, an irrelevant fact cannot be validly classified as an "adjudicative fact," the only type of fact noticeable under Neb. Evid. R. 201.
14. **Judges: Judicial Notice: Words and Phrases.** Judicial notice is not the same as extrajudicial or personal knowledge of a judge.
15. **Judicial Notice: Jury Instructions.** In a civil action or proceeding, the judge shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the judge shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed. Neb. Evid. R. 201(7).
16. **Judicial Notice: Juries.** In a civil action, the adjudicative fact judicially noticed is conclusively established and binds the jury, whereas in a criminal case a jury ultimately has the freedom to find that an adjudicative fact has not been established notwithstanding judicial notice by the trial court.
17. **Criminal Law: Trial: Juries: Appeal and Error: Words and Phrases.** Harmless error exists in a jury trial of a criminal case when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in a verdict adverse to a substantial right of the defendant.

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

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

Robert M. Spire, Attorney General, and Vanessa R. Jones for appellee.

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

SHANAHAN, J.

In a bench trial in the county court for Hall County, Mark Vejvoda was convicted of drunk driving and received an enhanced sentence as the result of his second conviction for drunk driving. See Neb. Rev. Stat. § 39-669.07 (Reissue 1988). On appeal, the district court affirmed Vejvoda's conviction and sentence. Vejvoda contends that the evidence is insufficient to

sustain his conviction for drunk driving and that the State failed to prove that Hall County was the venue for his trial because the court improperly took judicial notice that locations mentioned in Vejvoda's trial were within Hall County.

VEJVODA'S TRIAL

Officer Elmer Edwards of the Grand Island Police Department was the sole witness at Vejvoda's trial. Edwards testified that on May 1, 1987, at 2:14 a.m., he was in the vicinity of 7th and Vine Streets and noticed a vehicle proceeding west on 7th Street, "weaving back and forth across the entire width of the street." Edwards had observed the vehicle for "2 1/2 to 3 blocks," when the car commenced a right turn from 7th Street onto Oak Street and "ran over the curb section located at the . . . northeast corner of the intersection." In pursuit, Edwards followed the car northbound on Oak Street to 8th Street, where Edwards stopped the pursued vehicle.

On confronting the car's driver, whom Edwards eventually identified as Vejvoda, Edwards observed that Vejvoda's eyes were bloodshot and watery, and a strong odor of alcohol emanated from Vejvoda's car. According to Edwards, Vejvoda's reactions were "slow and sluggish" while he fumbled to produce a driver's license. Edwards then asked Vejvoda to step out of his car for field sobriety tests. Vejvoda was "swaying and wobbling" and had difficulty maintaining his balance during the field sobriety tests. In Edwards' opinion, Vejvoda was under the influence of alcohol when stopped by the officer, who later arrested Vejvoda for drunk driving. In all his testimony concerning his observations, pursuit, and stop of the vehicle, Edwards never mentioned the city or county where the events occurred. Defense counsel did not cross-examine Edwards, and the prosecution rested.

After Vejvoda offered no evidence, the prosecutor apparently realized that Edwards had not testified that the events involving Vejvoda occurred in Hall County. When the prosecutor asked leave to recall Edwards for testimony concerning the location of events, the court responded, "The Court will take judicial notice of the fact that all of the addresses and areas described are those — are those within the city limits of the city of Grand Island which lies wholly within

Hall County." Vejvoda objected to the court's "taking judicial notice after the . . . State has rested." In closing argument, Vejvoda argued, among other things, that the State had failed to prove proper venue. The court then found Vejvoda guilty of drunk driving.

Vejvoda contends, first, that there is insufficient evidence to sustain his conviction for drunk driving, and, second, the court improperly took judicial notice of facts establishing the site of the events on which his conviction is based. In essence, Vejvoda's venue claim is an assertion that the court improperly took judicial notice that Grand Island in Hall County was the site of the events in question and, as the result of the improper judicial notice, determined that venue was evidentially established as Hall County.

SUFFICIENCY OF EVIDENCE

In determining whether evidence is sufficient to sustain a conviction in a bench trial, the Supreme Court does not resolve conflicts of evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented, which are within a fact finder's province for disposition. A conviction in a bench trial of a criminal case is sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that conviction. See *State v. Brown*, 225 Neb. 418, 405 N.W.2d 600 (1987).

With no explanation for the obvious or further comment necessary, we find that the evidence supports Vejvoda's conviction for drunk driving, the substantive offense charged against Vejvoda.

GUARANTEE OF VENUE

The venue problem in this appeal could have been easily avoided by the court's merely granting the State's motion to withdraw its rest and present evidence on venue. "Even in criminal prosecutions the withdrawal of a rest in a trial on the merits is within the discretion of the trial court." *State v. Putnam*, 178 Neb. 445, 448-49, 133 N.W.2d 605, 608 (1965). Unfortunately, however, instead of allowing the State to recall Edwards to answer a single, simple question identifying venue, the court chose to try to remedy the evidential situation and created the venue problem presented in Vejvoda's appeal.

Vejvoda claims that "an accused is guaranteed the right to be tried in the county where the offense is committed by Article 1, Section 11 of the Constitution of the State of Nebraska." Brief for appellant at 3. Vejvoda, however, incorrectly interprets the constitutional guarantee in article I, § 11, of the Nebraska Constitution, which grants to a criminal defendant the right to "a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed." We have characterized the preceding constitutional language as "too plain to require interpretation." *Marino v. State*, 111 Neb. 623, 625, 197 N.W. 396, 397 (1924). Article I, § 11, of the Nebraska Constitution relates to an impartial jury in a criminal case for which a jury trial is constitutionally guaranteed, but does not grant a defendant a constitutional right to be tried in a particular county. In the present case, Vejvoda was convicted in a bench trial. Therefore, article I, § 11, of the Nebraska Constitution concerning a jury trial is inapplicable to Vejvoda's case.

Vejvoda's right to be tried in the county in which the criminal offense is alleged to have been committed is secured by statute rather than by the Nebraska Constitution. Neb. Rev. Stat. § 29-1301 (Reissue 1985) provides that "[a]ll criminal cases shall be tried in the county where the offense was committed . . . unless it shall appear to the court by affidavits that a fair and impartial trial cannot be had therein." While proper venue in a criminal case may be established by circumstantial evidence, we have held that the State must prove proper venue beyond a reasonable doubt. *Union P. R. Co. v. State*, 88 Neb. 547, 130 N.W. 277 (1911); *Keeler v. State*, 73 Neb. 441, 103 N.W. 64 (1905). It is clear from Nebraska decisions that a defendant may waive the statutorily designated venue for the trial of a criminal case in accordance with § 29-1301 concerning a change of venue. See *Kennison v. State*, 83 Neb. 391, 119 N.W. 768 (1909). Whether venue is an element of the substantive offense charged against an accused is apparently an unresolved issue in Nebraska. See, however, *State v. Harris*, 48 Wash. App. 279, 281-82, 738 P.2d 1059, 1061 (1987): "As a general rule, proof of venue is necessary in a criminal prosecution. [Citations omitted.] However, venue is not an element of the crime

[citations omitted], and it need not be proved beyond a reasonable doubt [citation omitted]." See, further, *State v. Graycek*, 335 N.W.2d 572, 574 (S.D. 1983): "Venue, not being an integral part of a criminal offense, does not affect the question of the guilt or innocence of the accused [and may be proved] by a preponderance of the evidence . . . ." Cf., *State v. Barnes*, 7 Ohio App. 3d 83, 84, 454 N.E.2d 572, 574 (1982): "Venue with respect to the situs of a crime is ordinarily considered an element of the offense which must be proved along with the other elements"; *State v. Hester*, 145 Ariz. 574, 703 P.2d 518 (1985) (venue is an essential element).

WAIVER OF VENUE

If the rules regarding waiver of venue in a civil action were applicable in the present appeal, Vejvoda's appellate claim based on venue would undoubtedly fail. At the risk of waiver, to preserve a claim of improper venue in a civil case, a defendant must raise the venue issue before or in the defendant's answer. In a civil action, if a defendant fails to timely raise the issue of proper venue, the defendant waives any venue question. See, *In re Interest of Adams*, 230 Neb. 109, 430 N.W.2d 295 (1988) (venue under the Nebraska Mental Health Commitment Act waived by failure to request transfer at appropriate time); *Blitzkie v. State*, 228 Neb. 409, 422 N.W.2d 773 (1988) (venue in a transitory civil action under the State Tort Claims Act waived unless raised in the answer or earlier). Unlike venue in a civil case, however, a statutorily designated venue in a criminal case may not be waived by a defendant's failure to raise the venue issue before or at trial. *Union P. R. Co. v. State, supra*; *State v. Lindsey*, 193 Neb. 442, 227 N.W.2d 599 (1975). In *Union P. R. Co. v. State, supra*, involving a prosecution for violation of the state's "anti-pass law" regarding railroads, the court was faced with a situation in which "the matter of venue was entirely overlooked by both the prosecutor and the trial court . . . ." *Union P. R. Co., supra* at 550, 130 N.W. at 278. Despite the fact that the defendant apparently did not raise the venue issue at trial, the court held, over dissent, that the defendant's conviction should be reversed "[f]or the sole reason that the state failed to prove the venue . . . ." *Union P. R. Co., supra* at 551, 130 N.W. at 279. (In *Union P. R. Co. v. State, supra*, the

dissent argued that the "ancient rule" that venue must be proved beyond a reasonable doubt was not "based upon reason," and further noted that "the rule that a defendant may waive the right to insist upon a trial in any particular county, and that if he goes to trial without objection he does so, is in accord with reason and modern conditions . . . ." (Sedgwick, J., dissenting.) *Union P. R. Co., supra* at 552, 130 N.W. at 279.)

Thus, Nebraska cases indicate that a defendant in a criminal case may waive the issue of a statutorily designated venue by requesting a change of venue in accordance with § 29-1301, but a defendant does not waive the venue issue by failure to raise the issue before or during trial. See *State v. Lindsey, supra*. In the absence of a defendant's waiver of venue, the State has the burden to prove proper venue beyond a reasonable doubt. *State v. Lindsey, supra*; *Union P. R. Co. v. State, supra*; *Keeler v. State, supra*. With this in mind, we turn to Vejvoda's claim that proper venue was not sufficiently proved in his case.

PROOF OF VENUE

> The venue of an offense may be proven like any other fact in a criminal case. It need not be established by positive testimony, nor in the words of the information; but if from the facts appearing in evidence the only rational conclusion which can be drawn is that the offense was committed in the county alleged, it is sufficient.

Weinecke v. State, 34 Neb. 14, 24, 51 N.W. 307, 310 (1892). See, also, *Gates v. State*, 160 Neb. 722, 71 N.W.2d 460 (1955); *State v. Liberator*, 197 Neb. 857, 251 N.W.2d 709 (1977); *State v. Laflin*, 201 Neb. 824, 272 N.W.2d 376 (1978); *State v. Ellis*, 208 Neb. 379, 303 N.W.2d 741 (1981).

The only testimony regarding venue was that of Edwards', a Grand Island police officer, who observed Vejvoda's car at "7th and Vine Streets" and later apprehended Vejvoda on a street called "Oak." Edwards never identified the city or county where he observed and apprehended Vejvoda. As this court noted in *State v. Bouwens*, 167 Neb. 244, 247, 92 N.W.2d 564, 566 (1958), the fact that a defendant was arrested by policemen of a particular city "is not proof that the offense was committed within the jurisdiction . . . of the city . . . ." When the judicial notice in question is disregarded, the evidence offered in

Vejvoda's case fails to establish that either a Vine Street or an Oak Street exists in Grand Island or Hall County. A defendant's arrest by a law enforcement officer of a particular political subdivision does not identify or establish the political subdivision as the proper venue in a criminal case. *State v. Bouwens, supra*. Therefore, without the court's judicial notice that events concerning Vejvoda occurred in Grand Island within Hall County, the evidence fails to establish venue.

In this appeal, the State does not challenge the current Nebraska rule that a waiver does not result from a defendant's inaction on a venue question in a criminal case, nor does the State take issue with the necessity of evidence beyond a reasonable doubt regarding proof of venue.

JUDICIAL NOTICE

Neb. Evid. R. 201(2), Neb. Rev. Stat. § 27-201(2) (Reissue 1985), pertains to judicial notice of adjudicative facts and states: "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (a) generally known within the territorial jurisdiction of the trial court or (b) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

A fact is adjudicative if the fact affects the determination of a controverted issue in litigation, or, as one author has characterized adjudicative facts:

> When a court or an agency finds facts concerning the immediate parties—who did what, where, when, how, and with what motive or intent—the court or agency is performing an adjudicative function, and the facts so determined are conveniently called adjudicative facts. . . .
>
> Stated in other terms, the adjudicative facts are those to which the law is applied in the process of adjudication. They are the facts that normally go to the jury in a jury case. They relate to the parties, their activities, their properties, their businesses.

Davis, *Judicial Notice*, 55 Colum. L. Rev. 945, 952 (1955).

Concerning judicial notice of adjudicative facts, Weinstein observes:

> The obvious cost of establishing adjudicative facts in an adversary proceeding—in terms of time, energy and

> money—justifies dispensing with formal proof when a matter is not really disputable. . . . When facts do not possess this requisite degree of certainty, our traditional procedure has been to require proof within the framework of the adversary system for reasons well-expressed by Professor Davis: "The reason we use trial-type procedure, I think, is that we make the practical judgment, on the basis of experience, that taking evidence subject to cross-examination and rebuttal, is the best way to resolve controversies involving disputes of adjudicative facts, that is, facts pertaining to the parties. The reason we require a determination on the record is that we think fair procedure in resolving disputes of adjudicative facts calls for giving each party a chance to meet in the appropriate fashion the facts that come to the tribunal's attention, and the appropriate fashion for meeting disputed adjudicative facts includes rebuttal evidence, cross-examination, usually confrontation, and argument (either written or oral or both)." [Quoting from K. Davis, *A System of Judicial Notice Based on Fairness and Convenience*, in Perspectives of Law 69 (1964).]

1 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 201[03] at 201-23 to 201-24 (1988).

When neither of the alternative tests prescribed in Neb. Evid. R. 201(2) is satisfied, judicial notice of an adjudicative fact is improper. See *Cardio-Medical Assoc. v. Crozer-Chester Med. Ctr.*, 721 F.2d 68 (3d Cir. 1983). See, also, 1 J. Weinstein & M. Berger, *supra*.

A judge or court may take judicial notice, whether requested or not. Neb. Evid. R. 201(3). Judicial notice of an adjudicative fact may be taken at any stage of the proceedings. Neb. Evid. R. 201(6).

JUDICIAL NOTICE: A SPECIES OF EVIDENCE

Judicial notice of an adjudicative fact is a species of evidence, which, if relevant as an ultimate fact or a fact from which an ultimate fact may be inferred, is received without adherence to the Nebraska Evidence Rules otherwise applicable to admissibility of evidence and establishes a fact without formal evidentiary proof. See, *In re Samaha*, 130 Cal. App.

116, 19 P.2d 839 (1933) (judicial notice is a form of evidence); *Moss v. Aetna Life Ins. Co.*, 267 S.C. 370, 377, 228 S.E.2d 108, 112 (1976): judicial notice "means that the court will admit into evidence and consider, without proof of the facts, matters of common and general knowledge"; *National Aircraft Leasing v. American Airlines*, 74 Ill. App. 3d 1014, 1017, 394 N.E.2d 470, 474 (1979): "Judicial notice is an evidentiary concept which operates to admit matters into evidence without formal proof . . . ." Although Neb. Evid. R. 201 does not expressly require relevance for judicial notice, an irrelevant fact cannot be validly classified as an "adjudicative fact," the only type of fact noticeable under Neb. Evid. R. 201. See, *Blank v. Kirwan*, 39 Cal. 3d 311, 703 P.2d 58, 216 Cal. Rptr. 718 (1985); *United States v. Byrnes*, 644 F.2d 107 (2d Cir. 1981); 21 C. Wright & K. Graham, Federal Practice and Procedure § 5104 (1977).

JUDICIAL NOTICE V. A JUDGE'S PERSONAL KNOWLEDGE

Judicial notice, however, is not the same as extrajudicial or personal knowledge of a judge. "What a judge knows and what facts a judge may judicially notice are not identical data banks. . . . [A]ctual private knowledge by the judge is no sufficient ground for taking judicial notice of a fact as a basis for a finding or a final judgment . . . ." McCormick on Evidence § 329 at 922-23 (E. Cleary 3d ed. 1984). As Wigmore observes:

> There is a real but elusive line between the judge's *personal knowledge* as a private man and these matters of which he takes judicial notice as a judge. The latter does not necessarily include the former; as a judge, indeed, he may have to ignore what he knows as a man and contrariwise.
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> . . . .
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> It is therefore plainly accepted that the judge is not to use from the bench, under the guise of judicial knowledge, that which he knows *only as an individual* observer outside of court. The former is in truth "known" to him merely in the fictional sense that it is known and notorious to all men, and the dilemma is only the result of using the term "knowledge" in two senses. Where to draw the line between knowledge by notoriety and knowledge by personal observation may sometimes be difficult but the

principle is plain.

(Emphasis in original.) 9 J. Wigmore, Evidence in Trials at Common Law § 2569(a) at 722-23 (J. Chadbourn rev. 1981). See, also, *Government of Virgin Islands v. Gereau*, 523 F.2d 140 (3d Cir. 1975).

JUDICIAL NOTICE IN CRIMINAL CASES

In function and effect, judicial notice in a civil action is fundamentally different from judicial notice in a criminal case. "In a civil action or proceeding, the judge shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the judge shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed." Neb. Evid. R. 201(7). In a civil action, the adjudicative fact judicially noticed is conclusively established and binds the jury, whereas in a criminal case a jury ultimately has the freedom to find that an adjudicative fact has not been established notwithstanding judicial notice by the trial court. If the conclusive effect of judicial notice in a civil action were transposed to the trial of a criminal case, judicial notice might supply proof of an element in the charge against an accused and thereby have the practical effect of a directed verdict on the issue of the defendant's guilt. The actual danger of judicial notice as a directed verdict against an accused was carefully considered in *State v. Lawrence*, 120 Utah 323, 234 P.2d 600 (1951), which involved a conviction of grand larceny, that is, theft of property with value in excess of $50. As recounted by the court in *Lawrence*:

> At the conclusion of the evidence, the defendant's counsel moved the court for a directed verdict on the ground that there had been no evidence of value of the stolen car. The State's attorney might properly and with little difficulty have moved to re-open and supply the missing evidence. He did not do so but instead argued that judicial notice could be taken of the value of the car. The court denied defendant's motion and included in its instructions to the jury the following:
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> . . . .
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> "In this case you will take the value of this property as being in excess of $50.00 and therefore the defendant, if he

is guilty at all, is guilty of grand larceny."

120 Utah at 326, 234 P.2d at 601.

In that setting, the *Lawrence* court directed its attention to the prosecution's argument that the court could take judicial notice of the automobile's value and instruct the jury accordingly. Rejecting the State's argument, the court concluded:

> It is to be admitted that upon the surface there doesn't appear to be much logic to the thought that a jury would not be bound to find that the car involved here (1947 Ford 2-Door Sedan) is worth more than $50. However, under our jury system, it is traditional that in criminal cases juries can, and sometimes do, make findings which are not based on logic, nor even common sense. No matter how positive the evidence of a man's guilt may be, the jury may find him not guilty and no court has any power to do anything about it. Notwithstanding the occasional incongruous result, this system of submitting all of the facts in criminal cases to the jury and letting them be the exclusive judges thereof has lasted for some little time now and with a fair degree of success. If the result in individual cases at times seems illogical, we can be consoled by the words of Mr. Justice Holmes, that in some areas of the law, "a page of history is worth a volume of logic." We, who live with it, have a fervent devotion to the jury system, in spite of its faults. We would not like to see it destroyed nor whittled away. If a court can take one important element of an offense from the jury and determine the facts for them because such fact seems plain enough to him, then which element cannot be similarly taken away, and where would the process stop?

120 Utah at 330-31, 234 P.2d at 603. The court then reversed Lawrence's conviction and ordered a new trial.

In *U.S. v. Mentz*, 840 F.2d 315 (6th Cir. 1988), the government prosecuted Mentz in a jury trial on charges of bank robbery. To convict Mentz, the government had to prove that Mentz robbed a financial institution insured by the Federal Deposit Insurance Corporation. See 18 U.S.C. § 2113(a) and (f) (1982). When Mentz moved for dismissal of the charges at

the close of the government's case, claiming that evidence failed to establish that the banks were FDIC-insured at the time of the robberies, the court overruled Mentz' motion and, although there was no evidence of FDIC insurance, instructed the jury that each of the banks, which Mentz was accused of robbing, was "insured by the Federal Deposit Insurance Corporation at the time of the offense alleged in the indictment." (Emphasis omitted.) 840 F.2d at 318-19. In reversing Mentz' conviction, the court stated:

> Regardless of how overwhelming the evidence may be, the Constitution delegates to the jury, not to the trial judge, the important task of deciding guilt or innocence. "[The jury's] overriding responsibility is to stand between the accused and a potentially arbitrary or abusive Government that is in command of the criminal sanction. For this reason, a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict, regardless of how overwhelming the evidence may point in that direction. The trial judge is thereby barred from attempting to override or interfere with the jurors' independent judgment in a manner contrary to the interests of the accused." *United States v. Martin Linen Supply Co.* [citation omitted].

840 F.2d at 319.

The *Mentz* court continued:

> We agree with Mentz that the trial judge invaded the jury's province by instructing that body, in clear and unequivocal language, that the banks were FDIC insured at the time the robberies occurred. His conclusive statement left no room for the jury to believe otherwise. The judge improperly cast himself in the role of trier of fact, and directed a verdict on an essential element of the bank robbery charge. His instructions had the effect of relieving the government of its burden of proving, beyond the *jury's* reasonable doubt, that the accused committed the crimes charged. . . .
>
> It is not important that the jury might have reached a similar conclusion had it been given an opportunity to

> decide the issue under a correct instruction. A plea of not guilty places all issues in dispute, "even the most patent truths." [Citations omitted.] The First Circuit has succinctly stated this point: "Whatever probative force the government's proof possessed, the jury had the power to accept or reject it—or to find it insufficiently persuasive. The defendant had a correlative right to free and unhampered exercise by the jury of all its powers." [Quoting from *U.S. v. Argentine*, 814 F.2d 783 (1st Cir. 1987).]

840 F.2d at 320.

The court in *Mentz* then noted: "Since the government's evidence on this issue consisted mainly of witness testimony, the trial judge replaced the jury by reaching a conclusion based on assessing the credibility of witnesses and weighing the probative value of the evidence." 840 F.2d at 320 n.8.

Specifically referring to judicial notice under Fed. R. Evid. 201(g), the counterpart to Neb. Evid. R. 201(7), the court concluded in *Mentz*:

> A court may take judicial notice of adjudicative facts in a criminal case, whether requested or not. Rule 201(c), (f), Fed.R.Evid. When the court does so, however, there will normally be a record of this. "Care should be taken by the court to identify the fact it is noticing, and its justification for doing so." *Colonial Leasing Company of New England v. Logistics Control Group International*, 762 F.2d 454, 459 (5th Cir.1985). This facilitates intelligent appellate review, and is particularly necessary when the fact noticed is an essential element of the crime charged.
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> . . .
>
> . . . In a criminal case, a trial court that takes judicial notice of an adjudicative fact must "instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed." Rule 201(g), Fed.R.Evid. This provision "contemplates that the jury in a criminal case [will] pass upon facts which are judicially noticed." *United States v. Jones*, 580 F.2d 219, 224 (6th Cir.1978). As so construed, Rule 201(g) preserves the jury's "traditional prerogative to ignore even uncontroverted facts in

> reaching a verdict," and thereby prevents the trial court from transgressing the spirit, if not the letter, of the Sixth Amendment right to a jury trial by directing a partial verdict as to the facts. [Citations omitted.]
>
> A trial court commits constitutional error when it takes judicial notice of facts constituting an essential element of the crime charged, but fails to instruct the jury according to Rule 201(g). The court's decision to accept the element as established conflicts with the bedrock principle that the government must prove, beyond the *jury's* reasonable doubt, every essential element of the crime. [Citation omitted.]
>
> Even assuming the district court in this case judicially noticed the insurance coverage by the FDIC, it was obligated to inform the jury that it could disregard the facts noticed. The court's failure to make such a statement permitted the jury to convict Mentz without ever examining the evidence concerning an element of the crime charged, and thus violated his Sixth Amendment right to a jury trial.

840 F.2d at 322-23.

As one commentator has remarked concerning judicial notice and Fed. R. Evid. 201(g), which remark is equally applicable to Neb. Evid. R. 201(7):

> With respect to criminal cases, Rule 201(g) apparently contemplates that contrary evidence is admissible, which of course means that evidence, if any, in support of the fact judicially noticed may also be admitted. Problems arising with respect to the court considering inadmissible evidence in determining the propriety of taking judicial notice coupled with the confusion that naturally would be expected to arise in the jury's mind when presented with judicial notice accompanied by conflicting evidence, makes resort to judicial notice in criminal cases where the opposing party is prepared to introduce contrary evidence highly undesirable.

M. Graham, Handbook of Federal Evidence § 201.7 at 83 (2d ed. 1986).

JUDICIAL NOTICE IN A BENCH TRIAL

Potential problems from judicial notice in a bench trial are discussed in 21 C. Wright & K. Graham, Federal Practice and Procedure § 5104 at 488 (1977):

> [T]he high degree of indisputability required before a fact can be judicially noticed applies to both forms of litigation [jury trials and court or bench trials]. However, the procedural context in which notice is taken makes the process quite different in court trials. Since the judge is not insulated, as the jury is, from the material consulted in deciding whether or not to take notice, it may make little difference whether he takes formal judicial notice based on the material or whether he is simply convinced of the fact as a result of having examined the sources. Technically, the source material is not in evidence, and thus a finding that was without other support in the record could not stand unless the matter was properly noticeable; but otherwise, the line between judicial notice and proof-taking is blurred in court trials.

From all the foregoing observations, we believe, and for that reason suggest, that judicial notice should be sparingly used in a criminal case lest prejudicial error result from denial of a defendant's constitutional or statutory rights in the trial of a criminal case.

JUDICIAL NOTICE IN VEJVODA'S CASE

Under the Nebraska Evidence Rules, the trial court's sua sponte judicial notice was permissible at the point in Vejvoda's trial where adduction of evidence had been concluded and the case was ready for submission to the factfinding process. See Neb. Evid. R. 201(4): "A judge or court shall take judicial notice if requested by a party and supplied with the necessary information." See, also, Neb. Evid. R. 201(6): "Judicial notice may be taken at any stage of the proceeding."

However, from the record in Vejvoda's case, one cannot conclude that the location of the municipal microcosm known as Vine Street or 8th and Oak Streets was known throughout the length and breadth of Hall County and, therefore, a fact "known within the territorial jurisdiction of the trial court." Neb. Evid. R. 201(2)(a). Consequently, we must focus on the alternative expressed in Neb. Evid. R. 201(2)(b), that is,

whether the location of Vine and Oak Streets in Grand Island and the site of Vejvoda's arrest are adjudicative facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

For resolution of Vejvoda's claim regarding the impropriety of the trial court's judicial notice, we must first identify and characterize the scope of the trial court's "judicial notice," which actually has two components: (1) Vine, Oak, 7th, and 8th Streets exist in Grand Island, which is located in Hall County, and (2) Vejvoda's drunk driving occurred at 8th and Oak in Grand Island. Thus, existence of Grand Island streets is inferentially correlated with Edwards' testimony, producing a conclusion judicially noticed by the trial court, namely, the judicially noticed streets are the same streets mentioned in Edwards' testimony, and, therefore, Vejvoda was arrested in Grand Island.

An inference may be entirely reasonable, yet nevertheless an improper subject for judicial notice.

> [Neb. Evid. R. 201] puts judges and attorneys on notice that underlying assumptions must be analyzed to ascertain whether their validity can be verified and placed beyond practical dispute. Attorneys must be alert to instances . . . where a court's statement, although plausible on the surface, may be based on unverified [and unverifiable] hypotheses.

1 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 201[03] at 201-34 (1988).

When a fact is not generally known within the territorial jurisdiction of the trial court, judicial notice may be taken only if an adjudicative fact can be verified by "sources whose accuracy cannot reasonably be questioned." Neb. Evid. R. 201(2)(b). The inference that Vejvoda was arrested in Grand Island is not "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Neb. Evid. R. 201(2)(b). We cannot imagine any unimpeachable source or sources which quickly and accurately verify the trial court's inferential determination that Vejvoda's drunk driving occurred in Grand Island. While a map of Grand Island would verify existence of Vine and Oak Streets within the

city, a Grand Island map would not indisputably establish that Vejvoda was driving in that city.

As a matter of judicial notice, the trial court's conclusion that Vejvoda's drunk driving occurred in Grand Island is verifiable only by the cumbersome process of examining all locations outside Grand Island, which might match Edwards' description of a site with "Vine" and "Oak" streets, and then eliminating those locations which are inconsistent with Edwards' testimony about the direction traveled by Vejvoda's vehicle, for example, Vejvoda's car traveled west on 7th Street, turned right from 7th Street onto Oak Street, and stopped at 8th and Oak Streets. In the foregoing process of comparison and elimination, a court would have to consult not only a map of Grand Island, but also maps of cities and towns outside Grand Island and Hall County which have streets designated "Vine," "Oak," "7th," and "8th." Although a court might, after a laborious comparison of virtually innumerable city maps, confirm Edwards' identification of "Vine" and "Oak" as the streets traveled by Vejvoda within Grand Island, such an unavoidably burdensome procedure is not only impracticable but contrary to Neb. Evid. R. 201(2)(b), which specifies that a judicially noticed adjudicative fact must be "capable of . . . ready determination."

A court may take judicial notice concerning the location of streets in a particular political subdivision within the court's jurisdiction. *State v. Scramuzza*, 408 So. 2d 1316 (La. 1982); *Evans Associated Industries, Inc. v. Evans*, 493 S.W.2d 547 (Tex. Civ. App. 1973); *State v. Martin*, 270 N.C. 286, 154 S.E.2d 96 (1967); *Cascio v. State*, 213 Ark. 418, 210 S.W.2d 897 (1948); *United States v. Hughes*, 542 F.2d 246 (5th Cir. 1976). See, also, Annot., Judicial Notice as to Location of Street Address Within Particular Political Subdivision, 86 A.L.R.3d 485 (1978). In the trial of a criminal case, whether a political subdivision has a street identified by a particular name used in evidence is an adjudicative fact for judicial notice, but whether the street location mentioned in testimony is actually within the political subdivision is a matter of reasonable inference by the fact finder. *United States v. Mendell*, 447 F.2d 639 (7th Cir. 1971).

In Vejvoda's case, the trial court could properly take judicial notice that Grand Island, which is wholly within Hall County, has streets named "Vine" and "Oak." Furthermore, by simply referring to a map of Grand Island, the court could properly take judicial notice that the intersection of 7th and Vine Streets is within two blocks of the intersection of 8th and Oak Streets. At that point the site of the offense was an issue submissible to the trier of fact.

Although the location of streets within Grand Island is readily verifiable by reference to a city map, a source capable of ready verification and a cartographic source of information which cannot reasonably be questioned, the county court took another and impermissible step by judicially noticing the inference that Vejvoda was driving in Grand Island. The court's locational inference necessary for venue was not an adjudicative fact "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." The county court erred in taking judicial notice of the inference that Vejvoda was driving in Grand Island and, therefore, that Vejvoda's drunk driving occurred in Grand Island.

If Vejvoda had been convicted in a jury trial, we would reverse Vejvoda's conviction on account of the trial court's invasion of the factfinding process within a jury's province in the trial of a criminal case. However, as mentioned, Vejvoda's case was tried to the court. Although Vejvoda's arrest by Edwards, a Grand Island police officer, does not establish venue, Edwards' official affiliation as a Grand Island police officer was a circumstance bearing on the issue of venue. When combined with other evidence, namely, the trial court's judicial notice of "Vine" and "Oak" as streets in Grand Island, Edwards' testimony supplied a sufficient evidentiary basis for a fact finder's determination that Vejvoda's drunk driving occurred in Grand Island, Hall County, Nebraska. "Harmless error exists in a jury trial of a criminal case when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in a verdict adverse to a substantial right of the defendant." *State v. Watkins*, 227 Neb. 677, 686, 419 N.W.2d 660, 666 (1988). The

preceding principle applicable in a jury trial of a criminal case is equally applicable to a judgment embodying factfinding in the bench trial of a criminal case.

Therefore, the trial court's error in judicially noticing the inferential location of Vejvoda's conduct, namely, drunk driving, is harmless error beyond a reasonable doubt. Vejvoda's conviction is affirmed.

AFFIRMED.

WHITE, J., dissenting.

Today, the majority holds that harmless error occurred during a bench trial of a criminal case when the trial court took judicial notice of venue.

Today's holding conflicts with our holding in *State v. Bouwens*, 167 Neb. 244, 92 N.W.2d 564 (1958). In *Bouwens*, this court affirmed the decision of the district court which dismissed a complaint against the defendant for disturbing the peace. While noting that "[i]t is fundamental that venue must be proven as any other essential fact," *id.* at 246, 92 N.W.2d at 566, the court held that the mere reference to streets and addresses in an unnamed city, standing alone, will not be deemed sufficient evidence for the court to take judicial notice of venue.

Second, as I first noted in my dissent in *State v. Foster*, 230 Neb. 607, 433 N.W.2d 167 (1988), today's holding is another step in the continuing process of making the trial court an active participant in criminal proceedings. Again, I submit that this active participation offends notions of fairness and due process.

STATE OF NEBRASKA, APPELLEE, V. LEROY J. PARMAR, APPELLANT.

437 N.W.2d 503

Filed March 31, 1989. No. 88-505.

1. **Probable Cause: Words and Phrases.** Probable cause is a flexible, commonsense standard. It merely requires that the facts available to the officer would warrant one of reasonable caution in the belief that certain items may be contraband or

stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false.

2. **Search Warrants: Appeal and Error.** In determining the validity of a search warrant, the reviewing court may consider only information brought to the attention of the issuing magistrate.
3. **Search Warrants: Affidavits: Probable Cause.** The test for reasonable reliance on a search warrant is whether the affidavit was sufficient to create disagreement among thoughtful and competent judges as to the existence of probable cause.
4. **Search Warrants: Affidavits: Probable Cause: Police Officers and Sheriffs.** The test in *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984), for good-faith reliance is an objective test, and it is based solely on facts presented to the magistrate. Thus, facts subjectively relied upon by the affiant but excluded from the affidavit do not establish that an officer acted in objectively reasonable reliance upon a subsequently invalidated search warrant.
5. **Search Warrants: Probable Cause: Police Officers and Sheriffs.** *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984), creates an exception to the exclusionary rule only when officers have acted in objectively reasonable reliance on the ruling of a judge or magistrate.

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

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

Robert M. Spire, Attorney General, and Kenneth W. Payne for appellee.

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

GRANT, J.

Defendant-appellant, Leroy J. Parmar, was convicted by a jury in the district court for Douglas County of murder in the first degree in violation of Neb. Rev. Stat. § 28-303(2) (Reissue 1985), commonly called felony murder. He was sentenced to life imprisonment. Defendant timely appealed to this court, alleging only one error: that the trial court erred in overruling defendant's motion to suppress certain "evidence seized from the Defendant's residence; namely, a brown wooden-handled pneumatic pump action BB gun." Although we conclude that the trial court erred in admitting this BB gun into evidence, the error was harmless beyond a reasonable doubt. We therefore affirm defendant's conviction and sentence.

The facts supporting defendant's conviction are as follows. The victim, Frederick Cox, lived in apartment 10, 3453 Ames Avenue, Omaha, in a four-building apartment complex. Defendant resided in apartment 16, 3455 Ames Avenue, Omaha, with Lanetta Harrington. Michelle Carrigan lived in apartment 15, 3455 Ames Avenue, Omaha, with Lanetta Harrington's sister, Joyce Harrington, and a man named Truman Stevenson. The apartments were all in the same complex.

The record shows that on the evening of April 15, 1987, Cox received $1,000 cash from his ex-wife pursuant to a property settlement agreement in the divorce proceeding between those parties. The receipt of this money was shown by a receipt signed by Cox and given to his ex-wife. The next morning, Cox rode to work with his friend, Thomas Tyron. Tyron testified that Cox called him at home later that morning, telling Tyron that "he had his good fortune with him" and that he wanted to leave work early. Tyron picked Cox up from work at 11 a.m. The two men rode around for awhile, and Cox paid some debts he owed. Tyron then took Cox to the store, where he purchased groceries and alcohol. The two men spent the day socializing and drinking at various places and returned to the apartment complex at about 4:10 p.m. Tyron left Cox's apartment at about 6 p.m. Cox and others continued to celebrate Cox's "good fortune."

Michelle Carrigan first met Cox between 5 and 6 p.m. on April 16 in the hallway of his apartment building. Later that evening, Carrigan and Lanetta Harrington went to Cox's apartment. After some conversation, Harrington left and Carrigan engaged in an act of prostitution with Cox. Cox pulled some money from underneath the mattress and paid Carrigan, who observed at that time that Cox had hidden what appeared to be a "lot of money . . . [m]aybe a thousand," underneath his mattress. Cox invited Carrigan to stop back later.

Carrigan returned to her apartment and talked with a group of people, including Joyce Harrington, Truman Stevenson, and Lanetta Harrington. She told Lanetta about Cox's money. Defendant eventually joined the group, and, as the evening progressed, the subject of Cox's money came up again.

Carrigan testified that she and defendant talked about how much money Cox might have had. Carrigan further testified that she and defendant discussed a specific plan to take the money. The plan was that Carrigan would go knock on Cox's door. When Cox opened the door, defendant and Lanetta Harrington would rush in, causing Carrigan to be pushed into Cox. In the process, defendant and Harrington would tie him up and rob him. The act was designed to make it appear that Carrigan did not have anything to do with the robbery.

Carrigan later joined Lanetta Harrington and defendant at their apartment and saw that defendant and Harrington had some extension cord, rope, and pieces of cutoff panty hose. Carrigan testified that defendant "got together" a BB gun, extension cord, and the nylons.

The three carried out the plan at about 2 on the morning of April 17. Carrigan knocked on the door. When Cox answered, defendant and Harrington rushed up from the stairs and pushed Carrigan into the apartment. As defendant and Harrington wrestled with Cox, a woman named Valerie Washington came out of the bedroom and asked what was going on. Carrigan said she did not know. Washington left, followed by Carrigan.

Carrigan went back to her own apartment, but eventually returned to Cox's apartment. She went to the bedroom and saw Lanetta Harrington tying Cox's legs. Carrigan testified that defendant was "down by the top of Mr. Cox" but the bed obstructed her view. Carrigan told them they should get out. She left Cox's apartment and went into the parking lot, where she saw Ronnie Franks, a part-time caretaker, picking up glass.

Valerie Washington testified that she had gone to Cox's apartment for a drink late on the night of April 16, possibly after midnight. While she was in the apartment, someone knocked on the door. Cox answered the door, said it was Michelle Carrigan, and told Washington to go in the back room. As he started to open the door, some people pushed their way in. Carrigan was knocked onto the couch, and defendant and Lanetta Harrington came in. Washington testified that defendant "pounded Fred Cox on the coffee table and to the ground." Although defendant and Harrington had panty hose

over their faces, Washington testified that she recognized them because she knew them. Washington did not remember seeing them carrying anything. As Washington ran to her own apartment, she saw Franks cleaning the parking lot. She later returned to the parking lot and saw defendant and Harrington come out of Cox's building.

Ronnie Franks testified that while he was picking up glass late on the night of April 16, he saw Valerie Washington, two other women, and a man out in the parking lot. Franks stated that the man "had some gloves and he had a little gun, a rifle, some type rifle." Franks identified defendant in court as the man he had seen in the parking lot and testified he knew defendant as the man who lived in apartment 16.

Thomas Tyron returned to Cox's apartment complex at 6:30 on the morning of April 17 to take Cox to work. Tyron thought Cox had overslept, because there were no lights on. He tried knocking on the door, but there was no answer. Tyron took his wife to work and returned to Cox's apartment and knocked on the door again, to no avail. He called Cox's employer and determined that Cox had not gone to work that morning. Tyron went home and called Cox's employer again. After another unsuccessful trip to Cox's apartment, Tyron and a friend, Thomas Jeffrey, went to look for Cox.

Tyron and Jeffrey went back to Cox's apartment at 11 a.m. There was no response to their knocking, and they could not find the landlord to let them in. Tyron and Jeffrey returned to Cox's apartment at noon. There was still no response to their knocking on the door. Both men then looked through a crack in the doorframe and saw that the living room was in disarray. They jimmied the door with a knife and entered the apartment.

Jeffrey testified that the apartment was "all disarrayed" and that it appeared there had been a struggle. The couch was overturned, the coffee table broken, lamps were on the floor, and the refrigerator door was open.

Jeffrey went into the bedroom, examined the dresser, and then saw Cox's feet over by the bed. Jeffrey called Tyron into the bedroom. They observed that Cox had been bound at the arms and ankles and that the body was "cold and sticky." The body was wedged between the bed and the wall, with the face

turned down into the carpet.

Dr. Wayne Roffman, a pathologist, performed an autopsy of Cox's body on April 18. He noted that Cox had a long history of heart disease and was of the opinion that Cox died of "anoxia associated with asphyxiation in association with coronary artery disease." Dr. Roffman was of the opinion that the death was due to a combination of factors and that the information he had concerning the condition and position of the body was consistent with "positional asphyxiation." The doctor explained that because Cox was intoxicated and had been bound face down on a carpet in a confined area, he was unable to move to a position where he could breathe.

In the course of their investigation of this incident, Omaha Police Detectives Paul Briese and Timothy Conahan interviewed Ronnie Franks on the afternoon of April 17. Briese also was instructed to draft an affidavit for a search warrant for defendant's apartment. The resulting "Affidavit and Application for Issuance of a Search Warrant," signed and sworn to by Officer John Newell and Conahan, stated, in part:

> That the Affiant has just and reasonable grounds to believe, and does believe that there is concealed or kept as hereinafter described the following property, to-wit: 1 pneumatic pump action BB gun with a brown handle and blue steel in color as well as a pair of dark grey women's nylon pantihose along with records indicating the residents of the address 3455 Ames Ave., Apt. #16.
>
> . . . .
>
> That said property is under the control or custody of HARRINGTON, Lanetta D. . . . and John or Jane Doe.
>
> That the following are the grounds for issuance of a search warrant for said property and the reasons for the Affiant's belief, to-wit: On Friday 17 Apr 87, the Omaha Police Homicide Unit along with the Omaha Police Uniform Field Bureau and Criminalistics Unit were called to the address of 3453 Ames Ave., Apt. #10, the address of the late Frederick COX . . . found to be bound with his hands behind his back and his bindings consisted of a white extension cord and his feet and ankles bound together by a dark grey colored women's pantihose and he

> was found lying face down along the north wall in the bedroom of the one bedroom apartment located at 3453 Ames Ave., Apt. #10, Omaha, Douglas County, Nebraska.
>
> Officers of the Omaha Police Division conducted an investigation into this matter regarding the death and bondage of the victim Frederick COX . . . and after interviewing several witnesses and those witnesses being identified as Truman STEVENSON . . . as well as a Ronnie FRANKS . . . . These parties advised Omaha Police investigators that they had information as to who the suspects were that were involved in this incident and as a result of that investigation officers learned that the victim COX had earlier on the date of Friday 17 April 1987 been in the accompaniment [sic] of one Michelle CARRIGAN . . . . Reporting officers . . . located Michelle CARRIGAN and this party was taken to Central Police Headquarters where she gave a taped statement implicating the individuals Leroy PARMAR and Lanatta [sic] HARRINGTON as being the two individuals who assaulted the victim COX, Frederick by bursting into his apartment, knocking him to the ground and subsequently taking him to the bedroom where he was bound and gagged and later on found to be deceased. Witnesses reported that the party Leroy PARMAR is the boyfriend of Lanatta [sic] HARRINGTON and that these parties reside at the address of 3455 Ames Ave., Apt. #16, the location listed in this affidavit and application . . . .
>
> Based upon the information obtained from those witnesses at the scene of the homicide of Frederick COX, affiant officers believe that if the court should authorize them to execute a search warrant on the address of 3455 Ames Ave., Apt. #16 in Omaha, Douglas County, Nebraska, they will be able to find evidence that will be needed in order to prosecute the parties Lannata [sic] HARRINGTON . . . and . . . PARMAR, Leroy J., . . . on a charge of felony murder.

Newell and Conahan took the application and search warrant to be signed by a county court judge. The warrant

signed by the county judge authorized the search of defendant's residence, and the seizure of the following items from the apartment: "1 blue steel and brown wooden stock pneumatic pump action BB gun along with a pair of dark grey women's pantihose and records pertaining to the occupants of the address of 3455 Ames Ave., Apt. #16." The officers proceeded to defendant's residence to serve the warrant. They tried to gain entry to the apartment by knocking, but there was no response. Consequently, Detective Briese forced the door open.

During the search of the southeast corner bedroom, the officers seized a brown vinyl briefcase containing various types of drug paraphernalia; a maroon billfold containing defendant's identification; a bill addressed to Lanetta Harrington; two nylon stockings (black and brown), cut and tied at the top; and a "Power Master 760 BB repeater." The billfold, which had been seized as a venue item, was later discovered to contain $240 in cash.

Defendant subsequently filed a motion to suppress evidence, alleging:

> 2. That the affidavit in support of the issuance of the search warrant does not allege the relevance of a pneumatic punch [sic] action BB gun to the crime being investigated. In spite of that fact, the search warrant approved by the magistrate specifically grants those executing the search warrant to search for such a BB gun. Absent any mention of said BB gun in the supporting affidavit, there is no probable cause to believe any BB gun was relevant to the investigation and the portion of the warrant allowing for the search of the BB gun is, therefore, defective.
>
> . . . .
>
> 6. That the so-called good faith exception has no application herein in that the facts are distinguishable from *U.S. v. Leon*, 468 U.S. 897, 104 S.Ct. 3405 (1984), and further that this motion is based in part on State constitutional grounds.

Defendant prayed that the evidence seized be suppressed.

At the hearing on defendant's motion to suppress, the State offered copies of the search warrant and affidavit without

objection. It is apparent from the face of the affidavit itself, and Detective Briese so testified, that the affidavit contained no factual information regarding the relevance of a BB gun to the investigation. Briese further testified that the affidavit did not set out a factual basis why the police wanted to seize the BB gun.

Over defendant's objection, Briese was allowed to testify at the suppression hearing that at the time he drafted the affidavit, he had been advised by the other investigating officers (who had interviewed Carrigan and Franks) that a pneumatic BB gun was relevant to the investigation. Briese also testified, over objection, that he "overlooked it when [he] drafted the probable cause for the issuance of the search warrant. It [was] an oversight on [his] behalf as to not indicating the two or three sentences why [they] wanted the BB gun." Detective Conahan testified, over objection, that Franks had told him that he saw one of the suspects coming out of the apartment carrying a rifle, which Conahan later determined to be a BB gun. Conahan further testified that although the county judge asked questions about the affidavit, Conahan did not believe he told the judge anything that was not included in the affidavit.

Defendant testified at the hearing that he resided at 3455 Ames, apartment 16, on April 17, 1987.

Defendant's motion to suppress was overruled. He contends on appeal that the district court erred in overruling the motion to suppress evidence seized from his residence, namely, a brown wooden-handled pneumatic pump action BB gun, (1) because the supporting affidavit was so inadequate that any official belief in the existence of probable cause cannot be deemed reasonable, and the reasoning of *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984), does not apply, and (2) because the court erred by allowing the affidavit to be remedied by subsequent testimony concerning the subjective knowledge of the officer who sought the warrant.

We note that defendant's assignments of error pertain only to his motion to suppress evidence of the BB gun. The invalidity of part of a search warrant does not require the suppression of all evidence seized pursuant to valid portions of the warrant. *State v. LeBron*, 217 Neb. 452, 349 N.W.2d 918 (1984). We limit our discussion accordingly.

Search warrants may be issued by an impartial magistrate, upon a showing of "probable cause." We have said that

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

State v. Haselhorst, 218 Neb. 233, 237, 353 N.W.2d 7, 10 (1984) (quoting *Texas v. Brown*, 460 U.S. 730, 103 S. Ct. 1535, 75 L. Ed. 2d 502 (1983)); *State v. Holman*, 221 Neb. 730, 380 N.W.2d 304 (1986).

We also have held that in determining the validity of a search warrant, the reviewing court may consider only information brought to the attention of the issuing magistrate. *State v. Hodge and Carpenter*, 225 Neb. 94, 402 N.W.2d 867 (1987). See, also, *Whiteley v. Warden*, 401 U.S. 560, 565 n.8, 91 S. Ct. 1031, 28 L. Ed. 2d 306 (1971), where the Supreme Court stated: "Under the cases of this Court, an otherwise insufficient affidavit cannot be rehabilitated by testimony concerning information possessed by the affiant when he sought the warrant but not disclosed to the issuing magistrate." The affidavit submitted to the county judge failed to establish any cause for the seizure of the BB gun, specifically listed as an item to be seized. The affidavit did not set out how such evidence would be useful to the investigating officers as evidence of the crime. It was error for the trial court to allow the affidavit to be remedied at the suppression hearing by subsequent testimony concerning the subjective knowledge of the two affiants who sought the warrant.

The State contends, however, that the "good faith" exception to the exclusionary rule renders this item admissible. We disagree.

In *United States v. Leon*, 468 U.S. 897, 922, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984), the U.S. Supreme Court held that "the marginal or nonexistent benefits produced by suppressing

evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion." The Court noted, however, that an officer would not "manifest objective good faith in relying on a warrant based on an affidavit 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.' " 468 U.S. at 923. The *Leon* case further stated at 468 U.S. at 919 n.20: "We emphasize that the standard of reasonableness we adopt is an objective one."

In *State v. Pecha*, 225 Neb. 673, 407 N.W.2d 760 (1987), we held that a warrant authorizing the search of "John and/or Jane Doe" was an invalid general warrant because the inclusion of the catchall phrase "John and/or Jane Doe" was not based upon any probable cause. In reaching our conclusion, we noted:

> Nothing in the affidavit filed by Officer Clark even made reference to a belief that there were or would be persons other than Edna Mohr and Stephen Pecha on the premises who were or might be involved in illegal activity. No evidence was introduced to show that there was anyone else residing at or in control of the premises other than Edna Mohr and Stephen Pecha.

Id. at 681, 407 N.W.2d at 765. We then concluded that the defect in the warrant was apparent on its face, and that the good-faith exception created in *Leon, supra*, did not apply.

Similarly, in *U.S. v. Hove*, 848 F.2d 137 (9th Cir. 1988), the affidavit submitted to the magistrate in support of a search warrant failed to link Hove to the address of the residence searched, and failed to explain the significance or relevance of searching the particular location. The U.S. Court of Appeals stated:

> The test for reasonable reliance is whether the affidavit was sufficient to "create disagreement among thoughtful and competent judges as to the existence of probable cause." *Leon* 468 U.S. at 926, 104 S.Ct. at 3422. . . . Here, reasonable judges could not disagree over whether probable cause existed to search the DeAnza location because the affidavit offers no hint as to why the police wanted to search this residence. . . . No such facts were

> stated in this affidavit. Thus, any official belief in the existence of probable cause must be considered unreasonable.

Hove, supra at 139-40. The court emphasized that the *Leon* test for good-faith reliance is an objective test, and it is based solely on facts presented to the magistrate. Thus, facts subjectively relied upon by the affiant but excluded from the affidavit do not establish that an officer acted in objectively reasonable reliance upon a subsequently invalidated search warrant.

We agree with the *Hove* court that *Leon* creates an exception to the exclusionary rule only when officers have acted in objectively reasonable reliance on the ruling of a judge or magistrate.

> The point is that officers who present a colorable showing of probable cause to a judicial officer ought to be able to rely on that officer's ruling in executing the warrant. [Citation omitted.] When the officers have not presented a colorable showing, and the warrant and affidavit on their face preclude reasonable reliance, the reasoning of *Leon* does not apply. To permit the total deficiency of the warrant and affidavit to be remedied by subsequent testimony concerning the subjective knowledge of the officer who sought the warrant would, we believe, unduly erode the protections of the fourth amendment.

Hove, supra at 140.

In this case, the affidavit of Officers Newell and Conahan was facially defective in failing to establish probable cause to seize a BB gun from defendant's residence, and the trial court erred in allowing the affidavit to be remedied at the suppression hearing by testimony concerning the subjective knowledge of the affiant officers, and in later admitting the BB gun in evidence. The admission of the evidence is the operative fact. In that connection, we note that appellant's brief at 12 states the gun was received in evidence as shown at page 238 of the bill of exceptions. At that page, the BB gun is specifically excluded from evidence. The BB gun was later admitted into evidence, at page 504, and we assume defendant's contentions are with that evidentiary ruling.

Our decision in *Pecha, supra*, supports the conclusion that

the officers could not reasonably objectively rely upon this facially invalid warrant in seizing a BB gun from defendant's residence and that the good-faith exception to the exclusionary rule does not apply in this case. The trial court erred in failing to exclude evidence of the BB gun.

The remaining issue is whether the erroneous admission into evidence of the BB gun was harmless beyond a reasonable doubt. *State v. Oliva*, 228 Neb. 185, 422 N.W.2d 53 (1988); *State v. Watkins*, 227 Neb. 677, 419 N.W.2d 660 (1988).

Defendant contends that the BB gun was relevant and prejudicial because the gun was an instrument of the crime and also corroborated the testimony of the State's main witness, Michelle Carrigan, who he claims was "fairly discredited" on cross-examination. Defendant further claims that evidence of the BB gun was prejudicial because it corroborated Franks' testimony and tended to put the gun at the scene of the crime.

The record shows that the BB gun was referred to approximately eight times in the course of 7 days of testimony. Franks testified, over objection, that the man he saw in the parking lot was carrying a "little gun" or a "rifle," and that the BB gun looked like the gun he saw. Franks, however, was able to independently identify defendant as the man he saw that night.

The next reference to the BB gun is Michelle Carrigan's testimony during direct examination that it was defendant's gun and that defendant "got together" the BB gun, extension cord, and nylons before he went to Cox's apartment. There was no objection to this testimony.

Detective Briese testified during direct examination that he had been instructed to draft an affidavit for a search warrant for defendant's residence. Briese assisted in executing the warrant and testified that "[w]e were looking for a BB gun that had a brown handle, nylon hose . . . and venue items." On cross-examination, he testified as to the phrase "BB gun" in the search warrant and affidavit.

Officer Newell testified during direct examination that he and Detective Conahan had taken an application for a search warrant to the county judge's house and that they executed the warrant. Newell stated only that "[t]he items listed in the

warrant were some nylon stockings possibly worn in the crime. A pneumatic BB gun with a brown wooden stock and handle, and items of venue." Newell identified the BB gun as the gun found in defendant's apartment. The BB gun was listed on their property report.

Defendant, testifying in his own defense, stated that "[a] friend of mine had [the BB gun] and he left it over to the house, and it's been over there for about two months under the bed."

In the context of the whole trial, the foregoing references to the BB gun are inconsequential. There is no testimony, direct or circumstantial, that the BB gun was used in striking, shooting, or threatening Cox on the night in question or that the BB gun was even taken into Cox's apartment. Washington testified that she did not see defendant, Lanetta Harrington, or Carrigan carrying anything when they burst into Cox's apartment. Carrigan did not testify that the BB gun was taken into Cox's apartment. Both Washington and Carrigan testified to a physical assault of Cox without the mention of any weapon or club.

Both Franks and Washington identified defendant by recognizing him as a resident of the apartment complex and the man they had seen on the night in question. Franks' passing reference to the gun was not needed by him in identifying defendant. There is the further fact that a BB gun does not automatically cause the prejudice which might be caused by the presence of AK-47 assault weapons, or similar automatic, lethal guns.

Both Washington, an independent witness, and Michelle Carrigan, an accomplice also charged with first degree murder in Cox's death, testified directly to acts of defendant resulting in the death of Frederick Cox. Each was cross-examined at length as to all the sordid aspects of their testimony. Substantial circumstantial evidence also connected defendant with the robbery and murder. The BB gun was of slight relevance to any issue in the trial.

The U.S. Supreme Court has often recognized the doctrine of "harmless error." The Court said in *Rose v. Clark*, 478 U.S. 570, 576, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986), that

> since [*Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)], "we have repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." *Delaware v. Van Arsdall*, 475 U. S. 673, 681 (1986). That principle has been applied to a wide variety of constitutional errors.

The holding of "harmless error" is applied on a case-by-case basis. In this case, although the court erred in failing to suppress the BB gun as evidence, we determine that the error was harmless beyond a reasonable doubt. The judgment of the trial court is affirmed.

AFFIRMED.

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

437 N.W.2d 786

Filed March 31, 1989. No. 88-604.

1. **Parental Rights.** Noncompliance with a reasonable plan of rehabilitation is sufficient grounds for termination of parental rights.
2. **Parental Rights: Juvenile Courts.** Under Neb. Rev. Stat. § 43-292(6) (Reissue 1988), a juvenile court has the discretionary power to prescribe a reasonable plan for parental rehabilitation to correct the conditions underlying the adjudication that a child is a juvenile within the Nebraska Juvenile Code.
3. **Parental Rights: Evidence: Proof.** This court has held that to terminate parental rights under Neb. Rev. Stat. § 43-292(6) (Reissue 1988), the State must prove by clear and convincing evidence that (1) the parent has willfully failed to comply, in whole or in part, with a reasonable provision material to the rehabilitative objective of the plan and (2) in addition to the parent's noncompliance with the rehabilitative plan, termination of parental rights is in the best interests of the child.
4. **Parental Rights: Evidence: Appeal and Error.** In an appeal from a judgment terminating parental rights, the Nebraska Supreme Court tries 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, 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. In addition, because the Supreme Court tries factual questions on the record de novo, impermissible or improper evidence is not considered.

5. **Parental Rights.** Materiality of a provision in a court-ordered rehabilitative plan is determined by a cause-and-effect relationship. Reasonableness of a rehabilitative plan for a parent depends on the circumstances in a particular case and, therefore, is examined on a case-by-case basis.
6. _____. Where parents are unable or unwilling to rehabilitate themselves within a reasonable time, the best interests of the children require that parental rights be terminated without delay.
7. _____. A child cannot, and should not, be suspended in foster care, nor be made to await uncertain parental maturity.
8. **Appeal and Error.** Assignments of error not discussed are not considered by this court.

Appeal from the County Court for Clay County: HARRY C. HAVERLY, Judge. Affirmed.

Dean N. Hansen for appellant.

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

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

WHITE, J.

V.C.T., the natural mother of P.M.C. (born May 18, 1983), the minor child involved in these proceedings, appeals from an order of the county court for Clay County, sitting as a juvenile court, terminating her parental rights. We affirm.

When P.M.C. was approximately 2 months old, she was removed from the care of her mother, and a petition was filed on July 21, 1983, in the county court for Clay County, alleging that P.M.C. was a "juvenile who is homeless or destitute, or without proper support through no fault of her parent, guardian or custodian," pursuant to Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 1982). The court adjudicated P.M.C. as a juvenile under § 43-247(3)(a) and made her a ward of the court under the supervision of the Nebraska Department of Social Services (DSS). A rehabilitation plan for the appellant was also ordered, and an initial plan was eventually adopted by the court on October 4. Subsequently, a second plan was devised by the appellant and her attorney and adopted by the

court on February 14, 1984.

Allegedly because of the appellant's failure to rehabilitate under either plan, a motion for termination of parental rights was filed on August 21. Termination of appellant's rights was ordered by the county court. The district court for Clay County, on appeal, reversed and remanded the case to the county court for development of further plans and efforts at rehabilitation. On appeal to this court, we affirmed the district court's decision in *In re Interest of P.M.C.*, 221 Neb. 33, 374 N.W.2d 598 (1985).

Following remand of the case to the county court, a third plan was developed and adopted by that court on March 4, 1986. During this period, appellant married and had another child, M.T. (born April 5, 1986). At this time, no petition has been filed for termination of parental rights regarding this child. Believing that appellant had failed to comply with the latest plan, P.M.C.'s guardian ad litem filed a petition for, and the county attorney filed a motion for, an order terminating parental rights on March 8, 1988. On May 24, the county court made its findings and entered an order terminating the appellant's parental rights and those of the natural father, whose identity and whereabouts remain unknown. Only the parental rights of the mother are involved in this appeal, since there has been no appearance made by or entered on behalf of P.M.C.'s natural father.

The mother appeals, assigning four errors, which can be consolidated as follows: The county court erred in finding that there was sufficient evidence to terminate appellant's parental rights and in denying appellant's request for extended and unsupervised visits with her child.

With respect to appellant's first assignment of error, she argues that her parental rights were improperly terminated because there was not sufficient evidence to support a finding of noncompliance with a rehabilitation plan, under Neb. Rev. Stat. § 43-292(6) (Reissue 1988), or neglect, pursuant to § 43-292(2). This court has held that noncompliance with a reasonable plan of rehabilitation is sufficient grounds for termination of parental rights. *In re Interest of A.Z., B.Z., and R.Z.*, 230 Neb. 291, 430 N.W.2d 901 (1988). Because we find that there is sufficient evidence to terminate appellant's

parental rights on the basis of noncompliance with the rehabilitation plan, we limit our analysis to that issue.

Section 43-292 provides:

> The court may terminate all parental rights between the parents or the mother of a juvenile born out of wedlock and such juvenile when the court finds such action to be in the best interests of the juvenile and it appears by the evidence that . . . .
>
> . . . .
>
> (6) Following a determination that the juvenile is one as described in subdivision (3)(a) of section 43-247, reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the determination.

Under § 43-292(6), a juvenile court has the discretionary power to prescribe a reasonable plan for parental rehabilitation to correct the conditions underlying the adjudication that a child is a juvenile within the Nebraska Juvenile Code. *In re Interest of A.Z., B.Z., and R.Z., supra.* This court has held that to terminate parental rights under § 43-292(6),

> "the State must prove by clear and convincing evidence that (1) the parent has willfully failed to comply, in whole or in part, with a reasonable provision material to the rehabilitative objective of the plan and (2) in addition to the parent's noncompliance with the rehabilitative plan, termination of parental rights is in the best interests of the child."

In re Interest of A.Z., B.Z., and R.Z., supra at 298, 430 N.W.2d at 907 (citing *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 417 N.W.2d 147 (1987)). Specifically, appellant argues that there was insufficient evidence to support a finding that her noncompliance with the plan was willful and that even if there was willful noncompliance on her part, it did not relate to a material provision of the plan.

In our de novo review of the record, we are 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. In addition, because

the Supreme Court tries factual questions on the record de novo, impermissible or improper evidence is not considered. *In re Interest of A.Z., B.Z., and R.Z., supra.* The final rehabilitation plan adopted by the county court on March 4, 1986, is set out in exhibits 3 and 4. Exhibit 4 is the more detailed version of the plan, which delineates the goals the plan is designed to accomplish and contains definitions of terms included within the plan. Exhibit 3 is a simplified version of the plan, which basically contains summaries of each provision in the plan. Both versions of the plan were signed by the appellant, and appellant testified on cross-examination that she understood the rehabilitation plan.

The first provision of the plan required appellant and her husband, S.T., to acquire a suitable living place. The plan, as set forth in exhibit 4, provides as follows:

> [S.T.] and [V.C.T.] shall obtain and maintain a suitable place to live utilizing appropriate household skills and performing normal household duties.
>
> A. To "obtain" a suitable place to live shall mean to rent, lease or purchase a home or apartment in a suitable location and of such size as to meet the minimum requirements of the total family, including children if they were returned to the home. This must be done for a minimum of 6 months.
>
> B. To "maintain" a suitable place to live shall mean to keep the utilities, taxes, insurance and any other normal expenses paid and current; to provide decent and adequate furniture of a sufficient quality and amount to accommodate the total family; *to keep the living unit clean* and demonstrate minimum basic home making skills diet, cooking and budget.
>
> C. The purposes of these requirements are to require the parent(s) and/or stepparent to assume the responsibility for providing and maintaining an independent dwelling unit which does not include relatives, to up-grade the atmosphere in which the family unit will live and *provide minimum healthy, safe, shelter care for the children.*

(Emphasis supplied.) The version in exhibit 3 summarizes this

provision by stating that appellant and her husband shall "[m]aintain a two bedroom house or apartment for six months." At the time of trial in May 1988, appellant had lived in a mobile home in Harvard, Nebraska, for 2 years. Based on the provision in the simplified plan, appellant argues that she has complied with the plan by maintaining a residence for over 6 months. However, as evidenced by the detailed version of the plan set out above, maintenance of a residence does not refer to geographic location alone. Appellant's argument completely ignores the fact that she was also required to keep the residence clean and to provide minimum, healthy, safe shelter for her children. The evidence clearly and convincingly establishes that she did not.

The evidence shows that during her 2-year occupancy, the appellant and her husband made several improvements to the mobile home, such as installing new carpeting, replacing the water pipes, repairing the floor, changing the linoleum, and replacing the stove and the refrigerator. Yet, despite these improvements, we find that the appellant has not complied with the housing provision in the plan because she has failed to provide a healthy, clean, and sanitary place to live for her children. When the appellant and her husband first moved into the mobile home, the carpets were covered with dog urine and smelled. Concerned about health problems for the newborn child, M.T., the DSS caseworker repeatedly urged the appellant to have the carpets cleaned. Yet, it took 5 months for the appellant to correct the problem. Subsequent to appellant's moving into the home, the residence became infested with cockroaches. At one point the infestation of cockroaches was so bad the caseworker was forced to keep her purse and coat off the floor so that she would not carry any roaches home with her. Cockroaches also infested the appellant's food, the refrigerator, and the stove. In fact, the appellant testified that she used to warm up the stove to kill the cockroaches so that she could cook in it. Before finally replacing it with another, she used this stove for 2 years, yet failed to clean it sufficiently to remove the roaches. The record indicates that the residence still is infested by cockroaches. Additionally, large numbers of flies and fleas pervade the house. In one instance, the flea infestation was so

bad that the caseworker would only meet with the appellant in her car. The pest problem was not helped by the fact that the appellant kept stray animals, such as kittens, in the home. According to the appellant, one time the flies laid eggs on the kittens, which then developed into maggots, which burrowed into the animals' skin. Appellant admitted that she kept the maggot-infested kittens in the house despite the recommendations of the DSS caseworker to remove them from the residence and the presence of M.T. In addition to these specific incidents and ongoing problems, the three caseworkers who worked with the appellant all testified that appellant failed to keep her home clean and sanitary on a consistent basis. The house would only be clean for scheduled visits and would be a mess for unscheduled visits. Finally, even the appellant, on cross-examination, admitted that her home was still not a fit place to raise children, although it was getting better. The lack of sanitary conditions is particularly alarming in view of the testimony of Dr. Thomas Tonniges, a pediatrician, who treated appellant's son, M.T., on an emergency or walk-in care basis. He stated:

> I have the feeling that there were lots of other illnesses that we didn't treat him for and in view of that I'd say that he has had a generous number of infections and accidents, particularly in view of the fact that he's the single child of the family which should limit his exposure to contagious disease.

We find that there is sufficient evidence to show clearly and convincingly that appellant has willfully not complied with the portion of the rehabilitation plan requiring her to obtain and maintain suitable housing.

Appellant, acknowledging the problems with the mobile home, contends that she did not move to a better home in order to demonstrate stability and to comply with the rehabilitation plan by maintaining a residence for more than 6 months. She further alleges that she is being penalized because she lacked the financial resources to obtain better housing. Finally, she contends in her testimony at trial that all the problems that occurred with the home were not her responsibility, but the responsibility of her landlord, and she should not be penalized

for the lack of diligence of her landlord in repairing the items. Notwithstanding her claims, we reiterate that our finding of noncompliance with the housing provision of the plan is not based on evidence relating to the structural shape the home was in but, rather, on evidence demonstrating that the home was not kept in a clean, safe, and sanitary condition. In addition, the DSS caseworkers all testified that recommendations they made to make the home sanitary and clean were within the appellant's financial means. For example, to solve the rug problem the caseworker recommended a $2 bottle of ammonia; yet, it still took 3 months after that recommendation was made for the appellant to clean the rug.

Because we find that appellant has not complied with the housing provision of the rehabilitation plan, it is not necessary to discuss the evidence relating to compliance with other provisions of the plan, except to note that appellant did comply with some of the provisions. However, it was apparent that there was evidence demonstrating that in the course of complying with the rehabilitation plan, appellant has a poor attitude and is resistant to change, and because of that there is little hope of reunification. When suggestions were repeatedly made to the appellant, she did not follow them or she would temporarily implement the suggestion only to ignore the recommendation the next day. Further, the appellant has never shown any initiative to resolve any of these problems without being instructed by DSS.

Despite appellant's contention to the contrary, we also find the housing provision of the rehabilitation plan reasonable and material. Specifically, the appellant argues that since P.M.C. was adjudicated, pursuant to § 43-247(3)(a) (Reissue 1988), as a juvenile "homeless or destitute, or without proper support through no fault of his or her parent," the provisions of the rehabilitation plan are not material, since they are not rehabilitative of the condition leading to the adjudication. As this court recently said in *In re Interest of M.R., J.R., and N.R.*, 228 Neb. 47, 52, 420 N.W.2d. 924, 927 (1988):

> "Materiality of a provision in a court-ordered rehabilitative plan is determined by a cause-and-effect relationship: Does a provision in the plan tend to correct,

> eliminate, or ameliorate the situation or condition on which the adjudication has been obtained under the Nebraska Juvenile Code? An affirmative answer to the preceding question provides the materiality necessary in a rehabilitative plan for a parent involved in proceedings within a juvenile court's jurisdiction. Otherwise, a court-ordered plan, ostensibly rehabilitative of the conditions leading to an adjudication under the Nebraska Juvenile Code, is nothing more than a plan for the sake of a plan, devoid of corrective and remedial measures. Similar to other areas of law, reasonableness of a rehabilitative plan for a parent depends on the circumstances in a particular case and, therefore, is examined on a case-by-case basis."

(Citing *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 417 N.W.2d 147 (1987).) At the time P.M.C. was removed from appellant's care, appellant and the child were living at the appellant's parents' house, and the appellant's parents were raising the child. It was this situation which precipitated the action on the part of DSS and ultimately led to the adjudication. Clearly, the housing provision in the plan was reasonable and material because it required the mother to take the responsibility of establishing her own home and to provide a clean, safe, and sanitary place to raise her children. Accordingly, we find that there is clear and convincing evidence to show willful noncompliance with a reasonable provision material to the rehabilitation plan.

We also find clear and convincing evidence that the termination of parental rights of the appellant is in the best interests of P.M.C. "[W]here parents are unable or unwilling to rehabilitate themselves within a reasonable time, the best interests of the children require that parental rights be terminated without delay." *In re Interest of M.R., J.R., and N.R., supra* at 53, 420 N.W.2d at 927-28. " ' "[A] child cannot, and should not, be suspended in foster care, nor be made to await uncertain parental maturity." ' " *In re Interest of L.O. and B.O.*, 229 Neb. 889, 896, 429 N.W.2d 388, 393 (1988) (citing *In re Interest of Z.R.*, 226 Neb. 770, 415 N.W.2d 128 (1987)). This court has said it will not gamble with a child's

future. *In re Interest of E.R., J.R., and A.R.*, 230 Neb. 646, 432 N.W.2d 834 (1988). Every expert working during the 5-year period this case was pending, including two psychologists and several DSS caseworkers who worked with the appellant, came to the same basic conclusion: No substantial progress has been made by the appellant toward rehabilitation, and there is no likelihood of rehabilitation within the next few years. As the county court noted in its order of termination, P.M.C. has been under the care of DSS "since approximately 3 weeks after her birth on May 18, 1983, or 98 % of her life to date." P.M.C. cannot wait forever for her mother to rehabilitate herself, and she needs some permanency in her life. Therefore, we find there is clear and convincing evidence that it is in the best interests of this child to terminate appellant's parental rights.

As an aside, however, this court is disturbed by the fact that despite the shocking lack of sanitary conditions in the appellant's home, which rendered the dwelling unsuitable as a place to raise children and provided the partial basis for termination of appellant's parental rights, DSS failed to take any action with regard to the younger child, M.T. Christine McCauley of DSS, who was in charge of supervising P.M.C.'s case, testified that to remove M.T. would have caused more problems than it solved. This glaring inconsistency is particularly disturbing, since the practical effect was to ignore the best interests of the younger child by leaving him exposed to extremely unsanitary conditions. How DSS can claim that a home is unsanitary, thereby not meeting the department's minimum standard for one child to live in, and yet virtually sit idly by, leaving another child to live in these conditions, is beyond imagination and is reprehensible.

Appellant's second and last assignment of error, relating to the court's denial of appellant's requests for extended and unsupervised visits, is not addressed because the appellant fails to discuss the issue in her brief. Assignments of error not discussed are not considered by this court. *Bock v. Bank of Bellevue*, 230 Neb. 908, 434 N.W.2d 310 (1989).

Accordingly, the judgment of the county court terminating the appellant's parental rights is affirmed.

AFFIRMED.

EDMUND W. HOLLSTEIN AND OTHER INDIVIDUALS SIMILARLY SITUATED, APPELLANTS, V. FIRST NATIONAL BANK OF AURORA, APPELLEE.

437 N.W.2d 512

Filed March 31, 1989. No. 88-737.

Certified Question from the U.S. Court of Appeals for the Eighth Circuit. Judgment entered.

Gary J. Nedved, of Bruckner, O'Gara, Keating, Sievers & Hendry, P.C., for appellants in the U.S. Court of Appeals.

William R. Hadley, of Hauptman, O'Brien, Wolf & Hadley, P.C., for appellee in the U.S. Court of Appeals.

Richard J. Pedersen and Carol C. Knoepfler, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for amicus curiae Nebraska Securities Industry Association.

Kenneth C. Stephan, of Knudsen, Berkheimer, Richardson & Endacott, for amicus curiae Dain Bosworth, Inc.

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

PER CURIAM.

This matter is submitted to us, pursuant to Neb. Rev. Stat. § 24-219 (Reissue 1985), as a certified question of law from the U.S. Court of Appeals for the Eighth Circuit. Specifically, the question is:

> Whether the Nebraska statutes governing sanitary and improvement districts, Neb. Rev. Stat. [§§] 31-701 et seq. (Reissue 1984), grant a priority of payment in favor of bonds over warrants so as to require that bonds be fully paid prior to utilizing revenues for payment of warrants.

This question was precipitated by the filing by Sanitary and Improvement District No. 65 of Sarpy County, Nebraska, of a chapter 9 bankruptcy petition. According to the statement of the case contained in the motion of the appellants in the U.S. Court of Appeals, which is accepted as true for the purpose of this proceeding, a declaratory judgment action pursuant to bankruptcy rule 7001 was filed by the debtor, requesting a

determination of the rights of warrantholders and bondholders under the plan of adjustment submitted by the debtor. The U.S. Bankruptcy Court found that "the intent of the Nebraska legislature was and still is to provide that bonds get paid under all circumstances," and "there is a significant difference in priority of payment as between warrantholders' and bondholders' rights under the Nebraska [statutes]." The order of the bankruptcy court was affirmed by the U.S. District Court for the District of Nebraska. Upon appeal to the U.S. Court of Appeals, and on motion of the appellants in that court, the present question of law was certified to this court.

S.I.D. No. 65 was formed in accordance with the laws of Nebraska. See Neb. Rev. Stat. §§ 31-727 et seq. (Reissue 1988). A sanitary and improvement district is a political subdivision of the state, the primary function of which is to install and maintain public improvements such as streets, sewers, utility lines, and other improvements associated with residential or commercial subdivisions.

A district initially pays for the costs of the improvements by issuing warrants to pay the contractors. At that time the S.I.D. does not have funds available to pay off the warrants because there is no significant tax base from which funds could come. Therefore, the warrants are presented to the county treasurer of the county wherein the district is located, who records the warrants with the promise to pay them when funds are available. The warrants draw interest from the time they are registered.

Contractors holding the S.I.D. warrants, wanting the money immediately, sell the warrants to investment bankers, who in turn sell them to investors. Warrants are essentially a construction loan and represent interim financing for the improvements. Under existing state law, warrants can be paid from funds expected to be received in the future, including, but not limited to, special assessment collections, proceeds of bond issues, or levies on taxable property in the district. See § 31-727(5)(d).

Bonds, on the other hand, are the long-term financing instrument of the district. Bonds are generally issued to pay off the warrants and accrued interest on the warrants. The bonds

are paid off with funds from special assessments, tax levies, or revenues received by the S.I.D.

Warrants of S.I.D. No. 65 were issued on various dates commencing on May 21, 1973, and as of April 5, 1985, the district had outstanding warrants in the total principal amount of $4,285,287.16, with accrued interest of $1,496,889.96.

Bonds of S.I.D. No. 65 were issued in March of 1977 in the total amount of $1,500,000. Proceeds of the bond issue were used to partially redeem outstanding warrants. As of April 5, 1985, the district had outstanding bond principal in the amount of $1,275,000, with accrued interest of $48,625.44. The bonds issued by S.I.D. No. 65 to redeem the district's warrants were general obligation bonds because the only source of revenue for repayment of the bonds was the general taxing authority of the district.

All parties agree S.I.D. No. 65 is unable to generate sufficient revenue to retire the outstanding warrants and bonds in full. A dispute over whether the claims of bondholders, warrantholders, or neither should be paid in full before payment is made on the claims of the other arose because the warrants, bonds, and all other documents of S.I.D. No. 65 are silent on the issue of priority of repayment between bonds and warrants. Therefore, resolution of the dispute depends upon the general law and interpretation of Nebraska statutes relating to sanitary and improvement districts.

The foregoing facts have been gleaned from the record furnished by the U.S. Court of Appeals of testimony and evidence originally adduced in the bankruptcy court.

The general law is of little help except for an isolated statement found in 15 E. McQuillin, The Law of Municipal Corporations § 42.02 at 500 (3d ed. 1985), that "[a] warrant is included within the term 'an instrument in writing,' but is to be distinguished from a municipal bond." The authority for this statement was found by the author in *Shelley v. St. Charles County Court*, 21 F. 699 (E.D. Mo. 1884). In *Shelley*, the court said at 700-01:

> There is a vast difference between bonds and warrants. Warrants are general orders payable when funds are found, and there is propriety in the rule providing that

> they shall be paid in the order of presentation, the time of presentation to be indorsed by the treasurer on the warrants. But bonds are obligations payable at a definite time, running through a series of years. They are payable when the time of their maturity arrives, independent of any presentation.

It is therefore necessary that we look to our own statutes.

> Warrant shall mean an investment security under Article 8 of the Uniform Commercial Code in the form of a short-term *interest-bearing order* payable on a specified date issued by the board of trustees or administrator of a sanitary and improvement district to be paid from funds expected to be received in the future, including, but not limited to, property tax collections, special assessment collections, and proceeds of sale of general obligation bonds.

(Emphasis supplied.) § 31-727(5)(d).

> General obligation bond shall mean an investment security under Article 8 of the Uniform Commercial Code in the form of a long-term *written promise to pay* a specified sum of money, referred to as the face value or principal amount, at a specified maturity date or dates in the future, plus periodic interest at a specified rate.

(Emphasis supplied.) § 31-727(5)(e).

> The district may borrow money for corporate purposes and issue its general obligation bonds therefor and *shall annually levy a tax* on the actual value of all the taxable property in the district, except intangible property, *sufficient to pay the interest and principal on the bonds and* for the purpose of creating a sinking fund for the maintenance and repairing of [improvements].

(Emphasis supplied.) § 31-739(1).

> The board of trustees shall have power, in connection with the issuance of any warrants or bonds of the district, *to agree to make a specified minimum levy* on taxable property in the district to pay, or *to provide a sinking fund to pay, principal and interest on warrants and bonds of the district* . . . .

(Emphasis supplied.) § 31-740.

> All special assessments provided by sections 31-727 to 31-762 and all connection charges collected shall, when levied, constitute a *sinking fund for the purpose of paying the cost of the improvements* herein provided for with allowable interest thereon and shall be solely and strictly applied to such purpose to the extent required . . . .

(Emphasis supplied.) § 31-754.

> For the *purpose of paying the cost of the improvements* herein provided for, the board of trustees or the administrator, after such improvements have been completed and accepted, shall have the *power to issue negotiable bonds* of any such district, to be called sanitary and improvement district bonds, payable in not to exceed thirty years. . . . Such bonds shall bear interest payable annually or semiannually. . . . For the purpose of *making partial payments* as the work progresses, *warrants may be issued* by the board of trustees or the administrator upon certificates of the engineer in charge showing the amount of work completed and materials necessarily purchased and delivered for the orderly and proper continuation of the project, in a sum not to exceed ninety-five percent of the cost thereof. *Warrants issued prior to July 10, 1976,* for capital outlays of the district *shall become due and payable twelve months after April 21, 1982,* and warrants issued on or after July 10, 1976, for capital outlays of the district shall become due and payable not later than five years from the date of issuance; *Provided,* that such *warrants need not be retired on such date or within such five-year period and shall* not be in default *if* the *district court of the county shall determine,* upon application to it by the district, that the *district does not have the funds to retire such warrants* and either (1) the *district is unable to sell its bonds* in amount sufficient to retire such warrants, *or* (2) an *unreasonably high tax levy, as compared to the levy on other similar property in the county, would be required in order to cover the debt service requirements on bonds issued to retire such warrants. . . . [T]he district court may make such orders concerning retirement of the warrants* as it shall determine proper under the

circumstances of the district including ordering an increase in the tax levy of the district to provide funds for warrant redemption, except that *no court-ordered tax levy for redemption of warrants shall cause the total tax levy of the district to be unreasonably high as compared* with the tax levy of other similar property in the county. Such warrants shall draw interest at such rate as fixed by the board of trustees or the administrator and endorsed on the warrants, from the date of presentation for payment and shall be redeemed and paid from the proceeds of special assessments or from the sale of the bonds issued and sold as provided in this section or from any other funds available for that purpose. *Bonds to redeem such warrants shall be issued as soon as economically feasible and* to the extent warrants are not redeemed from bond proceeds or other funds available for such purpose, *the district shall make a tax levy to provide a sinking fund for warrant redemption, except that such obligation shall not require a total tax levy by the district which shall be unreasonably high as compared with the tax levy on other similar property in the county. . . .* The *board of trustees* or the administrator *shall levy special assessments on all lots*, parcels, or pieces of real estate benefited by the improvement to the extent of the benefits to such property, *which, when collected, shall be set aside and constitute a sinking fund for the payment of the interest and principal of such bonds. In addition to the special assessments* provided for in this section, *there shall be levied annually a tax upon the actual value of all the taxable property in such district* except intangible property *which, together with such sinking fund* derived from special assessments, *shall be sufficient to meet payments of interest and principal on all bonds as such become due.* Such tax shall be known as the sanitary and improvement district tax and shall be payable annually in money.

(Emphasis supplied.) § 31-755.

The board of trustees or the administrator shall have the power to negotiate a scaling, discounting, reduction in

> interest rate, or any *other compromise* of any or all of the *bonds, warrants,* or *other indebtedness* of the district with the owners or holders of such indebtedness.

(Emphasis supplied.) § 31-778.

This court has established certain principles for the interpretation of statutes. When interpreting a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *Adkisson v. City of Columbus*, 214 Neb. 129, 333 N.W.2d 661 (1983). It is not within the province of the court to read meaning into a statute that is not warranted by legislative language. *State ex rel. Douglas v. Herrington*, 206 Neb. 516, 294 N.W.2d 330 (1980).

Statutes relating to the same subject are in pari materia and should be construed together. *McGowen v. Nebraska State Bank*, 229 Neb. 471, 427 N.W.2d 772 (1988). In construing a statute, the legislative intention is to be determined from general consideration of the whole act, with reference to the subject matter to which it applies and the particular topic under which the language in question is found, and the intent as deduced from the whole will prevail over that of a particular part considered separately. *Matzke v. City of Seward*, 193 Neb. 211, 226 N.W.2d 340 (1975).

Applying these principles, we find no quarrel with the reasoning of the judge of the bankruptcy court or that of the judge of the U.S. District Court on appeal. It is obvious that the Legislature did not anticipate nor provide for treatment of warrantholders or bondholders in the case of an S.I.D. bankruptcy. Nevertheless, the two are to be treated differently regarding payment, if and when warrants become due and payable there are insufficient funds available to make such payment.

Section 31-755 provides for the retirement of warrants when due *unless* the district court determines that the district is unable to sell its bonds in an amount sufficient to retire such warrants, *or an unreasonably high tax levy* when compared to the levy of other similar property in the county would be required to cover the debt service requirements on bonds issued

to retire such warrants. On the other hand, § 31-755 provides that in addition to special assessments, there *shall be levied annually* a tax which, together with the sinking fund from special assessments, *shall be sufficient* to meet payments of interest and principal on *all bonds* as such become due.

As suggested by the district court, the taxing authority of the district must be used without limit to satisfy its obligation to pay the bondholders; whereas, in order to pay the warrants, the authority of the district is limited to levying of a tax which is not unreasonably high as compared with the tax levy on other similar property in the county.

Our answer to the certified question is that the statutes of the State of Nebraska do grant a priority in favor of bonds over warrants so as to require that bonds be fully paid according to their terms prior to utilizing revenues for payment of warrants.

Judgment is entered accordingly.

JUDGMENT ENTERED.

STATE OF NEBRASKA, APPELLEE, V. GARY J. LESAC, APPELLANT.

437 N.W.2d 517

Filed March 31, 1989. No. 88-895.

1. **Judgments: Appeal and Error.** In all cases other than appeals from the small claims court, the district court shall review the case for error appearing on the record made in the county court. Neb. Rev. Stat. § 24-541.06 (Reissue 1985).
2. **Verdicts: Appeal and Error.** A guilty verdict will not be reversed by this court on appeal unless the evidence is so lacking in probative force that it is insufficient as a matter of law.
3. **Convictions: Appeal and Error.** In resolving a challenge to the sufficiency of the evidence, 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 must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
4. **Controlled Substances: Circumstantial Evidence: Proof.** Proof of the identity of a substance by circumstantial evidence, including lay testimony by a person sufficiently familiar with the drug in question, may be sufficient in a drug prosecution, as long as this evidence proves the identity of the substance beyond a reasonable doubt.

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

Michael L. Munch, Assistant Sarpy County Public Defender, for appellant.

Robert M. Spire, Attorney General, and Kimberly A. Klein for appellee.

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

WHITE, J.

Gary J. Lesac appeals from a judgment of conviction entered by the county court for Sarpy County, Nebraska, of driving while under the influence of a controlled substance, possession of marijuana (less than one ounce), and operating a motor vehicle left of the centerline. On appeal to the district court for Sarpy County, the convictions were affirmed.

The appellant assigns two errors: (1) the finding by the trial court that the State had introduced evidence sufficient to constitute a prima facie case of driving while under the influence of a controlled substance, and (2) the trial court's ruling allowing certain opinion testimony that the defendant was under the influence of a controlled substance.

On January 19, 1988, Officer Geralyn M. Brandt of the La Vista Police Department was patrolling in a cruiser eastbound on Harrison Street approaching 78th Street in La Vista, Sarpy County, Nebraska, when she observed an automobile, being operated in a westerly direction on Harrison Street, drive left of center on Harrison Street and almost strike the officer's cruiser. Officer Brandt turned her cruiser and began pursuit of what subsequently developed to be the appellant's automobile. While proceeding westbound on Harrison Street, she observed the automobile completely leave the westbound lane and operate in the wrong lane of traffic on Harrison Street. She successfully stopped the automobile at approximately 83d and Harrison Streets.

Approaching the vehicle, Officer Brandt testified, she asked for identification and observed that the appellant's eyes appeared to be bloodshot and glassy and that the appellant's

speech was slurred. She detected no odor of alcohol. Thereafter, Officer Brandt, suspecting that the appellant was operating under the influence of a substance other than alcohol, requested the appellant, Lesac, to perform certain sobriety tests, finger-to-nose and heel-to-toe, each of which tests the appellant failed.

In due course, the officer received written permission from the appellant to search the vehicle, a 1974 brown Mustang, and found nothing of interest. An officer who was summoned as a backup officer then engaged in a pat-down search of the appellant at the scene and discovered a package of a green, leafy substance identified at trial as marijuana. Appellant does not contest here the conviction on the charge of possession of marijuana, nor of operating a motor vehicle left of the centerline.

After *Miranda* warnings were given, the appellant waived the presence of counsel, agreed to speak with the officer, and thereupon informed the officer that he had consumed four bowls of marijuana on that same date. Told that he had been observed operating to the left side of the centerline, the appellant stated that he had fallen asleep.

At trial, Officer Brandt was asked whether she had an opinion whether, at the time of the stop, the appellant was under the influence of a controlled substance. Over objection, she indicated in the affirmative and, when asked her opinion, stated that she was of the opinion that the appellant was under the influence of a controlled substance. In addition, Richard Larsen, an investigator for the Sarpy County attorney's office, testified that he had been employed in the detection of substance abuse in the Boys Town Police Department and with the Nebraska State Patrol division of drug control. He stated that he had been employed at Boys Town for approximately a year and with the State Patrol 22 years, was a graduate of the Federal Drug Enforcement Administration Academy, had participated in over 300 drug-related arrests, and was familiar with the effects of marijuana. He described those effects as consistent with the appellant's condition, that is, glassy eyes and slurred speech. Based on the testimony of the officer, the presence of the marijuana found on the appellant's person, the

statement of the appellant admitting consumption of marijuana, and the officer's description of the driving pattern, Larsen was of the opinion that the appellant had consumed and was under the influence of a controlled substance, to wit, marijuana, at the time of his arrest.

In the State's brief, the State asserts that the appellant may not properly raise the assigned errors, since they were not raised in the district court on appeal, citing *State v. Painter*, 224 Neb. 905, 402 N.W.2d 677 (1987). The State's reliance on *Painter* is misplaced. In *Painter*, the error alleged that we declined to consider as not being raised in the district court was the alleged incompetence of counsel in the county court, a thing not demonstrable from the record made in the county court. Neb. Rev. Stat. § 24-541.06 (Reissue 1985) provides that "[i]n all cases other than appeals from the Small Claims Court, the district court shall review the case for error appearing on the record made in the county court . . . ." As the errors, if any, are contained in the record, the State's point is not well taken, and this court will properly consider the assigned errors.

In considering the first assignment of error, we note that we have frequently said, "A guilty verdict will not be reversed by this court on appeal unless the evidence is so lacking in probative force that it is insufficient as a matter of law." *State v. Taylor*, 221 Neb. 114, 119, 375 N.W.2d 610, 614 (1985); *State v. Painter, supra*. Further,

> [i]t, however, is a well-established axiom that in resolving a challenge to the sufficiency of the evidence, 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 is for the trier of fact and must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.

State v. Borchardt, 224 Neb. 47, 59, 395 N.W.2d 551, 559-60 (1986).

Taking a view most favorable to the State, there is sufficient evidence to support the appellant's conviction for operating a motor vehicle while under the influence of a controlled substance. The appellant does not contest that he was operating

a motor vehicle on the wrong side of the road. He admitted consumption of four bowls of marijuana (which, Larsen testified, would be between one-half and 1 gram of marijuana per bowl), was found to have marijuana in his possession, had glassy eyes, and, further, failed the sobriety tests. It would be frivolous to suggest that the evidence was not sufficient to sustain the conviction. The first assignment is without merit.

With respect to the second assignment of error, recently, in *State v. Watson, ante* p. 507, 437 N.W.2d 142 (1989), this court considered the evidence of the identity of a drug by a lay witness, and we said,

> We are therefore in agreement with the vast majority of courts in this nation that hold proof of the identity of a substance by circumstantial evidence, including lay testimony by a person sufficiently familiar with the drug in question, may be sufficient in a drug prosecution. Of course, this circumstantial evidence must prove the identity of the substance beyond a reasonable doubt.

Id. at 513, 437 N.W.2d at 146. The opinions of Officer Brandt and Investigator Larsen were rationally based on those witnesses' perceptions and were obviously helpful to the determination of a fact in issue. They were therefore admissible. Neb. Rev. Stat. § 27-701 (Reissue 1985).

The assignments of error are not meritorious. The judgment of the district court is therefore affirmed.

AFFIRMED.

IN RE ESTATE OF RUTH I. MILLER, DECEASED. PAULINE HARBERTS ET AL., APPELLANTS, V. JOHN P. MILLER, PERSONAL REPRESENTATIVE OF THE ESTATE OF RUTH I. MILLER, DECEASED, APPELLEE.

437 N.W.2d 793

Filed April 7, 1989. No. 87-404.

1. **Decedents' Estates: Appeal and Error.** The Supreme Court's review in probate cases is for error appearing on the record.
2. **Decedents' Estates: Proof.** A party seeking to recover upon a lost or stolen written instrument has the burden of proving the former existence, execution, delivery, theft or loss, and contents of the instrument by clear and convincing evidence.
3. **Decedents' Estates: Evidence.** The inability to find a document does not necessarily mean that the document is stolen or lost.
4. **Decedents' Estates: Wills: Jurisdiction: Courts.** When a will contest is transferred pursuant to Neb. Rev. Stat. § 30-2429.01 (Reissue 1985), the district court obtains jurisdiction over all proceedings related to the contest action. Jurisdiction remains with the district court until a final decision is reached and the case remanded to the county court. Once the contest is transferred to the district court, the county court has no authority over the matter other than to carry out the district court's final decision after remand.
5. **Decedents' Estates: Attorney Fees: Appeal and Error.** In all matters arising under the Nebraska Probate Code, if it shall appear to the district court that an appeal was taken vexatiously or for delay, the court shall adjudge that the appellant shall pay the cost thereof, including an attorney fee. Neb. Rev. Stat. § 24-541.10(2) (Reissue 1985).
6. **Decedents' Estates: Interest: Wills: Time.** To charge a personal representative with interest would be inequitable when the delay in payment is caused by a will contest or through other litigation which prevents speedy distribution of the estate. A personal representative is not ordinarily chargeable with interest, at least until a reasonable time has elapsed after the will contest or other litigation has been completed.

Appeal from the District Court for Douglas County: LAWRENCE J. CORRIGAN, Judge. Affirmed in part, and in part reversed.

Steven O. Stumpff, of Stumpff Law Office, and Daniel W. Ryberg for appellants.

Joseph P. Caniglia and James R. Sacoman, of Seminara, Caniglia, Turco, McCarthy & Sacoman, for appellee.

BOSLAUGH, WHITE, SHANAHAN, and FAHRNBRUCH, JJ., and WITTHOFF, D.J.

FAHRNBRUCH, J.

Three sisters of the decedent, Ruth I. Miller, contend that the probate court erred when it (1) failed to set over the benefits of Miller's retirement plan to them and their brother, (2) assessed attorney fees and costs against them in a contest of the decedent's will, and (3) disallowed interest on a bequest to one of the sisters.

On appeal, the Douglas County District Court affirmed the decision of the Douglas County Court, and the sisters appeal to this court. We affirm in part and reverse in part.

Our review in probate cases is for error appearing on the record. *In re Estate of Reimer*, 229 Neb. 406, 427 N.W.2d 293 (1988); *In re Estate of Odineal*, 220 Neb. 168, 368 N.W.2d 800 (1985).

Ruth Miller died in Omaha on June 18, 1984. Her husband, Bert Miller, preceded her in death on May 28, 1984. Mrs. Miller died without issue. Besides his wife, Bert Miller was survived by two sons from a prior marriage. Because Mrs. Miller had cancer, it was anticipated that she would die before her husband. Mrs. Miller's will in effect prior to Bert Miller's death left all of her property to her husband. It did not provide for any alternate beneficiaries. Under those circumstances, if her husband died before she did, Mrs. Miller's property would have descended to her three sisters and her brother under the intestate laws of Nebraska. Neb. Rev. Stat. § 30-2303 (Reissue 1985). However, after her husband died, Mrs. Miller did execute a new will. In that will, she left her interest in a farm she had received through her side of the family and her personal and household effects to her three sisters and brother. Mrs. Miller also left a $50,000 cash bequest to one of her sisters, Pauline Harberts. The balance of her $587,057 gross estate was left to Mrs. Miller's two stepchildren, sons of her deceased husband.

On June 18, 1985, appellants filed objections to the proposed "Schedule of Distribution" of the estate's assets. A hearing on those objections was held November 19, 1985. The probate division of the Douglas County Court found that the proceeds of Mrs. Miller's retirement plan were assets of the estate and that Mrs. Miller's sister, Pauline Harberts, was estopped from

receiving interest on her $50,000 bequest. A portion of the bequest was paid shortly after Mrs. Miller's death, and the balance was paid on August 25, 1986. The Douglas County probate court ordered appellants to pay attorney fees and other costs incurred by the estate in defending appellants' contest of their sister's will.

THE RETIREMENT PLAN

In life, Mrs. Miller owned and operated the Miller Art Gallery in Omaha. In 1981, she began contributing to a self-employed retirement program (Keogh plan). The plan was with Templeton World Fund and was serviced by Securities Fund Services, Inc. When she died, Mrs. Miller's plan totaled about $37,500. In May of 1982, Mrs. Miller executed a "Designation of Beneficiary" form naming her husband, Bert Miller, as the beneficiary of the plan upon her death. Her three sisters and brother were designated as alternate beneficiaries in the event Mrs. Miller's husband predeceased her. The original beneficiary document was mailed to Securities Fund. That organization acknowledged receipt of the document, but returned it to Mrs. Miller. The document states that the "form should be retained by the Participant. It should be forwarded to the Shareholder Service Agent, Securities Fund Services, Inc. . . . upon death of the Participant." Upon return by Securities Fund of the beneficiary document, Mrs. Miller sent a copy of it to her brother and advised him to maintain it in his safe.

After Mrs. Miller's death, the original beneficiary document was not found through a diligent search conducted by John P. Miller, the decedent's stepson and personal representative. Mrs. Miller's brother produced the copy. The fund proceeds were paid to the estate because the original "Designation of Beneficiary" was not presented to the fundholder. Nevertheless, John Miller indicated that he was willing to permit the proceeds of the Keogh plan to be distributed to his stepmother's sisters and brother, "although the absence of the executed beneficiary designation form [did] not legally require him to do so." Other issues were raised by Mrs. Miller's sisters. Thereafter, John Miller declined to set over the proceeds of Mrs. Miller's Keogh Plan to her sisters and brother.

The fact that John Miller was at first willing to give the plan's

proceeds to the appellants, even without the original beneficiary designation form, makes it unlikely that the form was stolen or destroyed after Mrs. Miller's death. As will be shown, the more likely inference is that before her death, Mrs. Miller intentionally destroyed the document.

Appellants contend that the original beneficiary designation form was lost by Mrs. Miller. Appellants argue that they met their burden of proof under the rules in *Kuenzli v. Kuenzli*, 150 Neb. 855, 36 N.W.2d 247 (1949). In *Kuenzli*, we held that a party seeking to recover upon a stolen or lost written instrument has the burden of proving the former existence, execution, delivery, theft or loss, and contents of the instrument by clear and convincing evidence.

Appellee theorizes that the missing original beneficiary designation form is analogous to a missing will. When a will cannot be found at the time of death, it is presumed destroyed by the decedent with the intention of revoking the will. *In re Estate of Drake*, 150 Neb. 568, 35 N.W.2d 417 (1948). This rule is specifically designed for lost wills, and we decline to apply it to missing beneficiary designation forms. Instead, we consider the missing form to be controlled by our stolen or lost document holdings and apply the rules set forth in *Kuenzli*.

Under *Kuenzli*, the appellants had the burden of proving by clear and convincing evidence (1) that the beneficiary designation form was in existence at one time; (2) the contents of the form; (3) that it had been executed by Mrs. Miller; (4) that it had been delivered; and (5) that it was stolen or lost, as opposed to having been intentionally destroyed by Mrs. Miller.

The appellants proved by clear and convincing evidence that the original beneficiary form naming Mrs. Miller's brother and sisters as alternate beneficiaries existed at one time, the contents of the form, and that it had been executed by Mrs. Miller.

Considering the facts of this case, the form could not have been effectively delivered after Mrs. Miller's death. It is to be remembered that the appellants' interest in the Keogh plan funds could not vest (1) until the death of Mrs. Miller and (2) until the original executed form naming appellants beneficiaries of the fund was delivered to the fund's agent after Mrs. Miller's death.

The trial court found that the appellants failed to prove by clear and convincing evidence that the original beneficiary form was stolen or lost. As a matter of fact, the appellants never claimed the form as stolen, only that it was lost. The inability to find a document after someone dies does not necessarily mean that the document is lost.

After Securities Fund returned the original beneficiary designation form, Mrs. Miller knew that if the form was to be effective, it must be sent to Securities Fund after her death. The beneficiary designation was revocable. If Mrs. Miller continued in her desire to have her siblings receive the fund proceeds, she could have placed the original form in escrow, placed it where it could have been found upon her death, or mailed the original, rather than a copy, to her brother for safekeeping and presentation to the fund upon her death.

At the time her will was written after her husband's death, Mrs. Miller was obviously aware of the extent of her property and the objects of her bounty. She did not exclude her siblings from her will, but left them her interest in the family farm and her personal and household effects. Mrs. Miller also left one of her sisters a bequest of $50,000; that amount alone is well in excess of the fund's proceeds. It can be inferred that Mrs. Miller, having had contact with Securities Fund regarding her beneficiary form, was aware of the Keogh fund contract provision that the funds would go to her estate in the absence of presenting a valid original beneficiary designation form to the funds servicing agent after her death.

The fact that Mrs. Miller, a competent and successful businesswoman, opted to keep the original beneficiary designation form herself, and the fact that the Keogh funds were not mentioned in her will, is significant. The inference that Mrs. Miller destroyed the original form designating her sisters and brother as alternate beneficiaries with the intent to revoke its effectiveness is, at the very least, as strong as the inference that the original form was lost.

The appellants, who are attempting to claim under the original beneficiary form, have failed to prove by clear and convincing evidence that the original beneficiary designation form was, in fact, lost. The trial court's finding that the Keogh

plan funds are an asset of the estate is correct and is affirmed.

ATTORNEY FEES AND COSTS

When a settlement involving the Keogh plan and other claims of the appellants against the decedent's estate could not be reached, appellants filed objections in county court to the probate of the will executed by Mrs. Miller after her husband's death. Appellants claimed that Mrs. Miller was coerced by her stepson lawyer, John Miller, into making the will and that the decedent was not competent at the time the will was executed.

The will contest was removed from the Douglas County probate court to the Douglas County District Court on July 3, 1985. Several depositions were taken. Mrs. Miller's three surviving sisters dismissed the case when it became apparent that they would not be successful in contesting the will Mrs. Miller had executed after her husband died.

Appellants' second assigned error is the Douglas County probate court's assessment against them of costs and attorney fees incurred by the personal representative in the will contest litigation. The court ordered that the appellants pay $6,146.64 in costs and attorney fees to the estate. Appellants argue that the county probate court was without jurisdiction to award costs related to their contest of the will because the action was removed to district court.

In support of their argument, appellants point to Neb. Rev. Stat. § 30-2429.01 (Reissue 1985), which provides the procedure for transferring a will contest to district court. That section in part provides:

> (3) Upon the filing of the transcript in the district court such court shall have jurisdiction over the proceeding on the contest. Within thirty days of the filing of the transcript any party may file additional objections.
>
> (4) The district court may order such additional pleadings as necessary, and shall thereafter determine whether the decedent left a valid will. Trial shall be to a jury unless a jury is waived by all parties who have filed pleadings in the matter.
>
> (5) The final decision and judgment in the matter transferred shall be certified to the county court and proceedings shall be had thereon necessary to carry the

final decision and judgment into execution.

When a will contest is transferred pursuant to this statute, the district court obtains jurisdiction over all proceedings related to the action. Jurisdiction remains with the district court until a final decision is reached as to the will's validity and the case remanded to the county court. Once the contest is transferred to the district court, the county probate court has no authority over the matter other than to carry out the district court's final decision after remand. We hold that the assessment of costs is in the district court.

We fail to find that the Nebraska Probate Code has any specific statute relating to the assessment of costs and attorney fees in a will contest action which has been transferred to a district court. That specific power has been reserved to the district court. Neb. Rev. Stat. § 24-541.10(2) (Reissue 1985) authorizes the district court to tax costs and attorney fees if appeal is taken vexatiously or for delay. The statute provides:

> In all matters arising under the Nebraska Probate Code, if it shall appear to the district court that an appeal was taken vexatiously or for delay, the court shall adjudge that the appellant shall pay the cost thereof, including an attorney's fee, to the adverse party in an amount fixed by the district court, and any bond required under subdivision (4)(a) of section 24-541.02 shall be liable therefor.

The order of the county probate court assessing costs and attorney fees to the appellants in the will contest is in error and should have been reversed by the district court on appeal. Accordingly, we reverse the district court on this issue and set aside the taxing of costs and attorney fees to the appellants. That being so, it is unnecessary for us to determine whether the will contest proceedings in the district court were taken vexatiously or for delay.

INTEREST ON PAULINE HARBERTS' BEQUEST

Finally, appellants assign as error the trial court's refusal to award interest on the $50,000 bequest to Pauline Harberts, Mrs. Miller's sister.

Neb. Rev. Stat. § 30-24,102 (Reissue 1985) provides that interest is to be paid on "pecuniary devises" paid out more than

1 year after the appointment of a personal representative. In this case, John Miller was appointed personal representative of the estate on June 25, 1984, and Harberts was paid the majority of her $50,000 bequest on August 25, 1986. Obviously the bequest was paid more than 1 year after the personal representative was appointed; however, that does not end the analysis.

Section 30-24,102 is qualified by the rule set forth in *In re Estate of Kierstead*, 128 Neb. 654, 259 N.W. 740 (1935). That rule provides in substance that to charge a personal representative with interest would be inequitable when the delay in payment is caused by a will contest or through other litigation which prevents speedy distribution of the estate. A personal representative is not ordinarily chargeable with interest, at least until a reasonable time has elapsed after the will contest or other litigation has been completed.

Because of the will contest action and the objections to the distribution schedule, the personal representative was unable to distribute the bequest within 1 year. It would be inequitable to charge the estate with interest for that time unless there was an unreasonable delay in payment after litigation ended.

The trial court released its memorandum decision on April 24, 1986. The final order and approval of the distribution schedule was filed July 24, 1986. According to appellants' brief, the bequest was paid to Harberts approximately 1 month later, on August 25, 1986. This is not an unreasonable delay, and Harberts is not entitled to interest.

The trial court's refusal to award interest on Harberts' bequest is correct and is affirmed.

AFFIRMED IN PART, AND IN PART REVERSED.

CAROL BROZOVSKY, APPELLANT, V. DEAN G. NORQUEST, APPELLEE. DEAN G. NORQUEST AND GRACE E. NORQUEST, APPELLEES, V. CAROL BROZOVSKY, APPELLANT.

437 N.W.2d 798

Filed April 7, 1989. Nos. 87-476, 87-477.

1. **Supreme Court: Jurisdiction: Final Orders: Appeal and Error.** The Supreme Court has jurisdiction only to hear appeals from final orders.
2. **Final Orders: Words and Phrases.** When no further action of the court is required to dispose of the cause pending, it is final; when the cause is retained for further action, it is interlocutory.
3. **Final Orders: Words and Phrases: Appeal and Error.** As a general rule, an order granting or denying a motion for a protective order is not a final judgment for purposes of appeal.
4. **Final Orders: Appeal and Error.** A discovery order can be reviewed on appeal from a final judgment in the case.

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

Lyle Joseph Koenig for appellant.

John C. Hahn, of Jeffrey, Hahn, Hemmerling & Wade, P.C., for appellees.

BOSLAUGH, SHANAHAN, and GRANT, JJ., and KNAPP and ROWLANDS, D. JJ.

BOSLAUGH, J.

These cases arise out of a controversy between Carol Brozovsky and Dean G. Norquest concerning the division and distribution of the assets of C.E. Norquest & Sons, Inc. Brozovsky was married to Clayton Norquest, who was a brother of Dean Norquest and who died in 1982.

On May 4, 1982, Brozovsky and Dean Norquest executed a detailed written agreement providing for the division of the assets of the corporation. At that time, Brozovsky was represented by Wallace W. Angle, and Norquest was represented by Ray L. Svehla. The agreement was approved by both counsel.

The agreement recited that the parties were the sole and equal shareholders of the corporation and provided for the division of both real and personal property and the assumption of

indebtedness.

Case No. 87-476 is an action commenced by Brozovsky to obtain a declaratory judgment as to the right of Dean Norquest to use a reuse pit located on land she received under the agreement, for partition of the pump located in the reuse pit, and for an accounting as to rent due her from Norquest for his use of her property.

Case No. 87-477 is an action commenced by Dean Norquest and Grace E. Norquest against Brozovsky for damages the plaintiffs alleged they sustained because of Brozovsky's failure to comply with the terms of the May 4, 1982, agreement. The plaintiffs allege that Brozovsky was to assume an indebtedness of $121,900 on land Dean Norquest received under the agreement and that as a result of her failure to assume the debt and make the mortgage payments, the Federal Land Bank of Omaha commenced an action to foreclose the mortgage. On April 29, 1987, the plaintiffs in case No. 87-477 filed "Proposed Deposition Questions to Wallace W. Angle" and filed the same document in case No. 87-476 on May 1, 1987. "Objections to Deposition Questions" were filed in case No. 87-477 on May 5, 1987. The objections alleged that a lawyer-client relationship existed between Angle and Brozovsky, that the proposed deposition questions sought to discover privileged information, and that Brozovsky claimed the privilege provided by Neb. Rev. Stat. § 27-503(3) (Reissue 1985).

On May 5, 1987, the objections filed by Brozovsky and a request for a protective order filed that day were heard and submitted to the trial court.

On May 15, 1987, the plaintiffs in case No. 87-477 filed a notice to take the deposition of Angle and a praecipe for a subpoena duces tecum for Angle. A subpoena was issued the same day.

On May 19, 1987, the trial court found that by pleading the "agreement upon which the action is based," Brozovsky had waived the attorney-client privilege. Angle was directed to testify and make himself available for the deposition. Brozovsky then filed a notice of appeal in each case.

The first matter that must be determined is whether there is a final order in either case from which an appeal could be taken.

Except in a very few situations where a special statute provides otherwise, the appellate jurisdiction of this court is limited to a review of final orders.

In *Lake v. Piper, Jaffray & Hopwood Inc.*, 212 Neb. 570, 573-74, 324 N.W.2d 660, 662 (1982), we said:

> It has long been the rule in this state that the Supreme Court has jurisdiction only to hear appeals from final orders. Neb. Rev. Stat. § 25-1911 (Reissue 1979). A final order is defined in Neb. Rev. Stat. § 25-1902 (Reissue 1979) as "[a]n order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment. . . ."
>
> In *Anson v. Kruse*, 147 Neb. 989, 990, 25 N.W.2d 896, 897 (1947), this court construed § 25-1902 as follows: " 'A decree to be final must dispose of the whole merits of the case, and leave nothing for the further consideration of the court. An order is final when it affects a substantial right and determines the action. . . . When no further action of the court is required to dispose of the cause pending, it is final; when the cause is retained for further action, as in this case, it is interlocutory.' "
>
> When a substantial right is undetermined and the cause is retained for further action, the order is not final. *Martin v. Zweygardt*, 199 Neb. 770, 261 N.W.2d 379 (1978).

In the absence of a final order from which an appeal may be taken, the appeal must be dismissed for lack of jurisdiction.

In *Matter of Bartow*, 101 N.M. 532, 685 P.2d 387 (1984), the appeal was from the trial court's denial of a request for a protective order. The court held:

> As a general rule an order granting or denying a motion for protective order is not a final judgment or decision for purposes of appeal. . . .
>
> Orders granting or denying a motion for protective order, like orders requiring or denying discovery, or orders requiring a party to submit to a physical or mental examination, generally do not constitute a final disposition of the proceedings. Therefore, they are not

> normally appealable, except upon the granting of an interlocutory appeal.

(Citations omitted.) *Id.* at 534, 685 P.2d at 389. See, also, *Bartschi v. Chico Community Memorial Hosp.*, 137 Cal. App. 3d 502, 187 Cal. Rptr. 61 (1982); *Breuer v. Flynn*, 64 Md. App. 409, 496 A.2d 695 (1985).

In 8 C. Wright & A. Miller, Federal Practice and Procedure § 2006 at 29-30, 33-36 (1970), the general rules applicable to discovery orders are stated as follows:

> A discovery order, as such, is normally merely an interlocutory order in the course of proceedings and is not appealable. . . .
>
> Ordinarily an order regarding discovery against a person not a party to the action is not appealable. The order is interlocutory insofar as it affects the party seeking discovery. It is final so far as the nonparty is concerned but if discovery is denied he has no need for review and if discovery is granted it is said that his remedy is to defy the order and appeal from a contempt judgment against him.
>
> . . .
>
> . . . .
>
> If a party is found guilty of criminal contempt for failure to comply with a discovery order, that is a separate proceeding and the contempt judgment is immediately appealable. If the party is held to be in civil contempt review must await final judgment, although it must be said that there are famous cases in which this distinction may have been overlooked. Some of the sanctions in addition to contempt that may be imposed under Rule 37 are final orders and are appealable as such. If an appeal lies from a contempt order or other sanction, the appellate court will consider whether the discovery order that led to the sanction was proper.
>
> A discovery order can always be reviewed on appeal from a final judgment in the case, even though it is difficult at that stage to show that the party has been prejudiced by the order, or that the question is not moot, and the harmless error doctrine, together with the broad discretion the discovery rules vest in the trial court, will

bar reversal save under very unusual circumstances. This is especially true when the order has granted discovery, since there is no effective means of correcting such an order once the discovery has been had. Reversal is more likely, although still unusual, when the trial court has erroneously denied or limited discovery.

In *Childs v. Kaplan*, 467 F.2d 628 (8th Cir. 1972), two judgment debtors attempted to appeal from an order requiring them to answer interrogatories regarding their assets. In holding the order not appealable the court said:

> The threshold issue presented by these appeals is whether the order appealed from is an appealable order.
>
> . . .
>
> . . . .
>
> The judgment appealed from is not a final judgment.
>
> . . .
>
> . . . The court, after considering the briefs submitted by the parties, entered the order appealed from requiring defendants to answer the interrogatories. In making such order, the court made the finding "there is nothing in the interrogatories which in the opinion of the court would tend to incriminate the defendants by answering the interrogatories." In our view, such order does not constitute a final order.
>
> The question of what sanctions, if any, should be imposed remains open. Defendants still have an opportunity in a proceeding to find them in contempt of court for failure to obey the order or in an application for a protective order to show that answers to the interrogatories will in fact tend to violate their Fifth Amendment rights under the standards set out in Hoffman v. United States, 341 U.S. 479, 71 S.Ct. 814, 95 L.Ed. 1118 (1951).
>
> In United States v. Ryan, 402 U.S. 530, 91 S.Ct. 1580, 29 L.Ed.2d 85 (1971), the Court held that an order denying a motion to quash a subpoena was not a final appealable order. The Court states: "We think that respondent's assertion misapprehends the thrust of our cases. Of course, if he complies with the subpoena he will

not thereafter be able to undo the substantial effort he has exerted in order to comply. But compliance is not the only course open to respondent. If, as he claims, the subpoena is unduly burdensome or otherwise unlawful, he may refuse to comply and litigate those questions in the event that contempt or similar proceedings are brought against him. Should his contentions be rejected at that time by the trial court, they will then be ripe for appellate review. But we have consistently held that the necessity for expedition in the administration of the criminal law justifies putting one who seeks to resist the production of desired information to a choice between compliance with a trial court's order to produce prior to any review of that order, and resistance to that order with the concomitant possibility of an adjudication of contempt if his claims are rejected on appeal. Cobbledick v. United States, *supra* [309 U.S. 323, 60 S.Ct. 540, 84 L.Ed. 783]; Alexander v. United States, 201 U.S. 117 [26 S.Ct. 356, 50 L.Ed. 686] (1906); cf. United States v. Blue, 384 U.S. 251, [86 S.Ct. 1416, 16 L.Ed.2d 510] (1966); DiBella v. United States, 369 U.S. 121, [82 S.Ct. 654, 7 L.Ed.2d 614] (1962); Carroll v. United States, 354 U.S. 394, [77 S.Ct. 1332, 1 L.Ed.2d 1442] (1957). Only in the limited class of cases where denial of immediate review would render impossible any review whatsoever of an individual's claims have we allowed exceptions to this principle. . . ." 402 U.S. 530, 532-533, 91 S.Ct. 1580, 1582, 29 L.Ed.2d 85.

While the proceeding in the case before us is distinguishable in that it involves a civil case rather than a criminal case, we believe the reasoning of Ryan and the cases cited therein applies to our present situation. Interlocutory appeals in civil cases will place an undue burden on the courts and delay the ultimate disposition of the litigation. Borden Co. v. Sylk, 410 F.2d 843 (3rd Cir. 1969), presents a sound basis for the dismissal of the appeal in our present case for want of jurisdiction by reason of lack of finality of the order appealed from.

The appeal is dismissed for want of jurisdiction.

467 F.2d at 629-30.

In *Hudak v. Curators of University of Missouri*, 586 F.2d 105 (8th Cir. 1978), the court held that orders sustaining objections to interrogatories and requiring the return of exhibits after the trial were not final orders which could be appealed. The court said at 106:

> She appeals the denial of counsel, various orders sustaining defendant's objections to certain of her interrogatories and a protective order providing that she return to defendants certain exhibits after their use in the trial and not use them in other cases.
>
> The latter two rulings relate to conduct of the trial and to discovery matters, and as such are not appealable as final decisions under 28 U.S.C. § 1291. *See Grinnell Corp. v. Hackett*, 519 F.2d 595 (1st Cir.), *cert. denied sub nom. Chamber of Commerce v. United Steelworkers*, 423 U.S. 1033, 96 S.Ct. 566, 46 L.Ed.2d 407 (1975); *Gialde v. Time, Inc.*, 480 F.2d 1295 (8th Cir. 1973); *Childs v. Kaplan*, 467 F.2d 628 (8th Cir. 1972).

In *Xerox Corp. v. SCM Corp.*, 534 F.2d 1031 (2d Cir. 1976), Xerox attempted to appeal from discovery orders on the ground that the information sought was privileged from disclosure by the attorney-client privilege. The court said at 1031-32:

> In recent years we have repeatedly sought to make clear that in the absence of a certification pursuant to 28 U.S.C. § 1292(b) or of a showing of "persistent disregard of the Rules of Civil Procedure," *Will v. United States*, 389 U.S. 90, 96, 88 S.Ct. 269, 274, 19 L.Ed.2d 305, 310 (1967), or of "a manifest abuse of discretion," *Baker v. United States Steel Corp.*, 492 F.2d 1074, 1077 (2d Cir. 1974), on the part of the district court, no jurisdictional basis exists for interlocutory review of pretrial discovery orders of the type here presented.

(Citations omitted.)

In *Grinnell Corporation v. Hackett*, 519 F.2d 595 (1st Cir. 1975), the court held that a discovery order was not appealable, although the appellant claimed the information sought was protected by the Constitution. The court said at 598:

> The basis for the order was that the information sought was "highly relevant" and that the Chamber had waived its first amendment protection by putting harm to its members in issue in the suit. Whether these decisions were right or wrong, they do not present the important question the Chamber asserts.
>
> . . . Here, the Chamber has not shot the last arrow in its quiver, since it can refuse to comply and seek review from the sanction, if any, imposed for that refusal. . . . The Supreme Court has recently styled it "a familiar procedure" to advise one's client "to resist and risk a contempt citation, thereby allowing precompliance appellate review." *Maness v. Meyers*, 419 U.S. 449, 95 S.Ct. 584, 593, 42 L.Ed.2d 574 (1975). And earlier cases echo the same theme. . . . If we treat these cases as providing guidance regarding the content of the urgency standard, they suggest that the Chamber's claim that review must be afforded now lest meaningful review be forever lost must fail absent a contempt adjudication.
>
> The Chamber could secure review of a criminal contempt finding. *See Union Tool Co. v. Wilson*, 259 U.S. 107, 111, 42 S.Ct. 427, 66 L.Ed. 848 (1922). If the district court certified it as final under Fed.R.Civ.P. 54(b), the Chamber could also appeal immediately from an order dismissing its complaint as the sanction for noncompliance.

The rationale for the rule was stated by the U.S. Supreme Court in *Cobbledick v. United States*, 309 U.S. 323, 324-25, 60 S. Ct. 540, 84 L. Ed. 783 (1940), as follows:

> The question is whether an order denying a motion to quash a subpoena *duces tecum* directing a witness to appear before a grand jury is included within those "final decisions" in the district court which alone the circuit courts of appeal are authorized to review by § 128 (a) of the Judicial Code (28 U.S.C. § 225).
>
> Finality as a condition of review is an historic characteristic of federal appellate procedure. It was written into the first Judiciary Act and has been departed from only when observance of it would practically defeat

> the right to any review at all. Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause.

Quoting from *Alexander v. United States*, 201 U.S. 117, 26 S. Ct. 356, 50 L. Ed. 686 (1906), the Court said:

> "In a certain sense finality can be asserted of the orders under review, so, in a certain sense, finality can be asserted of any order of a court. And such an order may coerce a witness, leaving to him no alternative but to obey or be punished. It may have the effect and the same characteristic of finality as the orders under review, but from such a ruling it will not be contended there is an appeal. Let the court go further and punish the witness for contempt of its order, then arrives a right of review, and this is adequate for his protection without unduly impeding the progress of the case. . . . This power to punish being exercised the matter becomes personal to the witness and a judgment as to him. Prior to that the proceedings are interlocutory in the original suit." 201 U. S. at 121-122.

309 U.S. at 327.

We conclude that the orders appealed from in these cases were interlocutory. The appeals must, therefore, be dismissed.

APPEALS DISMISSED.

STATE OF NEBRASKA AND J.M., APPELLEES, V. CLARK SMITH, APPELLANT.

437 N.W.2d 803

Filed April 7, 1989. Nos. 87-503, 87-665.

1. **Judgments: Appeal and Error.** In an action at law, this court on appeal views the evidence in the light most favorable to the prevailing party.
2. **Actions: Paternity.** A paternity action is an action at law.
3. **Trial: Witnesses: Evidence: Appeal and Error.** It is the province of the fact finder to judge the credibility of witnesses; it is not the province of this court to resolve conflicts in the evidence or to weigh the evidence.
4. **Paternity: Evidence.** A genetic test taken in a previous action where the case has been dismissed without trial and without prejudice may be used in a second case.
5. **Child Support: Paternity: Appeal and Error.** The trial court's award of child support after determination of paternity will not be disturbed on appeal absent an abuse of discretion.

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

Richards & Richards for appellant.

Sara Olsen, Deputy Scotts Bluff County Attorney, for appellees.

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

FAHRNBRUCH, J.

Claiming there was insufficient evidence and that the district court in a jury-waived trial erroneously admitted evidence regarding genetic testing, Clark Smith appeals a finding that he is the father of D.M.M., the minor child of the plaintiff J.M.

Smith also appeals a court order in another case requiring him to pay $200 per month child support for D.M.M. On appeal, the two cases were consolidated for briefing and argument. We affirm the trial judge in both cases.

In an action at law, this court on appeal views the evidence in the light most favorable to the prevailing party. See, *Knutson v. Snyder Industries, Inc., ante* p. 374, 436 N.W.2d 496 (1989); *Fisher Corp. v. Consolidated Freightways*, 230 Neb. 832, 434 N.W.2d 17 (1989). A paternity action is an action at law. *State ex rel. S.B. v. Dybdall*, 226 Neb. 473, 411 N.W.2d 649 (1987).

Taking the view of the evidence in the light most favorable to the plaintiffs-appellees in this case, the evidence reflects that on February 28, 1985, J.M. gave birth to D.M.M. out of wedlock. No father was listed on the birth certificate. A petition to establish paternity was filed against Smith in September 1985. Plaintiffs requested genetic testing, which the court ordered in December of 1985. Blood was drawn from D.M.M., J.M., and Smith in January 1986 at Western Pathology Consultants, P.C., in Scottsbluff, Nebraska. The samples were sent to Memorial Blood Center in Minneapolis, Minnesota, for genetic testing. Herbert F. Polesky, M.D., the director of the center, supervised the testing. The results of that testing were sent to counsel for both parties. The petition was dismissed without trial and without prejudice.

A second petition to determine paternity was filed by the State and J.M. against Smith. Genetic tests were not requested or ordered after the second petition was filed.

On January 13, 1987, Smith filed a motion objecting to the introduction of the results of the previous genetic testing. The court overruled the motion. Smith also timely objected to the introduction of a verified written report concerning the chain of custody of the blood samples. See Neb. Rev. Stat. § 43-1416 (Reissue 1988). In response to this objection, the plaintiffs filed a notice to take Dr. Polesky's deposition by written questions and mailed a copy of the notice and written questions to Smith's attorney.

Smith waived his right to a jury trial, and a bench trial was held on April 30, 1987. At trial, J.M. testified that after dancing several times with Smith, she and the defendant left the dance and went to Smith's home, where they had sexual intercourse several times in the early morning hours of May 27, 1985. She stated she left Smith's home around 8 a.m. Her testimony was corroborated in part by a friend, who saw J.M. and Smith dancing together several times. The friend, who went to the dance with J.M., also testified that J.M. told her to obtain a ride home because J.M. was going to Smith's home for the night. The friend said she saw Smith sitting in the driver's seat of his pickup truck but did not see Smith leave, nor did she see J.M. leave in her car. J.M.'s mother testified that J.M. was not

where she was supposed to be in the early morning hours of May 27, 1985.

Smith denied that J.M. was at his home in the early morning hours of May 27, 1985, and denied that he had had sexual intercourse with her. Friends of his testified that they arrived at Smith's house substantially before 8 a.m., May 27, 1985, and that J.M. was not there at that time. Smith's friends also testified that Smith was too drunk to drive his truck home from the dance. Obviously, the court did not accept these versions of the events. It is the province of the fact finder to judge the credibility of witnesses; it is not the province of this court to resolve conflicts in the evidence or to weigh the evidence. *State ex rel. S.B. v. Dybdall, supra*; *Kimberling v. Omaha Public Power Dist.*, 225 Neb. 744, 408 N.W.2d 269 (1987).

The physician who cared for J.M. during her pregnancy testified that May 27, 1985, was within the time conception could have occurred, given the date of the child's birth, the date of J.M.'s last menstrual period, and the average time of gestation. The physician also testified the child was not premature.

In regard to the genetic testing and its results, Smith's claims can be summarized as follows: (1) that a test obtained in a prior lawsuit between the parties is not admissible, even though the first case was dismissed without trial and without prejudice; (2) that there was insufficient evidence to prove the chain of custody of the samples taken from the parties and child through the time the samples were tested and from the time of the tests to when the samples were introduced into evidence; and (3) that the expert's testimony as to the results of the tests should not have been received in evidence.

The procedure to obtain genetic testing is explicitly set forth in Neb. Rev. Stat. § 43-1414 (Reissue 1988). Neb. Rev. Stat. §§ 43-1415 and 43-1416 (Reissue 1988) designate the method of introducing the tests into evidence, their admissibility, and the evidence necessary to show the chain of custody of the samples. Section 43-1415 provides that without an objection the test results may be introduced by a verified written report of the expert conducting the test. In Smith's case, the plaintiffs did not rely upon a verified written report, but introduced the

deposition of the expert taken by written questions pursuant to Neb. Ct. R. of Disc. 31 (rev. 1986). Admission in evidence of the deposition was proper. Neither did plaintiffs rely upon a verified written report to prove chain of custody of the samples taken for genetic testing. The chain of custody was properly proven by testimony.

We have carefully reviewed the record and Neb. Rev. Stat. §§ 43-1415 through 43-1418 (Reissue 1988), and find that the plaintiffs fully complied with those statutes. The trial court was correct in admitting into evidence the results of the genetic testing.

Smith's complaint that a genetic test taken in a previous action where the case has been dismissed without trial and without prejudice cannot be used in a second case has no merit. Section 43-1414 provides that a court may, upon its own motion, or shall, at the request of a party, order genetic testing to be performed on the mother, child, and alleged father. The purpose of this statute is to make such evidence available for use at the trial. In this instance, the evidence was already available from a previous action, which had been voluntarily dismissed without prejudice by the plaintiffs. There was no need to repeat the testing. In addition, the release Smith signed on January 8, 1986, specifically authorized the use of the results of the blood testing in future actions to determine paternity. Therefore, the trial court did not err in admitting the test results.

The results of the genetic testing revealed that there was a 98.473-percent probability that Smith was the father of D.M.M. This, together with J.M.'s testimony as corroborated by her witnesses, was more than sufficient for the trial court to hold that Smith is the father of D.M.M.

In a separate action, Smith was ordered to pay the $1,339.53 medical cost of J.M.'s pregnancy. In addition, Smith was ordered to pay $200 per month in child support for D.M.M.

Smith testified that before 1986, he worked as a state brand inspector, making approximately $18,000 per year. At the beginning of 1986, after he knew he was accused of being D.M.M.'s father, he quit his job to work on his parents' ranch. He receives no compensation for working on the ranch other than room and board. He occasionally works day labor jobs as

a ranch hand for approximately $50 per day. This work varies depending on the season. He also raises a few cattle on his own. His tax returns indicate he has continually lost money on this venture. The court found, although Smith had made a business decision to cease being a brand inspector, it was not a factor to be considered in determining the amount of child support he should pay. Based upon his earning capacity, as evidenced by his earnings as a brand inspector, the court ordered Smith to pay $200 per month in child support. Taking into consideration J.M.'s income and this court's child support guidelines, we cannot find that the trial court abused its discretion in ordering Smith to pay $200 per month child support for D.M.M. The trial court's award of child support after determination of paternity will not be disturbed on appeal absent an abuse of discretion. See *Hanson v. Rockwell*, 206 Neb. 299, 292 N.W.2d 786 (1980). The trial court did not abuse its discretion in requiring Smith to pay $200 per month child support for D.M.M. That order should continue until D.M.M. reaches majority age or is emancipated, or until further order of the trial court.

For the foregoing reasons, the judgment of paternity and the order for child support are affirmed.

AFFIRMED.

EMPLOYERS REINSURANCE CORPORATION, A MISSOURI CORPORATION, AS ASSIGNEE OF ROGER BROCKMANN AND PATRICIA BROCKMANN, HUSBAND AND WIFE, APPELLEE, V. SANTEE PUBLIC SCHOOL DISTRICT NO. C-5, A NEBRASKA POLITICAL SUBDIVISION, APPELLANT.

438 N.W.2d 124

Filed April 7, 1989. No. 87-574.

1. **Political Subdivisions Tort Claims Act: Pleadings: Notice.** The filing of a notice of claim under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 13-901 et seq. (Reissue 1987), is a condition precedent to the institution of a suit to which the act applies.

2. **Political Subdivisions Tort Claims Act: Pleadings: Demurrer.** When the Political Subdivisions Tort Claims Act is applicable, the failure to allege compliance with its provisions is a fatal defect, rendering the petition defective and subject to a demurrer.
3. **Political Subdivisions Tort Claims Act: Actions: Contracts.** A contract action does not involve a tort claim, as defined in Neb. Rev. Stat. § 13-903 (Reissue 1987), and thus is not subject to the provisions of the Political Subdivisions Tort Claims Act.
4. **Actions: Pleadings: Parties.** The granting of leave to file a third-party complaint under Neb. Rev. Stat. § 25-331 (Reissue 1985) is within the discretion of the trial court.
5. **Actions: Parties.** The basic purpose of third-party practice is to permit the original defendant to seek to transfer to the third-party defendant the liability asserted by the original plaintiff.
6. _____: _____. Under Neb. Rev. Stat. § 25-331 (Reissue 1985), in order for a defendant, as a third-party plaintiff, to serve summons upon one not a party to the action, the nonparty must be someone who is or may be liable to the defendant for all or part of the plaintiff's claim against the defendant.
7. **Moot Question: Appeal and Error.** As a general rule, appellate courts do not sit to give opinions on moot or abstract questions, and an appeal will ordinarily be dismissed where no actual controversy exists between the parties at the time of the hearing.
8. **Moot Question: Words and Phrases.** A moot case is one which seeks to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive or the parties lack a legally cognizable interest in the outcome.
9. **Actions: Pleadings.** Under Neb. Rev. Stat. § 25-812 (Reissue 1985), an affirmative defense must refer in an intelligible manner to the cause of action which it is intended to answer.
10. **Actions: Pleadings: Judgments: Parties.** It is not a proper defense to an action that a judgment against the defendant will obligate a third party to indemnify the defendant.
11. **Actions: Pleadings.** A defense may not be based on allegations of wrongdoing which are unrelated to the plaintiff's cause of action.
12. **Insurance: Subrogation.** No right of subrogation can arise in favor of an insurer against its own insured.
13. **Insurance: Subrogation: Assignments.** The right of an insurer to recover against a wrongdoer whose conduct has subjected the insurer to a liability, whether the insurer's right be based on equitable subrogation or express assignment, is traced through the insured.
14. _____: _____: _____. An insurer cannot defeat the law of subrogation by taking an assignment against its insured.
15. **Insurance: Parties: Claims: Assignments.** When an insurer pays a third-party claimant, the right of the claimant to pursue its claim against the insurer is destroyed, as the claimant would not be permitted a dual recovery; thus, once paid, a claimant no longer possesses an enforceable claim which can be assigned.

16. **Breach of Contract: Insurance: Damages.** The measure of damages for the breach of a contract to obtain insurance is that amount which would have been recovered had the insurance been furnished as agreed.

Appeal from the District Court for Knox County: MERRITT C. WARREN, Judge. Reversed and remanded for further proceedings.

John M. Peebles, of Domina, Gerrard, Copple & Stratton, P.C., and, on brief, Dean J. Sitzmann, of Steier & Kreikemeier, P.C., for appellant.

Gregory M. Neuhaus, of Archbold & Neuhaus, and John Thomas for appellee.

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

CAPORALE, J.

As a result of the failure of defendant-appellant, Santee Public School District No. C-5, to fulfill its contractual obligation to provide health insurance coverage to Roger Brockmann, Employers Reinsurance Corporation, apparently as the errors and omissions carrier for First Americans Insurance Service, the entity which was to have provided the coverage for the district, paid certain of Brockmann's health costs. Nine days later, Employers took an assignment of such causes of action as Brockmann possessed, brought this suit, and recovered a judgment of $47,639.57 against the district. The district appeals, assigning as error the trial court's (1) failure to find the suit barred by Employers' failure to comply with the Nebraska Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 13-901 et seq. (Reissue 1987), (2) overruling of the district's motion to file a third-party complaint against First Americans, (3) striking of the district's affirmative defense relating to the "wrongful actions" of First Americans, and (4) computation of damages. We reverse and remand for further proceedings.

I. THE RECORD

Employers' amended third amended petition asserts the district's aforesaid contractual obligation and alleges the district had obtained insurance coverage in fulfillment of that obligation with Blue Cross/Blue Shield, but later canceled same

without having acquired other insurance; that Brockmann subsequently underwent major surgery, thereby incurring medical expenses which were not reimbursed by the district; and that the district "breached its contract with [Brockmann] by not providing insurance coverage as agreed."

The district moved to make First Americans a third-party defendant to the action on the ground that First Americans would be liable to the district for all or part of any judgment which might be entered against the district and in favor of Employers. The proposed third-party complaint attached to the motion averred that the district and First Americans had agreed that First Americans would provide health insurance coverage for the district; that First Americans thereafter advised the district that persons such as Brockmann "were provided health insurance coverage, including hospitalization, surgical and other coverage by Central Reserve Life Insurance," and, thus, the district could cancel its present insurance coverage; that the district did so cancel; that Brockmann was thereafter hospitalized for major surgery; that First Americans then informed the district it "was not covered by the Central Reserve Life Insurance policy"; and that if the district "is held liable to Brockmanns, [the district] will be entitled to indemnification from First Americans." On Employers' motion, the trial court denied the district leave to file its proposed third-party complaint.

As originally filed, the district's answer included as an affirmative defense allegations which were essentially the same as those contained in the proposed third-party complaint, asserting that First Americans breached its obligation to provide the district with replacement insurance. As part of this defense, the answer also asserts the claim that as a result of First Americans' failure to provide replacement insurance coverage, Employers, as First Americans' insurer, is contractually obligated to indemnify the district. This affirmative defense was stricken pursuant to Employers' motion.

Ultimately, a jury was waived, and a bench trial was had solely on the basis of stipulations entered into by the parties. Specifically, Employers and the district stipulated that the district was contractually obligated to provide Brockmann with

complete health insurance coverage; that Brockmann incurred medical expenses in the sum of $48,807.11; that his expenses were not covered by health insurance; that Blue Cross/Blue Shield would have provided $47,649.57 in coverage; that Central Reserve Life would have provided $47,639.57 in coverage; and that Employers paid Brockmann the sum of $48,287.

II. ANALYSIS

1. Tort Claims Act

The district concedes that this is a contract action but, in support of the first assignment of error, contends that contract actions are within the Political Subdivisions Tort Claims Act; thus, according to the district, Employers was required to have alleged and proved compliance with the act, which it did not do.

The filing of a notice of claim under the Political Subdivisions Tort Claims Act is a condition precedent to the institution of a suit to which the act applies. *West Omaha Inv. v. S.I.D. No. 48*, 227 Neb. 785, 420 N.W.2d 291 (1988); *Parriott v. Drainage Dist. No. 6*, 226 Neb. 123, 410 N.W.2d 97 (1987); *Utsumi v. City of Grand Island*, 221 Neb. 783, 381 N.W.2d 102 (1986); *Campbell v. City of Lincoln*, 195 Neb. 703, 240 N.W.2d 339 (1976). See, also, *Franklin v. City of Omaha*, 230 Neb. 598, 432 N.W.2d 808 (1988). We have held that when the act is applicable, the failure to allege compliance with its provisions is a fatal defect, rendering the petition defective and subject to a demurrer. *Utsumi v. City of Grand Island, supra.*

A school district is, by definition, a political subdivision. § 13-903(1). Section 13-902 provides in relevant part that no political subdivision shall be liable for "the torts of its officers, agents, or employees" and that no suit shall be maintained against a political subdivision "except to the extent, and only to the extent provided by this act." Section 13-903 defines a tort claim as

> any claim against a political subdivision for money only on account of damage to or loss of property or on account of personal injury or death, caused by the negligent or wrongful act or omission of any employee of the political subdivision, while acting within the scope of his or her office or employment, under circumstances in which the

> political subdivision, if a private person, would be liable to the claimant for such damage, loss, injury, or death . . . .

The present action does not involve a claim "on account of damage to or loss of property or on account of personal injury or death" as the result of negligence; rather, the claim is based on the district's breach of its contract with the Brockmanns to provide health insurance. Therefore, the act does not apply. See *L. J. Vontz Constr. Co. v. State*, 230 Neb. 377, 432 N.W.2d 7 (1988), wherein we determined that a claim based on a contract was not a "tort claim" under the State Tort Claims Act, Neb. Rev. Stat. § 81-8,210(4) (Reissue 1987), and that, therefore, the contract claim was not within the jurisdiction of the State Claims Board but was instead within the jurisdiction of the Department of Administrative Services. The State Tort Claims Act defines "tort claims" in the same words as does the Political Subdivisions Tort Claims Act.

Because the Political Subdivisions Tort Claims Act does not apply, the trial court did not err as claimed in the first assignment of error.

2. Third-Party Complaint

The district next argues that the trial court abused its discretion in refusing to permit First Americans to be joined as a third-party defendant.

The matter of granting leave to file a third-party complaint under Neb. Rev. Stat. § 25-331 (Reissue 1985) is within the discretion of the trial court. *Life Investors Ins. Co. v. Citizens Nat. Bank*, 223 Neb. 663, 392 N.W.2d 771 (1986); *AgriStor Credit Corp. v. Radtke*, 218 Neb. 386, 356 N.W.2d 856 (1984); *Northwestern Bell Tel. Co. v. Woodmen of the World Life Ins. Soc.*, 189 Neb. 30, 199 N.W.2d 729 (1972).

Section 25-331 provides in part:

> At any time after commencement of the action, a defendant, as a third-party plaintiff, may cause a summons to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third-party plaintiff must obtain leave of the trial court on motion upon notice to all parties to the action before filing a third-party complaint. . . . The court on its own motion, or motion of

> any party, may move to strike the third-party claim, or for its severance or separate trial if the third-party claim should delay trial, might tend to confuse a jury, or in any way jeopardize the rights of the plaintiff.

We have said, "A third-party claim under § 25-331 may be asserted *when a third party's liability is in some way dependent on the outcome of the main claim or when the third party is secondarily liable to the defendant.*" (Emphasis in original.) *Life Investors Ins. Co. v. Citizens Nat. Bank, supra* at 670, 392 N.W.2d at 776; *AgriStor Credit Corp. v. Radtke, supra*; *Church of the Holy Spirit v. Bevco, Inc.*, 215 Neb. 299, 338 N.W.2d 601 (1983). "The basic function of third-party practice is the original defendant's seeking to transfer to the third-party defendant the liability asserted by the original plaintiff." *Life Investors Ins. Co. v. Citizens Nat. Bank, supra* at 670-71, 392 N.W.2d at 776; *AgriStor Credit Corp. v. Radtke, supra*; *Church of the Holy Spirit v. Bevco, Inc., supra*. In *Church of the Holy Spirit v. Bevco, Inc., supra*, we noted that § 25-331 was patterned on rule 14 of the Federal Rules of Civil Procedure, and quoted with approval 3 J. Moore, Moore's Federal Practice ¶ 14.04 (2d ed. 1983):

> "The general purpose of Rule 14 is to avoid two actions which should be tried together to save the time and cost of a reduplication of evidence, to obtain consistent results from identical or similar evidence, and to do away with the serious handicap to a defendant of a time difference between a judgment against him, and a judgment in his favor against the third-party defendant."

Church of the Holy Spirit v. Bevco, Inc., supra at 306, 338 N.W.2d at 605.

Under § 25-331, in order for a defendant, as a third-party plaintiff, to serve summons upon one not a party to the action, the nonparty must be someone who is or may be liable to the defendant for all or part of the plaintiff's claim against the defendant. *Life Investors Ins. Co. v. Citizens Nat. Bank, supra*; *AgriStor Credit Corp. v. Radtke, supra*; *Church of the Holy Spirit v. Bevco, Inc., supra*. In *AgriStor Credit Corp. v. Radtke, supra*, we held that where the defendants' motion and third-party petition neither alleged nor advanced the theory

that the third-party defendants might be liable to the defendants for all or a part of the plaintiff's claim against the defendants, it was error for the trial court to permit the filing of the third-party petition.

In its proposed third-party complaint against First Americans, the district pled sufficient allegations to support a theory that First Americans would be liable to the district as the result of First Americans' breaching its contract to provide the requisite insurance coverage, thereby meeting the requirements of § 25-331. However, under § 25-331, a trial court may nevertheless strike an otherwise appropriate third-party complaint where such complaint could delay trial, might tend to confuse a jury, or could in any way jeopardize the rights of the plaintiff. The determination of whether First Americans contracted to provide the district with the requisite insurance, whether it told the district to cancel the existing insurance, and whether it thereafter failed to provide replacement insurance and thereby became liable to the district involves substantially different facts than the determination of whether the district breached its contract to provide Brockmann with health insurance coverage. Thus, in the then posture of the case, the trial court did not abuse its discretion in concluding that the addition of First Americans as a third-party defendant would delay the trial, confuse the fact finder, and thereby jeopardize Employers' rights. Thus, there is no merit to the second assignment of error.

3. Affirmative Defense

The district next complains that by striking its affirmative defense, as described in part I above, the trial court deprived the district of the opportunity to prove the relationship which existed between it and Employers and thus divested it of the ability to show that it could not be held liable to Employers.

a. Appropriateness of Defense

In its stricken affirmative defense, the district alleges, as stated earlier in part I, that, among other things, First Americans wrongly failed to provide the district with replacement insurance.

Neb. Rev. Stat. § 25-812 (Reissue 1985) sets forth the procedure for pleading an affirmative defense:

> The defendant may set forth in his answer as many grounds of defense, counterclaim, and setoff as he may have. Each must be separately stated and numbered, and they must refer in an intelligible manner to the cause of action which they are intended to answer. . . .

Employers is correct in asserting that it is not a proper defense to an action that a judgment against the defendant will obligate a third party to indemnify the defendant. *Andersen v. Gold Seal Vineyards*, 81 Wash. 2d 863, 505 P.2d 790 (1973). Further, a defense may not be based on allegations of wrongdoing which are unrelated to the plaintiff's cause of action. See *TNT Communications v. Mgt. Tel.*, 32 A.D.2d 55, 299 N.Y.S.2d 692 (1969), *aff'd* 26 N.Y.2d 639, 255 N.E.2d 780, 307 N.Y.S.2d 667 (1970).

However, the district's affirmative defense also asserts that "Employers is the insurer of First Americans and required pursuant to its contract of insurance to indemnify, pay and hold [the district] harmless from all losses described in Plaintiff's Amended Third Amended Petition." As the discussion which follows demonstrates, these allegations, coupled with the claim that First Americans wrongly failed to provide replacement insurance, are sufficient to state an affirmative defense which does refer in an intelligible manner to Employers' cause of action against the district.

Midwest Lumber Co. v. Dwight E. Nelson Constr. Co., 188 Neb. 308, 312, 196 N.W.2d 377, 380 (1972), holds that where an owner contracts to procure insurance to cover a builder and fails to do so, the owner becomes the builder's insurer, and the owner's insurer may not recover against the builder, because "[t]he rights of a subrogated insurer can rise no higher than the rights of its insured against the third party [and an] insurer cannot recover by right of subrogation from his own insured." Thus, if Employers is First Americans' insurer and is thereby contractually required to indemnify First Americans for First Americans' alleged failure to provide insurance, and, through that relationship with First Americans, Employers is obligated to indemnify the district as well, then both First Americans and the district are Employers' insureds, and Employers could not maintain an action against either of them. This is so because no

right of subrogation can arise in favor of an insurer against its own insured. *Control Specialists v. State Farm Mut. Auto. Ins. Co.*, 228 Neb. 642, 423 N.W.2d 775 (1988); *Reeder v. Reeder*, 217 Neb. 120, 348 N.W.2d 832 (1984). Were the rule otherwise, an insurer would be able to recover from its insured for the very risk the insurer contracted to protect the insured against. See *Stetina v. State Farm Mut. Auto. Ins. Co.*, 196 Neb. 441, 243 N.W.2d 341 (1976).

Furthermore, if Employers paid off Brockmann's claim because Employers is the insurer for First Americans, then Employers' right of subrogation is traced through First Americans. The right of an insurer to recover against a wrongdoer whose conduct has subjected the insurer to a liability, whether the insurer's right be based on equitable subrogation or express assignment, is traced through the insured. *Reeder v. Reeder, supra.*

We recognize that Employers purported to take an assignment of Brockmann's causes of action and thus proceeds on the basis of that assignment rather than on any theory of subrogation. However, an insurer cannot defeat the law of subrogation by taking an assignment against its insured. See, *Md. Cas. Co. v. Gough*, 146 Ohio St. 305, 65 N.E.2d 858 (1946); *Oxford Credit Ass'n v. Bk. of Oxford*, 196 Miss. 50, 16 So. 2d 384 (1944); *Meyers v. Bank of America etc. Assn.*, 11 Cal. 2d 92, 77 P.2d 1084 (1938) (holding that where by the application of equitable principles a surety has been found not to be entitled to subrogation, an assignment will not confer on the surety the right to be so substituted in an action at law upon the assignment). Thus, if the facts are as the district alleges them to be, Brockmann's assignment to Employers is ineffective to give Employers a right against the district, one of Employers' insureds, greater than its other insured, First Americans, has against the district.

Moreover, once Employers paid Brockmann, Brockmann's right to pursue his claim against the district was destroyed, as Brockmann would not be permitted a dual recovery. Therefore, there was in existence no enforceable claim against the district which Brockmann could assign to Employers and which would support a recovery in favor of Employers. See, *St. Paul Fire &*

Marine Ins. Co. v. Mich. Nat. Bank, 660 F.2d 196 (6th Cir. 1981); *American Surety Co. v. Bank of California*, 133 F.2d 160 (9th Cir. 1943). (For the interplay of "loan receipts" or "loan agreements," see, inter alia, *Hammond v. Nebraska Nat. Gas Co.*, 209 Neb. 616, 309 N.W.2d 75 (1981), and *Tober v. Hampton*, 178 Neb. 858, 136 N.W.2d 194 (1965), *overruled in part, Royal Ind. Co. v. Aetna Cas. & Sur. Co.*, 193 Neb. 752, 229 N.W.2d 183 (1975).)

The trial court thus erred in striking the district's affirmative defense against Employers. The district should have been given an opportunity to prove that Employers could not maintain an action against the district either because the district is Employers' insured or because the district is First Americans' insured, and Employers' rights against the district, as the insurer for First Americans, extend only as far as do the rights of First Americans.

b. Not Moot

Employers attempts to persuade us that, in any event, the allegations concerning its relationship to First Americans and the district and the obligations arising therefrom are moot insofar as this action is concerned, for the district has filed a separate action against First Americans, First Americans' agent, and Central Reserve Life, which action will adjudicate such rights as may exist among the parties in that action. It is of course true that as a general rule, appellate courts do not sit to give opinions on moot or abstract questions, and an appeal will ordinarily be dismissed where no actual controversy exists between the parties at the time of the hearing. *Williams v. Hjorth*, 230 Neb. 97, 430 N.W.2d 52 (1988). A moot case is one which seeks to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive or the parties lack a legally cognizable interest in the outcome. *Mullendore v. School Dist. No. 1*, 223 Neb. 28, 388 N.W.2d 93 (1986). See, also, *Mullendore v. Nuernberger*, 230 Neb. 921, 434 N.W.2d 511 (1989) (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).

Here, however, there exists an actual controversy between the district and Employers, for there is nothing abstract about the judgment which has been rendered against the district. The judgment subjects the district's assets to levy by execution. The fact that some other entity may later be held obligated to indemnify the district for any losses the district may suffer as a result of that judgment does not mean the issues presented by this appeal are no longer alive or that the parties lack a legally cognizable interest in the outcome. Accordingly, the appeal is far from moot.

4. Damages

This leaves the question raised by the fourth and final assignment of error, Should the district fail to prove its defense, what are the appropriate damages to be awarded Employers?

The measure of damages for the breach of a contract to obtain insurance is that amount which would have been recovered had the insurance been furnished as agreed. *Action Ads, Inc. v. Judes*, 671 P.2d 309 (Wyo. 1983); *Hardcastle v. Greenwood Sav.*, 9 Wash. App. 884, 516 P.2d 228 (1973); *Les Shellabarger Chevrolet, Inc. v. Romero*, 490 P.2d 98 (Colo. App. 1971); *Mid-America Corporation v. Roach*, 412 P.2d 188 (Okla. 1966).

The parties stipulated that although Blue Cross/Blue Shield would have provided $47,649.57 in coverage, the substitute coverage which First Americans was to have provided through Central Reserve Life would have provided $47,639.57 in coverage. Since it is the Central Reserve Life coverage which would have been furnished had First Americans performed as the district claims it was contractually obligated to do, the appropriate damages would be $47,639.57, as the trial court determined.

III. DECISION

Because the trial court erroneously deprived the district of the opportunity to prove its relationship with First Americans and thus establish its rights vis-a-vis Employers, the judgment of the trial court is reversed, and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

JAMES R. CUNNINGHAM, INDIVIDUALLY AND AS NEXT FRIEND OF HIS MINOR DAUGHTER, JANELLE C. CUNNINGHAM, APPELLEE, V. JOSEPH E. LUTJEHARMS, COMMISSIONER OF EDUCATION, ET AL., APPELLANTS.

437 N.W.2d 806

Filed April 7, 1989. No. 87-754.

1. **Constitutional Law: Schools and School Districts.** The loan of textbooks designated for use in public schools to private school students under Neb. Rev. Stat. § 79-4,118 (Reissue 1987) is permissible under the Constitutions of Nebraska and the United States.
2. **Constitutional Law: Statutes.** A three-pronged analysis is used in determining whether legislation is violative of the first amendment's establishment clause. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; and, third, the statute must not foster an excessive government entanglement with religion.
3. **Constitutional Law: Equal Protection.** The establishment clause of the U.S. Constitution is applicable to the states through the 14th amendment to the U.S. Constitution.
4. **Constitutional Law: Schools and School Districts.** Neb. Rev. Stat. § 79-4,118 (Reissue 1987) does have a secular purpose: It provides all schoolchildren, public or private, with free textbooks designated for use in the public schools.
5. _____: _____. Since the contents of the textbooks to be loaned to nonpublic students will be secular in nature, the principal or primary effect of Nebraska's textbook loan program will neither advance nor inhibit religion.
6. _____: _____. Merely loaning secular textbooks to nonpublic school students, as provided in Neb. Rev. Stat. § 79-4,118 (Reissue 1987), will not require close supervision of nonpublic school teachers by government and will not foster an excessive government entanglement with religion.
7. **Constitutional Law: Statutes.** Although most decisions invoking the void for vagueness doctrine have dealt with criminal statutes, the doctrine applies equally to civil statutes.
8. _____: _____. The established test for vagueness in a statute is whether it either forbids or requires the doing of an act in terms so vague that people of common intelligence must necessarily guess at its meaning and differ as to its application.
9. _____: _____. Even in criminal statutes, the language adopted need not afford an interpretation approaching mathematical certainty.
10. **Constitutional Law: Schools and School Districts: Words and Phrases.** The language of Neb. Rev. Stat. § 79-4,118 (Reissue 1987) is not so vague that a school board will be required to guess at its meaning. Upon individual request means upon request of the student.
11. **Constitutional Law: Schools and School Districts.** A parent or legal guardian may request textbooks on behalf of his or her nonpublic school student.

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

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

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

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

FAHRNBRUCH, J.

This appeal seeks to have declared unconstitutional legislation requiring public school districts to purchase and loan textbooks to students in private schools. Textbook purchases would be funded through appropriations by Nebraska's Legislature.

We find the legislation, Neb. Rev. Stat. § 79-4,118 (Reissue 1987), constitutional.

James R. Cunningham brought this action in the Lancaster County District Court, seeking to borrow fourth-grade textbooks for his daughter, Janelle C. Cunningham, from the Lincoln, Nebraska, public school district in which she resides. Janelle Cunningham attends St. John's Elementary School in Lincoln.

Named as defendants are Joseph E. Lutjeharms, Commissioner of Education; the State Board of Education; and the State Department of Education. This lawsuit was presented as a case stated pursuant to Neb. Rev. Stat. § 25-903 (Reissue 1985). The statute at issue, § 79-4,118, provides in part:

> (2) Boards of education shall have the power and duty to purchase and to loan textbooks to all children who are enrolled in kindergarten to grade twelve of a public school *and, upon individual request, to children who are enrolled in kindergarten to grade twelve of a private school which is approved for continued legal operation under rules and regulations established by the State Board of Education* pursuant to subdivision (5)(c) of section 79-328. The Legislature may appropriate funds to carry out the provisions of this subsection. A school district shall not be

> obligated to spend any money for the purchase and loan of textbooks to children enrolled in private schools other than funds specifically appropriated by the Legislature to be distributed by the State Department of Education for the purpose of purchasing and loaning textbooks as provided in this subsection. Textbooks loaned to children enrolled in kindergarten to grade twelve of such private schools shall be textbooks which are designated for use in the public schools of the school district. Such textbooks are to be loaned free to such children subject to such rules and regulations as are or may be prescribed by such boards of education. The State Department of Education shall adopt and promulgate rules and regulations to carry out the provisions of this section. The rules and regulations shall include provisions for the distribution of funds appropriated for textbooks. The rules and regulations shall include a deadline for applications from school districts for distribution of funds. If funds are not appropriated to cover the entire cost of applications, a pro rata reduction shall be made.

(Emphasis supplied.)

A "private school," for the purposes of this opinion, is synonymous with "nonpublic school," both of which include church-related schools. Based upon previous decisions by this court, the district court determined that the statute is constitutional. The appellants assign as error the district court's finding that § 79-4,118 does not violate the Constitution of Nebraska or the Constitution of the United States.

Stipulated facts show that in November of 1986, James Cunningham made a written request of the Lincoln Public Schools for the loan of textbooks designated for use in the fourth grade in the public school district. Cunningham's request was made individually and on behalf of his daughter. The Lincoln Public Schools made a written request of Joseph Lutjeharms, Commissioner of Education of the State of Nebraska, for the distribution of funds appropriated by the Legislature for the purchase of textbooks to be loaned to Janelle. Commissioner Lutjeharms refused to distribute the funds until the statute's constitutionality had been tested in

court. This action ensued.

Appellants claim: (1) that the statute violates article VII, § 11, of the Nebraska Constitution; (2) that the statute violates the establishment clause of the first amendment to the U.S. Constitution; and (3) that the statute is impermissibly vague, in violation of article I, § 3, of the Nebraska Constitution and the 14th amendment to the U.S. Constitution.

Article VII, § 11, of the Nebraska Constitution, as amended in 1972, states: "[A]ppropriation of public funds shall not be made to any school or institution of learning not owned or exclusively controlled by the state or a political subdivision thereof. . . ."

We have previously held that this section of the Nebraska Constitution, as amended, prohibits appropriations by the Legislature *to* nonpublic schools. See, *State ex rel. Bouc v. School Dist. of City of Lincoln*, 211 Neb. 731, 320 N.W.2d 472 (1982); *Lenstrom v. Thone*, 209 Neb. 783, 311 N.W.2d 884 (1981). Section 79-4,118 does not permit public funds to be distributed *to* nonpublic schools, nor does it permit publicly owned textbooks to be loaned *to* private schools. The statute authorizes and directs that, under certain conditions, public schools must loan to private school students, without charge, textbooks which are designed for use in public schools of the school district. Reading the statute in its entirety, the loan of textbooks treats all kindergarten to 12th-grade students alike, whether public or private students.

Before it was amended by the voters in 1972, article VII, § 11, of Nebraska's Constitution prohibited appropriation of public funds "in aid of" any nonpublic school.

In interpreting article VII, § 11, of Nebraska's Constitution when it prohibited appropriation of public funds "in aid of" any nonpublic school, this court held unconstitutional a statute requiring the loan of textbooks by public schools to nonpublic schools for students grades 7 to 12. *Gaffney v. State Department of Education*, 192 Neb. 358, 220 N.W.2d 550 (1974).

Appellants argue that whether it uses "to" any nonpublic school or "in aid of" any nonpublic school, article VII, § 11, of Nebraska's Constitution should be interpreted to prevent the

loan of textbooks to private school students. Similar arguments were raised and rejected in *Bouc, supra*, *Lenstrom, supra*, and *State ex rel. Creighton Univ. v. Smith*, 217 Neb. 682, 353 N.W.2d 267 (1984). After the 1972 amendment, *Bouc* held it was constitutional to permit students, under certain conditions, to ride public school buses to private schools. In *Lenstrom*, it was held constitutional to issue grants of public funds to students who in turn used them to attend private colleges. A contract between the state and a nonpublic medical school involving cancer research was found constitutional in *Smith*. The discussions in those cases are thorough and will not be repeated here. For the reasons given in *Bouc*, *Lenstrom*, and *Smith*, § 79-4,118 does not violate article VII, § 11, of the Nebraska Constitution.

Appellants also argue that § 79-4,118 violates the first amendment to the U.S. Constitution. We are controlled in this area by the holdings of the U.S. Supreme Court in *Meek v. Pittenger*, 421 U.S. 349, 95 S. Ct. 1753, 44 L. Ed. 2d 217 (1975). In that case, the Supreme Court upheld the loan of textbooks to nonpublic school students. See, also, *Wolman v. Walter*, 433 U.S. 229, 97 S. Ct. 2593, 53 L. Ed. 2d 714 (1977).

The U.S. Supreme Court has developed a three-pronged analysis for determining whether legislation is violative of the first amendment's establishment clause. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; and, finally, the statute must not foster "an excessive government entanglement with religion." See, *Meek, supra*; *Wolman, supra*. The establishment clause is applicable to the states through the 14th amendment to the U.S. Constitution.

Section 79-4,118 is nearly identical to the statutes approved by the U.S. Supreme Court in *Meek* and *Wolman*. Using the U.S. Supreme Court's three-pronged analysis, the Nebraska statute does, without question, pass U.S. Constitutional scrutiny.

As in *Meek* and *Wolman*, the words of the statute itself show that § 79-4,118 does have a secular purpose: It provides all schoolchildren, public and private students, without charge, the use of textbooks. Ownership of the books remains with the

public schools. The language of the statute requires that the books loaned to nonpublic school children be those "designated for use in the public schools." We follow the U.S. Supreme Court's lead in construing this language to limit the statute to the loan of only secular textbooks. See *Meek, supra*. The textbook loan provisions of § 79-4,118 in every material respect are the same as those approved in *Meek* and *Wolman*.

Nebraska's Legislature has " 'merely [made] available to all children the benefits of a general program to lend school books free of charge. . . .' " *Meek, supra* at 360, quoting *Board of Education v. Allen*, 392 U.S. 236, 88 S. Ct. 1923, 20 L. Ed. 2d 1060 (1968).

Since the contents of the textbooks to be loaned to nonpublic students will be secular in nature, the principal or primary effect of Nebraska's textbook loan program will neither advance nor inhibit religion. The program passes the second-prong test of the U.S. Supreme Court's three-pronged analysis.

Next, we turn to whether § 79-4,118 will foster "an excessive government entanglement with religion," since most, if not all, of the nonpublic schools in Nebraska are religion related.

In disagreeing with the U.S. Supreme Court's plurality opinion upholding the loan of textbooks to nonpublic students in *Meek v. Pittenger, supra* at 374-75, Justice Brennan, quoting from *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971), struck this warning note:

> "In a community where . . . a large number of pupils are served by church-related schools, it can be assumed that state assistance will entail considerable political activity. Partisans of parochial schools, understandably concerned with rising costs and sincerely dedicated to both the religious and secular educational missions of their schools, will inevitably champion this cause and promote political action to achieve their goals. Those who oppose state aid, whether for constitutional, religious, or fiscal reasons, will inevitably respond and employ all of the usual political campaign techniques to prevail. Candidates will be forced to declare and voters to choose. It would be unrealistic to ignore the fact that many people confronted

with issues of this kind will find their votes aligned with their faith.

"Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, *but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect*. . . . The potential divisiveness of such conflict is a threat to the normal political process. . . . It conflicts with our whole history and tradition to permit questions of the Religion Clauses to assume such importance in our legislatures and in our elections that they could divert attention from the myriad issues and problems that confront every level of government. . . .

". . . *Here we are confronted with successive and very likely permanent annual appropriations that benefit relatively few religious groups. Political fragmentation and divisiveness on religious lines are thus likely to be intensified.*

"*The potential for political divisiveness related to religious belief and practice is aggravated . . . by the need for continuing annual appropriations and the likelihood of larger and larger demands as costs and populations grow. . . .*" *Id.*, at 622-623. (Emphasis added.)

Without being all-inclusive, examples of types of government programs that will not, and other types of programs that will, foster "excessive government entanglement with religion" may be gleaned from *Wolman v. Walter*, 433 U.S. 229, 97 S. Ct. 2593, 53 L. Ed. 2d 714 (1977). *Wolman*, citing *Lemon v. Kurtzman, supra*, and *Everson v. Board of Education*, 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711 (1947), notes that earlier opinions of the U.S. Supreme Court " 'permitted the States to provide church-related schools with secular, neutral, or nonideological services, facilities, or materials. Bus transportation, school lunches, public health services, and secular textbooks supplied in common to all students were not thought to offend the Establishment Clause.'. . ." (Emphasis omitted.) 433 U.S. at 242.

On the other hand, *Wolman* affirms that providing

nonpublic schools maps and charts, teaching and counseling services, and the funding for student field trips are offensive to the establishment clause of the U.S. Constitution when the nonpublic school would be the direct recipient of the items or services or when it would involve close supervision of nonpublic school teachers to ensure the nonreligious use of the items, funds, and services. That necessary supervision would constitute excessive government entanglement.

Merely loaning secular textbooks to nonpublic school students, as provided in § 79-4,118, will not require close supervision of nonpublic school teachers by government and will not foster "an excessive government entanglement with religion."

Applying the U.S. Supreme Court's three-pronged test required by *Wolman, supra*, we find that § 79-4,118 of the Nebraska statutes is not violative of the establishment clause of the U.S. Constitution.

Appellants' final argument is that the statute in question is impermissibly vague and therefore violates the due process provisions of the Nebraska and U.S. Constitutions. Although most decisions invoking the void for vagueness doctrine have dealt with criminal statutes, the doctrine applies equally to civil statutes. *Weiner v. State ex rel. Real Estate Comm.*, 217 Neb. 372, 348 N.W.2d 879 (1984); *State v. A. H.*, 198 Neb. 444, 253 N.W.2d 283 (1977).

The established test for vagueness in a statute is whether it either forbids or requires the doing of an act in terms so vague that people of common intelligence must necessarily guess at its meaning and differ as to its application. See *State ex rel. Douglas v. Herrington*, 206 Neb. 516, 294 N.W.2d 330 (1980).

At issue is the following language: "Boards of education shall have the power and duty to purchase and to loan textbooks . . . *upon individual request*, to children who are enrolled in kindergarten to grade twelve of a private school . . . ." (Emphasis supplied.) Appellants contend that the emphasized portion of that phrase does not give school boards sufficient guidance. They question whether a school board will be able to determine when an individual request has been made. Appellee argues that common sense need not be disregarded

and that the phrase "upon individual request" is specific enough to put a school board on notice that a request has to be made on behalf of each student.

" '[E]ven in criminal statutes the language adopted need not afford an interpretation approaching mathematical certainty. . . .' " *Weiner v. State ex rel. Real Estate Comm., supra* at 375, 348 N.W.2d at 882; *State v. A. H., supra*, citing *Parker v. Levy*, 417 U.S. 733, 94 S. Ct. 2547, 41 L. Ed. 2d 439 (1974). The language of § 79-4,118 could perhaps be more artfully designed. However, it is not so vague that a school board will be required to guess at its meaning.

The statute gives each nonpublic school student the right to obtain textbooks from a public school. "[U]pon individual request" means upon request of the student. Fathers and mothers are the natural guardians of their children and have the right to direct their education. Neb. Rev. Stat. § 30-2608 (Reissue 1985). A legal guardian of a minor has the powers and responsibilities of a parent. Neb. Rev. Stat. § 30-2613 (Reissue 1985). Accordingly, a parent or legal guardian may request a textbook on behalf of his or her nonpublic school child.

We find no merit to any of the appellants' arguments challenging the constitutionality of § 79-4,118. The statute violates neither the Nebraska Constitution nor the U.S. Constitution.

The judgment of the district court is affirmed.

AFFIRMED.

COUNTY OF HALL, STATE OF NEBRASKA, EX REL. DEBRA A. TEJRAL, APPELLEE, V. BRUCE ANTONSON, APPELLANT.

437 N.W.2d 813

Filed April 7, 1989. No. 87-775.

1. **Pleadings: Rules of the Supreme Court: Good Cause: Pretrial Procedure.** Although the pleadings alone may demonstrate a physical or mental condition "in controversy," that is, a condition directly involved in the litigation as a material element of the cause of action or defense, and establish "good cause,"

generally, the requirements of "in controversy" and "good cause" contained in Neb. Ct. R. of Disc. 35 (rev. 1986) are not satisfied by mere conclusory allegations of pleadings, but are fulfilled by a movant's affirmative showing that the condition to be verified by the requested examination, physical or mental, is actually controverted and that good cause exists for ordering the examination.

2. **Pleadings: Rules of the Supreme Court: Pretrial Procedure.** A movant's inability to obtain the desired information without the requested examination is relevant to a court's decision whether to order an examination under Neb. Ct. R. of Disc. 35 (rev. 1986).
3. **Pleadings: Rules of the Supreme Court: Pretrial Procedure: Evidence.** To obtain discovery under Neb. Ct. R. of Disc. 35 (rev. 1986), the requisite showing does not require the movant to prove the movant's case on the merits at an evidentiary hearing, but may include a showing by an appropriate affidavit or other suitable information presented to a court whereby the court can perform its function under Rule 35.
4. **Constitutional Law: Statutes: Appeal and Error.** The Supreme Court declines to pass on the constitutionality of legislation unless such determination concerning constitutionality of a statute is necessary for proper disposition of a question raised in an appeal.

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.

Ellen L. Totzke, Deputy Hall County Attorney, for appellee.

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

SHANAHAN, J.

In a petition verified by Debra A. Tejral and on the relation of Debra A. Tejral, the County of Hall, State of Nebraska, commenced a filiation proceeding on March 19, 1986, under Neb. Rev. Stat. § 43-1406 (Reissue 1988), in the district court for Hall County on the allegations that Debra Tejral, unmarried, is the mother of Andrew L. Tejral, whose father, Bruce Antonson, has denied paternity.

As the result of Debra Tejral's motion for genetic testing, the district court, authorized by Neb. Rev. Stat. § 43-1414 (Reissue 1988) and over Antonson's objection that § 43-1414 is unconstitutional, ordered Antonson to furnish a blood sample

for genetic testing. At trial and over Antonson's objection on constitutional grounds, the court received in evidence the verified written laboratory report containing the results of the genetic testing ordered by the court and determined that Antonson was the father of Andrew Tejral.

STATUTORY AUTHORITY FOR GENETIC TESTING

Concerning genetic testing, Nebraska statutes provide:

> In any proceeding to establish paternity, the court may, on its own motion, or shall, on a timely request of a party, after notice and hearing, require the child, mother, and alleged father to submit to genetic testing to be performed on blood or any other appropriate tissue. If genetic testing is required, the court shall direct that inherited characteristics, including, but not limited to, blood types, be determined by appropriate testing procedures and shall appoint an expert in genetic testing and qualified as an examiner of genetic markers to analyze and interpret the results and to report to the court. The court shall determine the number of experts required.
>
> For purposes of sections 43-1414 to 43-1418, an expert in genetic testing shall mean a person who has formal doctoral training or postdoctoral training in human genetics.

§ 43-1414.

> The results of the tests, including the statistical probability of paternity, shall be admissible evidence and shall be weighed along with other evidence of paternity. Such evidence may be introduced by verified written report unless there is a timely request for personal testimony of the expert at least thirty days prior to trial.

Neb. Rev. Stat. § 43-1415 (Reissue 1988).

DETERMINATION OF PATERNITY

After the paternity petition had been filed and Antonson in his answer had denied that he was the father of the child in question, the county attorney filed a motion, requesting "the Court to set down a hearing regarding the Respondent [Antonson] making himself available for blood testing to aid in the determination of the paternity of Andrew L. Tejral," and notified Antonson's lawyer concerning the scheduled hearing

on the motion. The court conducted a hearing, attended by lawyers for the parties, at which the court ordered that blood tests be obtained for genetic testing to be performed by Roche Biomedical Laboratories, Inc., the expert in genetic testing designated by the court. See § 43-1414.

At trial, Debra Tejral testified that, during the time from October 1984 through the end of January 1985, she had periodic sexual relations with only Antonson and that her son, Andrew, was born on August 28, 1985. Notwithstanding Antonson's objection on constitutional grounds, but without any objection based on the Nebraska Evidence Rules, the verified report of Roche Biomedical Laboratories was received in evidence and contained:

> CONCLUSIONS:
>
> The alleged father, BRUCE ANTONSON, cannot be excluded as the biological father of the child, ANDREW L. TEJRAL, since they share common genetic markers. Using the HLA system, along with ABO, Rh, MNSs, Kell, and Duffy, the probability of paternity is 99.97%, as compared to an untested man of the North American Caucasian population. Therefore, the alleged father is practically proven to be the biological father of the child.

The court entered judgment that Antonson is the father of Andrew Tejral.

ASSIGNMENT OF ERROR

Antonson, basing his appeal on "one specific issue," contends that § 43-1414 is unconstitutional because the statute procedurally offends due process accorded by the Nebraska and U.S. Constitutions. See, Neb. Const. art. I, § 3; U.S. Const. amends. V and XIV. Antonson suggests that a deficiency of due process in § 43-1414 results from the statutory language "the court . . . shall, on a timely request of a party, after notice and a hearing, require the child, mother, and alleged father to submit to genetic testing," and argues:

> There is nothing in the statute [§ 43-1414] that allows or requires the trial court any discretion as to the ordering of the test, nor is there any requirement that there be any showing of either reasonable or probable cause as to why the natural mother has filed the motion or allowed the trial

> court to receive any evidence to consider the motion and subsequent ordering of the genetic testing of the alleged father's tissue.

Brief for appellant at 12. Neb. Rev. Stat. § 49-802 (Reissue 1988) provides: "Unless such construction would be inconsistent with the manifest intent of the Legislature, rules for construction of the statutes of Nebraska hereafter shall be as follows: (1) . . . When the word shall appears, mandatory or ministerial action is presumed." As we understand the gist of Antonson's argument, *shall* in § 43-1414 renders genetic testing mandatory in a filiation proceeding under § 43-1406 and transforms a "hearing" into a perfunctory procedure which is meaningless inasmuch as genetic testing is inevitable and a foregone conclusion without an actual hearing on the propriety of the testing authorized by § 43-1414.

DISCOVERY FOR GENETIC TESTING

Section 43-1414 is essentially a discovery statute with a function and procedure quite similar to Neb. Ct. R. of Disc. 35 (rev. 1986), a discovery rule concerning examination of a party, which states:

> (a) Order for Examination. When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in his or her custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

Rule 35 is one of the "Nebraska Discovery Rules For All Civil Cases Promulgated By The Nebraska Supreme Court," which rules became effective on January 1, 1983.

In *Younkin v. Younkin*, 221 Neb. 134, 375 N.W.2d 894 (1985), a dissolution proceeding or divorce action involving disputed paternity, we held that a blood grouping test or other scientific tests for determining paternity were within the

purview of discovery authorized by Rule 35 of the Nebraska Discovery Rules.

Although the pleadings alone may demonstrate a physical or mental condition "in controversy," that is, a condition directly involved in the litigation as a material element of the cause of action or defense, and establish "good cause," generally, the requirements of "in controversy" and "good cause" contained in Rule 35 are not satisfied by mere conclusory allegations of pleadings, but are fulfilled by a movant's affirmative showing that the condition to be verified by the requested examination, physical or mental, is actually controverted and that good cause exists for ordering the examination. See, *Schlagenhauf v. Holder*, 379 U.S. 104, 85 S. Ct. 234, 13 L. Ed. 2d 152 (1964); *Neuman v. Neuman*, 377 A.2d 393 (D.C. 1977). A movant's inability to obtain the desired information without the requested examination is relevant to a court's decision whether to order an examination under Rule 35. See *Schlagenhauf v. Holder, supra*. See, also, *Martin v. Tindell*, 98 So. 2d 473 (Fla. 1957).

To obtain discovery under Rule 35, the requisite showing does not require the movant to prove the movant's case on the merits at an evidentiary hearing, but may include a showing by an appropriate affidavit or other suitable information presented to a court whereby the court can perform its function under Rule 35. See, *Schlagenhauf v. Holder, supra*; *Anderson v. Anderson*, 470 So. 2d 52 (Fla. App. 1985).

This brings us to Antonson's claim concerning the deficiency of procedural due process in § 43-1414. More appropriately, this brings us to the point that we need not consider Antonson's contention about unconstitutionality of § 43-1414. The Supreme Court declines to pass on the constitutionality of legislation unless such determination concerning constitutionality of a statute is necessary for proper disposition of a question raised in an appeal. *Sommerfeld v. City of Seward*, 221 Neb. 76, 375 N.W.2d 129 (1985). Antonson does not contest the reliability or scientific accuracy of the genetic testing ordered by the district court and reflected in the report received in evidence at Antonson's trial. While § 43-1415 relates to admissibility of a report on genetic testing if the report is used

as an exhibit in the face of an objection to admissibility under the Nebraska Evidence Rules, Antonson objected to evidential introduction of the report as a product of a statute alleged to be deficient in procedural due process and did not object to the admissibility of the report under the Nebraska Evidence Rules. Were we to consider Antonson's constitutional claim concerning § 43-1414, and, even if the statute were deficient regarding procedural due process as claimed by Antonson, the blood tests, ordered by the district court in conjunction with genetic testing, were used in a proceeding involving disputed paternity of a child. Thus, the blood tests were a proper matter for discovery under Rule 35. *Younkin v. Younkin, supra.* In the case before us, the petition to determine paternity, a pleading verified by the oath of Debra Tejral, presented sufficient "good cause" concerning disputed paternity, a matter "in controversy," which might well be resolved, or at least made more or less probable, by the results from a reliable and accurate scientific test. Thus, the pleadings demonstrated a physical condition "in controversy" and "good cause" for the requested blood samples used in genetic testing.

For the reason that the district court's order regarding genetic testing was obtained in conformity with Rule 35, we need not, and do not, consider Antonson's assault on the constitutionality of § 43-1414, a constitutional tempest in a statutory teapot.

Inasmuch as Antonson does not question the sufficiency of the evidence for the district court's adjudication of the paternity issue, we affirm the judgment of the district court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. KENNETH N. THOMPSON, APPELLANT.

438 N.W.2d 131

Filed April 7, 1989. No. 88-303.

1. **Trial: Joinder: Appeal and Error.** A trial court's ruling on a motion for consolidation of prosecutions properly joinable will not be disturbed on appeal in the absence of an abuse of discretion.
2. **Trial: Joinder: Indictments and Informations.** If the offenses involved were of the same or similar character, they can be joined together in one information, and the trial court can order that they be tried together.
3. **Trial: Joinder: Evidence: Appeal and Error.** Joinder is not prejudicial error where evidence relating to both offenses would be admissible in a trial of either offense separately.
4. **Investigative Stops: Police Officers and Sheriffs: Probable Cause.** A reasonably founded suspicion to stop a vehicle cannot be based solely on the receipt of a radio dispatch by the officer without any proof of the factual foundation for the relayed message.
5. **Investigative Stops: Police Officers and Sheriffs: Probable Cause: Identification Procedures.** An officer's independent recognition of an individual with an outstanding arrest warrant following an illegal stop constitutes an intervening circumstance sufficient to break the causal connection between the stop and a subsequent identification lineup.
6. **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.
7. **Constitutional Law: Equal Protection: Prosecuting Attorneys: Juror Qualifications: Discrimination.** The equal protection clause of the U.S. Constitution bars a prosecutor from challenging potential jurors solely on account of their race or on the assumption that they, as a group, will not be able to impartially consider the State's case against a black defendant.
8. **Trial: Juries: Discrimination: Appeal and Error.** The trial court's determination as to whether a defendant has established purposeful discrimination in the selection of a jury is a finding of fact which will not be reversed on appeal unless clearly erroneous.
9. **Evidence: Appeal and Error.** Where evidence is objected to which is substantially identical to evidence admitted and not objected to, prejudicial error will not lie because of its admission.
10. **Criminal Law: Identification Procedures.** Whether identification procedures were unduly suggestive and conducive to a substantial likelihood of mistaken identification is determined by a consideration of the totality of the circumstances surrounding the procedures.

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.

Kenneth N. Thompson, pro se.

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

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

WHITE, J.

This is an appeal from the district court for Douglas County following convictions of two counts of robbery and two counts of using a weapon to commit a felony, and a determination that the appellant was a habitual criminal. The appellant was sentenced to a term of imprisonment of 15 years on each count, all sentences to be served consecutively. Counsel for appellant contends the district court erred in four respects: (1) in granting the State's motion to consolidate the two robbery charges and the two weapons charges, (2) in overruling the appellant's motion to suppress the fruits of the stop and arrest of the appellant on November 12, 1987, (3) in overruling the appellant's motion for a mistrial because the prosecutor used peremptory challenges to strike one of two black prospective jurors, and (4) in permitting police officers to testify regarding what photo or person was picked out of the pretrial photo array and physical lineup.

In pro se briefs filed with this court, the appellant alleges two additional errors on his behalf. First, the appellant alleges the pretrial identification procedures were unnecessarily suggestive, and, second, he alleges prosecutorial misconduct on the basis of references made by the prosecutor to "mug shots" in violation of the court's order to refrain from so referring. After a brief recitation of the relevant facts, we will address each of the above contentions.

At 10:40 p.m. on October 12, 1987, Herr's Gas 'N' Shop in Omaha, Nebraska, was robbed by a black male. Shawn

Claycomb was working alone that evening, doing stockwork in the back cooler area, when she was approached by a black male wearing a nylon stocking over his face. The assailant was armed with a sawed-off shotgun. Claycomb described her assailant as 6 feet 1 inch, 200 to 230 pounds, with short hair and medium-light skin.

On Wednesday, October 14, a Runza Hut drive-in located within four blocks from Herr's Gas 'N' Shop was robbed by two black males at approximately 7:50 p.m. At the time of the robbery, Renee Welch was working the front counter, and Daniel Flud, Sean Stevens, and Alex Adams were working the back kitchen, where a second cash register is located near the drive-up window. Welch observed two black males outside the restaurant. She watched them walk into the restaurant and went behind the counter to wait on them. When she looked up to take their order, she noticed that they were wearing nylon stocking masks over their heads. One of the assailants had a sawed-off shotgun and pointed it in her face. He ordered her to give him the money out of the front register. He then told her to lie down and went into the back kitchen area, where the second cash register was located. The shorter black male stayed up front and held a handgun on Welch. Flud, Stevens, and Adams were all ordered to get on the floor when the assailant armed with the sawed-off shotgun entered the kitchen area.

Two days after the robbery of Herr's Gas 'N' Shop, Ray Hunt, an Omaha police detective, came to Claycomb's apartment to show her a photo array of eight people. Claycomb chose a photograph of the appellant out of the array. Following the Runza Hut robbery on October 14, Omaha police detectives showed Welch, Stevens, and Adams the same photo array that had been shown to Claycomb after the robbery at Herr's Gas 'N' Shop. When shown the array, Welch chose the appellant, but stated that she could not be positive regarding her identification of the assailant. Stevens also chose the photo of the appellant, stating that the picture "resembled [the robber] a lot more." He also could not be positive about his identification. After looking at the same array, Adams stated that he was positive that the photo of the appellant he chose from the array was that of the assailant.

On November 12, Omaha Police Officer Edward Hale was on routine patrol in his police cruiser. In the nighttime hours Hale pulled over a brown Chevrolet Nova. Officer Hale testified during pretrial proceedings that he pulled over this vehicle in response to a call from the police dispatcher to go to the area of 48th and Sahler because a brown Chevrolet Nova was at that location acting in a suspicious manner. However, a review of the tape made by the chief of the Omaha Public Safety Communications Division of the dispatch for that evening discloses no reference to a brown Chevrolet Nova. Nonetheless, Officer Hale did stop a brown Chevrolet Nova on that date. Two people were in the car. The officer asked both the driver and the passenger for identification. The passenger did not have any identification and told the officer that his name was James Johnson and his date of birth was August 30, 1950. After not being able to verify the name with the date of birth, Hale recognized the passenger as a possible robbery suspect with an active warrant on file. Officer Hale told the appellant that he was going to take him to headquarters to run an identification check on him. At that time the appellant told the officer his real name, Kenneth Thompson.

To further support the prior photo identifications, the police conducted a physical lineup on November 13, consisting of the appellant and three other individuals with physical characteristics similar to the appellant's. At this lineup both Claycomb and Welch chose the appellant.

Prior to trial, the appellant filed a motion to suppress all evidence seized as a result of the November 12 stop and subsequent arrest of the appellant by Officer Hale. In his motion, the appellant alleged that the initial stop and detention were not based upon probable cause or a reasonable or articulable suspicion. This motion was overruled. Also prior to trial, the State made an oral motion for an order consolidating the two robbery informations, pursuant to Neb. Rev. Stat. § 29-2002 (Reissue 1985). The court granted the State's request over objection by the appellant. At trial, the State was allowed to present testimony of the officers present at the photo array and the lineup regarding the pretrial identification of the appellant. This testimony was accepted over hearsay objections

by the appellant. The appellant first assigns as error the consolidation of the two robbery and two weapons counts into one trial. Section 29-2002 provides:

> (1) Two or more offenses may be charged in the same indictment, information, or complaint in a separate count for each offense if the offenses charged, whether felonies or misdemeanors, or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.
>
> . . . .
>
> (3) The court may order two or more indictments, informations, or complaints, or any combination thereof, to be tried together if the offense, and the defendants, if there are more than one, could have been joined in a single indictment, information or complaint. The procedure shall be the same as if the prosecution were under such single indictment, information, or complaint.
>
> (4) If it appears that a defendant or the state would be prejudiced by a joinder of offenses or of defendants in an indictment, information, or complaint, or by such joinder of offenses in separate indictments, informations, or complaints for trial together, the court may order an election for separate trials of counts, indictments, informations, or complaints, grant a severance of defendants, or provide whatever other relief justice requires.

It is important to note that a trial court's ruling on a motion for consolidation of prosecutions properly joinable will not be disturbed on appeal in the absence of an abuse of discretion. *State v. Vrtiska*, 225 Neb. 454, 406 N.W.2d 114 (1987). If the offenses involved were of the same or similar character, they can be joined in one information, and the trial court can order that they be tried together. *State v. McGuire*, 218 Neb. 511, 357 N.W.2d 192 (1984). In the present case, although the offenses were not joined in one information, the State made a proper motion to consolidate prior to trial.

In applying the statutory criteria for determining whether consolidation is proper, there are a number of similarities

between the two robberies in the instant case. The offenses occurred within 2 days and four blocks of each other. In both robberies a sawed-off shotgun was used, and although two men were involved in the Runza Hut robbery whereas only one was involved in the Herr's Gas 'N' Shop incident, the assailant with the sawed-off shotgun in both robberies was similarly described. A woman's nylon stocking mask was worn at both robberies. During both crimes, the assailant armed with the shotgun ordered the employees to the floor, at Herr's Gas 'N' Shop stating, "Get your white ass on the floor," and at the Runza Hut stating, "Get your fucking white ass down."

The appellant contends that he was prejudiced by the joinder, in contravention of § 29-2002(4). In *State v. Walker*, 200 Neb. 273, 263 N.W.2d 454 (1978), and *State v. McGuire, supra*, we found that joinder was not prejudicial error where evidence relating to both offenses would be admissible in a trial of either offense separately. Based on the reasoning of *Walker* and *McGuire*, evidence of either robbery would have been admissible at a separate trial of the other robbery to establish method of operation and identity. Therefore, the appellant was not prejudiced by the consolidation, and the trial court did not abuse its discretion in ordering the two informations consolidated for trial.

The appellant next assigns as error the overruling of his motion to suppress the fruits of the stop and subsequent arrest of the appellant on November 12, 1987. The appellant contends that the stop was illegal, in violation of the fourth amendment to the U.S. Constitution. Officer Hale testified that he received a radio broadcast of a suspicious car in a certain area. He proceeded to that area and pulled over a car containing the appellant. This stop, alleges the appellant, was an investigatory stop which must be justified by an objective manifestation that the person stopped has been, is, or is about to be involved in criminal activity. *State v. Thomte*, 226 Neb. 659, 413 N.W.2d 916 (1987). In *State v. Benson*, 198 Neb. 14, 251 N.W.2d 659 (1977), *cert. denied* 434 U.S. 833, 98 S. Ct. 117, 54 L. Ed. 2d 93, this court held that a reasonably founded suspicion to stop a vehicle *cannot* be based solely on the receipt by the stopping officer of a radio dispatch to stop the described vehicle without

any proof of the factual foundation for the relayed message. This holding was reiterated by this court in *State v. Beerbohm*, 229 Neb. 439, 427 N.W.2d 75 (1988). In *Beerbohm*, we upheld the stop, finding it appropriate because the officer observed evidence of improper operation of a vehicle with his own eyes. "It is noteworthy that [the officer] did not stop Beerbohm's automobile as soon as he located it, based solely upon the information relayed to him by radio." *Id.* at 444, 427 N.W.2d at 79.

There is nothing in the record of this case regarding specific observations by Officer Hale corroborating the characterization of the vehicle stopped as the vehicle identified as "suspicious" by the dispatcher. In fact, according to the affidavit of the chief of the Omaha Public Safety Communications Division, upon listening to the dispatch tape there is no evidence that Officer Hale was ever told to stop a brown Chevrolet Nova, directly contradicting his pretrial statements to that effect. It would therefore appear that this stop was not a legal one.

However, our characterization of this stop as illegal does not mean that the motion to suppress should have been granted. The appellant argues that both the postarrest lineup and the giving of a false name to Officer Hale should have been suppressed. We believe this contention is in error.

Evidence of the postarrest lineup was properly admitted. This lineup did not constitute "fruit" tainted by the initial illegal stop. When Officer Hale stopped the appellant, he recognized him as the subject of a current robbery warrant. This recognition constitutes an intervening circumstance sufficient to break the causal connection between the stop and the lineup. The connection between the illegal stop and the outstanding robbery warrant was so attenuated as to dissipate the taint of the illegal stop. The officer's actions after recognizing the appellant were based on a source completely independent of and unrelated to the radio dispatch preceding the stop. See *Brown v. Illinois*, 422 U.S. 590, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975).

The Supreme Court of Colorado, in *People v. Hillyard*, 197 Colo. 83, 589 P.2d 939 (1979), was faced with a situation similar

to the facts at issue in the present case. In *Hillyard*, an officer stopped the defendant without a reasonable suspicion that he had committed any crime. After a computer check was undertaken by the officer, he discovered an outstanding U.S. Navy arrest warrant for the defendant. The officer arrested the defendant pursuant to the warrant, and en route to the station the defendant volunteered information about a burglary for which he was later convicted. The Colorado court held that the connection between the evidence regarding the burglary and the illegal stop was so attenuated as to dissipate the taint from the initial illegal stop. As stated by the court:

> The officer stopped the defendant without a reasonable suspicion that he had committed, or was about to commit, any crime. That, however, was the extent of his misconduct. He did not arrest upon such general suspicions. Rather, he acted because of the Navy's outstanding arrest warrant. . . . Once he knew of the warrant, the officer would have been derelict in his duty not to have arrested the defendant.

Id. at 85, 589 P.2d at 941. We believe that the logic employed by the Colorado court in the *Hillyard* case is equally applicable in this action. Therefore, the motion to suppress the postarrest lineup was properly denied.

Another question is presented with regard to the false information provided by the appellant to Officer Hale. Officer Hale directly asked the appellant his name after stopping the vehicle. The subsequent statement by the appellant was a clear and direct response flowing from the initial illegal stop. There was nothing to break the connection between the unlawful stop and the statement of the appellant's to dispel the taint of the stop from the false identification information. However, we hold the error committed by the district court in admitting Officer Hale's testimony regarding the appellant's false statement to be harmless beyond a reasonable doubt. 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). When the appellant told the officer his correct name, he

told the officer that he had misinformed him regarding his identity because of his belief that other warrants for traffic offenses were outstanding. The appellant's motive for misidentification was therefore sufficiently ambiguous that the probative value of this information was minimal. In addition, there was a significant amount of other evidence, including eyewitness testimony, implicating the appellant in these two robberies. On balance, we cannot say that the erroneous admission of the appellant's false information was error of a magnitude requiring reversal.

Next, the appellant contends the district court erred in overruling his motion for a mistrial because the prosecutor used a peremptory challenge to strike one of two black prospective jurors. The appellant in this case is a black male. Two of the 24 prospective jurors called to serve on the jury were black. The State used a peremptory challenge to strike only one of the two black prospective jurors; the other remained on the jury panel. In *State v. Rowe*, 228 Neb. 663, 423 N.W.2d 782 (1988), this court articulated the following rule applicable in cases alleging a discriminatory jury selection:

> Although a criminal defendant has no right to a petit jury composed in whole or in part of persons of her or his own race, *Strauder v. West Virginia*, 100 U.S. 303, 25 L. Ed. 664 (1879), the equal protection clause of U.S. Const. amend. XIV bars a prosecutor from challenging potential jurors "solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Batson v. Kentucky*, 476 U.S. 79, 89, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). . . . In order to make a prima facie case of discrimination in the selection of a jury, a criminal defendant must show that (1) she or he is a member of a cognizable racial group, (2) the prosecutor used peremptory challenges to remove members of the defendant's race from the venire, and (3) the facts and other relevant circumstances give rise to an inference that the prosecutor used those challenges to exclude potential jurors because of their race.

Rowe, supra at 667-68, 423 N.W.2d at 786.

Following a defense motion for mistrial, the trial court in the

present case asked the prosecutor to articulate his reasons for excluding one of the two black potential jurors. The prosecutor stated a number of nondiscriminatory factors. This court has held that the trial court's determination as to whether a defendant has established purposeful discrimination in the selection of a jury is a finding of fact which will not be reversed on appeal unless clearly erroneous. *State v. Rowe, supra.* The trial court's finding in this case was not clearly erroneous. The fact that a black male was left on the jury provides further support for finding that the jury selection was not racially discriminatory, and the defense motion for mistrial was properly denied.

The appellant also assigns as error the admission of testimony, over hearsay objection, regarding the pretrial identifications. These objections relate to three specific areas of testimony. First, James Reuting, a member of the robbery squad of the Omaha Police Division, stated that he showed a photo array to Welch and she chose a photo of the appellant. Also, robbery investigator Kenneth Bavasso testified that he showed Stevens the photo array and Stevens chose the appellant as well. Finally, Officer Melvin Berney testified that Claycomb viewed a lineup and picked out the appellant.

We need not decide whether the admission of this testimony was error. Where evidence is objected to which is substantially identical to evidence admitted and not objected to, prejudicial error will not lie because of its admission. *White v. Lovgren*, 222 Neb. 771, 387 N.W.2d 483 (1986). In the present case, although the testimony of the officers was objected to, each of the eyewitnesses also testified to the same pretrial identifications of the appellant. Because this identical evidence was admitted, the appellant was not harmed by the admission of the testimony to which he objected. The admission of this testimony was therefore harmless error beyond a reasonable doubt. *State v. Watkins*, 227 Neb. 677, 419 N.W.2d 660 (1988).

In his pro se briefs the appellant assigns additional errors. First of all, the appellant contends that the pretrial identification procedures utilized by the police were unnecessarily suggestive, and therefore the identifications made by several of the witnesses should have been suppressed. A review of the photo array and a photograph of the lineup

refutes this allegation. In addition, the record reveals that the photos were given to the witnesses in an unsuggestive manner and without comment. This court has held that whether identification procedures were unduly suggestive and conducive to a substantial likelihood of mistaken identification is determined by a consideration of the totality of the circumstances surrounding the procedures. *State v. Price*, 229 Neb. 448, 427 N.W.2d 81 (1988). In *State v. Richard*, 228 Neb. 872, 424 N.W.2d 859 (1988), we listed several factors to be considered in determining the likelihood of misidentification. These factors include 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. A review of the facts in this case in light of the *Richard* standards evidences that the identification procedures were not unduly suggestive or likely to result in a misidentification.

The lineup objected to by the appellant was conducted with defense counsel present, and no suggestive procedures are evident. There are no apparent errors in the procedure utilized, and the subjects chosen to participate in the lineup are sufficiently physically similar to the appellant to dispel any claim of the appellant that he "stood out" among the group. Therefore, this assignment of error is without merit.

The appellant next alleges misconduct by the prosecution in referring to "mug shots" when questioning a witness, in violation of the trial court's order to refrain from so referring. The appellant contends that in examining Welch the reference made by the prosecutor to "mug shots" amounted to prosecutorial misconduct. The exchange, not objected to at trial, was as follows:

> Q . . . [O]n the day of the robbery were you asked to come to Omaha Police Headquarters and take a look at some photographs of some people?
>
> A Yes, I was.
>
> . . . .
>
> Q Do you remember how many photographs you

looked at that day?

A I looked at books and then at some little pictures.

Q Like mug books?

A Yeah.

Q So a lot of photographs?

A Yes.

Following this exchange, the witness was shown the photo array and indicated that she had seen those pictures at the station. This incidental reference does not amount to prosecutorial misconduct.

Because we find all of appellant's assignments of error to be without merit, the judgment and sentences of the district court are hereby affirmed.

AFFIRMED.

VINCENT MILES, APPELLEE, V. MARIETTA MILES, APPELLANT.

438 N.W.2d 139

Filed April 7, 1989. No. 88-517.

1. **Child Custody: Appeal and Error.** 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.
2. **Trial: Evidence: Witnesses: Appeal and Error.** Where the evidence is in conflict, we 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. **Child Custody: Appeal and Error.** An order concerning the custody of children will not be modified unless there has been a material change of circumstances indicating that the person with custody of the children is unfit or that the best interests of the children require such action.
4. **Child Custody.** In determining a child's best interests under Neb. Rev. Stat. § 42-364(1) (Reissue 1988), the court may consider factors such as general considerations of moral fitness of the child's parents, including the parents' sexual conduct; respective environments offered by each parent; the emotional relationship between a child and parents; the age, sex, and health of the child and parents; the effect on a child as the result of continuing or disrupting an existing

relationship; the attitude and stability of each parent's character; parental capacity to provide physical care and satisfy educational needs of the child; the child's preferential desire regarding custody if the child is of sufficient age of comprehension regardless of chronological age, and when such child's preference for custody is based on sound reasons; and the general health, welfare, and social behavior of the child.

5. _____. While the wishes of a child are not controlling in the determination of custody, if a child is of sufficient age and has expressed an intelligent preference, his preference is entitled to consideration.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Affirmed.

James W. Ellison, of Holtorf, Kovarik, Nuttleman, Ellison, Mathis & Javoronok, P.C., for appellant.

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

BOSLAUGH, WHITE, SHANAHAN, and FAHRNBRUCH, JJ., and WITTHOFF, D.J.

WHITE, J.

Respondent, Marietta Miles, appeals an order of the district court for Scotts Bluff County modifying a decree of divorce by transferring custody of 15-year-old Theron Miles, one of the minor children of the parties, to the petitioner, Vincent Miles. Mrs. Miles assigns two errors, which, consolidated, are that the district court erred in its determination that a material change of circumstances had occurred affecting the best interests of the minor child. We affirm.

The standard of review for orders modifying child custody awards in dissolution decrees is as follows. "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." *Hibbard v. Hibbard*, 230 Neb. 364, 365, 431 N.W.2d 637, 638 (1988). Where the evidence is in conflict, we give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Rollogas v. Rollogas*, 230 Neb. 46, 429 N.W.2d 727 (1988). "[A]n order concerning custody of children

will not be modified unless there has been a material change of circumstances indicating that the person with custody of the children is unfit *or* that the best interests of the children require such action." *Hibbard v. Hibbard, supra* at 365, 431 N.W.2d at 639. In the case at bar there were no allegations that either parent was unfit. The crucial issue was to determine if there had been a material change of circumstances indicating that the best interests of Theron mandated a change in custody.

In child custody modification actions, as well as initial custody awards, Neb. Rev. Stat. § 42-364 (Reissue 1988) lists factors for the court to consider in determining the best interests of the children. Specifically, this court has said that in determining a child's best interests under § 42-364(1) the court may consider

> factors such as general considerations of moral fitness of the child's parents, including the parents' sexual conduct; respective environments offered by each parent; the emotional relationship between child and parents; the age, sex, and health of the child and parents; the effect on the child as the result of continuing or disrupting an existing relationship; the attitude and stability of each parent's character; parental capacity to provide physical care and satisfy educational needs of the child; the child's preferential desire regarding custody if the child is of sufficient age of comprehension regardless of chronological age, and when such child's preference for custody is based on sound reasons; and the general health, welfare, and social behavior of the child.

Christen v. Christen, 228 Neb. 268, 271-72, 422 N.W.2d 92, 95 (1988).

Though there was some conflict in the evidence, a de novo review of the record discloses no abuse of discretion on the part of the trial court. The evidence shows that Theron has a poor emotional relationship with his mother and that Mrs. Miles has lost control of her son. During phone conversations between Theron and his father, he has constantly expressed the desire to live with his father and has repeatedly threatened to kill himself and his mother if he could not do so. Theron has punched holes in the walls of the residence, broken the windshield of Mrs.

Miles' car, threatened Mrs. Miles with scissors, and struck his sisters. He has also run away from home at least once. At one point, Theron became such a problem to Mrs. Miles that she had to call the police several times and juvenile proceedings against Theron were considered. Prior to trial, Theron was receiving Ds and Fs in school.

Two mental health experts, including Mrs. Miles' own psychotherapist, expressed the opinion that Theron should live with his father. The court-appointed mental health examiner felt that Theron's desire to live with his father was based on sound reasons.

It is clear from the record that Theron wants to live with his father and that he has sound reasons to support his preference. While the wishes of the child are not controlling in the determination of custody, if a child is of sufficient age and has expressed an intelligent preference, his preference is entitled to consideration. *Goodman v. Goodman*, 180 Neb. 83, 141 N.W.2d 445 (1966). See, also, *Grace v. Grace*, 221 Neb. 695, 380 N.W.2d 280 (1986).

In an interview with the judge, Theron said he needed more discipline and that he felt his father was the only one who could provide it. He also stated that he and his mother did not get along and that they should be apart from each other until "we get to know each other a little better . . . put it all in the past and then start from scratch again . . . ." In addition, Theron said he was putting pressure on his mother to see that his preference was granted and that he would take matters into his own hands if he was not allowed to live with his father.

The deterioration of the relationship between Theron and his mother, her inability to control or discipline him, and his obvious preference for living with his father clearly constitute a material change of circumstances which in the best interests of Theron mandated a modification of custody.

Accordingly, the district court judgment is affirmed. Appellee's request for attorney fees in this court is denied.

AFFIRMED.

JOSEPH A. GLORIA, APPELLEE, V. NEBRASKA PUBLIC POWER DISTRICT, APPELLANT.

438 N.W.2d 142

Filed April 7, 1989. No. 88-745.

1. **Workers' Compensation: Appeal and Error.** Factual findings by the Workers' Compensation Court have the same effect as a jury verdict in a civil case and will therefore not be set aside unless clearly wrong.
2. **Workers' Compensation: Limitations of Actions.** When a claimant suffers a latent and progressive injury, the statute of limitations will be tolled until it becomes, or should have become, reasonably apparent to the claimant that a compensable disability was present.
3. _____: _____. If an employee suffers an injury which appears to be slight but which is progressive in its course, and which several physicians are unable to correctly diagnose, the worker's failure to file claim or bring suit within the time limited by law will not defeat his right to recovery, if he gave notice and commenced action within the statutory period after he had knowledge that compensable disability resulted from the original accident.
4. **Workers' Compensation: Judgments: Appeal and Error.** On appeal of a workers' compensation case to the Supreme Court, if there is reasonable, competent evidence to support the findings of fact in the trial court, the judgment, order, or award will not be modified or set aside for insufficiency of the evidence.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

John K. Sorensen, of Wright & Sorensen, P.C., for appellant.

George A. Sommer for appellee.

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

WHITE, J.

This is an action for workers' compensation benefits filed by the appellee, Joseph A. Gloria, on April 13, 1987. The appellee seeks benefits alleged to be due as a result of an injury sustained on March 25, 1981, in an accident arising out of and in the course of his employment. The last payment was made by the defendant on January 18, 1982.

On November 9, 1987, the petition of the plaintiff was dismissed after the first hearing before a single judge of the

Nebraska Workers' Compensation Court. Plaintiff filed an application for rehearing and, on August 19, 1988, three judges of the Nebraska Workers' Compensation Court reversed the order of dismissal and awarded the plaintiff benefits of $180 per week for temporary total disability, from November 5, 1986, and for as long in the future as the plaintiff remains totally disabled. It is from this award that the defendant appeals.

The appellant assigns seven errors, which, in summary, state that the court erred in finding the claimant's injury not barred by application of the statute of limitations.

Factual findings by the Workers' Compensation Court have the same effect as a jury verdict in a civil case and will therefore not be set aside unless clearly wrong. *Noah v. Creighton Omaha Health Care Corp.*, 213 Neb. 169, 328 N.W.2d 203 (1982). "We are not at liberty to substitute our views for those of the Workmen's Compensation Court regarding questions of fact if there is evidence in the record to substantiate its conclusions." *Thomas v. Kayser-Roth Corp.*, 211 Neb. 704, 711, 320 N.W.2d 111, 115 (1982). Although there is some conflict in the evidence, sufficient evidence exists to affirm the findings of the Workers' Compensation Court.

As stated above, the appellant contends that this claim must fail because the statute of limitations has expired. Neb. Rev. Stat. § 48-137 (Reissue 1988) provides in relevant part:

> In case of personal injury, all claims for compensation shall be forever barred unless . . . within two years after the accident, one of the parties shall have filed a petition . . . . When payments of compensation have been made in any case, such limitation shall not take effect until the expiration of two years from the time of the making of the last payment.

The 2-year limitation period began to run when the last medical payment was made by the appellant on January 18, 1982. This action was not filed until April 13, 1987. Therefore, this case is time barred unless it is found to be within an exception that tolls the statute of limitations.

One well-recognized limitations exception is for injuries that are latent and progressive. Because of the latent nature of

certain injuries, we have repeatedly held that when a claimant suffers such an injury, the statute of limitations will be tolled until it becomes, or should have become, reasonably apparent to the claimant that a compensable disability was present. *Cemer v. Huskoma Corp.*, 221 Neb. 175, 375 N.W.2d 620 (1985). In *Thomas v. Kayser-Roth Corp., supra* at 707-08, 320 N.W.2d at 114, we stated that

> if an employee suffers an injury which appears to be slight but which is progressive in its course, and which several physicians are unable to correctly diagnose, the worker's failure to file claim or bring suit within the time limited by law will not defeat his right to recovery, if he gave notice and commenced action within the statutory period after he had knowledge that compensable disability resulted from the original accident.

The facts surrounding the injury incurred by the appellee must be examined in order to determine whether the disability from which the appellee now suffers is within the scope of the "latent and progressive injury" exception to the statute of limitations. The appellee, Gloria, is a 48-year-old man with a ninth-grade education and no special training or experience. Gloria began work as a lineman with the Nebraska Public Power District (NPPD) on May 15, 1974, where he worked until November of 1986. On March 25, 1981, he was involved in an accident which is the basis of this action.

Prior to the accident, Gloria had some difficulty with his cervical spine. On October 20, 1980, Gloria was admitted to the hospital for decompression laminectomy surgery due to a diagnosis of degenerative changes in his cervical spine. These degenerative changes were located in the C6 through T1 vertebras. The operation was performed by Dr. Ernest Beehler, a neurosurgeon located in Scottsbluff, Nebraska. The medical reports indicate that Gloria was recovering well from the surgery, and he returned to work in January of 1981. On March 25, 1981, the appellee was working on a power pole. A spike strapped to one of his boots apparently hit a soft spot on the pole, and he fell, still strapped to the pole, 17 or 18 feet to the ground. He landed on his feet and then fell backward. An ambulance took him to the hospital, and Gloria was released

approximately 3 hours later.

Immediately after the fall, appellee testified, his body went numb. However, feeling did return to his body prior to his discharge from the emergency room. The doctor on duty at the emergency room did not indicate in his report that there was any apparent injury, but noted that should any symptoms appear, Gloria was to see his family physician. Gloria returned to work the following day but was unable to do much of anything other than watch for a period of about a month. The appellant saw Dr. W.F. Ropp on March 30, 1981, due to soreness he was still experiencing in his upper extremities. Dr. Ropp, an orthopedic specialist, reported that Gloria had a strain and contusion, but apparently did rule out the presence of a spinal cord contusion at that time. After consulting with Dr. Beehler, he prescribed merely "conservative treatment at [home]" and moist heat to be applied to Gloria's upper extremities. By December 8, 1981, Dr. Beehler stated in his report that Gloria was "considerably improved even over the last time I saw him." No evidence of atrophy and no definitive weakness at all were found. In conclusion, Dr. Beehler wrote, "From the neurological point of view he has recovered sufficiently that he can do this sort of thing [work]. He says that most all of the pain is gone." He resumed climbing poles when he was released from Dr. Beehler's care. The date Gloria was released is not clear from the record. Dr. Beehler testified that Gloria continued to improve after the fall; however, he did not remember the exact date of Gloria's release.

Between his visits with Dr. Beehler in 1981 and 1986, Gloria had one incident with a sharp pain in his lower back. On April 1, 1983, he saw his family physician, Dr. Alan Johnson, for severe low back pain. This was apparently diagnosed as a muscle spasm. He saw Dr. Johnson for followup visits on both September 28, 1983, and July 31, 1984. This episode was not shown to be directly related to the injury suffered by Gloria in March of 1981.

Finally, in the summer of 1986, Gloria began noticing a substantial change in his condition. He began dropping things and felt his hands going numb. Gloria visited Dr. Beehler at that time. On November 4, 1986, a myelogram was performed

which diagnosed cervical cord atrophy and a bulging disk around the L2 and L3 vertebras. Medical reports indicate that this bulging disk was not related in any way to the shrinking, or atrophy, of the cord and instead was, in all probability, related directly to the fall. Just before the myelogram was performed, Dr. Beehler stated in his clinical summary that Gloria "fell off a pole . . . but seemed to recover." In a report from Dr. Beehler on December 11, 1986, he stated that following the fall, Gloria gradually became aware of the present symptoms and that now there appears a generalized weakness. Dr. Beehler testified in his deposition that he does not believe the current injury was caused by the previous surgery because if this was the case, Gloria would not have improved so significantly before the accident.

The evidence in this case establishes that Gloria had an injury for which he sought medical treatment. According to medical testimony and the appellee's own statements, following the accident the claimant appeared to recover. It was not until November of 1986, following the myelogram, that the nature of his injury was discovered. Since that time the condition of the claimant has worsened, and the prognosis is very poor. The compensation court could reasonably have found from the evidence that the injury to Gloria's back was of such a nature that it could not have been detected at the time the injury occurred and was not discovered until the myelogram was performed in 1986.

Although there may be some conflicting evidence in this action, we have held, " 'On appeal of a workmen's compensation case to the Supreme Court, if there is reasonable competent evidence to support the findings of fact in the trial court, the judgment, order, or award will not be modified or set aside for insufficiency of the evidence.' " *O'Connor v. Anderson Bros. Plumbing & Heating*, 207 Neb. 641, 645-46, 300 N.W.2d 188, 191 (1981), citing *Borowski v. Armco Steel Corp.*, 188 Neb. 654, 198 N.W.2d 460 (1972). Because there is evidence to support the decision of the three-judge panel, we affirm the decision.

Because this appeal was taken by the employer and no reduction in the award was granted by this court, Gloria is

entitled to an award of reasonable attorney fees pursuant to Neb. Rev. Stat. § 48-125 (Reissue 1988). No specific amount was requested by the appellee in this appeal; therefore, we grant the claimant $1,500 as a reasonable attorney fee, to be taxed as costs against NPPD.

AFFIRMED.

IN RE INTEREST OF Q.R. AND D.R., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. D.R., APPELLANT.

438 N.W.2d 146

Filed April 7, 1989. No. 88-781.

1. **Parental Rights: Evidence: Proof.** Regarding parental noncompliance with a court-ordered rehabilitative plan, under Neb. Rev. Stat. § 43-292(6) (Reissue 1988), as a ground for termination of parental rights, the State must prove by clear and convincing evidence that (1) the parent has willfully failed to comply, in whole or in part, with a reasonable provision material to the rehabilitative objective of the plan and (2) in addition to the parent's noncompliance with the rehabilitative plan, termination of parental rights is in the best interests of the child.
2. **Parental Rights: Evidence: Appeal and Error.** In our review of a judgment terminating parental rights, we try the factual questions de novo on the record and are required to reach a conclusion independent of the juvenile court. In such review, where the evidence is in conflict, we consider and may give weight to the juvenile court's observation of the witnesses and acceptance of one version of the facts rather than another.
3. **Parental Rights.** Where parents are unable or unwilling to rehabilitate themselves within a reasonable time, the best interests of the children require that parental rights be terminated without delay.

Appeal from the Separate Juvenile Court of Douglas County: COLLEEN R. BUCKLEY, Judge. Affirmed.

Gloria Jean Sorey for appellant.

Ronald L. Staskiewicz, Douglas County Attorney, and Richard E. Rothrock for appellee.

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

GRANT, J.

D.R., mother of Q.R., born May 17, 1977, and D.R., born August 19, 1984, appeals from an order of the separate juvenile court of Douglas County terminating her parental rights to the two minor children. The mother timely appealed, contending in this court that the juvenile court erred in (1) "[d]etermining that the State had clearly and convincingly proved Appellant's failure to comply with the Plan designed to correct the conditions leading to the adjudication under Section 43-247(3)(a) R.S. Supp.,1986," and (2) finding that in the best interests of the children, termination of parental rights "was the only reasonable alternative in view of noncompliance with the Plan." We affirm.

The record shows that appellant is the mother of the two children named above and of another child, M.R., born May 14, 1986. As to M.R., a motion to terminate appellant's parental rights was filed on April 20, 1987, and appellant's parental rights were terminated on July 14, 1987. That order of termination became final and is not the subject of this appeal. The circumstances, however, are important in considering the case involving the other two children.

The record shows that M.R., at birth, was suffering from drug withdrawal symptoms, had asphyxia, and required help before she could breathe alone. Three months after birth, the infant still required special care and a heart monitor. Appellant admitted to drug use at some time before the birth of M.R., but indicated that she had stopped using drugs before the birth of M.R. The fact of appellant's drug use was shown by M.R.'s symptoms of drug withdrawal at birth. Further evidence showed appellant had not seen the child during the 13 months preceding the hearing. As stated, the termination order as to M.R. was not appealed.

As to the other two children, the record shows that on June 24, 1986, the children were placed in the custody of the Nebraska Department of Social Services (DSS), without objection by appellant, and that at the adjudication hearing on July 28, 1986, appellant admitted the factors set out above as to M.R. and admitted that the living accommodations for the

children were inadequate and had been observed to be cluttered and roach infested. The court ordered that the children remain in the custody of DSS.

On September 9, 1986, at a dispositional hearing, the court ordered that the children remain in the custody of DSS and ordered appellant to conform to seven conditions: to maintain visitation with the children; to submit to chemical dependency evaluation and follow the recommendations resulting from the evaluation; to obtain and maintain employment; to obtain independent housing and keep the house clean; to refrain from criminal activity; to attend counseling with regard to relinquishment of her parental rights to M.R.; and to cooperate with the workers involved in her case and notify them of any change of address.

The case was reviewed on December 9, 1986, and April 9, July 13, and December 15, 1987. On each review, similar conditions were imposed on appellant after hearings which showed that the only condition observed by appellant was the condition relating to visitation with her children. Appellant did visit the two children, with some omissions, such as when she was in jail for various misdemeanor offenses.

On July 8, 1988, the county attorney filed a motion for termination of appellant's parental rights, alleging that appellant had not followed the recommendations of the plan, in that appellant did not participate in the Equilibria drug treatment program and had failed to attend an interview at the NOVA drug program, had not maintained employment and furnished proof of income, had not obtained independent housing, had not refrained from criminal activity, and had failed to cooperate with the workers involved with her case. On August 17, 1988, appellant's parental rights were terminated.

With regard to appellant's first assigned error, that there was not clear and convincing proof of appellant's noncompliance with the court-ordered rehabilitative plan, we have held:

> [R]egarding parental noncompliance with a court-ordered rehabilitative plan, under § 43-292(6) as a ground for termination of parental rights, the State must prove by clear and convincing evidence that (1) the parent has

> willfully failed to comply, in whole or in part, with a reasonable provision material to the rehabilitative objective of the plan and (2) in addition to the parent's noncompliance with the rehabilitative plan, termination of parental rights is in the best interests of the child.

In re Interest of J.S., A.C., and C.S., 227 Neb. 251, 267, 417 N.W.2d 147, 158 (1987), quoted in *In re Interest of P.M.C., ante* p. 701, 437 N.W.2d 786 (1989).

In our review of a judgment terminating parental rights, we try the factual questions de novo on the record and are required to reach a conclusion independent of the juvenile court. In such review, where the evidence is in conflict, we consider and may give weight to the juvenile court's observation of the witnesses and acceptance of one version of the facts rather than another. *In re Interest of P.M.C., supra*; *In re Interest of A.Z., B.Z., and R.Z.*, 230 Neb. 291, 430 N.W.2d 901 (1988).

After each of the review hearings set out above, the court entered a rehabilitative plan. The last plan, set out in the juvenile court's order of December 15, 1987, provided that appellant should:

> 1. Maintain regular visits with [the children];
>
> 2. Submit to random drug screenings within 24 hours of request by the workers involved;
>
> 3. Attend a preliminary interview at the NOVA Program within 30 days from December 15, 1987, and follow all recommendations, including participation of in-patient treatment or out-patient treatment of at least 3 times a week;
>
> 4. Obtain regular income through employment and provide proof (pay stubs) to the probation officer no later than the 15th day of each month starting January, 1988;
>
> 5. Obtain independent and adequate housing and provide rent receipts to the probation officer no later than the 15th day of each month;
>
> 6. Abstain from all illegal activities and make resolution of any current charges or warrants pending;
>
> 7. Contact the probation officer at least every other Friday starting December 18, 1987 at 444-7629;
>
> 8. Cooperate with the workers and professionals

involved and give 48 hours notice of change in employment, income or residence.

At the termination hearing, evidence adduced proved that appellant complied only with the first condition. Appellant did visit her children with some regularity.

Other evidence showed that the requirements of the plan were explained, in detail, to appellant and that appellant understood the plan and agreed to do the required things. The record establishes that appellant did not violate condition 2, in that, for some inexplicable reason, no random drug screening was requested. We share the concern of the juvenile court that the authorized tests were not used and that the checking by the caseworkers seemed to concentrate on employment, housing, and cooperation with the professionals and workers concerned in appellant's case, rather than on appellant's drug usage.

The evidence is clear and convincing, however, that even without the random tests, appellant has failed to comply with condition 3 of the December 15, 1987, order. That part of the order required appellant to "attend a preliminary interview at the NOVA Program within 30 days from December 15, 1987, and follow all recommendations, including participation of in-patient treatment or out-patient treatment of at least 3 times a week." All the evidence, including appellant's, shows that appellant did not comply with this requirement or with earlier orders of the court requiring drug addiction treatment. A juvenile court probation officer testified that appellant had partially complied with an earlier court order that she submit to a chemical dependency evaluation, in that appellant had obtained such an evaluation on October 8, 1987. Appellant, however, did not comply with the recommendation of that evaluation which indicated appellant had a drug problem. Appellant admitted that she, at least at one time, had been a heroin addict. The recommendation was that appellant should participate in the heroin addiction program at the Equilibria drug program. Appellant did not participate at any time in that program, although she had specifically been ordered to do so on July 13, 1987.

Appellant was also specifically ordered to interview at the NOVA program, by the December 15, 1987, order, within 30

days. She did not interview at NOVA. Appellant testified that she had called NOVA, but not until sometime in July 1988, just before the termination hearing. At that time, appellant admitted she was told she needed inpatient drug treatment. Appellant further admitted that she had not sought such treatment during the whole period of time this case was going on, but that she had not sought the treatment because "probably to just be honest is because I wasn't ready, and if I — just say for instance if I was put there, you know, not on my own free will, then it wouldn't have done me no good . . . ."

There was further conclusive evidence that appellant did not furnish any required information showing that she was employed. Caseworkers testified that appellant did not cooperate with them in any way with drug counseling or in obtaining independent housing. Other evidence showed that appellant had not abstained "from all illegal activities."

In short, appellant has violated a substantial number of the provisions of the rehabilitative order and has chosen not to comply with reasonable orders attempting to straighten out her life so that she could give her children the care and guidance they need. Appellant's first assignment of error is without merit.

As to appellant's second assignment of error, we hold that the State does not have to prove that termination "was the only reasonable alternative in view of noncompliance with the Plan." In a termination proceeding, the only burden on the State is to prove, by clear and convincing evidence, that termination of parental rights is in the best interests of the child and that one or more of the six conditions set out in Neb. Rev. Stat. § 43-292 (Reissue 1988) exists. There is no burden on the State to prove that termination is the only alternative available.

In the case at bar, the State has proved that the best interests of the children require that the parental rights of their mother be terminated in order that they may have the opportunity to pursue their lives in a drug-free environment. We have stated:

> "[W]here parents are unable or unwilling to rehabilitate themselves within a reasonable time, the best interests of the children require that parental rights be terminated without delay." *In re Interest of M.R., J.R., and N.R.,*

> [228 Neb.] at 53, 420 N.W.2d at 927-28. " ' "[A] child cannot, and should not, be suspended in foster care, nor be made to await uncertain parental maturity." ' " *In re Interest of L.O. and B.O.*, 229 Neb. 889, 896, 429 N.W.2d 388, 393 (1988) (citing *In re Interest of Z.R.*, 226 Neb. 770, 415 N.W.2d 128 (1987)).

In re Interest of P.M.C., ante p. 701, 709, 437 N.W.2d 786, 792 (1989).

In addition, the State has fully proved that the conditions set out in § 43-292(6) are present in this case. That section provides that parental rights are subject to termination when the following condition exists: "Following a determination that the juvenile is one as described in subdivision (3)(a) of section 43-247, reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the determination."

Neb. Rev. Stat. § 43-247 (Reissue 1988) provides: "The juvenile court . . . shall have jurisdiction of . . . (3) Any juvenile (a) . . . who lacks proper parental care by reason of the fault or habits of his or her parent . . . whose parent . . . neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of such juvenile . . . ." On July 28, 1986, the juvenile court determined, without objection from appellant, that the two children in this case were children within the meaning of § 43-247(3)(a). On September 9, 1986, the court ordered a reasonable rehabilitative plan and later simplified that plan for appellant. In the time elapsing between the first plan and the termination hearing on August 17, 1988 (some 23 months), four review hearings were held. Each time appellant was encouraged and exhorted to comply with the plans so that she could regain her children. Each time appellant was told of the dire consequences that could follow if she failed to comply. All encouragement, exhortation, and warnings were ignored by appellant.

The evidence is clear and convincing that appellant has willfully failed to comply with reasonable plans which, if complied with, would have resulted in the restoration of her children to her. The evidence is also clear and convincing that

the best interests of Q.R. and D.R. require that the parental rights of their mother, D.R., be terminated.

The judgment of the juvenile court is affirmed.

AFFIRMED.

INTERNATIONAL HARVESTER CREDIT CORPORATION, NOW KNOWN AS NAVISTAR FINANCIAL CORPORATION, APPELLEE, V. HARRY LECH AND LECH EQUIPMENT, INC., APPELLANTS.

438 N.W.2d 474

Filed April 14, 1989. No. 87-572.

1. **Summary Judgment.** Summary judgment is an extreme remedy to be awarded only when an issue is clear beyond all doubt.
2. _____. 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.
3. **Summary Judgment: Appeal and Error.** In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
4. **Contracts.** The construction of a written contract, if needed, is a question of law for the court.
5. **Replevin.** The cardinal question in every replevin action is whether the plaintiff was entitled to immediate possession of the property replevied at commencement of the action.
6. **Contracts: Presumptions: Intent.** There is a strong presumption that a written instrument correctly expresses the intention of the parties to it.
7. **Contracts: Intent.** Parties are bound by the terms of the contract even though their intent may be different from that expressed in the agreement.
8. _____: _____. It is well-established law in this state that the interpretation given to a contract by the parties themselves while engaged in the performance of it is one of the best indications of true intent and should be given great, if not controlling, influence.
9. _____: _____. When the terms of a contract and the facts and circumstances that aid in ascertaining the intent of the parties are insufficient to raise an issue of fact, the interpretation of the contract is a matter of law.

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

Vince Kirby for appellants.

Geraldine L. Clanton, of Schmid, Mooney & Frederick, P.C., for appellee.

HASTINGS, C.J., CAPORALE, and GRANT, JJ., and BURKHARD and HANNON, D. JJ.

HASTINGS, C.J.

Defendants, Harry Lech and Lech Equipment, Inc., have appealed from the judgment of the district court which granted summary judgment to the plaintiff on its suit for replevin of a combine and a corn head. Defendants' three assignments of error may be summarized as asserting that the trial court erred in granting summary judgment because there are genuine issues of material fact that are unresolved. We affirm.

Harry Lech operated Lech Equipment as an International Harvester (IH) dealer for 24 years, until his franchise was voluntarily terminated in December of 1984.

In January 1981, Lech Equipment took delivery of an IH combine for a purchase price of $46,432.50 and, in October 1982, took delivery of an IH corn head for a purchase price of $9,780.72.

The two pieces of equipment became part of Lech Equipment's inventory, which was financed under the floor plan Lech Equipment had with either IH, according to the affidavit of Harry Lech, or International Harvester Credit Corporation (IHCC), in line with Lech's deposition testimony. There is no indication in the record that the purchase prices have ever been paid.

On October 31, 1983, apparently in an effort to aid in the financing of Lech Equipment, IH and Lech Equipment entered into a retail installment contract regarding the combine and corn head. The retail installment contract named IH as the seller and Lech Equipment as the purchaser, and required Lech Equipment to make four annual payments of $17,772.99, commencing on November 1, 1984. The contract was signed by Harry Lech as or for the purchaser, and was approved for IH by an indecipherable signature as "mgr." This particular document contained some blank spaces in the lower left-hand corner to

permit the assignment of the contract to IHCC. The pertinent language was "APPROVED for Seller and ASSIGNED TO IHCC under the terms of Assignment # 1, appearing on the reverse of this contract." The handwritten words "Lech Equipment, Inc.," appear on the signature line for the seller, but they have been crossed out. The net effect, it would seem, is that no one executed the assignment on the part of the seller as was contemplated by the retail installment contract form which was employed.

Lech Equipment failed to make the first payment due on November 1, 1984. Thereafter, on December 4, 1984, an extension agreement was signed by Harry Lech on behalf of Lech Equipment to extend the due date of the installment payment to January 1, 1985. The extension agreement refers to the combine and corn head by model number and serial number. It recites that IHCC agrees to

> extend due date(s) of the following retail installment payments subject to the terms and conditions set forth below:
>
> | Contractual Amount of Installment | Original Contract Due Date | Amount of Installment Extended | Extended Due Date |
> |---|---|---|---|
> | 17,772.99 | 11-1-84 | 17,772.99 | 1-1-85 |
>
> . . . .
>
> 2. Except as modified by this extension agreement, all the terms and conditions contained in the retail installment contract/installment note and security agreement date 10-31-83 between Lech Equipment as purchaser and International Harvester Co. as seller which has been assigned to International Harvester Credit Corporation shall remain in full force and effect.

The agreement was signed on behalf of IHCC by its district manager, followed by the words, "The undersigned Lech Equip (purchaser) hereby acknowledges that the terms and conditions of this extension agreement are accepted." The agreement was dated January 4, 1984, and signed by "Lech Equip by Harry J Lech."

Lech testified that he signed the extension agreement, marked exhibit 14, on behalf of Lech Equipment and that it was

an extension agreement of the security agreement dated October 31, 1983, mentioned above, and which was marked as exhibit 9.

Lech Equipment failed to make any of the payments required under the contract. IHCC, as the assignee of the retail installment contract, made demand for payments or for return of the equipment. Lech Equipment refused. IHCC then brought this replevin action, claiming a special ownership interest in the equipment by virtue of the retail installment contract assigned to it by IH. IHCC claims that the indebtedness of Lech Equipment is in the amount of $37,390.99 plus interest. Lech and Lech Equipment denied any special ownership interest by IHCC, claiming Lech Equipment obtained title to the equipment by virtue of the delivery invoices and therefore IH had no title to the equipment in 1983 so as to enable it to sell the equipment to Lech Equipment under the retail installment contract.

Harry Lech acknowledges his signature on the retail installment contract, acknowledges that payments were not made to IHCC, and acknowledges receipt of demands from IHCC that payments be made.

Summary judgment is an extreme remedy to be awarded only when an issue is clear beyond all doubt. *Strother v. Herold*, 230 Neb. 801, 433 N.W.2d 535 (1989); *Muller v. Thaut*, 230 Neb. 244, 430 N.W.2d 884 (1988). It 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. Neb. Rev. Stat. § 25-1332 (Reissue 1985); *Svoboda v. First Nat. Bank of O'Neill*, 230 Neb. 595, 432 N.W.2d 806 (1988); *Everlasting Golden Rule Ch. v. Dakota Title*, 230 Neb. 590, 432 N.W.2d 803 (1988).

In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Svoboda, supra*; *Everlasting Golden Rule Ch., supra.*

However, the construction of a written contract, if needed, is

a question of law for the court. *Artex, Inc. v. Omaha Edible Oils, Inc., ante* p. 281, 436 N.W.2d 146 (1989).

The cardinal question in every replevin action is whether the plaintiff was entitled to immediate possession of the property replevied at commencement of the action. *Arcadia State Bank v. Nelson*, 222 Neb. 704, 386 N.W.2d 451 (1986). According to IHCC, the contract represented a retail sale of the combine and corn head to Lech Equipment and granted IHCC, as assignee of the contract, a purchase money security interest in the equipment to secure the amount of indebtedness owed under the contract. Lech, however, claims that the contract was not intended by the parties to represent a retail sale but, rather, was intended to be an extension of Lech Equipment's floor plan to keep the equipment wholesale and to extend the due date because Lech could not obtain local financing to make the floor plan payment that was due. Resolution of the dispute turns on an interpretation of the retail installment contract.

There is a strong presumption that a written instrument correctly expresses the intention of the parties to it. *Artex, Inc. v. Omaha Edible Oils, Inc., supra*; *Bedrosky v. Hiner*, 230 Neb. 200, 430 N.W.2d 535 (1988). Parties are bound by the terms of the contract even though their intent may be different from that expressed in the agreement. *Artex, supra*; *Bedrosky, supra.*

Defendants argue that the transaction between Lech Equipment and IH was not a retail sale and that IHCC had no special ownership interest in the property by reason of the assignment. It is defendants' position that Lech, or his company, owned every piece of equipment in the inventory despite not having paid anything on it, because they would be held responsible in case of loss. Therefore, defendants reason, IH could not have sold the equipment to Lech Equipment because IH did not have title.

Defendants cite *Mansinger v. Steiner-Medinger Co.*, 4 Neb. (Unoff.) 392, 94 N.W. 633 (1903), in support of their position. In *Mansinger*, which was a replevin action, the court found that an instrument purporting to change an absolute sale between the parties into a conditional sale was not a contract and therefore was unenforceable. The court reasoned that title to the subject of the instrument, flour, had passed to the vendee as

a result of the first contract between the parties, and therefore the vendor had no title to pass under the alleged conditional sale.

However, *Mansinger* is distinguishable on the facts. The first transaction between IH and Lech Equipment, delivery of the equipment from IH to Lech Equipment, was not an absolute sale. Rather, Lech Equipment took *possession* of the equipment subject to payment of the purchase price. No title ever passed from IH to Lech Equipment. Therefore, IH did have title to the equipment in 1983 when the parties entered into the retail installment contract. Even Lech, in his deposition, acknowledged that he never paid anyone for the combine or corn head and that the owner was the person or entity to whom he owed the money.

Lech and his company also claim that the retail installment contract was intended to be an extension of Lech Equipment's floor plan, not a retail sale. However, this court has stated: "It is well-established law in this state that the interpretation given to a contract by the parties themselves while engaged in the performance of it is one of the best indications of true intent and should be given great, if not controlling, influence." *Nowak v. Burke Energy Corp.*, 227 Neb. 463, 471, 418 N.W.2d 236, 241-42 (1988); *Marvin E. Jewell & Co. v. Thomas, ante* p. 1, 434 N.W.2d 532 (1989).

The contract was not treated as an extension of the floor plan. Shortly after the retail installment contract was entered into, the combine and corn head no longer appeared on the monthly summary of outstanding wholesale notes Lech Equipment received from IHCC for items on the floor plan.

In addition to the monthly summary of outstanding wholesale notes, IHCC would send Lech Equipment due notices for wholesale notes. The last due notice for the combine was dated February 18, 1984. The corn head was not included on the February 18 due notice. Neither the combine nor the corn head appeared on the March 24, 1984, due notice.

Lech Equipment also received floor plan verification reports from IHCC indicating what pieces of equipment were supposed to be part of the inventory, and the monthly inventory was confirmed by representatives of IHCC. Neither the combine

nor the corn head appeared on the March 1984 floor plan verification report, indicating the representatives of IHCC were no longer checking to make sure the combine and corn head were part of Lech Equipment's inventory.

Other evidence favoring IHCC's version of the transaction as a retail sale includes the extension agreement, demands from IHCC for the downpayment, and demands from IHCC for the payments under the contract. Additionally, the warranty and delivery registration for the combine indicates delivery to a retail customer, Lech Equipment.

Despite repeated assertions that the contract was intended to extend the floor plan, Lech testified during his deposition, "The biggest concern was the 10-31, to get it off of the wholesale — floor plan."

When the terms of a contract and the facts and circumstances that aid in ascertaining the intent of the parties are insufficient to raise an issue of fact, the interpretation of the contract is a matter of law. *Watmore v. Ford*, 229 Neb. 121, 425 N.W.2d 612 (1988). The terms of the retail installment contract and the facts and circumstances that aid in ascertaining the intent of IH and Lech Equipment in entering into the installment contract are insufficient to raise an issue of fact.

Finally, Lech and Lech Equipment argue that IHCC did not have a valid assignment of the contract because the signature of Lech Equipment as the seller and assignor had been crossed out. However, under the terms of the retail contract, as previously stated, IH was the seller, not Lech Equipment. True enough, IH's signature as seller and assignor did not appear on the contract. However, Michael Duffy, district collection supervisor for IHCC, indicated in his affidavit that the contract had been duly assigned to IHCC. More importantly, however, Lech orally acknowledged that the contract had been assigned, and by executing the extension agreement, exhibit 14, he acknowledged the assignment in writing.

There is no genuine issue of material fact presented in the record, and IHCC is entitled to judgment as a matter of law. The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JESSE E. NARCISSE, APPELLANT.

438 N.W.2d 743

Filed April 14, 1989. No. 88-426.

1. **Verdicts: Appeal and Error.** A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict.
2. **Sexual Assault: Corroboration.** In a sexual assault case the victim need not be independently corroborated on the particular acts constituting the sexual assault, but must be corroborated on the material facts and circumstances tending to support the victim's testimony about the principal fact in issue.
3. _____: _____. It is not necessary that the victim of a sexual assault make a complaint at the first available opportunity. It is only necessary that the complaint be made within a reasonable amount of time following the assault in order to constitute sufficient corroboration.
4. **Jury Instructions: Evidence: Lesser-Included Offenses.** Generally, it is not prejudicial error to not instruct upon a lesser offense when the evidence entirely fails to show an offense of a lesser degree than that charged in the information.
5. _____: _____: _____. When the State offers uncontroverted testimony on an essential element of a crime, mere speculation that the jury may disbelieve the testimony does not entitle the defendant to an instruction on a lesser-included offense.
6. **Trial: Appeal and Error.** An issue not presented to or passed upon by the trial court is not appropriate for consideration on appeal.
7. **Appeal and Error.** Generally, assigned errors not discussed are not considered by the Supreme Court on appeal.

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

Miles W. Johnston, Jr., for appellant.

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

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

PER CURIAM.

Defendant has appealed from convictions of first degree sexual assault and first degree false imprisonment, following a trial by jury. He assigns as errors the insufficiency of the corroboration testimony and the refusal of the trial court to give instructions on lesser-included offenses. We affirm.

A verdict in a criminal case must be sustained if the evidence,

viewed and construed most favorably to the State, is sufficient to support that verdict. *State v. McDonald*, 230 Neb. 85, 430 N.W.2d 282 (1988).

On the evening of June 16, 1987, the defendant offered the victim a ride to McDonald's restaurant, where she desired to use the public telephone. The victim thought she knew the defendant through her brother so she got into the defendant's car. Instead of taking her to the phone booth, the defendant drove the victim to a dark isolated area near some grain elevators.

The defendant parked the car and locked it. The victim was able to take note of the interior of the automobile and items inside the car. The defendant made advances to the victim, and the two struggled briefly, during which time the defendant yanked the victim's hair, bit her neck, brandished his fist, and threatened to hit her. During this time, the defendant removed a gold ring from his finger and placed it in his pants pocket.

The defendant then sexually assaulted the victim. She testified that he inserted his fingers into her vagina, placed his penis into her vagina, and inserted his finger into her anus.

The victim was eventually able to escape from the car. She ran until she reached a liquor store, where she called police. She provided a description of the defendant, as well as of the interior and exterior of the car and its contents. The next evening the victim identified the defendant from a photo array. She later also identified the defendant's car. Inside the car were the items that the victim described.

When questioned, the defendant first admitted being in the vicinity where the victim testified that she was picked up, but denied that he had talked to anyone or picked anyone up. He gave the police permission to search his residence, where a pair of his pants were recovered which contained the gold ring in a pocket, as described by the victim.

After being arrested and read his *Miranda* rights, the defendant was again questioned by the police. This time he stated that he had been with the victim, but that she had gone with him willingly and that all sexual contact was consensual. He admitted kissing the victim and feeling between her legs, but denied any penetration. He also stated that the victim had asked

for money when they were finished.

The defendant later admitted that he had inserted his finger into the victim's vagina and that he had unsuccessfully attempted to penetrate her vagina with his penis. He continued to maintain that all contact with the victim had been consensual on her part.

The defendant has type O blood, and the victim's blood type is A. The forensic serologist testified that fingernail scrapings of the defendant revealed the presence of type A secretions other than blood (e.g., vaginal secretions, tears, or other tissues); therefore, the secretion had to have come from a person other than the defendant—someone, like the victim, with blood type A.

Defendant's claim that the victim's testimony was not sufficiently corroborated is without merit. This court has held many times that in a sexual assault case the victim need not be independently corroborated on the particular acts constituting the sexual assault, but must be corroborated on the material facts and circumstances tending to support the victim's testimony about the principal fact in issue. *State v. Antillon*, 229 Neb. 348, 426 N.W.2d 533 (1988). The reporting by the victim in *Antillon* to an uncle and a caseworker was held sufficient corroboration. Here, the victim called the police. Although she was reluctant to talk to the first officer who arrived on the scene, a man, she did provide him with a rough description of the defendant and his car, and as soon as a female police officer arrived, the victim related the account of the sexual assault.

In *State v. Wounded Arrow*, 207 Neb. 544, 551, 300 N.W.2d 19, 24, (1980), this court stated that "[i]t is not necessary that the victim of the assault make the complaint at the first available opportunity . . . . It is only necessary that the complaint be within a reasonable amount of time following the assault."

We note in passing that although 1989 Neb. Laws, L.B. 443, which repealed Neb. Rev. Stat. § 29-2013 (Reissue 1985) and which was passed with the emergency clause and signed by the Governor on March 14, 1989, eliminates the requirement of corroboration of the victim's testimony in a sexual assault case,

clearly sufficient corroboration existed in this case.

Defendant's claim that the trial court should have instructed the jury on the lesser-included offenses of sexual assault in the second and third degrees is wholly without merit. As defined by Neb. Rev. Stat. § 28-319 (Reissue 1985), sexual assault in the first degree differs from the crimes of second degree and third degree sexual assault in that only in first degree sexual assault does the State have to prove that the actor subjected the victim to sexual *penetration*. The defendant argues that there was a reasonable doubt as to whether penetration had occurred in this case, and, hence, the defendant was entitled to have the jury instructed on the lesser-included offenses.

His contention in this regard is simply incorrect. True enough, the victim's testimony standing alone perhaps could be disbelieved by the jury on the issue of penetration. However, defendant overlooks the fact that he *admitted* that he had inserted his finger into the victim's vagina and that he had unsuccessfully attempted to penetrate her vagina with his penis. The defendant's statement in his brief that "[i]t appears from the record that the only evidence that the state put on regarding sexual penetration was that of the alleged victim" is clearly erroneous. Brief for appellant at 7.

This court's language in *State v. Brown*, 225 Neb. 418, 430-31, 405 N.W.2d 600, 608 (1987), quoting from *State v. Beasley*, 214 Neb. 918, 336 N.W.2d 601 (1983), is dispositive of the defendant's argument:

> "Generally, it is not prejudicial error to not instruct upon a lesser offense when the evidence entirely fails to show an offense of a lesser degree than that charged in the information. [Citation omitted.] In *State v. Tamburano*, 201 Neb. 703, 271 N.W.2d 472 (1978), a prosecution for sexual assault in the first degree, the only testimony regarding penetration was that of the victim. The defendant did not testify and argued that the jury should have been instructed on second degree sexual assault. We held that when the State offers uncontroverted testimony on an essential element of a crime, mere speculation that the jury may disbelieve the testimony does not entitle the defendant to an instruction on a lesser-included offense. . . ."

Defendant claims that the trial court refused to give instructions on the lesser-included offenses of the crimes which the defendant was convicted of, and states in his argument heading in his brief that the court "erred in failing to give instructions on the lesser-included [offense] of . . . 2nd degree false imprisonment." Brief for appellant at 6. However, nowhere in the defendant's brief does he discuss this alleged error, nor does it appear that he objected to the lack of such an instruction at the trial level, nor did he make such an argument in his motion for new trial.

An issue not presented to or passed upon by the trial court is not appropriate for consideration on appeal. *State v. Blair*, 230 Neb. 775, 433 N.W.2d 518 (1988); *First Nat. Bank v. Rickel, Inc.*, 229 Neb. 478, 427 N.W.2d 777 (1988). Furthermore, assigned errors not discussed are not considered by this court. *State v. Blair, supra*; *State v. Lynch*, 223 Neb. 849, 394 N.W.2d 651 (1986).

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CORELIA THREET, APPELLANT.

438 N.W.2d 746

Filed April 14, 1989. No. 88-506.

1. **Postconviction.** An evidentiary hearing may be denied on a motion for postconviction relief when the records and files in the case affirmatively establish that the defendant is not entitled to relief.
2. _____. In a proceeding under the Postconviction Act, the applicant is required to allege facts which, if proved, constitute a violation or infringement of rights, and the pleading of mere conclusions of fact or law is not sufficient to require the court to grant an evidentiary hearing.

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

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

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

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

GRANT, J.

Defendant appeals from the denial of her petition for postconviction relief in the district court for Douglas County. Defendant was convicted of second degree murder and the use of a firearm in the commission of a felony in connection with the February 2, 1986, killing of Steven W. Johnson. Her conviction was affirmed in this court. *State v. Threet*, 225 Neb. 682, 407 N.W.2d 766 (1987).

On May 2, 1988, defendant filed a motion for postconviction relief, pursuant to the provisions of Neb. Rev. Stat. §§ 29-3001 to 29-3004 (Reissue 1985). In her motion, defendant set out 16 allegations and requested that a specific attorney outside of the public defender's office be appointed, that a judge other than the trial judge hear the motion, and that her sentence be vacated.

Section 29-3001 provides:

> Unless the motion and the files and records of the case show to the satisfaction of the court that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. . . .
>
> A court may entertain and determine such motion without requiring the production of the prisoner, whether or not a hearing is held.

The trial court did not hold an evidentiary hearing, but on May 12, 1988, entered a five-page order denying defendant's motion. Defendant timely filed a notice of appeal together with a poverty affidavit, and the trial court appointed the public defender to represent her on this appeal. In this court, defendant assigns a single error, contending that the trial court erred in not granting defendant an evidentiary hearing on her claim that she received ineffective assistance of counsel during her trial and appeal. We affirm.

An evidentiary hearing may be denied on a motion for

postconviction relief when the records and files in the case affirmatively establish that the defendant is not entitled to relief. *State v. Reddick*, 230 Neb. 218, 430 N.W.2d 542 (1988). In this case, the transcript and the 585-page trial bill of exceptions established that defendant is not entitled to relief.

Before we examine the sole error assigned, we note the other issues raised by defendant in her motion. Defendant alleges that there had been prosecutorial misconduct in this case, in that "[d]uring closing arguments the prosecutor conducted himself in such a way as to result in prosecutorial misconduct," and "[t]he prosecutor erred . . . in his closing remarks. Making derogatory remarks." The trial court determined, and we agree, that defendant's motion does not set out any facts, but only conclusions. We held in *State v. Turner*, 194 Neb. 252, 257, 231 N.W.2d 345, 349 (1975),

> In a proceeding under the Post Conviction Act the applicant is required to allege facts which, if proved, constitute a violation or infringement of constitutional rights and the pleading of mere conclusions of fact or of law are [sic] not sufficient to require the court to grant an evidentiary hearing.

See, also, *State v. Bradford*, 223 Neb. 908, 395 N.W.2d 495 (1986); *State v. Start*, 229 Neb. 575, 427 N.W.2d 800 (1988).

Apparently recognizing the above statement of law, defendant states in her motion that "[w]ithout the court records which would include motions presented in the first trial transcript, which I know to include errors, I'm unable to elaborate the issues." Again we agree with the trial court, whose order included the statement, "Had defendant wished to review the Bill of Exceptions in this case, same was available to her as it would be to any convicted defendant." The record does not show any request for the transcript, and appellant may not rely on her own inactivity to excuse the proper presentation of any claim she may have. See, *State v. Robinson*, 215 Neb. 449, 339 N.W.2d 76 (1983); *State v. Blue*, 223 Neb. 379, 391 N.W.2d 102 (1986).

We further note, as did the trial court, that allegations of prosecutorial misconduct are proper subjects for a direct appeal, not a postconviction hearing, and in the absence of a

direct appeal, the issue will not be considered in this hearing. *State v. Reddick, supra*; *State v. Painter*, 229 Neb. 278, 426 N.W.2d 513 (1988).

Defendant, in her motion, contends that her sentences were excessive. That point, too, should be raised in a direct appeal, and was not. In point of fact, in any event, the record shows the allegation of excessiveness of sentences is without merit. Defendant was convicted of murder in the second degree for killing a man who was a guest in her house and for using a firearm in so doing. The possible penalty for second degree murder is life imprisonment, and the possible penalty for using a firearm in the commission of a felony is 1 to 20 years' imprisonment. Defendant was sentenced to 30 years for second degree murder and 5 to 10 years for use of a firearm. Aside from the fact that the sentences were proper subjects for a direct appeal, both sentences are well within the statutory limits for such crimes and will not be disturbed in the absence of an abuse of the sentencing court's discretion. *State v. Cadwallader*, 230 Neb. 881, 434 N.W.2d 506 (1989); *State v. Bewley*, 229 Neb. 293, 426 N.W.2d 286 (1988).

Defendant then raises all the above matters in connection with her allegation that her trial and appellate counsel, chosen and paid for by defendant, was ineffective. She contends in her motion that her counsel was ineffective in failing to call enough character witnesses, but does not specify what witnesses should have been called and were not. The record shows that counsel called seven such witnesses. The record shows that defendant's privately engaged counsel ably and forcefully represented defendant throughout the pretrial motions, the 5-day trial, and the subsequent motions and sentencing, and ably filed and briefed defendant's appeal to this court.

In her motion for postconviction relief, plaintiff specifically requested that the Douglas County public defender not be appointed and requested a specific private lawyer. Defendant did not file a poverty affidavit at the time of her postconviction filings, and the court did not appoint an attorney at that time. After the trial court's order, the defendant filed a notice of appeal and a poverty affidavit, and the trial court appointed the public defender to represent her on this appeal. This court has

often said that a defendant is entitled to an attorney, but not always the specific attorney requested. *State v. Reddick*, 230 Neb. 218, 430 N.W.2d 542 (1988); *State v. McCoy*, 228 Neb. 178, 421 N.W.2d 780 (1988). There was no error in the refusal to appoint a specific attorney for defendant.

With regard to the issue of allegedly ineffective counsel, this court has said that to establish a successful claim of ineffective counsel, a defendant must prove (1) that her counsel's performance was deficient and (2) that 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. Neal, ante* p. 415, 436 N.W.2d 514 (1989). In this case, since there was no evidentiary hearing, we must examine the allegations made by defendant in her motion to see if she alleged facts which, if proved, might establish those elements. In that examination, we again set out the controlling rule that in a proceeding under the Postconviction Act, a defendant is required to allege facts which, if proved, constitute an infringement of constitutional rights, and the pleading of mere conclusions of fact or law is not sufficient to require the trial court to grant an evidentiary hearing. *State v. Turner*, 194 Neb. 252, 231 N.W.2d 345 (1975); *State v. Bradford*, 223 Neb. 908, 395 N.W.2d 495 (1986).

Examination of defendant's motion in this case discloses no factual allegation as to her counsel's failure to render effective assistance of counsel. Typical of defendant's assertions is the allegation that "Defense Counsel did not procure witness and evidence that would have been favorable to Defendant nor did Defense Counsel utilize defense available to Defendant." What witnesses could have been procured or what evidence could have been adduced favorable to defendant is not set out. If defendant does not choose to specify what she is claiming, a trial court need not conduct a discovery hearing to determine if anywhere in this wide world there is some evidence favorable to defendant's position.

We have examined the record in this case. Defense counsel called 11 witnesses at the trial. Seven of them were witnesses as to defendant's good character. The other witnesses testified as

to some facts of the case. After all the defendant's witnesses are evaluated, the fact remains that upon the police arrival at the scene of the murder, defendant, acting in a belligerent manner, told the police, "I shot the mother fucker, I know I did but it was an accident." Her versions of the facts were first that she had fired in the air and later that she had fired out the door. The physical facts showed that decedent had been killed by a shot fired by defendant from defendant's back porch at decedent, who was in defendant's backyard on a level below the porch. The fact that the jury did not believe the shooting was an accident cannot be laid at able counsel's feet. Defendant's case was vigorously presented, and defendant has not alleged one fact as to counsel's alleged ineffectiveness.

The judgment of the trial court is affirmed.

AFFIRMED.

SCOTT R. DAVIS, APPELLANT, V. TOWN OF CLATONIA, APPELLEE.
CHARLES R. DAVIS, APPELLANT, V. TOWN OF CLATONIA, APPELLEE.

438 N.W.2d 479

Filed April 21, 1989. Nos. 87-248, 87-249.

1. **Political Subdivisions Tort Claims Act: Limitations of Actions.** Where the governmental subdivision does not act on a claim within 2 years after the claim accrued and the claimant does not withdraw the claim within 2 years after the claim accrued, all suits permitted by the Political Subdivisions Tort Claims Act are barred, and the additional 6-month period granted under particular circumstances does not apply.
2. **Political Subdivisions Tort Claims Act: Words and Phrases.** The definition of "governing body" under the Political Subdivisions Tort Claims Act does not include an insurance carrier for the political subdivision. As such, a decision concerning a claim by the carrier will not be considered a final disposition of the claim on the part of the governing body.

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

Rodney P. Cathcart, of Erickson & Sederstrom, P.C., for appellants.

James A. Eske, of Barlow, Johnson, DeMars & Flodman, for appellee.

HASTINGS, C.J., WHITE, and FAHRNBRUCH, JJ., and FUHRMAN and WHITEHEAD, D. JJ.

FUHRMAN, D.J.

This case involves consolidated appeals from orders of the district court for Gage County, Nebraska, sustaining the defendant's demurrers and holding the actions were barred by the statute of limitations. We affirm.

On September 4, 1983, appellants, Scott R. and Charles R. Davis, were injured in an automobile accident on a road maintained by the Clatonia Township Road District. Appellants contend the road did not have proper traffic control signs and was not properly maintained. Appellants filed claims with the road district, as required by the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 to 23-2420 (Reissue 1983). Appellants received a letter, dated December 11, 1984, from an insurance company, stating that their claims were being investigated. Appellants received another letter, dated April 30, 1985, from the insurance company for the insured, "Clatonia Township," stating the company was denying the claims. These lawsuits were filed on October 25, 1985.

The defendant named in the petitions was Clatonia Township Road District. Special appearances were filed by the road district. Before the court issued decisions on the special appearances, appellants requested, and were granted, leave to file amended petitions designating the Town of Clatonia as defendant. Clatonia filed special appearances, which were sustained, alleging no proper service had been obtained upon it and the service on the road district did not confer jurisdiction over the town. Appellants each filed a praecipe for alias summons on the Town of Clatonia, service to be upon individuals designated as trustees. After service was effected, appellants moved to have the returns amended to show the correct titles of the individuals served. These motions were sustained. Second amended petitions were filed on November 12, 1986. Clatonia demurred, alleging the petitions were barred by the statute of limitations and did not sufficiently plead facts

to toll the running of the statute. The district court sustained the demurrers, finding the causes of action accrued on September 4, 1983; the actions against the town were not filed until January 23, 1986, when the first amended petitions were filed; the denial of the claims by the insurance company was not a final action by the governing body of Clatonia and therefore did not extend the time for filing actions; even if the denial by the insurance company was such a final action, the petitions would have to have been filed by October 30, 1985 (6 months from such denial); and, therefore, the actions were not timely and were barred by the statute.

Appellants allege that the trial court erred in finding that the actions were barred by the statute of limitations and that the court erred in failing to find the defendant was barred from denying that the action of the insurance company was a final decision on the appellants' claims.

The automobile accident involved in these cases occurred on September 4, 1983. Because the claims are against a political subdivision, they are governed by the provisions of the Political Subdivisions Tort Claims Act. The applicable statute of limitations is set out in § 23-2416. Section 23-2416(1) provides:

> Every claim against a political subdivision permitted under this act shall be forever barred, unless within one year after such claim accrued, the claim is made in writing to the governing body. Except as otherwise provided in this section, all suits permitted by this act shall be forever barred unless begun within two years after such claim accrued. The time to begin a suit under this act shall be extended for a period of six months from the date of mailing of notice to the claimant by the governing body as to the final disposition of the claim or from the date of withdrawal of the claim from the governing body under section 23-2405, if the time to begin suit would otherwise expire before the end of such period.

Section 23-2405 provides:

> No suit shall be permitted under this act unless the governing body of the political subdivision has made final disposition of the claim, except that if the governing body does not make final disposition of a claim within six

> months after it is filed, the claimant may, by notice in writing, withdraw the claim from consideration of the governing body and begin suit under this act.

The operation of these statutes was defined in *Ragland v. Norris P. P. Dist.*, 208 Neb. 492, 304 N.W.2d 55 (1981). In *Ragland*, this court stated:

> The statute is clear beyond question that suit must be filed within 2 years after the date the claim accrued or it will be forever barred. There are but two exceptions to that provision. One is where the governmental subdivision takes some action on the claim before the 2 years has expired but at a time when less than 6 months remains for filing suit. The second occurs if the claimant withdraws his claim within the 2-year period but at a time when less than 6 months to file suit remains. Under either of those circumstances the statute of limitations is extended for an additional 6-month period from and after the date that the governmental subdivision acts on the claim or the claim is withdrawn by the claimant. In order for the extended period to apply, one of two positive acts must occur: the governmental subdivision must act on the claim or the claimant must withdraw the claim. Absent the occurrence of either one of those affirmative steps, the statute of limitations runs at the end of 2 years from and after the date the claim accrued, and the action is barred.

Id. at 495-96, 304 N.W.2d at 57.

As stated earlier, the claims in these cases accrued on September 4, 1983. The 2-year limitation period under the statute expired on September 4, 1985. The first petitions of any kind were filed on October 25, 1985. Therefore, one of the two above acts must have occurred in order for the limitations period to be extended 6 months.

There is no question that the appellants did not withdraw their claims and therefore cannot claim extensions under that exception. The appellants, however, claim that the letter from the insurance company denying their claims, dated April 30, 1985, was a final disposition on the part of the Town of Clatonia and therefore extended the limitations period for 6 months from the date of the disposition, to October 30, 1985.

We disagree.

Section 23-2416 requires that the final disposition of the claim, extending the limitations period for 6 months, come from the governing body. Governing body is defined in § 23-2402 as:

> (2) Governing body shall mean the village board of a village, the city council of a city, the board of commissioners or board of supervisors of a county, the board of directors of a public power district, and any duly elected or appointed body holding power and authority to determine the appropriations and expenditures of any other unit of local government.

This definition is clear and unambiguous. Only those bodies falling within the definition of "governing body" may make final disposition of a claim as contemplated under the Political Subdivisions Tort Claims Act. The definition of "governing body" under the Political Subdivisions Tort Claims Act does not include an insurance carrier for the political subdivision. As such, a decision concerning a claim by the carrier will not be considered a final disposition of the claim on the part of the governing body. The appellants proceeded at their own risk when they delayed filing suit. They could have withdrawn their claims after receiving notice from the insurance company in the letter dated April 30, 1985, and filed suit within the limitations period. However, appellants did not withdraw their claims, and the letter of the insurance company was not a final disposition of appellants' claims by the governing body. As such, the 2-year limitations period ran on September 4, 1985, and the appellants' claims are barred.

AFFIRMED.

ROBERT C. WADMAN, APPELLEE, V. CITY OF OMAHA ET AL., APPELLEES, FRANK JACKSON, INTERVENOR-APPELLANT.

438 N.W.2d 749

Filed April 21, 1989. No. 87-339.

1. **Administrative Law: Appeal and Error.** In an error proceeding, both the district court and the Supreme Court review an administrative agency's decision to determine whether the agency acted within its jurisdiction and whether relevant evidence in the record supports the agency's decision.
2. **Administrative Law: Evidence: Appeal and Error.** Evidence supports an administrative agency's decision reviewed in an error proceeding if the agency could reasonably find the facts for the agency's decision on the basis of the relevant evidence contained in the record before the agency.
3. **Administrative Law: Appeal and Error.** In an error proceeding to review a decision by an administrative agency, the reviewing court is restricted to the record before the administrative agency and does not reweigh evidence or make independent findings of fact.
4. **Employer and Employee: Words and Phrases.** Insubordination is an employee's willful or intentional disregard of, or refusal to obey, an employer's reasonable order, rule, or regulation, which is expressed or implied and is given or promulgated under lawful authority related to the employment.
5. **Employer and Employee.** An employee's good faith disagreement with the employer's opinion or judgment underlying a reasonable order does not justify the employee's refusal to follow the employer's valid order.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Reversed and remanded with direction.

Thomas F. Dowd, of Dowd, Fahey, Dinsmore & Hasiak, for appellant.

Martin A. Cannon, of Matthews & Cannon, P.C., for appellee Robert C. Wadman.

BOSLAUGH, WHITE, SHANAHAN, and FAHRNBRUCH, JJ., and WITTHOFF, D.J.

SHANAHAN, J.

As the result of a hearing before the Omaha personnel director, Robert C. Wadman was dismissed from his employment as chief of police of the Omaha Police Division (OPD) on account of insubordination in his refusal to sign disciplinary notices directed by the Omaha public safety director, Keith Lant. After the Omaha Personnel Board upheld

Wadman's dismissal, Wadman filed his petition in error in the district court for Douglas County, contending that Lant's directive to Wadman was unreasonable, so that Wadman's refusal to obey the directive was not insubordination. The district court reversed the personnel board's decision and ordered Wadman's reinstatement. When the city decided not to appeal from the district court's decision, Frank Jackson, an Omaha taxpayer, intervened pursuant to Neb. Rev. Stat. § 14-810 (Reissue 1987) and the Omaha Home Rule Charter, art. VIII, § 8.10, which provide that a taxpayer may defend any suit against a city of the metropolitan class (Omaha) if the city refuses to defend the suit. On behalf of the city, Jackson appeals and claims that the district court erred in its conclusion that the evidence was insufficient to sustain the personnel board's findings and order for Wadman's dismissal.

STANDARD OF REVIEW

In an error proceeding, both the district court and the Supreme Court review an administrative agency's decision to determine whether the agency acted within its jurisdiction and whether relevant evidence in the record supports the agency's decision. *Trolson v. Board of Ed. of Sch. Dist. of Blair*, 229 Neb. 37, 424 N.W.2d 881 (1988); *Stone v. City of Omaha*, 229 Neb. 10, 424 N.W.2d 617 (1988). Evidence supports an administrative agency's decision reviewed in an error proceeding if the agency could reasonably find the facts for the agency's decision on the basis of the relevant evidence contained in the record before the agency. *Trolson v. Board of Ed. of Sch. Dist. of Blair, supra; Stone v. City of Omaha, supra*. In an error proceeding to review a decision by an administrative agency, the reviewing court is restricted to the record before the administrative agency and does not reweigh evidence or make independent findings of fact. *Coffelt v. City of Omaha*, 223 Neb. 108, 388 N.W.2d 467 (1986); *Richardson v. City of Omaha*, 214 Neb. 97, 333 N.W.2d 656 (1983).

DISCIPLINARY PROCEDURE AT OPD

OPD is part of the Department of Public Safety of the City of Omaha. The public safety director heads the safety department and is the police chief's immediate superior. Omaha Mun. Code, ch. 23, art. III, §§ 23-292 to 23-296 (1980) confers on the safety director the power or authority to discipline

department employees, including OPD employees, by admonishment, reprimand, suspension, demotion, or dismissal.

Specifically, Omaha Mun. Code, *supra*, § 23-294, states:

> A department head may suspend any employee without pay for cause for a period or periods not exceeding sixty (60) calendar days in any twelve (12) months, however, no single suspension shall be for more than thirty (30) calendar days. The department head shall notify the employee concerned and the personnel director in writing not later than one day after the date the suspension is made effective. Such notice shall include the reasons for and the duration of the suspension.

Omaha Mun. Code, *supra*, § 23-296, in part provides:

> A department head may dismiss for cause any regular employee under his jurisdiction by delivering at least fifteen (15) days before the effective date thereof a written statement of reasons to the employee concerned and to the personnel director. If the department head, because of the reasons for the discharge, desires to make an immediate separation from the service he may make a suspension without pay pending discharge.

Under the collective bargaining agreement between OPD employees and the city, police officers involved in a disciplinary action must receive written notice of the reason for the officer's suspension or dismissal from employment. Pursuant to the collective bargaining agreement, disciplinary notice relative to suspension and dismissal is patterned on the notice specified by §§ 23-294 and 23-296 of the Omaha Municipal Code.

The safety director and police chief had developed a longstanding practice in furtherance of the disciplinary process authorized by the Omaha Municipal Code and collective bargaining agreement. When improper conduct by police personnel became known, usually as a consequence of an investigation, the police chief drafted a suggested or recommended disciplinary notice, which indicated the proposed discipline to be imposed; signed the notice "By order of /s/ [police chief]"; and submitted the proposed notice to the safety director for the director's approval and signature. The

chief's proposed disciplinary notice, submitted for the safety director's approval, was only a recommendation. In the absence of discipline actually imposed by the safety director, the chief cannot discipline a police officer by admonishment, reprimand, suspension, demotion, or dismissal. If the safety director disagreed with the chief's recommended discipline, the chief redrafted another disciplinary notice conforming with the safety director's instructions and submitted the redraft to the safety director for approval. In all cases, after approving the disciplinary notice drafted by the police chief and the discipline to be imposed, the safety director returned the approved disciplinary notice to the chief for transmittal to the police officer involved in the disciplinary action. Since at least 1972, all disciplinary notices, specifying the discipline imposed, have been signed by both the safety director and the police chief. The apparent genesis of the police chief's role in transmitting a disciplinary notice is Neb. Rev. Stat. § 14-602 (Reissue 1987), which pertains to cities of the metropolitan class (Omaha) and provides in part: "All orders relating to the direction of the police force shall be given through the chief of police . . . ."

None of the Omaha ordinances, contained in the record presented to the courts in these proceedings, requires a written directive from the safety director to the police chief for commencement of disciplinary action against a police officer or a document issued or signed by the safety director to impose a particular form of discipline authorized under the municipal code.

THE PLAN FOR ARREST OF JOHN HOWELL

In October 1985, OPD Lt. Anthony Infantino met with OPD Officers James Alexander and Tom Martin and gave the officers a memo entitled "Mission Impossible"—an outline of an undercover plan designed by Police Lt. Timothy Dunning for surveillance and arrest of John Howell. Although Alexander and Martin were experienced narcotics and intelligence officers, Infantino assigned the officers to "conduct a covert type surveillance in an attempt to arrest [John Howell] for operating a motor vehicle while intoxicated." John Howell had relatives who held political office, including his father, Sam Howell, Douglas County treasurer, and his

brother-in-law, Michael Boyle, mayor of Omaha. Infantino told Alexander and Martin that the purpose of John Howell's arrest was to provide Howell's relatives with an opportunity to interfere with or obstruct the criminal justice process and that Infantino's superiors as well as the FBI knew about and approved the plan to arrest Howell. Pursuant to the plan and after surveillance of Howell for 8 hours each day during 7 days of surveillance, Alexander and Martin arrested Howell for drunk driving in October 1985. Howell's case went through the court system without incident and resulted in Howell's conviction and sentence for DWI, presumably in late 1985 or sometime in the forepart of 1986.

THE INVESTIGATION

In August 1986, Alexander and Martin approached Safety Director Keith Lant and told him about the undercover operation which led to Howell's arrest, the underlying plan to involve political figures in improper activity undertaken as the result of Howell's arrest, and possible implication or knowledge of OPD personnel in the undercover operation, including Capt. John Mitchell, Dunning, and Infantino.

Mayor Boyle and Lant ordered an inquiry into the Howell arrest, an investigation led by Wadman with the help of OPD Lts. Dennis Howard and Foster Burchard and the Omaha labor relations director, Tom Marfisi.

During the course of the investigation, Dunning was interviewed by Lant, Marfisi and Burchard concerning the Howell arrest, and was ordered not to discuss his interview with anyone. Notwithstanding silence ordered by the investigators, Dunning contacted Infantino and discussed the interview by Lant, Marfisi, and Burchard. Mitchell was "evasive" in his response to questions during his interview concerning the Howell arrest. A polygraph examination was inconclusive concerning Mitchell's denial of participation in a plot to involve political figures through their improper response to Howell's arrest.

WADMAN'S REFUSAL

On October 1, 1986, Wadman concluded that there was no plot to involve political figures in misconduct resulting from Howell's arrest and that none of the officers investigated had

violated any OPD policies or procedures concerning the Howell arrest. Consequently, in a memo to Lant, Wadman recommended that no disciplinary action be taken against Mitchell and that Dunning be suspended for 1 day on account of Dunning's discussing his interview with Infantino in violation of the investigators' order to refrain from discussing the interview. Wadman further recommended that Infantino be given a written reprimand for poor judgment exhibited by writing the "Mission Impossible" memo. To his memo Wadman attached the proposed disciplinary notices to Dunning and Infantino.

Later on October 1, Wadman met with Lant, Marfisi, and members of the city's legal department to discuss Wadman's recommendations. Lant conveyed his belief that the investigation showed a plot to involve political figures as the result of the Howell arrest and expressed his opinion that Wadman's recommended discipline for Dunning and Infantino was too lenient. Lant then suggested termination of Mitchell's employment based on Mitchell's improper conduct leading to Howell's arrest and Mitchell's deceptive conduct during the investigation into the undercover plan for the Howell arrest. Lant proposed a 30-day suspension for Dunning on account of Dunning's participation in the plan for Howell's arrest, deceptive conduct during the departmental inquiry into the Howell arrest, and discussing his interview with Infantino notwithstanding the direct order not to discuss his interview regarding the circumstances surrounding Howell's arrest. Lant also proposed a 3-day suspension for Infantino on account of Infantino's participation in the operation for Howell's arrest. Wadman, Lant, and Marfisi discussed other options for disciplining Mitchell, Dunning, and Infantino, but the meeting produced no consensus on the discipline to be imposed. At Lant's request, Wadman returned to his office, where he awaited Lant's decision on the discipline to be imposed. About an hour later, Lant telephoned Wadman and told him that Mitchell's employment was terminated, Dunning received a 30-day suspension, and Infantino received a 3-day suspension. Lant then directed Wadman to prepare the disciplinary notices for Mitchell, Dunning, and Infantino. The notice to Mitchell

stated that his dismissal was the result of Mitchell's "improper conduct surrounding the DWI arrest of John Howell in October of 1985" and Mitchell's "deceptive conduct over the last 30 days in the Internal Security Investigation surrounding the above arrest." The reason for Dunning's suspension, expressed in the disciplinary notice, was:

> During the course of the past month, you have been interviewed concerning your involvement in the arrest of John Howell for a charge of OMVI. On September 3, 1986, you were ordered to refrain from talking about this investigation with any other Police employee. Subsequent to that date, you did in fact discuss the case with another Police employee, thereby disregarding the above mentioned order given to you.
>
> This action is also taken, pursuant to Article 6, Section 1(J), and that during the course of the investigation recited above, you, on two occasions, were not truthful when being interrogated by Internal Security.
>
> Further, this action is taken pursuant to Article 6, Section 1(J), in that you failed to follow any proper procedures in creating and executing the undercover plan, to arrest John Howell, in October of 1985, for DWI, and to "monitor" the case through the Criminal Justice System, to see if anyone would "interfer" [sic] with that process.

In the notice to Infantino, the reason was expressed:

> During the month of October 1985, in collaboration with Lt. Tim Dunning, and others, you created a plan to arrest John Howell for DWI and to watch the case go through the system. That plan, and in particular the memo that you gave to Officers Martin and Alexander, constitutes the . . . violation.

In response to Lant's directive concerning the disciplinary notices, Wadman said: "I won't sign." Lant then told Wadman: "I'll give you an out. You can sign under duress, you can disclaim, you can write anything you want and disagree with my discipline. I need your signature on that document . . . and I'll be down and sign them." Wadman renewed his refusal to sign the disciplinary notices and explained that, based on polygraph

examinations of Mitchell, Dunning, and Infantino, he did not believe that the Howell arrest was a part of a plot to provide political figures with the opportunity to interfere in the criminal justice process, as expressed in the disciplinary notices directed by Lant. Later on October 1, Lant personally issued and signed the disciplinary notices without Wadman's signature.

DISMISSAL OF WADMAN

As the result of Wadman's refusal to sign the disciplinary notices, Lant sent Wadman the following notice:

> You are hereby suspended as an employee of the City of Omaha and member of the Omaha Police Division for a period of fifteen (15) days pending consideration of my recommendation that you be terminated from City employment. This action is taken because of:
>
> On October 1, 1986 you were given a direct order by the undersigned to sign and deliver three letters notifying certain individuals that disciplinary action was being taken against them. You were advised by the undersigned that you should sign the letters but were free to indicate thereon, in writing, your disapproval of same and reasons therefor. You were further advised that same was a direct order, yet you nonetheless refused to obey. Your conduct has been deemed to constitute insubordination.
>
> This action is taken because of your violation of Section 23-291(f) of the Omaha Municipal Code, and because your actions reflect discredit upon the service and are a direct hinderance to the effective performance of City government functions.

Under Omaha Mun. Code, ch. 23, art. III, § 23-291(f) (1980), insubordination is "good cause" to subject a police officer to disciplinary action, but the ordinance fails to define or otherwise characterize *insubordination*.

After a hearing, the city personnel director dismissed Wadman from employment. At the hearing in his appeal to the Omaha Personnel Board, Wadman, through his lawyer, detailed his position:

> Boyle's and Lant's proposal was improper in Wadman's view, and he would not set his name down beside the words "by order of." As Wadman put it, he "would not

> sign a lie." It would have been a lie, if he pretended authorship of Lant's document. He does not have a duty to lie for Mr. Lant, direct order or no, and to refuse to do so was not insubordinate.

The Omaha Personnel Board, unanimously upholding Wadman's dismissal, found that Wadman was insubordinate in his refusal to comply with Lant's directive concerning the disciplinary notices to Mitchell, Dunning, and Infantino, which the personnel board described as "a reasonable and lawful order" from Lant to Wadman.

In his petition in error, Wadman alleged several procedural deficiencies concerning the composition of the personnel board, which, according to Wadman, rendered the personnel board incapable of legally determining the validity of the charges against Wadman. Also, Wadman claimed that the personnel board's decision was "erroneous, unsupported by evidence, and unsupported by the law" because Lant's order to Wadman concerning the disciplinary notices was "unreasonable" and Wadman's conduct in refusing to sign the disciplinary notice did not cause any discredit to the OPD or hinder the "effective performance of City government." Finally, in his petition Wadman acknowledged that he lacked "authority to order discipline," but concluded: "Nevertheless, the Mayor and the department head 'ordered' [Wadman] to sign as author of an order, and purportedly discharged him for insubordination when he ethically refused the ultra vivres [sic] order."

Although Wadman did not expressly allege that his signing the disciplinary notices would have been the exercise of authority improperly delegated by Lant, the district court found that, as the result of an absence of guidelines or standards "specifying the conditions under which the delegated discretion could be exercised," there was no valid delegation of the safety director's authority to discipline members of the police department and concluded that "there is no competent evidence to sustain the decision of the Personnel Board upholding the termination of the Police Chief for insubordination." The district court reversed the dismissal order of the personnel board and entered judgment that

Wadman be reinstated to his position as police chief with payment of benefits and wages withheld during his suspension and on account of his dismissal from employment.

INSUBORDINATION

Although § 23-291(f) of the Omaha Municipal Code fails to define or characterize *insubordination*, we hold that insubordination is an employee's willful or intentional disregard of, or refusal to obey, an employer's reasonable order, rule, or regulation, which is expressed or implied and is given or promulgated under lawful authority related to the employment. *Sims v. Bd. of Trustees, Holly Springs, etc.*, 414 So. 2d 431 (Miss. 1982); *Bd. of Trustees of S. D. No. 4 v. Colwell*, 611 P.2d 427 (Wyo. 1980); *Ray v. Minneapolis Board of Education*, 295 Minn. 13, 202 N.W.2d 375 (1972); *Parrish v. Civil Service Commission*, 66 Cal. 2d 260, 425 P.2d 223, 57 Cal. Rptr. 623 (1967); *Porter v. Pepsi-Cola Bottling Co.*, 247 S.C. 370, 147 S.E.2d 620 (1966); *Cunningham v. Civil Service Comm'n*, 48 Haw. 278, 398 P.2d 155 (1964); *MacIntosh v. Abbot*, 231 Mass. 180, 120 N.E. 383 (1918).

" 'Under the law, an employee is required to obey all reasonable orders of the employer.' " *Stoffel v. Metcalfe Construction Co.*, 145 Neb. 450, 455, 17 N.W.2d 3, 6-7 (1945) (quoting *Bang v. International Sisal Co.*, 212 Minn. 135, 4 N.W.2d 113 (1942)).

An employee's good faith disagreement with the employer's opinion or judgment underlying a reasonable order does not justify the employee's refusal to follow the employer's valid order. See, *Matter of MacMillan v. Morgenthau*, 146 Misc. 588, 263 N.Y.S. 568 (1933) (employee's difference of opinion with employer does not justify refusal to obey the employer's orders); *Siglin v. Kayenta Unified School Dist. No. 27*, 134 Ariz. 233, 655 P.2d 353 (1982).

In substance, Wadman argues that Lant directed him to sign an order imposing discipline on Mitchell, Dunning, and Infantino, whereas only Lant, as safety director, was authorized to impose discipline on police officers. However, Wadman overlooks the salient fact that imposition of discipline, whether suspension or dismissal from employment, is ultimately effectuated by the safety director, not by Wadman.

Because the safety director actually decides whether an officer will be subjected to disciplinary action and determines the particular discipline imposed on the officer, the police chief is only a conduit through which a notice of disciplinary action and the nature of the discipline imposed is transmitted to a police officer. What the district court mistakenly characterized as an impermissible delegation of authority is actually an appropriate directive for transmittal of disciplinary notices through the police chain of command, a statutorily prescribed procedure, see § 14-602, which has been utilized in a longstanding practice of the Omaha Police Division. Although Wadman's consent or approval was unnecessary for imposition of discipline on an officer, Wadman's signature on the disciplinary notices, nevertheless, served an important function in the disciplinary process—compliance with the statutory mandate that orders relating to the direction of the police force must be "given through the chief of police," § 14-602, or, more simply and fundamentally, obedience to law. In the final analysis of the disciplinary process, Wadman made no decision or determination which necessarily resulted in discipline of an officer and had no discretion in the process once the safety director had determined to commence disciplinary action against an officer and had imposed an authorized form of discipline, and Lant did not direct Wadman to make such a determination or decision. Imposition of discipline on Mitchell, Dunning, and Infantino was already an accomplished fact when Wadman was directed to transmit the disciplinary notices to the officers, although, in the case of dismissal as the discipline, the effective date of the dismissal was deferred until 15 days had elapsed after delivery of the disciplinary notice to the disciplined officer. See Omaha Mun. Code, ch. 23, art. III, § 23-296 (1980).

Lant's offer of the disclaimer, if accepted by Wadman, would have left no doubt in the disciplined officer's mind that the originator of the discipline was Lant, not Wadman. Given Lant's allowance of absolute ability for the injection of Wadman's express disagreement into the disciplinary notices in question and the opportunity for Wadman's total disclaimer of approval and responsibility for initiating the disciplinary action

against the police officers, Lant's directive cannot reasonably be construed as an order that Wadman represent himself to be the author of the disciplinary notices. Moreover, Wadman's disagreement with the commencement of disciplinary action or the discipline imposed, even if such disagreement is founded on a good faith opinion, did not justify willful disobedience to Lant's directive.

Consequently, there is relevant evidence to support the personnel board's finding that Wadman willfully or intentionally refused to obey Lant's express directive, which was made under lawful authority pertinent to Wadman's duties as police chief. Thus, there was evidence supporting the personnel board's conclusion that Wadman was insubordinate in his refusal to carry out the directive from Lant.

Implicit in the district court's decision and judgment is the conclusion that the personnel board was empowered to order Wadman's dismissal from employment. Since Wadman has not cross-appealed concerning any of the procedural deficiencies alleged in his petition in error, deficiencies which, according to Wadman, prevented the personnel board from entering a valid order for Wadman's dismissal from employment, we do not reach any issue based on the alleged invalidity of the process by which the personnel board was constituted or ordered Wadman's dismissal from employment.

Therefore, the district court's judgment is reversed, and this cause is remanded to the district court with direction that the court enter judgment, affirming the personnel board's order dismissing Wadman from employment as the chief of police in the Omaha Police Division.

REVERSED AND REMANDED WITH DIRECTION.

BOSLAUGH, J., dissenting.

The issue in this case is whether the order which the director of public safety gave to the appellee Wadman was of such a nature that Wadman was required to obey it. The trial court found that under the circumstances in this case, the order was not a reasonable order and that the appellee's refusal to obey it was not insubordination.

The majority opinion points out that although it has been the custom for disciplinary notices to be signed by both the safety

director and the chief of police, the authority to impose discipline is vested in the safety director and the only disciplinary authority vested in the chief of police is purely advisory.

The order involved in this case was a direct order from the safety director to the appellee to sign three letters which advised the officers addressed of discipline which the safety director had decided to impose upon them. The letters, however, were in the form of letters from the appellee to the officers and concluded with the words, "By order of." Although the safety director informed the appellee that he could "sign under duress" and "disclaim" and "disagree with my discipline," the forms of the letters indicated that the discipline was being imposed by the order of the appellee. The appellee had no authority to impose discipline.

Neb. Rev. Stat. § 14-602 (Reissue 1987), which provides in part that "[a]ll orders relating to the direction of the police force shall be given through the chief of police," in my opinion, does not relate to the imposition of discipline but refers to the operation of the department and the performance of police work.

I would affirm the judgment of the district court.

LEO DICKIE BUHRMANN, APPELLANT, V. LOMA JUNE BUHRMANN, APPELLEE.

438 N.W.2d 481

Filed April 21, 1989. No. 87-362.

1. **Declaratory Judgments: Equity: Appeal and Error.** A declaratory judgment action is sui generis and may involve both questions of law and equity. Questions of fact are tried and determined as in other civil actions. With regard to questions of law, this court has the obligation to reach independent conclusions with respect to those questions. Equity issues are reviewed de novo on the record.

2. **Divorce: Final Orders: Actions: Declaratory Judgments: Appeal and Error.** What a dissolution of marriage decree, after it becomes final, means as a matter of law is determined from the four corners of the decree. Where there is a genuine controversy between the parties as to the meaning of language in a decree of dissolution and the time for appeal has passed, a proper method to resolve the controversy is by a separate action for declaratory relief.
3. **Divorce: Final Orders: Actions.** A decree of dissolution is conclusive in any future action between the parties as to all facts directly in issue and actually or necessarily determined therein.
4. _____: _____: _____. A decree of dissolution which does not contain a complete adjudication of property rights of the parties does not operate as an absolute bar to the maintenance of an independent action by either of the parties involving such rights if the issue of such property rights was not placed in issue by either of the parties or determined by the district court.

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

Tad D. Eickman, of Steinacher, Vosoba & Hanson, for appellant.

Elaine A. Waggoner, of Waggoner Law Office, for appellee.

BOSLAUGH, SHANAHAN, and GRANT, JJ., and KNAPP and ROWLANDS, D. JJ.

ROWLANDS, D.J.

This case arises out of a declaratory judgment action commenced by the appellant, Leo Dickie Buhrmann, in April of 1986. In his petition, Leo alleged that he was the sole owner of certain improvements on land leased from the Board of Educational Lands and Funds of the State of Nebraska (Board). Leo further asserted that he and his former wife, Loma June Buhrmann, were divorced on September 27, 1978, in the district court for Lancaster County, Nebraska, and that it was his understanding the leasehold improvements were awarded to him.

Loma answered and claimed that she and Leo were each the owners of one-half the improvements pursuant to the educational land lease which became effective January 1, 1974; that the ownership of these improvements was not mentioned in the decree of dissolution or in the property settlement agreement which was signed by the parties; and that she was entitled to one-half the value thereof.

The district court found in favor of Loma and held that each party owned a one-half interest in the improvements, with a total value of $7,950. Leo was ordered to pay Loma $3,975 within 60 days, or if he did not and the Board assigned the lease to a third party, the parties would equally divide the sum received for the improvements from the new tenant.

We have reviewed the matter as required by *OB-GYN v. Blue Cross*, 219 Neb. 199, 361 N.W.2d 550 (1985). A declaratory judgment action is sui generis and may involve both questions of law and equity. Insofar as fact questions are concerned in a declaratory judgment action, those issues are tried and determined as in other civil cases. Neb. Rev. Stat. § 25-21,157 (Reissue 1985). With regard to questions of law, we have the obligation to reach independent conclusions with respect to those questions. Equity issues are reviewed de novo on the record.

We find that the judgment is correct in all respects and should be affirmed.

The parties were married on June 30, 1944, and they resided together until Loma filed an action to dissolve their marriage on May 24, 1978, in the Lancaster County District Court. Leo was engaged in farming, and Loma was the primary caretaker in the raising of three children born during the marriage.

In 1950 or 1951, the couple moved into a dilapidated farmhouse on land owned by the Board which was leased to Leo's father. The parties expended considerable money and labor in making the home habitable, even to the extent of installing indoor plumbing during the early 1970s.

The lease was transferred to Leo in 1960, and on December 10, 1973, a new 12-year lease was executed, to become effective January 1, 1974. Leo and Loma were named in that lease as joint tenants with rights of survivorship.

On September 27, 1978, a decree of dissolution was entered approving a settlement agreement signed by the parties. Leo was awarded all real property and farm machinery. Each party received an automobile. Loma received all household furnishings and appliances that she wished to remove from the family home. Finally, the settlement agreement provided in paragraph 7: "Respondent agrees to pay petitioner the sum of

$15,000.00 in lieu of alimony as petitioner's share in the real property and machinery jointly owned by the parties, said sum to be paid in full within five years from date hereof." The judgment was paid in full with interest after a contempt proceeding was filed against Leo. The decree and settlement agreement were completely silent on the issue of the school lease and the home of the parties located thereon, and there was no residuary clause assigning property not specifically described.

On May 27, 1982, Loma filed a petition for an accounting, in Lancaster County District Court, alleging that she and Leo had formed a partnership in 1973 to farm certain lands which were leased by Leo and Loma and located in Lancaster County. Loma prayed for her share of undistributed profits, which she claimed were in excess of $10,000.

Leo denied the existence of the partnership and answered that the decree of dissolution barred the action for accounting as res judicata.

Trial was held on November 23, 1983. After Loma presented her case, the district court sustained Leo's motion to dismiss and found that

> the Defendant's Motion should be granted because the Plaintiff has failed to sustain her burden of proof regarding the existence of the partnership and whether said alleged parnership [sic] made any profit during the period it allegedly existed as set out in the Petition. The Court also finds that Plaintiff is estopped by application of the doctrine of res judicata from alleging the existence of this partnership because it is a matter which could have been litigated by the parties at the time of their divorce proceedings in 1978.

Neither party appealed from this decision.

Between 1978 and 1985, Leo made all the rental payments on the school land, and he received all of the income generated by the property.

On December 31, 1985, the joint lease expired. The Board notified the parties that the improvements would be appraised and the lease put up for bids. The value of the house was appraised at $7,950. Leo was the high bidder but was informed by the Board that before a new lease could be executed, he

would have to pay to the treasurer of Lancaster County the sum of $7,950 to be distributed one-half to Loma and one-half to himself.

Leo initially filed a motion for order nunc pro tunc in the dissolution action, asking the district court to amend the decree to provide that all the improvements located on the leased school land were his property. Although the record is unclear, counsel stated during oral arguments that this motion was summarily overruled. The district court was correct in this decision based upon our decision in *Neujahr v. Neujahr*, 223 Neb. 722, 393 N.W.2d 47 (1986), which held that what a decree, after it becomes final, means as a matter of law is determined from the four corners of the decree.

This action by Leo for declaratory relief was immediately filed after the motion for order nunc pro tunc was denied. Where there is a genuine controversy between the parties as to the meaning of language in a decree of dissolution, and the appeal period has passed, a proper method to resolve the controversy is by a separate action for declaratory relief. See, *Neujahr, supra*; *Black v. Sioux City Foundry Co.*, 224 Neb. 824, 401 N.W.2d 679 (1987).

It appears in most jurisdictions that a decree of dissolution which does not contain a complete adjudication of property rights of the parties does not operate as an absolute bar to the maintenance of an independent action by either of the parties involving such rights. Annot., 32 A.L.R.2d 11451 (1953); 27C C.J.S. *Divorce* § 765 (1986); 24 Am. Jur. 2d *Divorce and Separation* § 957 (1983). As stated in 27A C.J.S. *Divorce* § 264 at 606-08 (1986):

> A valid judgment or decree in a divorce suit is conclusive in any future action between the parties as to all the facts directly in issue and actually or necessarily determined therein. The judgment in such case operates by way of an estoppel and not by way of a bar.
>
> The statement is frequently made that a judgment in a divorce proceeding is conclusive upon the parties as to all matters that were, or might have been, litigated in that action; and such is the rule where the subsequent suit is upon the same or substantially the same cause of action.

> . . .
>
> In so far, however, as the subsequent suit is on a different cause, the prior judgment is generally held conclusive only as to matters which were in issue and actually adjudicated or as to matters which were in issue and necessarily adjudicated, and is not conclusive as to questions which might have been but were not litigated in the original action. . . .
>
> The burden of proving that a particular issue was tried and determined or necessarily involved in the prior action rests on the party asserting that it was.

Although decided in a community property state, the decision of *Thompson v. Thompson*, 500 S.W.2d 203 (Tex. Civ. App. 1973), presents issues similar to those in this proceeding. In *Thompson*, a detailed property settlement agreement was executed which contained an itemization and description of various pieces of property. The agreement did not contain a residuary clause to dispose of property not specifically described therein. After entry of the divorce decree, the wife discovered the existence of two joint venture projects owned by her ex-husband during the marriage. She took no action to set the divorce decree aside but instituted suit to partition the property interests in the two joint ventures. The husband took the position that the property rights were disposed of in the divorce, and the action was barred as res judicata. The court in *Thompson* held:

> We conclude that the divorce decree does not constitute an adjudication or disposition of the community property interest in the two joint venture projects known as Cloverleaf and Mapleleaf Apartments. Such property was not brought within the jurisdiction of the divorce court so that it cannot be said that such divorce decree amounts to a bar against bringing the subsequent action. . . . "If the decree does not consider the property rights of the parties, they are unaffected by it and may be asserted anywhere and any time the occasion may arise. . . . It is res judicata as to the property awarded. But the decree is binding only with reference to such property as is brought within the jurisdiction of the court and the scope of its adjudication.

> If property was omitted from such consideration by either, it might authorize the opening of the decree as to the property, or a separate suit with reference to it, as the divorce judgment could not be an adjudication of their rights in property not considered by the court."

(Citations omitted.) 500 S.W.2d at 208-09.

Since the issue of the house located on the leased land was not placed in issue by either party or adjudicated by the district court in 1978, it was a proper subject for determination in the declaratory judgment action. The trial judge found that Loma was the owner of a one-half interest in the improvements, and his decision is clearly supported by the evidence adduced at trial. The judgment of the district court is therefore affirmed.

Our review of the record convinces us that each party was equally culpable in not bringing this matter to the attention of the district judge in 1978. Leo acknowledged that the lease was renewed in their joint names in 1974 for ease of inheritance if something happened to him. Loma admitted the lease was disclosed to her former attorney: "It was mentioned as we were trying to sort things out."

The request of the appellee for attorney fees is therefore denied. Costs are taxed to the appellant.

AFFIRMED.

DEANNA S. LANDON, APPELLANT, V. RAYMOND E. PETTIJOHN AND WENDY L. PETTIJOHN, HUSBAND AND WIFE, APPELLEES.

438 N.W.2d 757

Filed April 21, 1989. No. 87-373.

1. **Summary Judgment: Appeal and Error.** In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. Moreover, summary

judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.

2. **Pleadings.** All material allegations of new matter contained in an answer are admitted if no reply is made to them.
3. **Homesteads.** Two separate homesteads cannot exist in the same parcel of land.
4. **Homesteads: Contracts: Conveyances.** Neb. Rev. Stat. § 40-104 (Reissue 1988) applies to contracts for sale as well as to conveyances or encumbrances.
5. **Constitutional Law: Statutes.** In examining the validity of a legislative act, all reasonable doubts must be resolved in favor of its constitutionality.
6. **Homesteads.** The preservation of the family is the primary purpose of the homestead legislation.
7. _____. Homestead law should be liberally construed in favor of those for whose benefit it was enacted.
8. **Constitutional Law: Homesteads.** The classification made in Neb. Rev. Stat. § 40-104 (Reissue 1988), that is, the line drawn between married property owners and nonmarried property owners, is one rationally related to a legitimate governmental end.

Appeal from the District Court for Cass County: RAYMOND J. CASE, Judge. Affirmed.

Dennis L. Wills for appellant.

James E. Case, of Case, Reinsch & Slattery, P.C., for appellees.

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

WHITE, J.

Plaintiff, Deanna S. Landon, appeals from an order of the district court for Cass County sustaining appellees' motion for summary judgment.

On June 16, 1985, the appellant and Raymond E. and Wendy L. Pettijohn, appellees, signed a uniform purchase agreement for the sale of appellees' home to the appellant. Appellees, husband and wife, signed the document, but their signatures were not acknowledged by a notary public. Two and one-half months later appellees rescinded the agreement.

Appellant filed suit for specific performance or damages in the alternative. Appellees moved the court for summary judgment on the basis that the executed agreement was subject

to the homestead act, specifically Neb. Rev. Stat. § 40-104 (Reissue 1988), and therefore was void and unenforceable because the appellees' signatures were not acknowledged before a notary public. The motion was granted, resulting in this appeal.

Appellant's seven assignments of error can be condensed into two. She alleges the district court erred in (1) sustaining the appellees' motion for summary judgment and (2) failing to find that § 40-104, as applied to the appellant, is unconstitutional under U.S. Const. amend. XIV, § 1, and Neb. Const. art. I, § 25.

> In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. [Citations omitted.]
>
> Moreover, summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.

Bedrosky v. Hiner, 230 Neb. 200, 201-02, 430 N.W.2d 535, 537-38 (1988).

In her first assignment of error, appellant contends that summary judgment, on the basis of § 40-104, was improperly granted because there was insufficient evidence as a matter of law to establish the elements of the statute. Section 40-104, as relevant to this action, provides that "[t]he homestead of a married person cannot be conveyed or encumbered unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both husband and wife . . . ." In the case at bar, for the trial court to grant a summary judgment pursuant to this statute, it has to find as a matter of law that (1) the property must be a "homestead"; (2) the property must be owned by a married person; and (3) the conveyance or encumbrance of the real estate was executed but was not acknowledged by both the husband and wife.

An examination of the record reveals that appellees' answer

to appellant's amended petition alleges, as a new matter, that the property in question was the homestead of the appellees. Appellant did not file a reply. Neb. Rev. Stat. § 25-842 (Reissue 1985) in pertinent part provides that "every material allegation of new matter in the answer not controverted by the reply, shall, for the purposes of the action, be taken as true; but the allegation of new matter in the reply shall be deemed controverted by the adverse party as upon a direct denial or avoidance." Therefore, since the appellant failed to file a reply controverting appellees' allegation that the property was their homestead, we deem the allegation to be taken as true. To the extent that *Watmore v. Ford*, 229 Neb. 121, 425 N.W.2d 612 (1988); *Wood v. Tesch*, 222 Neb. 654, 386 N.W.2d 436 (1986); *Snyder v. Fort Kearney Hotel Co., Inc.*, 182 Neb. 859, 157 N.W.2d 782 (1968); and *Dorland v. Dorland*, 175 Neb. 233, 121 N.W.2d 28 (1963); hold otherwise, they are overruled. Accordingly, the allegation, taken as true, is sufficient evidence to support a finding that the property in question is a homestead.

In regard to the requirement that the property be owned by a married person, we begin our analysis by noting the pleadings conclusively establish that the appellees owned the property and that the uniform purchase agreement, submitted with the pleadings, was signed by Raymond and Wendy Pettijohn. Neb. Rev. Stat. § 40-102 (Reissue 1988), governing the selection of property for homestead status, provides:

> If the claimant be married, the homestead may be selected from the separate property of the husband, or with the consent of the wife from her separate property. When the claimant is not married, but is the head of the family within the meaning of section 40-115, the homestead may be selected from any of his or her property.

This statute, in addition to delineating which property may be selected as the homestead, defines the persons who are entitled to make the selection. Under § 40-102, a homestead can only arise where the claimant is married or, if not married, where the claimant is the head of the family as defined by Neb. Rev. Stat. § 40-115 (Reissue 1988). Since we have already determined that

the property is a homestead, it logically follows that the appellees must either be married or be unmarried and each qualify as the "head of the family." However, it is legally impossible to have two persons qualify as the "head of the family" because then each person could raise a claim of homestead in the same parcel of property. Analogizing to the rule that "[a] person cannot have two homesteads, nor can he have two places either of which at his election he may claim as a homestead," *Travelers Indemnity Co. v. Heim*, 218 Neb. 326, 330, 352 N.W.2d 921, 924 (1984), we note that two separate homesteads cannot exist in the same parcel of land. Thus, by inference, the appellees must be husband and wife. In addition, we note that the record indicates that in every pleading, by both parties, the appellees are listed in the caption as "RAYMOND E. PETTIJOHN and WENDY L. PETTIJOHN, Husband and Wife, Defendants." We find, under the particular facts of this case, that appellant conceded the issue of whether the appellees were husband and wife and that there is sufficient evidence to establish the second element of the statute.

Concerning the last requirement, appellant contends that § 40-104 is inapplicable because the uniform purchase agreement, which called for conveyance of the title of the property at closing, only created a contractual obligation of the parties and did not create an interest in the real estate. Appellant's argument is without merit. In *McIntosh v. Borchers*, 196 Neb. 109, 112, 241 N.W.2d 534, 537 (1976), we said: "This court has consistently held that [§ 40-104] applies to *contracts for sale* as well as to conveyances or encumbrances . . . ." (Emphasis supplied.) See *Christensen v. Arant*, 218 Neb. 625, 358 N.W.2d 200 (1984) (§ 40-104 applies to uniform purchase agreements). The purchase agreement shows that it was not acknowledged before a notary public. Accordingly, we hold that there was sufficient evidence as a matter of law for the trial court to grant a summary judgment motion on the basis of § 40-104.

In appellant's second assignment of error she argues that even if this court determines that summary judgment is proper, the cause should still be reversed by finding § 40-104 unconstitutional under U.S. Const. amend. XIV, § 1, and Neb.

Const. art. I, § 25. Though appellees challenge the manner in which this issue was raised, we note that, because the appellant did raise the question regarding the constitutionality of § 40-104 during the hearing on the summary judgment motion, we will therefore review this issue. *In re Estate of Snyder*, 217 Neb. 356, 348 N.W.2d 136 (1984).

Appellant contends that "Sec. 40-104 is discriminatory in its classification of married property owners and non-married owners, since only married property owners are required to have any transfer of an interest of real estate executed and acknowledged by a notary." Brief for appellant at 18. Specifically, appellant complains that appellees have used § 40-104 as a sword to defeat legally binding duties that they have voluntarily entered into, and are exploiting the statute contrary to its intended legislative purpose. Arguing that the statute has "outlived its usefulness" and is "outmoded," appellant urges this court to declare § 40-104 unconstitutional.

"In examining the validity of a legislative act, we must keep in mind the oft-declared rule to the effect that in construing an act of the Legislature all reasonable doubts must be resolved in favor of its constitutionality." *State ex rel. Douglas v. Nebraska Mortgage Finance Fund*, 204 Neb. 445, 452, 283 N.W.2d 12, 18 (1979). The U.S. Supreme Court and the Nebraska Supreme Court have stated that the government is not foreclosed from classifying persons or from differentiating one class from another when enacting legislation. *State v. Michalski*, 221 Neb. 380, 377 N.W.2d 510 (1985), citing *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 31 S. Ct. 337, 55 L. Ed. 369 (1911). Because the nature of the classification and the rights affected are not based on sex, *Craig v. Boren*, 429 U.S. 190, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976); alienage, *Mathews v. Diaz*, 426 U.S. 67, 96 S. Ct. 1883, 48 L. Ed. 2d 478 (1976); illegitimacy, *Trimble v. Gordon*, 430 U.S. 762, 97 S. Ct. 1459, 52 L. Ed. 2d 31 (1977), *questioned on other grounds Lalli v. Lalli*, 439 U.S. 259, 99 S. Ct. 518, 58 L. Ed. 2d 503 (1978); a suspect class (race), *Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967); or a fundamental right (voting), *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 86 S. Ct. 1079, 16 L. Ed. 2d 169 (1966), this court's scope of review, as

appellant correctly acknowledges, is limited to determining whether there is a rational basis for the classification created by § 40-104. See, *In re Statham*, 483 F.2d 436 (9th Cir. 1973), *cert. denied* 414 U.S. 1069, 94 S. Ct. 578, 38 L. Ed. 2d 474 (homestead statute, distinguishing between widowers and other single persons without dependents, subject to rational basis review); *Beard v. Montgomery Ward & Co.*, 215 Kan. 343, 524 P.2d 1159 (1974) (homestead statute, distinguishing between families and single persons, subject to rational basis review). See, e.g., *State v. Michalski, supra*, citing *Vance v. Bradley*, 440 U.S. 93, 99 S. Ct. 939, 59 L. Ed. 2d 171 (1979) (economic or social legislation subject to rational basis review); 40 Am. Jur. 2d *Homestead* § 7 (1968).

The Nebraska Supreme Court has clearly recognized that the preservation of the family is the primary purpose of homestead legislation. *Bowker v. Collins*, 4 Neb. 494 (1876). As was noted in Foster, *The Nebraska Homestead*, 3 Neb. L. Bull. 109, 112 (1924):

> The object of homestead legislation is to conserve the family by provisions which tend to keep a roof over it. . . . The policy back of the statutes is to promote the general welfare of the commonwealth by aiding in the preservation of the family, as the oldest, most indispensible of human institutions and one on whose welfare that of the commonwealth depends. The ultimate beneficiary is the state; the immediate beneficiary is the family owning a home. All members of the family, the head as well as dependents, derive benefits from this legislation.

In conformity with this policy, "[t]his court has often said that the homestead law should be liberally construed in favor of those for whose benefit it was enacted." *Horn v. Gates*, 155 Neb. 667, 671, 53 N.W.2d 84, 86 (1952), citing *First Nat. Bank of Tekamah v. McClanahan*, 83 Neb. 706, 120 N.W. 185 (1909); *Hanlon v. Pollard*, 17 Neb. 368, 22 N.W. 767 (1885); *Bowker v. Collins, supra*. We think that the classification distinguishing between married property owners and nonmarried property owners, as contained in § 40-104, is rationally related to the legislative policy of preservation of the family. By requiring the

parties to acknowledge their signatures, the Legislature was preventing the possibility of the homestead being conveyed or encumbered by fraud, thereby preserving the family "by keeping a roof over it." In *Paxton v. Sutton*, 53 Neb. 81, 84, 73 N.W. 221, 222 (1897), this court stated in regard to the homestead legislation that "courts cannot set aside valid legislative acts or engraft amendments upon them merely because the judges deem the legislation unwise or even unjust." In sum, we cannot say that the classifications in § 40-104 are arbitrary and without rational basis.

Accordingly, the decision of the district court is affirmed.

AFFIRMED.

JEANNE A. BURNS, APPELLANT AND CROSS-APPELLEE, V. VETERANS OF FOREIGN WARS, A NEBRASKA NONPROFIT CORPORATION, DOING BUSINESS AS VFW BENSON POST NO. 2503, APPELLEE AND CROSS-APPELLANT; THE AETNA CASUALTY & SURETY COMPANY, A FOREIGN INSURANCE CORPORATION, APPELLEE.

438 N.W.2d 485

Filed April 21, 1989. No. 87-386.

1. **Motions to Dismiss.** A party against whom a motion to dismiss is directed is entitled to have all relevant evidence accepted or treated as true, every controverted fact as favorably resolved, and every beneficial inference reasonably deducible from the evidence.
2. **Directed Verdict.** A court cannot decide an issue as a matter of law unless the facts adduced on an issue are such that reasonable minds can draw but one conclusion from the evidence. In a jury trial, when evidence compels but one reasonable conclusion regarding an issue or question in the litigation, a court can properly direct a verdict on such issue or question.
3. **Negligence.** A plaintiff is contributorily negligent if (1) the plaintiff fails to protect himself or herself from injury; (2) the plaintiff's conduct concurs and cooperates with the defendant's actionable negligence; and (3) the plaintiff's conduct contributes to the plaintiff's injuries as a proximate cause.
4. _____. For actionable negligence, there must be a defendant's legal duty to protect or not injure the plaintiff, a failure to discharge that duty, and plaintiff's damage proximately caused by such undischarged duty.

5. **Negligence: Liability.** One cannot be held responsible on the theory of negligence for an injury caused by an act or omission unless the negligent tort-feasor had knowledge or was reasonably charged with knowledge that the act or omission involved danger to another.
6. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the appellant was prejudiced by the court's refusal to give the tendered instruction; (2) the tendered instruction is a correct statement of the law; and (3) the tendered instruction is warranted by the evidence.
7. **Negligence: Liability: Invitor-Invitee: Proximate Cause.** A possessor of land is subject to liability for injury caused to a business invitee by a condition on the land if (1) the possessor defendant either created the condition, knew of the condition, or by the exercise of reasonable care would have discovered the condition; (2) the defendant should have realized the condition involved an unreasonable risk of harm to a business invitee; (3) the defendant should have expected that a business invitee such as the plaintiff, either (a) would not discover or realize the danger, or (b) would fail to protect himself or herself against the danger; (4) the defendant failed to use reasonable care to protect the plaintiff invitee against the danger; and (5) the condition was a proximate cause of damage to the plaintiff.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Reversed and remanded for a new trial.

Michael A. Nelsen, of Schmid, Mooney & Frederick, P.C., for appellant.

Eugene P. Welch, of Gross, Welch, Vinardi, Kauffman & Day, P.C., for appellee Veterans of Foreign Wars.

BOSLAUGH, WHITE, SHANAHAN, and FAHRNBRUCH, JJ., and WITTHOFF, D.J.

SHANAHAN, J.

Jeanne A. Burns sued the Veterans of Foreign Wars, a Nebraska nonprofit corporation, doing business as VFW Benson Post No. 2503 (VFW), in a slip and fall case based on VFW's negligence regarding the icy loading zone on its premises. From a defendant's verdict, Burns appeals and asserts error in the district court's refusal to direct a verdict that Burns was free from contributory negligence and in the instruction given on liability of a possessor of land for a dangerous condition known to or discoverable by the possessor. VFW cross-appeals and contends that the court should have directed a verdict against Burns because she failed to prove that

the "ice patch caused her fall," and failed to prove that VFW was negligent by the presence of ice in its parking lot.

Burns filed suit against VFW, claiming that she was an invitee of VFW, which negligently allowed ice to accumulate in the loading zone near the front door of its building, an unsafe and dangerous condition which VFW knew or by exercise of reasonable care should have discovered. Burns further alleged that VFW was negligent in its failure "to have removed or remedied said [icy] condition or to have warned plaintiff concerning the same." VFW denied any negligence and alleged that Burns' negligence was "the sole and proximate cause" of her injuries.

Throughout the forepart of November 22, 1985, in Omaha, there were subfreezing temperatures, and a 19 °F reading in midafternoon. Although there had been a 3-inch snow on November 20, snow cover had dissipated to 1 inch on November 22. There was no precipitation on November 22, and the weather was sunny.

Around 2 p.m. on November 22, Burns, an employee of Martin Pastry, drove her station wagon to the front door of the VFW club to deliver a multilayer or tiered wedding cake for a reception to be held in the ballroom of the club. Burns, who had previously delivered cakes at several other wedding receptions held in the VFW club, parked her northbound station wagon at the curb of the sidewalk, 6 feet from the club's front door on the east, the only convenient access to the club's interior. The asphalt driveway where Burns parked her vehicle sloped eastward to the club's parking lot. Burns did not observe any ice as she approached the area used for loading and unloading at the club's east entrance. After she had parked her station wagon and from the left side of her vehicle, Burns commenced removing the cake, section by section, for assembly inside the club's ballroom. Burns entered the club through the front door. Just south of the doorway was a downspout for transmission of water from the club's roof to ground level. Water from the downspout entered a drain, which was laid beneath the sidewalk area, and discharged water onto the driveway and the area where Burns had parked her station wagon.

Ten minutes into the cake assembly, Burns needed the top tier

and returned to her station wagon. The last tier of the cake was located on the right rear seat of Burns' station wagon. As she stepped from the sidewalk and was walking at the right rear of her vehicle, Burns began looking for the handle of the station wagon's rear door to where the cake tier had been placed. Near the station wagon's right rear wheel, Burns fell, or in Burns' words: "[M]y feet just flew out from under me. It felt like they went up in the air." As a result of the fall, Burns sustained a broken ankle. When Burns attempted to get up, she noticed that she was on a smooth, untreated patch of ice about 2 feet wide. No VFW personnel had warned Burns about ice in the parking lot.

Dennis Taylor, the groom for whom Burns was delivering the cake, testified that he and his wife-to-be arrived at the VFW club shortly after noon on the day of the accident. Taylor had gone to the club early in order to carry some items into the hall and set up tables. When Taylor arrived, he also parked his car in the area immediately adjacent to the club's front door so that he could carry some stereo equipment into the hall. Taylor's bride-to-be, having driven her own car, arrived after Taylor and parked her car in the VFW parking lot. Taylor saw scattered icy patches between the parking lot and the sidewalk area in front of the club's east door and later walked his bride to and from her car several times because she nearly slipped and fell on the icy surface. About 15 minutes after Burns' fall, Taylor overheard Harry Housh, the VFW club manager, say, "I should have had somebody throw some salt out there."

At trial, Burns acknowledged that it was "conceivable" that she saw, but disregarded, the icy patch on the surface of the loading area at the club's entrance. Burns realized that the wintertime melting-freezing cycle in Omaha would result in the formation of ice on sidewalks and streets, requiring a pedestrian's extra precaution. According to Burns, the distinctive color and texture of the ice where she fell would have been apparent as she walked around her station wagon, but she was not looking at the ground as she approached the right rear door of her vehicle.

Burns called VFW personnel as witnesses, namely, Housh, and Harlan Menefee, the VFW custodian. Housh testified that

he was aware that individuals setting up a wedding reception in the club's ballroom would use the front door through which Burns carried material into and out of the VFW club, and knew that people would carry items through the club's front door in preparation for a wedding reception. Housh admitted that he knew that the downspout had discharged water near the front door, and was aware that water from the downspout would freeze and cause an icy condition in the area adjacent to the front door. Menefee, who had been the VFW custodian for "a couple years," was the sole VFW employee responsible for seeing that the parking lot and walkways were free from ice, but could not recall whether he had checked for ice the day of the accident. Menefee testified that he had left the club before noon and, therefore, was absent from the club when Burns fell. At times before the day of Burns' fall, Menefee had noticed that water accumulated "in front of the drainspout" in the vicinity where Burns fell. On those occasions, Menefee would apply "Ice-Melt . . . or salt" on the ice.

At the conclusion of the evidence, the judge determined, as a matter of law, that Burns was a business invitee. Burns requested a directed verdict that she was free from contributory negligence. VFW asked for a directed verdict that, as a matter of law, Burns was guilty of contributory negligence sufficient to bar recovery, see Neb. Rev. Stat. § 25-21,185 (Reissue 1985) (contributory negligence; comparative negligence), and that Burns had not established VFW's negligence. The court overruled each party's motion for a directed verdict. Burns requested an instruction based on *Tichenor v. Lohaus*, 212 Neb. 218, 322 N.W.2d 629 (1982), and *Corbin v. Mann's Int'l Meat Specialties*, 214 Neb. 222, 333 N.W.2d 668 (1983), both of which adopted a liability standard identical to that expressed in Restatement (Second) of Torts § 343 at 215-16 (1965):

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
>
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> (b) should expect that they will not discover or realize

> the danger, or will fail to protect themselves against it, and
>
> (c) fails to exercise reasonable care to protect them against the danger.

The judge rejected Burns' tendered instruction and stated:

> But my idea of Corbin and Tichenor were the plaintiff admittedly knew the condition existed and went ahead and did it. The old instruction kind of made it an automatic directed verdict, as they said, but I don't think that situation is here, and I don't think it's necessary to change the NJI instruction [NJI 8.22] under the fact situation of this case.

Over Burns' objection, the court instructed the jury in accordance with NJI 8.22 concerning a defendant's duty to a business invitee:

> [I]f you find that all of the following conditions are true:
>
> 1. That there was a condition on defendant's premises involving an unreasonable risk of harm to plaintiff, which defendant knew of or in the exercise of reasonable care could have discovered; and
>
> 2. That defendant had no reasonable ground to believe that plaintiff would discover the condition or realize the risk involved; and
>
> 3. That plaintiff did not know, or from facts known to her could not reasonably have been expected to know, of the condition and the risk involved;
>
> then the defendant was under a duty to use reasonable care to make the premises safe for plaintiff or to give her adequate warning to enable her to avoid harm, and failure to use such reasonable care, in the described circumstances, would be negligence.

DIRECTED VERDICTS

As we have noted above, VFW does not contend that the district court erred by not directing a verdict against Burns on account of contributory negligence and, therefore, Burns' contributory negligence is not an issue on appeal. Rather, VFW's cross-appeal involves the issues whether the "ice patch caused" Burns to fall and whether VFW was negligent in the

presence of ice in its parking lot. Since VFW has not made Burns' contributory negligence an issue in this appeal, we first address the assignment of error that the district court should have directed a verdict for each of the parties—for Burns on her freedom from contributory negligence and against Burns on the question of causation regarding the ice patch and the issue of VFW's negligence.

A party against whom a motion to dismiss is directed is entitled to have all relevant evidence accepted or treated as true, every controverted fact as favorably resolved, and every beneficial inference reasonably deducible from the evidence. *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 412 N.W.2d 56 (1987).

> A court cannot decide an issue as a matter of law unless the facts adduced on an issue are such that reasonable minds can draw but one conclusion from the evidence. [Citation omitted.] In a jury trial, when evidence compels but one reasonable conclusion regarding an issue or question in the litigation, a court can properly direct a verdict on such issue or question.

Anderson v. Union Pacific RR. Co., 229 Neb. 321, 323, 426 N.W.2d 518, 519 (1988).

A plaintiff is contributorily negligent if (1) the plaintiff fails to protect himself or herself from injury; (2) the plaintiff's conduct concurs and cooperates with the defendant's actionable negligence; and (3) the plaintiff's conduct contributes to the plaintiff's injuries as a proximate cause. *Lynn v. Metropolitan Utilities Dist.*, 225 Neb. 121, 403 N.W.2d 335 (1987).

BURNS' CONTRIBUTORY NEGLIGENCE

Burns acknowledged that it was conceivable that she saw, but disregarded, the ice. Also, Burns realized that wintertime formation of ice on streets and sidewalks was a common occurrence, which necessitated precaution. According to Burns, the ice at the point of her fall would have been apparent if she were looking for surface ice. However, she was not looking at the ground as she walked and, therefore, failed to discover the icy condition near her station wagon and protect herself while walking around the vehicle. Burns' conduct is

indicative of contributory negligence. Consequently, a jury could find that the ice patch was open and obvious and conclude that Burns was contributorily negligent in failing to discover the ice and take appropriate precautions to prevent her injury. See, *Bruyninga v. Nuss*, 216 Neb. 801, 346 N.W.2d 245 (1984); *Tichenor v. Lohaus*, 212 Neb. 218, 322 N.W.2d 629 (1982). The trial court properly overruled Burns' motion for a directed verdict that she was free from contributory negligence.

VFW'S NEGLIGENCE

VFW claims that the trial court erroneously overruled its motion for directed verdict because: (1) Burns failed to prove VFW's negligence, and (2) Burns failed to prove that she slipped on a patch of ice.

"One alleging negligence has the burden to prove such negligence. Establishing that an accident has occurred does not prove a case of negligence. [Citations omitted.] Negligence is not presumed and must be proved by evidence, direct or circumstantial. [Citations omitted.]" *Holden v. Urban*, 224 Neb. 472, 474, 398 N.W.2d 699, 701 (1987).

For actionable negligence, there must be a defendant's legal duty to protect or not injure the plaintiff, a failure to discharge that duty, and plaintiff's damage proximately caused by such undischarged duty. *Wilson v. F & H Constr. Co.*, 229 Neb. 815, 428 N.W.2d 914 (1988).

"One cannot be held responsible on the theory of negligence for an injury caused by an act or omission unless the negligent tort-feasor had knowledge or was reasonably charged with knowledge that the act or omission involved danger to another." *Wilson v. F & H Constr. Co., supra* at 819-20, 428 N.W.2d at 918. See, also, *Center State Bank v. Dana, Larson, Roubal & Assoc.*, 226 Neb. 408, 415, 411 N.W.2d 635, 639 (1987): " 'Knowledge is fundamental to liability for negligence. The very concept of negligence presupposes that the party charged therewith either fails to foresee an unreasonable risk of injury to another, or could have foreseen it had he conducted himself as a reasonably prudent person.' "

Under the evidence, a jury could reasonably conclude that VFW knew that ice sometimes formed on the loading zone at the club's entrance which was used by individuals carrying items

into the club, individuals who were invitees distracted during their tasks and who would not protect themselves from the icy surface. (An invitee's failure to protect against an open or obvious dangerous condition will be considered in greater detail in our discussion concerning the district court's instruction on liability of a land possessor.) The icy condition was a risk of harm to invitees using the loading zone. Yet, Menefee, the VFW custodian, did not recollect checking for ice at the loading zone on the day of the accident. Menefee's testimony, coupled with the postaccident statement by Housh, the VFW manager, namely, he should have had "somebody throw some salt" on the loading zone, presented a jury question regarding VFW's breach of a duty to protect Burns from injury resulting from the icy condition at the loading zone.

VFW further claims that the evidence failed to establish that Burns slipped on ice, and, therefore, Burns failed to prove her injuries were caused by VFW's negligence. Burns testified, in substance, that her "feet just flew . . . up in the air" during her fall. After her fall, Burns realized that she was on an ice patch. From the evidence, a reasonable inference is deducible that Burns actually slipped on the ice on which she found herself after the fall. See *Anderson v. Union Pacific RR. Co.*, 229 Neb. 321, 426 N.W.2d 518 (1988). Therefore, a question of fact existed concerning the presence of ice at the site of Burns' fall. The district court correctly denied a directed verdict to VFW on the issue of VFW's negligence.

LAND POSSESSOR'S LIABILITY TO AN INVITEE

The next issue in Burns' appeal is a possessor's duty to a business invitee to protect against an open and obvious dangerous condition which is discoverable by the invitee. Burns contends that a possessor may be liable for injury resulting from an open and obvious, but undiscovered, dangerous condition if the possessor defendant should expect that the invitee "will fail to protect" himself or herself from the dangerous condition. Brief for appellant at 8. Under the instruction given in Burns' trial, VFW owed no duty if Burns should have recognized the unsafe condition. VFW asserts that this instruction is consistent with the "general rule" in Nebraska, namely, "there is no duty on the part of an invitor

owner to protect the invitee against hazards which are known to the invitee or are so apparent that he may reasonably be expected to discover them and protect himself." *Bruyninga v. Nuss, supra* at 803, 346 N.W.2d at 247.

> " 'Prejudicial error regarding jury instructions may not be predicated solely upon a particular sentence or phrase in an isolated instruction, but must appear from consideration of the entire instruction of which the questioned sentence or phrase is part, as well as consideration of other relevant instructions given to the jury. . . . " ' "All the instructions must be read together and if the instructions taken as a whole correctly state the law, are not misleading, and adequately cover the issues, there is no prejudicial error." ' " ' "

Bergman v. Anderson, 226 Neb. 333, 337, 411 N.W.2d 336, 339-40 (1987) (quoting *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987)).

To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the appellant was prejudiced by the court's refusal to give the tendered instruction; (2) the tendered instruction is a correct statement of the law; and (3) the tendered instruction is warranted by the evidence. See *Zeeb v. Delicious Foods, ante* p. 358, 436 N.W.2d 190 (1989).

LIABILITY FOR OPEN OR OBVIOUS CONDITIONS

The open or obvious nature of a dangerous condition in or on a possessor's land does not automatically relieve the possessor from liability for injury resulting from the dangerous condition. In commenting on *Tichenor v. Lohaus*, 212 Neb. 218, 322 N.W.2d 629 (1982), this court, in *Corbin v. Mann's Int'l Meat Specialties*, 214 Neb. 222, 224, 333 N.W.2d 668, 669 (1983), stated:

> In *Tichenor* we pointed out that subsection (b) of § 343 contains alternatives, and although the danger may be open and obvious or known, the possessor of land may be liable if he should expect that the invitee will fail to protect himself against it. We also said that a complete statement of the rules applicable to liability of possessors of land for dangerous conditions known or discoverable by the

possessor includes § 343 A.

Both *Tichenor* and *Corbin* involved an invitee's slip and fall on an icy surface.

More recently, in *Carnes v. Weesner*, 229 Neb. 641, 649, 428 N.W.2d 493, 498-99 (1988), which also involved an invitee's slip and fall on an icy surface, we noted:

> In *Tichenor* and *Corbin*, this court expanded the potential for finding a duty owed by possessors to invitees in the area of known or obvious dangers. Prior to these cases, possessors normally had no duty to invitees if the dangers were known and apparent to the invitees. However, in *Tichenor*, we adopted the rationale of the Restatement, *supra*, § 343 A, and comment *f.* of this section.
>
> Section 343 A at 218 states: "(1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them [the invitees], *unless the possessor should anticipate the harm despite such knowledge or obviousness*." [Emphasis in original.]
>
> In *Tichenor* and in *Corbin*, we cited comment *f.* of § 343 A with approval:
>
> " ' "There are, however, cases in which the possessor of land can and should anticipate that the dangerous condition will cause physical harm to the invitee notwithstanding its known or obvious danger. In such cases the possessor is not relieved of the duty of reasonable care which he owes to the invitee for his protection. This duty may require him to warn the invitee, or to take other reasonable steps to protect him, against the known or obvious condition or activity, if the possessor has reason to expect that the invitee will nevertheless suffer physical harm. . . ." ' "

In Burns' case, the evidence shows that, while the icy condition was unknown to Burns before she fell, the condition was "obvious" within the meaning of the Restatement (Second) of Torts § 343 A(1) (1965). " 'Obvious' means that both the condition and the risk are apparent to and would be recognized by a reasonable man, in the position of the visitor, exercising

ordinary perception, intelligence, and judgment." The Restatement, *supra*, § 343 A, comment *b*. at 219. Nevertheless, VFW may be liable if it should have anticipated the harm to Burns despite the obviousness of the dangerous condition. See, *Carnes v. Weesner, supra*; *Corbin v. Mann's Int'l Meat Specialties, supra*; *Tichenor v. Lohaus, supra*; *Syas v. Nebraska Methodist Hospital Foundation*, 209 Neb. 201, 307 N.W.2d 112 (1981).

> [R]eason to expect harm to the visitor from known or obvious dangers may arise, for example, where the possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it. Such reason may also arise where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk. In such cases the fact that the danger is known, or is obvious, is important in determining whether the invitee is to be charged with contributory negligence, or assumption of risk. . . . It is not, however, conclusive in determining the duty of the possessor, or whether he has acted reasonably under the circumstances.

The Restatement, *supra*, § 343 A, comment *f*. at 220.

VFW employees admitted that they were familiar with VFW invitees' parking in the loading zone adjacent to the club's front door through which items were carried into and out of the hall and acknowledged that the front door was the only convenient access into the club for individuals preparing a wedding reception in the club's ballroom. VFW's knowledge about the tasks performed by invitees, such as Burns, provides a basis for a jury to conclude that VFW should have expected that Burns, occupied in preparing the wedding reception and focusing her attention on her station wagon, which contained the remaining tier of the cake for the reception, would fail to protect herself against danger from the icy surface.

In view of this court's decisions in *Tichenor v. Lohaus*, 212 Neb. 218, 322 N.W.2d 629 (1982), *Corbin v. Mann's Int'l Meat*

Specialties, 214 Neb. 222, 333 N.W.2d 668 (1983), and *Carnes v. Weesner, supra*, the correct statement of Nebraska law is: A possessor of land is subject to liability for injury caused to a business invitee by a condition on the land if (1) the possessor defendant either created the condition, knew of the condition, or by the exercise of reasonable care would have discovered the condition; (2) the defendant should have realized the condition involved an unreasonable risk of harm to a business invitee; (3) the defendant should have expected that a business invitee such as the plaintiff, either (a) would not discover or realize the danger, or (b) would fail to protect himself or herself against the danger; (4) the defendant failed to use reasonable care to protect the plaintiff invitee against the danger; and (5) the condition was a proximate cause of damage to the plaintiff.

The court's instruction on a land possessor's liability to a business invitee was an incorrect statement of law. Burns' tendered instruction was a correct statement of the law and was warranted by the evidence. The instruction given improperly allowed the jury to find that VFW owed no duty to Burns if VFW reasonably believed that Burns would discover the dangerous condition which resulted in her injury. The court's instruction failed to mention VFW's liability in the event of Burns' omitted protection for herself, although the risk of harm from the icy condition at the loading zone was open and obvious. In reality, the court's instruction directed a verdict for VFW regarding a dangerous condition which was open and obvious notwithstanding VFW's expectation of Burns' omission of self-protection against the danger. Because the jury, as instructed, was authorized to find that Burns' recovery was precluded by the open and obvious nature of the icy condition on the loading zone, we reverse the judgment entered on the verdict against Burns and remand this cause for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

BOSLAUGH, J., dissenting.

I dissent from that part of the majority opinion which holds that the jury should have been instructed that it could find that the defendant should have expected that the plaintiff would not discover or realize the danger or fail to protect herself against it.

The accident happened at around 2 or 2:30 in the afternoon

on November 22, 1985. The plaintiff was returning to her station wagon to get the last layer of the cake she was delivering when she slipped on a small patch of ice and fell on the parking lot. When asked if she was looking where she was going as she came around, she answered: "I was looking at the side of the car, the door, I suppose, to go open the door."

In my opinion there was no basis upon which the jury could find that the defendant should have anticipated that the plaintiff would not discover the ice on the parking lot or fail to protect herself against it. As we said in *Syas v. Nebraska Methodist Hospital Foundation*, 209 Neb. 201, 204, 307 N.W.2d 112, 115 (1981), "[T]here is no evidence that the hospital should have expected Syas would not have discovered or realized the danger or would have failed to protect himself against it."

At the close of the evidence, the defendant's motion for a directed verdict was overruled. In the cross-appeal portion of the defendant's brief, it argues that the motion should have been sustained. I agree.

BRENDA KAYE GORDON, APPELLEE, V. GARRIE WARD GORDON, APPELLEE; STATE OF NEBRASKA, DEPARTMENT OF SOCIAL SERVICES, APPELLANT.

438 N.W.2d 762

Filed April 21, 1989. No. 87-494.

1. **Divorce: Child Support.** A decree of dissolution which provides for the payment of monthly support for a minor child or children vests those payments in the payee named in the decree as they accrue.
2. _____: _____. The county attorney or an authorized attorney may intervene in any proceeding for dissolution of marriage, separate maintenance, or child or spousal support for the purpose of securing an order for child or spousal support or amending an order for inadequate child support.
3. **Divorce: Child Support: Actions.** An action for child support may be brought against a noncustodial parent or parents in the district court separate and apart from any action for dissolution of marriage.
4. **Divorce: Child Support: Assignments.** An assignment of child support

payments to the Department of Social Services, as they accrue under a decree of dissolution, by one who has no present interest in their collection is a nullity.

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

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

Michael G. Heavican, Lancaster County Attorney, and Janice Lipovsky for appellee Brenda Kaye Gordon.

BOSLAUGH, SHANAHAN, and GRANT, JJ., and KNAPP and ROWLANDS, D. JJ.

ROWLANDS, D.J.

This is an appeal from an order of the district court for Lancaster County, Nebraska, finding that a claimed assignment of child support to the Nebraska Department of Social Services (DSS) on account of aid to dependent children (ADC) benefits received by a relative caretaker (not the mother designated in the support order) was null and void. DSS was further ordered to return all child support money received from the clerk of the district court to the appellee Brenda Kaye Gordon. We affirm.

On November 20, 1975, the marriage of Brenda Kaye Gordon and Garrie Ward Gordon was dissolved. Pursuant to the decree, Brenda was awarded the permanent control and custody of the minor children of the parties, Bryan Ward Gordon, born March 25, 1972, and Nathan Terrel Gordon, born June 8, 1973. Garrie was ordered to pay $130 per month to Brenda as child support, which amount would be reduced to $65 per month when Bryan died, became emancipated, married, or reached age 19.

The facts in this case are not in dispute, and the record consists of stipulated facts and only limited testimony. The parties stipulated that during 1986, Bryan began residing with a relative, Betty Gordon. Betty made application for and received ADC on account of her caretaker status for Bryan. Brenda did not apply for ADC benefits for either of her children, nor did she assign her rights to collect child support payments from Garrie to DSS.

DSS filed the following documents against Brenda's account with the clerk of the district court for Lancaster County: (1) a notice of assignment filed May 1, 1986, effective April 24, 1986; (2) a notice of partial termination of assignment filed October 7, 1986, effective October 1, 1986; (3) an affidavit of lien in the amount of $2,063 filed October 7, 1986; and (4) a notice of assignment filed October 14, 1986, effective October 3, 1986. The net result of these filings was that the clerk of the district court disbursed all of the child support payments received from May of 1986 to February of 1987 to DSS rather than to Brenda.

It should be initially stated that this situation could easily have been avoided had DSS sought and obtained an assignment of Brenda's child support benefits on behalf of Bryan in the amount of $65 per month while Bryan resided with his relative who was receiving ADC. In fact, Brenda filed such an assignment on May 28, 1987, directing the clerk to transmit to DSS up to $65 per month, but not more than 50 percent of any child support payment made during any calendar month if the amount paid was less than the court ordered amount of $130. Brenda also assigned to DSS 50 percent of any child support arrearage which accrued while the assignment was in effect.

We further note that neither party raises any constitutional issue in this proceeding. The instant case involves only a statutory interpretation of Neb. Rev. Stat. § 43-512.07 (Cum. Supp. 1986), which provides in pertinent part:

> The application for an acceptance of an aid to dependent children payment by a parent, other relative, or a custodian shall constitute an assignment of the right to child and spousal support payments and arrearages, from the inception of the court order, to the Department of Social Services up to the amount of aid to dependent children paid to the recipient. Child and spousal support payments made pursuant to a court order shall be paid to the Department of Social Services upon notice by the department to the clerk of the district court that the child is a recipient of public assistance. Upon receipt of notice from the department of such assignment of support payments, each clerk of the district court shall transmit the payments received to the department in accordance

> with the cooperative agreement provided for in section 43-512.05 without the requirement of a subsequent order by the court.

DSS asks this court to find that the acceptance of ADC benefits by Bryan's relative constituted an assignment by operation of law of Brenda's right to receive child support payments from her ex-husband pursuant to a valid decree of dissolution which had not been modified. For the reasons hereafter stated, we decline to so hold.

It is axiomatic that under Nebraska law the right to receive child support payments pursuant to a decree of dissolution is a property right of the custodial parent. Neb. Rev. Stat. § 42-364(4) (Reissue 1988). The custodial parent becomes a judgment creditor who may collect or enforce the child support judgment by execution and the means authorized for collection of money judgments. Release of child support judgments must be approved by the court which rendered the judgment. Neb. Rev. Stat. § 42-371 (Reissue 1988).

Although the payments, when received, are to be used for the benefit of the minor child or children, the custodial parent determines how and when the money should be spent. See Introducer's Statement of Intent, L.B. 612, Judiciary Committee, 89th Leg., 1st Sess. (Mar. 25, 1985). If there is a misapplication of those funds, § 42-364(4) provides the following remedy:

> Upon application, hearing, and presentation of evidence of an abusive disregard of the use of child support money paid by one party to the other, the court may require the party receiving such payment to file a verified report with the court as often as the court shall require stating the manner in which such money is used.

While DSS cites a number of decisions from other jurisdictions which contain language that child support is the right of the child and not its custodian, *Stewart v. Stewart*, 160 Ga. App. 463, 287 S.E.2d 378 (1981); *Armour v. Allen*, 377 So. 2d 798 (Fla. App. 1979); and *Mason v. Mason*, 148 Or. 34, 34 P.2d 328 (1934), even a cursory reading of those decisions discloses that they do not mandate the result sought by DSS in this action.

In *Stewart*, the Georgia Court of Appeals held that the conduct of the custodial parent in withholding visitation rights would not deprive the child of the right to support, reasoning that

> [c]hild support is the right of the child and not of its custodian; "[n]either the wife nor the civil courts can take away this right that inheres expressly in the children." . . . The conduct of the custodian cannot deprive the child of this right to support any more than the custodian can waive it for the child or contract it away.

(Citations omitted.) 160 Ga. App. at 463, 287 S.E.2d at 379.

Armour v. Allen involved an attempt by divorced parents to contract away the child's right to receive support from the father if he refrained from contacting his ex-wife and visiting his child. Obviously, the Florida court's statement that child support is a right which belongs to the child must be read in context with the holding that parents may not contract away their dual obligation imposed by the state to support a minor child.

Finally, the *Mason* decision dealt with a situation where a mother who had obtained custody of her children by virtue of a divorce decree, but who abandoned them, was held estopped from later claiming child support from her ex-husband, who had supported the children in the absence of their mother.

In *Wassung v. Wassung*, 136 Neb. 440, 286 N.W. 340 (1939), we recognized that provisions for the maintenance of children in divorce cases are for the benefit of the child or children, and not for the benefit of the parent, but further stated: "Where a divorce decree provides for the payment of stipulated sums monthly for the support of a minor child or children, contingent only upon a subsequent order of the court, marriage, or the reaching of majority, such payments become vested in the payee as they accrue." *Id.* at 443, 286 N.W. at 342. The holding in *Wassung* that child support payments are a vested right of the payee in a dissolution action as they accrue and that such payments may be changed only by modification of the decree in the court which entered it on the basis of a material change in circumstances has repeatedly been stated by this court. See, *Ferry v. Ferry*, 201 Neb. 595, 271 N.W.2d 450

(1978); *Smith v. Smith*, 201 Neb. 21, 265 N.W.2d 855 (1978); *Schrader v. Schrader*, 148 Neb. 162, 26 N.W.2d 617 (1947).

The record is clear that Brenda at all relevant times remained the payee under the decree of dissolution. Neither her child Bryan nor his relative Betty had an assignable property interest in Brenda's child support at the time DSS filed its notice of assignment.

It is well established that the intention of the assignor must be to transfer a present interest in a debt, fund, or subject matter. If this is clearly expressed, the transaction is an assignment; otherwise not. 6A C.J.S. *Assignments* § 53 (1975); *Tilden v. Beckmann*, 203 Neb. 293, 278 N.W.2d 581 (1979). Further, an assignee acquires only the rights of the assignor. *State Securities Co. v. Daringer*, 206 Neb. 427, 293 N.W.2d 102 (1980). Since Betty had no present interest in the child support payments to be paid to Brenda under the decree, the district court was correct in holding that Betty's assignment to DSS was a nullity. Accord *State ex rel. Crews v. Parker*, 319 N.C. 354, 354 S.E.2d 501 (1987), holding that an ADC applicant assigns only the right that he or she possesses.

Under Neb. Rev. Stat. § 43-512.08 (Reissue 1988), the county attorney or an authorized attorney for DSS had the right to intervene in this dissolution proceeding to amend the order of support to require that child support payments attributable to Bryan be remitted to DSS or to bring a separate action for child support for Bryan in district court against either or both parents, pursuant to Neb. Rev. Stat. § 43-512.04 (Reissue 1988). DSS chose neither alternative. In its effort to create a shortcut through established statutory guidelines and legal precedent of this court, DSS has caused the expenditure of valuable legal talent and judicial resources without result. While reduction of bureaucratic redtape is commendable, this court may not ignore basic tenets of Nebraska law or established property rights for the sake of administrative convenience.

AFFIRMED.

MARVIN E. STILES, APPELLEE, V. SKYLARK MEATS, INC., A NEBRASKA CORPORATION, APPELLANT.

438 N.W.2d 494

Filed April 21, 1989. No. 87-816.

1. **Contracts.** Words in a contract are to be given their plain and ordinary meaning as reasonable persons would understand them.
2. **Employment Contracts: Termination of Employment: Good Cause: Words and Phrases.** In the context of employment contracts, "good cause" for dismissal is that which a reasonable employer, acting in good faith, would regard as good and sufficient reason for terminating the services of an employee, as distinguished from an arbitrary whim or caprice.
3. **Employment Contracts: Breach of Contract: Proof.** In an action for breach of a contract of employment, the burden of proving the existence of a contract and all the facts essential to the cause of action is upon the person who asserts the contract.
4. **Employment Contracts: Breach of Contract: Termination of Employment: Proof: Good Cause.** An employee who claims the breach of an employment contract has the burden of proving the employer breached that contract by firing him or her for other than good cause.
5. **Employer and Employee: Termination of Employment: Proof: Good Cause.** Once an employee has made a prima facie showing that the discharge was for other than good cause, the burden shifts to the employer to prove good cause existed for discharging the employee.
6. **Employer and Employee: Termination of Employment.** An employee may attack an employer's offered explanation for discharge as pretextual.
7. **Contracts: Actions.** A suit on a contract is an action at law.
8. **Appeal and Error.** In an action at law tried to the court, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong.
9. **Judgments: Appeal and Error.** In reviewing the trial court's judgment in an action at law tried to the court, the Supreme Court does not reweigh the evidence but, instead, considers the judgment in the light most favorable to the successful party, with conflicts resolved in favor of the successful party, who is entitled to the benefit of every inference which can be reasonably deduced from the evidence.
10. **Trial: Evidence: Witnesses: Appeal and Error.** In a bench trial, the judge sitting as the trier of fact is the sole judge of the credibility of the witnesses and the weight to be given their testimony, and we do not reweigh the evidence on appeal.
11. **Employment Contracts: Breach of Contract: Master and Servant: Damages.** The measure of damages in a suit for breach of an employment contract for personal services is the amount of salary agreed upon for the period involved, less the amount which the servant earned, or with reasonable diligence might have earned, from other employment.
12. **Employment Contracts: Breach of Contract: Damages: Proof.** In an action for the breach of an employment contract, the burden rests with the employer to

show that with the exercise of reasonable diligence a discharged employee could have obtained other employment.

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

Russell S. Daub, of Daub Haggart & Rebensdorf, for appellant.

Alan G. Stoler for appellee.

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

CAPORALE, J.

Following a bench trial, the district court found that defendant-appellant, Skylark Meats, Inc., breached its contract of employment with plaintiff-appellee, Marvin E. Stiles, by discharging him without good cause, and entered judgment in favor of Stiles in the sum of $48,000. In this appeal from that judgment, Skylark Meats assigns five errors, which may be summarized as challenging the district court's findings that (1) there was no good cause for the discharge and (2) Stiles made a reasonably diligent effort to obtain other employment. We affirm.

Skylark Meats is a corporation in the business of preparing, packaging, and selling meat, fish, and poultry. Stiles began work for Skylark Meats in July 1977, managing its meat-processing room. After Stiles had been working for Skylark Meats for almost 2 1/2 years, the parties, on December 31, 1979, entered into a written employment agreement. The agreement provided in relevant part that Stiles was to serve as the manager of Skylark Meats' processing room at a salary of $46,800 per year and that Stiles could terminate his employment at any time upon notice, but that Skylark Meats could terminate Stiles' employment "only for breach of the terms [of the agreement] by Stiles or for other good cause." Stiles' salary was increased during the course of his employment, so that at the time of his discharge on February 12, 1986, he was earning $53,560 per year.

We begin by recalling that words in a contract are to be given their plain and ordinary meaning as reasonable persons would

understand them. *Reeves v. Hill Aero, ante* p. 345, 436 N.W.2d 494 (1989); *Kreikemeier v. McIntosh*, 223 Neb. 551, 391 N.W.2d 563 (1986). In the context of employment contracts, "good cause" for dismissal is that which a reasonable employer, acting in good faith, would regard as good and sufficient reason for terminating the services of an employee, as distinguished from an arbitrary whim or caprice. *Roach v. Consolidated Forwarding Co.*, 665 S.W.2d 675 (Mo. App. 1984).

In an action for breach of a contract of employment, the burden of proving the existence of a contract and all the facts essential to the cause of action is upon the person who asserts the contract. *Smith v. City of Omaha*, 220 Neb. 217, 369 N.W.2d 67 (1985). Stiles thus had the burden of proving his contract of employment with Skylark Meats and that Skylark Meats breached that contract by firing him for other than good cause. The burden then shifted to Skylark Meats to prove good cause indeed existed for Stiles' discharge. See *Stoffel v. Metcalfe Construction Co.*, 145 Neb. 450, 17 N.W.2d 3 (1945). See, also, *Rasch v East Jordan*, 141 Mich. App. 336, 367 N.W.2d 856 (1985); *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981); *Rosecrans v. Intermountain Soap & Chem. Co.*, 100 Idaho 785, 605 P.2d 963 (1980). According to *Pugh v. See's Candies, Inc., supra*, an employee may attack an employer's offered explanation as pretextual.

Little, if any, purpose would be served by burdening this opinion with a detailed recitation of the numerous conflicts in the evidence relating to the bases for Stiles' discharge. Suffice it to say that through its evidence, Skylark Meats attempted to convince the district court that Stiles was an incompetent manager unable to cope with Skylark Meats' growth (when he began his employment, Stiles supervised 7 to 10 people, whereas at the time of his discharge, he was supervising 35 to 40 people); that he was insubordinate; that he did not understand and could not apply U.S. Department of Agriculture regulations; that he kept inaccurate cost records; that he produced inferior products; and that he did not know how to package or present a product to existing or potential customers, as a consequence of which Skylark Meats lost sales.

On the other hand, Stiles adduced evidence which, if believed by the trier of fact, established that he was a capable manager; that he was not insubordinate but had conflicts with upper management because he sought to comply with USDA regulations as he should; that he kept as accurate cost records as the quality of meats and equipment he was given permitted; that he produced products as good as the meats and environment supplied him permitted; and that he made as good a package and presentation of products to customers and potential customers as the quality of meat supplied him permitted. Stiles testified that on one occasion when discussing the regulations he was trying to meet, one of Skylark Meats' owners said, "I really don't know whether you're working for USDA or Skylark Meats anymore." One former Skylark Meats employee testified that Stiles was forced to use spoiling meat and, on cross-examination by Skylark Meats, expressed the view that Stiles was discharged because

> he was doing his job. And he didn't want to put out bad meat, and they wanted us to cut it, which is—I've seen it. I've cut it. I've sent it out. I cut meat into steaks. I put meat into the hamburger. I put meat into the sausage that was rancid that we had to put in there.

One USDA inspector refused to answer questions relating to the inspections he conducted at Skylark Meats, preferring, in his words, to "take the Fifth."

According to Stiles' son, a former assistant manager for Skylark Meats, one of the owners of Skylark Meats stated his father was discharged because Skylark Meats "wanted to head off in a different direction." Another supplier of meat products testified that Stiles had in the past worked for him managing 40 to 50 employees in the meat-processing room, and proved himself a good employee.

This appeal, arising out of suit on a contract, involves an action at law. *Reeves v. Hill Aero, supra.* In such an action tried to the court, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. In reviewing the trial court's judgment in such a case, the Supreme Court does not reweigh the evidence but, instead, considers the judgment in the light most favorable to the

successful party, with conflicts resolved in favor of the successful party, who is entitled to the benefit of every inference which can be reasonably deduced from the evidence. *State v. Smith, ante* p. 740, 437 N.W.2d 803 (1989); *Knutson v. Snyder Industries, Inc., ante* p. 374, 436 N.W.2d 496 (1989); *Reeves v. Hill Aero, ante* p. 345, 436 N.W.2d 494 (1989); *Mahler v. Bellis, ante* p. 161, 435 N.W.2d 661 (1989); *McKinstry v. County of Cass*, 228 Neb. 733, 424 N.W.2d 322 (1988). In a bench trial, the judge sitting as the trier of fact is the sole judge of the credibility of the witnesses and the weight to be given their testimony, and we do not reweigh the evidence on appeal. *Justice v. Hand*, 227 Neb. 856, 420 N.W.2d 704 (1988); *Zeller v. County of Howard*, 227 Neb. 667, 419 N.W.2d 654 (1988); *Lynn v. Metropolitan Utilities Dist.*, 225 Neb. 121, 403 N.W.2d 335 (1987). Whether good cause existed for the discharge under the circumstances of the instant case, considering the contract language and the evidence, was a decision for the trier of fact. See *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981). Given the state of the evidence, it cannot be said that the district court was clearly wrong in finding that good cause to discharge Stiles did not exist.

As to the remaining assignment of error, Skylark Meats attacks not the amount of damages awarded but, rather, argues that the district court's implicit finding that Stiles made a reasonably diligent search for other employment is not supported by the evidence.

Skylark Meats correctly states that the measure of damages in a suit for breach of an employment contract for personal services is the amount of salary agreed upon for the period involved, less the amount which the servant earned, or with reasonable diligence might have earned, from other employment. *Ridenour v. Kuker*, 185 Neb. 321, 175 N.W.2d 287 (1970); *Henderson v. Joplin*, 191 Neb. 827, 217 N.W.2d 920 (1974). The burden rested with Skylark Meats to show that with the exercise of reasonable diligence Stiles could have obtained other employment. *Henderson v. Joplin, supra*; *Rase v. Southeast Nebraska Consol. School Dist.*, 190 Neb. 800, 212 N.W.2d 629 (1973).

Stiles testified that he applied to and made personal contacts with a number of different employers within the meat industry immediately after he was dismissed, but that none had openings. The only countervailing evidence in this regard is the testimony of the same supplier of meat products who had characterized Stiles as a good employee. This supplier testified that although his operation did not currently have an opening for Stiles to fill, various openings below manager of the processing department had become available since 1986. Stiles, however, testified that when he applied to this supplier, he was told there were no openings and that he was still looking for work in the meat industry.

The evidence shows that since his discharge, Stiles has worked as a newspaper distributor. In addition, contrary to Skylark Meats' misapprehension that such does not constitute the pursuit of other employment, *Ridenour v. Kuker, supra*, Stiles has also sold, through an entity he owns, automobile cleaning products to automobile dealers and detail shops.

Under that state of the record, it cannot be said the district court's factual finding concerning Stiles' efforts to find other employment is clearly wrong.

Accordingly, the judgment of the district court is affirmed.

AFFIRMED.

THE FEDERAL LAND BANK OF OMAHA, APPELLANT, V. JERALD E. SWANSON AND PAMELA A. SWANSON, HUSBAND AND WIFE, ET AL., APPELLEES.

438 N.W.2d 765

Filed April 21, 1989. No. 87-844.

1. **Injunction: Equity.** An action for injunction sounds in equity.
2. **Equity: Appeal and Error.** In an appeal of an equity 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.

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. **Property: Appurtenances: Intent: Words and Phrases.** Three main factors determine whether an article, or combination of articles, is a fixture. They are (1) whether the article or articles are actually annexed to the realty, or something appurtenant thereto; (2) whether the article or articles have been appropriated to the use or purpose of that part of the realty with which it is or they are connected; and (3) whether the party making the annexation intended to make the article or articles a permanent accession to the freehold. The third factor, the intention of the annexing party to make the article or articles a permanent accession to the realty, is the factor typically given the most weight.
5. **Security Interests.** A party cannot claim a superior interest in property solely on the alleged weakness of another's failure to perfect his or her security interest.

Appeal from the District Court for Cheyenne County: JOHN D. KNAPP, Judge. Affirmed.

John W. Ballew, Jr., of Simmons, Raymond, Olsen, Ediger, Selzer & Ballew, P.C., for appellant.

Thomas M. Sonntag, of John Peetz, P.C., for appellee Arlington State Bank.

BOSLAUGH, WHITE, CAPORALE, and GRANT, JJ., and RIST, D.J.

WHITE, J.

This case arose from a dispute between two banks over the possession of two grain bins and their accompanying accessories. On April 8, 1983, codefendants Jerald E. and Pamela A. Swanson gave a note and mortgage on their land located 6 miles west of Gurley, Nebraska, to the plaintiff-appellant, The Federal Land Bank of Omaha. In September 1983, the Swansons acquired a loan from codefendant-appellee Arlington State Bank for the purchase of two grain bins and accessories. The loan from the appellee bank was evidenced by a promissory note and a financing and security agreement signed by Jerald Swanson.

Sometime in 1986, the Swansons, who are not involved in

this appeal, defaulted and voluntarily surrendered the real estate to the appellant. Appellee bank initiated a replevin action in order to obtain possession of the two grain bins and accessories. After securing an order in replevin, the appellee bank attempted to arrange an auction to sell the grain bins.

On November 5, 1986, appellant applied for and received a temporary restraining order from the district court for Cheyenne County enjoining the appellee bank from selling the grain bins and accessories. Appellee bank filed an answer and counterclaim for damages on March 23, 1987.

A hearing for a permanent injunction was held, and on July 27, 1987, the district court entered an order dissolving the temporary injunction and awarded possession of the grain bins and accessories to the appellee bank pursuant to the order of replevin. The district court found that the grain bins were the personal property of the Swansons and were not fixtures. A hearing on the issue of damages was reserved for a later date.

The Federal Land Bank appeals from the district court's July 27 order, alleging that the court erred in (1) finding that the grain bins and accessories were personal property; (2) failing to enter a permanent injunction enjoining appellee bank from selling the grain bins and accessories; and (3) allowing appellee bank to have possession of the grain bins and accessories in light of its defective security interest in the grain bins and accessories.

An action for injunction sounds in equity. *Selection Research, Inc. v. Murman*, 230 Neb. 786, 433 N.W.2d 526 (1989).

> 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. . . . 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.

(Citations omitted.) *Id.* at 795, 433 N.W.2d at 531-32.

The appellant's claim to the grain bins and accessories necessarily arises from its interest in the Swansons' real estate pursuant to the April 1983 mortgage. The appellee bank contends the grain bins and accessories are personalty in which it has a valid security interest because of the promissory note and financing and security agreement. Hence, the threshold question is whether the grain bins are, as the district court found, personalty.

In *Metropolitan Life Ins. Co. v. Reeves*, 223 Neb. 299, 389 N.W.2d 295 (1986), this court said:

> Three main factors determine whether an article, or combination of articles, is a fixture. They are (1) whether the article or articles are actually annexed to the realty, or something appurtenant thereto; (2) whether the article or articles have been appropriated to the use or purpose of that part of the realty with which it is or they are connected; and (3) whether the party making the annexation intended to make the article or articles a permanent accession to the freehold. . . .
>
> . . . [T]he third factor, the intention of the annexing party to make the article or articles a permanent accession to the realty, is the factor which is typically given the most weight.

(Citations omitted.) *Id.* at 301, 389 N.W.2d at 296-97. In our de novo review of the record, we address each factor.

With respect to the first factor, the evidence shows that the disputed bins are utilized for drying and storing grain. One bin is a 30-foot-diameter eight-ring bin with a 14,000-bushel capacity, and the other is a 24-foot-diameter seven-ring bin with a 6,000-bushel capacity. The bins are provided with several accessories for drying and moving the grain, such as drying fans, heaters, and augers. Each bin sits on a concrete slab. On the bottom ring of each bin is an angle ring which lies flush on top of the concrete slab. Clips, which are not part of the bin structure, are placed over the lip of the angle ring and are attached to bolts protruding from the concrete slab around the outside of the bin. The clips are adjustable and can easily be slid off the lip of the angle ring, allowing removal of the bin. The

contractor, Isadore Stoetzel, whose company erected the bins, testified that the bins were designed to sit on top of the concrete and that the purpose of the clip anchoring system was to prevent the bin from blowing away in the wind. Though Stoetzel has never moved this particular type of grain bin before, he has moved several bins similar to the ones in dispute. Stoetzel stated that on one occasion it took him only 4 hours to move two larger, 36-foot-diameter bins. On cross-examination, the following testimony occurred:

> Q. Did you ever discuss with [Jerald Swanson] whether [the bins] were ever going to be moved or not?
>
> A. He asked me if they could be moved prior to signing the contract.
>
> Q. And you told him —
>
> A. I told him basically what I am telling you, that they can be moved.

The evidence also demonstrates that the accessories are items which are either attached to the grain bins or are readily movable. Accordingly, we find that the grain bins and accessories are not annexed to the real estate, and for the remainder of this opinion we treat the accessories as part of the grain bins.

The evidence going to the second factor, whether the grain bins have been appropriated to the use or purpose of that part of the realty with which they are connected, showed that Jerald Swanson used the bins to store crops raised on the surrounding land. However, on one occasion he did store some of his neighbor's grain for a short period of time.

Though finding that the evidence satisfies the second factor, as stated above, the third factor, regarding the intent of the annexing party, is given the most weight. *Metropolitan Life Ins. Co. v. Reeves, supra.* We note that the evidence shows that Jerald Swanson purchased the grain bins in August of 1983, approximately 5 months after the mortgage was executed. The loan from the appellee bank was used exclusively for the purchase and erection of the two bins. During a deposition, Jerald Swanson testified as follows:

> Q. . . . [W]ere you giving something to the [appellee] bank when you signed [the financing statement and

security agreement]?

A. Well, you were giving an agreement that you were going to pay them back, I guess, for the property that they had. I guess they had the right to it until you paid it off.

Q. And the property that you are referring to then would be what?

A. My personal property which, you know.

Q. Would that include the grain bins?

A. Right, yes.

. . . .

Q. So if you did not pay off the loan, it was your intention that the bank would be entitled to the grain bins?

A. Yes.

In addition, every year appellee bank required a property statement from Jerald Swanson. On the 1984 statement, Jerald Swanson listed the grain bins as farm equipment and noted that appellee bank held a lien on the bins. Based on the foregoing, it is clear that Jerald Swanson's intention was that the bins were his personal property subject to a lien held by the appellee bank. He never intended the grain bins to be fixtures. Thus, we find that the evidence clearly establishes that the grain bins were personal property and not fixtures. The appellant failed to establish by a preponderance of the evidence each factor to support its claim to relief.

Because of our finding, it is not necessary to address appellant's other assignments of error except to note, with regard to its third assignment of error, that appellant cannot claim a superior interest in the grain bins on the alleged weakness of appellee bank's failure to perfect its security interest. See *Mack v. Luebben*, 215 Neb. 832, 341 N.W.2d 335 (1983).

Accordingly, the judgment of the district court for Cheyenne County is affirmed.

AFFIRMED.

J. C. RAWLINGS, ALSO KNOWN AS JACK C. RAWLINGS, AND AILEEN RAWLINGS, APPELLANTS, V. AMCO INSURANCE COMPANY, APPELLEE.

438 N.W.2d 769

Filed April 21, 1989. No. 87-966.

1. **Insurance: Contracts.** A clause in a policy of insurance which purports to bind the parties to a nonjudicial determination of a future dispute concerning the amount of a loss where an insurer has admitted liability is void and unenforceable.
2. **Summary Judgment.** Summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.

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

Richard L. DeBacker for appellants.

Daniel M. Placzek, of Luebs, Dowding, Beltzer, Leininger, Smith & Busick, for appellee.

BOSLAUGH, WHITE, CAPORALE, and GRANT, JJ., and RIST, D.J.

CAPORALE, J.

Appellants, J.C. Rawlings, also known as Jack C. Rawlings, and his wife, Aileen Rawlings, sue to recover for tornado damage to their "residence property" under a policy of homeowners' insurance issued to them by appellee, Amco Insurance Company. The district court sustained Amco's motion for summary judgment and dismissed the Rawlingses' petition, to which ruling they assign error. We reverse and remand for further proceedings.

Amco admitted it had in force and effect a policy of insurance which covered the loss, but defended on the ground that the Rawlingses failed to comply with the condition of the policy which provides:

> If you [the insureds] and we [the insurer] fail to agree on the amount of loss, either one can demand that the

> amount of the loss be set by appraisal. If either makes a written demand for appraisal, each shall select a competent, independent appraiser and notify the other of the appraiser's identity within 20 days of receipt of the written demand. The two appraisers shall then select a competent, impartial umpire. If the two appraisers are unable to agree upon an umpire within 15 days, you or we can ask a judge of a court of record in the state where the **residence premises** is located to select an umpire. The appraisers shall then set the amount of the loss. If the appraisers submit a written report of an agreement to us, the amount agreed upon shall be the amount of the loss. If the appraisers fail to agree within a reasonable time, they shall submit their differences to the umpire. Written agreement signed by any two of these three shall set the amount of the loss. Each appraiser shall be paid by the party selecting that appraiser. Other expenses of the appraisal and the compensation of the umpire shall be paid equally by you and us.

This court's most recent treatment of contractual provisions purporting to require the parties to arbitrate future disputes is found in *Overland Constructors v. Millard School Dist.*, 220 Neb. 220, 369 N.W.2d 69 (1985), a case involving a construction contract. We observed therein that although this court is supportive of parties' resolving their differences through arbitration, if possible (that is, if all parties so desire), arbitration agreements entered into before a dispute arises which purport to deny the parties the right to resort to the courts nonetheless oust the courts of their jurisdiction and are thus against public policy and therefore void and unenforceable. The doctrine applies to contracts of insurance. E.g., *Heisner v. Jones*, 184 Neb. 602, 169 N.W.2d 606 (1969); *Phoenix Ins. Co. v. Zlotky*, 66 Neb. 584, 92 N.W. 736 (1902); *National Masonic Accident Association v. Burr*, 44 Neb. 256, 62 N.W. 466 (1895); *German-American Ins. Co. v. Etherton*, 25 Neb. 505, 41 N.W. 406 (1889).

Amco concedes that such is the status of the law in this jurisdiction, but contends that an "appraisal clause," that is, a clause which binds the parties to some nonjudicial

determination of a future dispute concerning the amount of a loss where an insurer has admitted liability, is qualitatively different from an "arbitration clause" which seeks to bind the parties to some nonjudicial determination of an insurer's liability for the loss. Amco's reliance on cases such as *School Dist. No. 1 v. Globe & Republic Ins. Co.*, 146 Mont. 208, 404 P.2d 889 (1965), which approve appraisal clauses as conditions precedent to the filing of suit, is misplaced, for the clause before us undertakes not merely to interpose a formalized procedure in an effort to reach an amicable settlement prior to the institution of suit but, rather, undertakes to deprive the parties of a judicial determination of the amount of a loss. Moreover, we do not find persuasive the reasoning of cases such as *Saba v. Ins. Co.*, 159 Ohio St. 237, 112 N.E.2d 1 (1953), *Glidden Co. v. Retail Hardware Mut. Fire Ins. Co.*, 181 Minn. 518, 233 N.W. 310 (1930), *overruled in part Park Construction Co. v. Independent School Dist.*, 209 Minn. 182, 296 N.W. 475 (1941), and *Hamilton v. Liverpool &c. Ins. Co.*, 136 U.S. 242, 10 S. Ct. 945, 34 L. Ed. 419 (1890), which conclude that clauses binding the parties to a nonjudicial resolution of disputes concerning only the amount of loss do not oust the courts of jurisdiction. The extent of a party's obligation of payment or right of recovery is no less a function of the insurance contract than is the existence of the obligation or right. Accordingly, both aspects of the contract are subject to judicial resolution, and any predispute effort to bind the parties to forgo resort to the courts on either issue ousts the courts of their legitimate jurisdiction.

Nor is there any merit to Amco's implied suggestion that the approval of its policy language by the Department of Insurance is evidence that the public policy of this state is as Amco contends. Although the Department of Insurance does important work, it is not the guardian of the judicial rights the citizens of this sovereign state enjoy.

Amco's final suggestion, that the recent enactment of the Uniform Arbitration Act, Neb. Rev. Stat. §§ 25-2601 et seq. (Cum. Supp. 1988), evidences a public policy in support of the position Amco advances, is also devoid of substance. While that act purports to authorize executory agreements to arbitrate

certain disputes, it specifically exempts from its contemplation insurance contracts such as is involved in this case. § 25-2602. Whatever may be the import of that legislation, it is not before us, and, thus, nothing more need, should, or will be said about it.

Accordingly, we adhere to the doctrine enunciated by Commissioner Pound and adopted by this court in *Schrandt v. Young*, 62 Neb. 254, 266-67, 86 N.W. 1085, 1090 (1901), a replevin action:

> Whatever distinction may be made elsewhere between arbitration generally and arbitration as to damages only, it is well settled in this state that a provision in a contract requiring arbitration, whether of all disputes arising under the contract, or only of the amount of loss or damage sustained by the parties thereto, will not be enforced, and that refusal to arbitrate is not available to the parties in an action growing out of the contract.

For a prior proclamation of the principle in a case involving a contract of insurance, see *Union Ins. Co. v. Barwick*, 36 Neb. 223, 54 N.W. 519 (1893).

Summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Landon v. Pettijohn, ante* p. 837, 438 N.W.2d 757 (1989); *Five Points Bank v. White, ante* p. 568, 437 N.W.2d 460 (1989). This is obviously not such a case. Since the Rawlingses' refusal to submit to appraisal does not entitle Amco to judgment as a matter of law, genuine issues of material fact related to the amount of their insured loss exist.

The judgment of the district court is therefore reversed and the matter remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WHITE, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. JOSEPH DAVIS, APPELLANT.

438 N.W.2d 772

Filed April 21, 1989. No. 88-379.

1. **Motions to Suppress: Pretrial Procedure: Appeal and Error.** In order to preserve a question concerning the admissibility of evidence for review on appeal, it is necessary to object at trial to the admission of evidence even though it was earlier considered at a hearing on a motion to suppress, which motion was overruled.
2. **Criminal Law: Investigative Stops: Probable Cause.** An investigatory stop must be justified by an objective manifestation that the person stopped has been, is, or is about to be engaged in criminal activity.
3. **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 possible criminal behavior even though there is no probable cause to make an arrest.
4. **Criminal Law: Police Officers and Sheriffs: Search and Seizure: Probable Cause.** Probable cause to seize an individual exists at the moment the collective knowledge and trustworthy information of all the police officers engaged in a common investigation are such as to warrant a conclusion by a prudent person that the individual seized committed a felony.
5. **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. In reviewing a court's ruling as the result of a suppression hearing, this court will not reweigh or resolve conflicts in the evidence, but will uphold the trial court's findings of fact unless those findings are clearly wrong.
6. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to sustain a criminal conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence; such matters are for the trier of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed.

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

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

HASTINGS, C.J., SHANAHAN, and FAHRNBRUCH, JJ., and NORTON, D.J., and RONIN, D.J., Retired.

HASTINGS, C.J.

The defendant, Joseph Davis, was convicted by a jury of theft by receiving stolen property. He was sentenced to a 1-year term of imprisonment. He appeals to this court and assigns as error that (1) the court overruled his motion to suppress physical evidence; (2) the court overruled his motion to suppress statements given by him to the police; and (3) there was insufficient evidence to support the conviction. We affirm.

On September 1, 1987, a diamond ring worth approximately $1,950 was stolen from Takechi's jewelry store in Omaha. Kevin Phillips admitted to the theft and told police that he and his brother Michael had sold the ring to a man named Joe. Police accompanied Kevin to Joe's neighborhood, and Kevin pointed out the house where Joe and his parents lived. Officer Bruce Ferrell, an investigating officer, requested the name of the owner of the home, and was informed over police radio that it was Ollie Davis. Upon hearing this, Kevin advised Officer Ferrell that Joe's last name was Davis.

A search warrant was obtained for the search of the premises on the strength of an affidavit of John W. Ewing, an Omaha police officer. The stolen ring was found in a dresser drawer in the defendant's bedroom. The defendant was not at home at that time.

Officer Ferrell subsequently informed Officer Timothy Andersen and others that he was looking for a burglary suspect, a black male driving a green or brown Jaguar with "in transit" signs. While on patrol, Officer Andersen spotted a car matching this description. The defendant was the driver of the car. Officer Andersen stopped the car and checked the in transit signs, which were proper, and also examined the defendant's identification papers. He then ran a check on the defendant with police headquarters and found that he matched the description of a person who had a felony warrant on file from another state. Accordingly, Officer Andersen took the defendant into police headquarters.

After taking the defendant's fingerprints and checking with New York authorities, it was discovered that the defendant was not the man wanted by that state. However, in the meantime Officer Andersen had been in touch with Officer Ferrell, and

the latter stated that he wanted to talk to the defendant. Andersen asked the defendant to remain at police headquarters, and although he conceded that the defendant would not have been free to leave had he wanted to, Andersen testified that the defendant agreed to wait.

The defendant was advised of his rights and agreed to waive them and to talk to the officer. The defendant eventually made a statement to the police admitting that he had purchased the ring from two men for $200. He did not admit that he knew the ring had been stolen. However, Kevin Phillips testified at trial that he had asked the defendant for $300 or $400 for the ring, but that the defendant "said — He said he would give me two for it, you know, so that if we didn't, you know, the — like if the cops watch us, you know, something we wouldn't get busted with it or nothing like that."

Before trial, defendant's counsel moved to suppress the results of the search (the ring) and the defendant's statement. Following a hearing on the motions, they were overruled.

From an examination of the record, including the affidavit for the search warrant and the testimony at the suppression hearing, there appears to be little doubt but that the warrant was issued upon probable cause. However, we need not belabor a discussion of that issue. At trial, the ring was offered in evidence, and upon a statement by defense counsel that he had no objection, it was received. In order to preserve a question concerning the admissibility of evidence for review on appeal, it is necessary to object at trial to the admission of evidence even though it was earlier considered at a hearing on a motion to suppress, which motion was overruled. *State v. Sock*, 227 Neb. 646, 419 N.W.2d 525 (1988).

Regarding the statement made to the police, the defendant argues that there was no basis for suspecting him of criminal activity so as initially to stop the defendant's car and that his statements were the fruits of a custodial interrogation that was the direct result of a warrantless and unlawful arrest.

The defendant concedes that the initial stop of his car was more in the nature of an investigatory stop than an arrest, and thus the officer did not need probable cause to detain him. He cites *State v. Thomte*, 226 Neb. 659, 413 N.W.2d 916 (1987), as

authority for the proposition that an investigatory stop must be justified by an objective manifestation that the person stopped has been, is, or is about to be engaged in criminal activity. The defendant asserts that Officer Andersen had no objective basis for suspecting the defendant of criminal activity.

The standard for investigative stops was recently set forth by this court in *State v. Kuil, ante* p. 62, 64, 434 N.W.2d 700, 702 (1989):

> A police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest. [Citations omitted.] In *State v. Kavanaugh*, 230 Neb. 889, 434 N.W.2d 36 (1989), we stated that 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.

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

The Nebraska statutes also provide for investigatory stops. Neb. Rev. Stat. § 29-829 (Reissue 1985) states in part: "A peace officer may stop any person in a public place whom he reasonably suspects of committing, who has committed, or who is about to commit a crime and may demand of him his name, address, and an explanation of his actions."

The problem is what, and how much, information is sufficient to create a particularized and objective basis for suspecting that the person stopped has been involved in criminal activity. Some of our opinions seem to have lacked consistency in this area.

In *State v. Benson*, 198 Neb. 14, 251 N.W.2d 659 (1977), *cert. denied* 434 U.S. 833, 98 S. Ct. 117, 54 L. Ed. 2d 93, a state patrolman heard a radio broadcast from the local sheriff's office requesting officers to watch for a white or cream-colored van with California plates pulling a U-Haul trailer. Shortly thereafter, the patrolman observed such a vehicle and, upon

communicating with the sheriff's office, was told that that office wanted the vehicle stopped and checked for a possible involvement in a theft. Although the stop was upheld on other grounds, this court stated that

> the radio message standing alone does not furnish legal cause for the detention . . . . If this case rested solely upon the foundation of the radio message to Officer Hogue with no evidence or proof that a factual foundation for the message existed, the legality of the detention here could not be supported.

198 Neb. at 17, 251 N.W.2d at 661.

In *State v. Beerbohm*, 229 Neb. 439, 427 N.W.2d 75 (1988), the officer was informed by radio that a blue pickup truck with a specified license number had scraped a railing on the viaduct. The officer subsequently observed a blue pickup truck with that license number, which he followed for some distance. During that time he observed the truck's driver commit numerous traffic violations. The court upheld the stop, finding that the officer had the requisite "articulable basis or reasonable suspicion," which was "justified by an objective manifestation," to make the stop. However, this court pointed out that the stop was appropriate because the officer observed improper operation of the vehicle with his own eyes. "It is noteworthy that [the officer] did not stop Beerbohm's automobile as soon as he located it, based solely upon the information relayed to him by radio." *Id.* at 444, 427 N.W.2d at 79.

In *Fulmer v. Jensen*, 221 Neb. 582, 379 N.W.2d 736 (1986), the officer received a radio dispatch reporting a recent theft and identifying a white El Camino-type vehicle as having been involved. Shortly afterward, the officer spotted the defendant's vehicle, which matched the description and license plate number given in the radio dispatch. The court found that the investigating officer had a "particularized and objective basis" for suspecting the defendant of criminal activity and making the initial investigatory stop. The court distinguished the admonition contained in *State v. Benson, supra*, that " '[a] reasonably founded suspicion to stop a vehicle cannot be based solely on the receipt by the stopping officer of a radio dispatch

to stop the described vehicle without any proof of the factual foundation for the relayed message,' " *Fulmer v. Jensen, supra* at 588, 379 N.W.2d at 741, stating that the factual foundation in this case was "supplied by the testimony that the other passenger in the [defendant's] car was involved in the theft." *Id.*

This court also upheld an investigatory stop based on information that the stopping officer received from another person in *State v. Ege*, 227 Neb. 824, 420 N.W.2d 305 (1988). In that case, the officer was approached by an employee of a nearby gas station, who informed the officer that the driver of an automobile across the street had just driven over a curb and smelled strongly of alcohol. The officer followed the vehicle for a short distance, without observing any traffic violations, and then stopped the vehicle. The defendant, who was subsequently convicted of driving while intoxicated, argued that the initial stop was unlawful.

The court held that the officer had a reasonable basis, supported by specific and articulable information, upon which to stop the defendant's vehicle. The court stated that the factual basis for the stop need not arise from the officer's personal observation of criminal activity, but may be supplied by information acquired from another person if that information contains sufficient indicia of reliability.

In the same vein, the court in *State v. LaChappell*, 222 Neb. 112, 382 N.W.2d 343 (1986), comments on the effect of information received by other police officers.

> Probable cause to seize an individual exists at the moment the collective knowledge and trustworthy information of all the police officers engaged in a common investigation are such as to warrant a conclusion by a prudent person that the individual seized committed a felony. . . . It is not required that an officer see the commission of the felony . . . ."

Id. at 118, 382 N.W.2d at 347.

In this case, Officer Andersen was entitled to rely not only on his own knowledge and observations of the defendant, but upon the collective knowledge of the entire police force involved in the investigation. *State v. LaChappell, supra.* Officer Ferrell had information from the man who stole the

ring that the ring had been sold to a black man who lived in the 1400 block of Emmet Street and who drove a green or brown Jaguar with in transit signs on it. His transmittal of this information to Officer Andersen gave Officer Andersen a reasonable and articulable basis to suspect that the driver of the Jaguar with in transit signs had been engaged in criminal activity and, thus, gave him justification for an investigative stop. " '[T]he essence of all that has been written [concerning the concept of cause sufficient to justify a stop] is that the totality of the circumstances—the whole picture—must be taken into account. . . .' " *Fulmer v. Jensen, supra* at 588, 379 N.W.2d at 741, quoting *United States v. Cortez*, 449 U.S. 411, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981).

In *State v. DeJesus*, 216 Neb. 907, 347 N.W.2d 111 (1984), the court referred to *State v. Longa*, 211 Neb. 356, 318 N.W.2d 733 (1982), in holding: "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." *DeJesus, supra* at 914, 347 N.W.2d at 116. *Longa* explains at 363, 318 N.W.2d at 738: " '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.' "

> "The brief detention of a citizen based upon an officer's reasonable suspicion that criminal activity may be afoot is permissible for the purpose of limited inquiry in the course of routine investigation, and any incriminating evidence which comes to that officer's attention during this period of detention may become a reasonable basis for effecting a valid arrest."

State v. Donald, 199 Neb. 70, 77, 256 N.W.2d 107, 111 (1977); *State v. Irwin*, 191 Neb. 169, 214 N.W.2d 595 (1974).

The initial stop of the defendant's car was justified under the totality of the circumstances. Officer Andersen knew the defendant was wanted for questioning for his involvement in a theft, and, given the information he possessed as a result of that furnished by Officer Ferrell, his suspicion of the defendant was reasonable.

The defendant argues that even assuming the initial stop of his vehicle was lawful, it was unreasonable for Officer Andersen to take him into custody for further checking on the felony warrant. Furthermore, he argues, even if there was reason to believe the defendant was wanted for a felony in New York, after he was cleared of any involvement in that felony, the police did not have sufficient information to justify detaining him further.

After having received reliable information that the defendant fit the description of the man wanted on the felony warrant from New York, the officer would have been derelict in his duty had he not brought the defendant in. Defendant's argument in this regard is totally without merit.

The police had sufficient articulable reasons constituting probable cause for holding the defendant pending questioning as to the receiving of stolen property. One of the persons involved in stealing the ring showed the police where the defendant lived, told police that the defendant had bought the ring, and gave the officers a description of the defendant and his car. This information was confirmed when the ring was found hidden in the defendant's room, and the defendant was found in the neighborhood of the house which Phillips had pointed out as being the defendant's and was driving a car which matched the description given by Phillips. In the language of *State v. Moore*, 226 Neb. 347, 411 N.W.2d 345 (1987), the facts and circumstances within the officer's knowledge and of which he had reasonable trustworthy information were sufficient to warrant a person of reasonable caution to believe that an offense had been committed. That is, there was probable cause to detain the defendant even after he had been cleared of the New York felony.

Beyond that, the fact remains the officer testified that the defendant voluntarily agreed to stay at police headquarters until Officer Ferrell arrived to question him. 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. In reviewing a court's ruling as the result of a suppression hearing, the Supreme Court will not reweigh or resolve conflicts in the evidence, but will uphold the

trial court's findings of fact unless those findings are clearly wrong. *State v. Sutton, ante* p. 30, 434 N.W.2d 689 (1989).

Regarding the third assignment of error, pertaining to the sufficiency of the evidence to convict the defendant, it is undisputed that the ring was a stolen ring. It was found in the dresser drawer in the defendant's bedroom and was hidden under a bunch of socks. Additionally, Phillips, one of the thieves, testified that when the defendant made the lower offer to purchase the ring, he talked in terms of taking the ring off their hands so that "if the cops watch us . . . we wouldn't get busted with it or nothing like 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. Quiring*, 230 Neb. 535, 432 N.W.2d 243 (1988).

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. FREDERICK E. MCSWINE, APPELLANT.

438 N.W.2d 778

Filed April 21, 1989. No. 88-391.

1. **Trial: Evidence: Appeal and Error.** The admission or exclusion of evidence is a matter within the sound discretion of the trial court, whose ruling on an evidential question will be upheld unless such ruling constitutes an abuse of discretion.
2. **Due Process: Trial: Witnesses.** Few rights are more fundamental than that of an accused to present witnesses in his own defense.
3. _____: _____: _____. The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a

defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

4. **Prior Convictions: Proof: Right to Counsel: Waiver.** 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.
5. **Prior Convictions: Collateral Attack: Right to Counsel: Appeal and Error.** A defendant cannot collaterally attack a prior conviction in an enhancement proceeding. 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.

Appeal from the District Court for Lancaster County: BERNARD J. McGINN, Judge. Judgment on count I reversed and remanded for a new trial. Judgment on count II affirmed.

John R. Doyle, of Doyle & Doyle Law Office, for appellant.

Frederick E. McSwine, pro se.

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

BOSLAUGH, SHANAHAN, and GRANT, JJ., and KNAPP and ROWLANDS, D. JJ.

PER CURIAM.

The defendant, Frederick E. McSwine, was charged as a habitual criminal with two counts of willful failure to appear. After trial to a jury, he was convicted and sentenced to imprisonment for 10 years on each count, the sentences to run concurrently. He has appealed and contends that his trial was in violation of his rights under the interstate agreement on detainers act, Neb. Rev. Stat. §§ 29-759 et seq. (Reissue 1985); that the trial court erred in refusing to admit testimony of his former counsel; and that he should not have been sentenced as a habitual criminal.

The first assignment of error relates to charges of forgery and burglary that had been filed against the defendant in

Lancaster County, Nebraska. The information charging second degree forgery was filed June 27, 1985, and was known as case No. 68-234. The information charging burglary was filed on July 19, 1985, and was known as case No. 68-278.

On August 8, 1985, the defendant appeared in person in the district court to make bond on both cases. At that time the defendant was sworn by the district judge, and the defendant acknowledged under oath that he would appear on August 20, 1985, on case No. 68-234 and at such other times as he might be ordered to appear, and would remain in Lancaster County. He further acknowledged under oath that he would appear on September 9, 1985, for trial in case No. 68-278 or at such other times as he might be ordered to appear, and would remain in Lancaster County. The district judge at that time warned the defendant that if he did not appear for trial on September 9, 1985, the bond could be forfeited, a warrant could be issued for his arrest, and he could be liable for all costs incurred in his apprehension and return. A similar warning was given as to his appearance on August 20, 1985, in case No. 68-234.

When the defendant failed to appear for trial on September 9, 1985, his bond was forfeited and a bench warrant issued for his arrest. When he failed to appear for trial on October 29, 1985, in case No. 68-234, his bond in that case was forfeited and a bench warrant issued for his arrest.

The defendant did not remain in Lancaster County, as he had promised he would, but was apprehended in the State of Washington and charged with burglary. He was in prison in Washington until June 1987.

On June 30, 1986, the defendant signed a waiver of extradition to Nebraska for trial on the forgery and burglary charges pending in Nebraska. He was not returned to Nebraska until June 17, 1987. Apparently, the defendant was never tried on the forgery and burglary charges in Nebraska, and they were dismissed.

Any rights the defendant may have had under the interstate agreement on detainers act related to the forgery and burglary cases and not to this case. The first assignment of error is without merit.

The information in this case was filed on September 14,

1987, after the defendant had been returned to Nebraska. Count I alleges that the defendant willfully failed to appear on September 9, 1985, for trial in case No. 68-278. Count II alleges that he willfully failed to appear on October 29, 1985, for trial in case No. 68-234.

The second assignment of error relates to testimony of Joseph Nigro, a deputy public defender in Lancaster County, which the defendant attempted to introduce in regard to count I. Nigro had been appointed to represent the defendant in the burglary and forgery cases. The State had made a motion in limine to exclude the testimony of Nigro as hearsay and not relevant. Before ruling on the motion in limine, the trial court permitted the defendant to make an offer of proof by question and answer out of the presence of the jury.

In the offer of proof, Nigro testified in part as follows:

> According to my notes in the case at 68, . . . Page 278 [burglary], when I saw Mr. McSwine on August 20, the notes that I made after the conversation were that I told him to stay out of trouble and to get a job. I also noted that I will try to — that I told him that I will try to negotiate with the prosecutor after the September jury term. And obviously I saw Mr. McSwine on August 29th when he was arraigned on the second case. I would say that the way things work in Lancaster County District Court all cases are set for the next jury term.
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> . . . .
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> . . . All cases are set for the next jury term. But obviously 100 cases don't go to trial on the same day. The, generally, the oldest cases are the cases that are called for trial and cases that do wind up going to trial generally don't go to trial for two or three jury terms after the arraignment. And I would say it's a practice of defense attorneys in Lancaster County to tell their clients that they do not need to be present for the beginning of the next jury term but to remain in contact with the attorney so they can be advised when the case is called for trial. But it is not the practice of the district court to require all defendants to be present for that beginning day of the jury term and then 98 defendants are told to go home and two defendants are

told to remain for trial. And so in practice, I tell all of my clients that they don't need to be there for the beginning of the jury term but to stay in touch with me and, based on my notes, where I indicated that I would try to negotiate with the prosecutor after the September jury term, that makes me fairly certain that I told Mr. McSwine his case would not be called for trial and that after the jury term was over when I was less busy I would try to see if something could be worked out in the case.

. . . .

Q. . . . What's your best recollection as what you told McSwine as to whether or not he would have to be in district court on September the 9th, 1985?

A. My best recollection would be that when I saw him on August 20 and then again on August 29th that I probably told him that his case would not come to trial, that therefore he wouldn't need to be there and that he should stay in contact with me. My notes indicate when I spoke to Mr. Colborn on September 9th I noted that Mr. — my notes says Colborn thinks that defendant was ordered to appear at 9 o'clock today, and my recollection would be that on September 9th that John Colborn called me up and said, "I think Fred was ordered to appear," that he had recalled the bond form, and — but that he was perhaps not certain. We went in and checked the file. There was the bond form. And at that time the case was called up. And I was unable to reach Mr. McSwine on the morning of September the 9th.

. . . .

. . . I would guess almost certainly on the case that was arraigned on August 29th [forgery], which would be just a few days before the jury term, that I would have told Mr. McSwine that that case would not come up. And generally district court orders defendants — they tell them that their case is set for September 9th or as soon as the same could be reached. So, in effect, they're not required to be there on that day. And, of course, on the case where he was arraigned on August 29th, that case was not called up until October.

Q. . . . Have you, in fact, when the case was a recently arraigned case, within the last month and now he's right up in front of the district court, have you told defendants, in fact you're not going to be tried this time, you're not going to have to come?

A. That's what I would virtually always tell defendants when they're arraigned, just within a couple of weeks before the next jury term, and oftentimes defendants do — they get confused, and I have to explain to them that, you know, the Court may say it's set for this jury term, that they may not go to trial for three or four months, because the older cases are tried first. And only so many cases can be tried during a single jury term.

Q. And the cases that have been on file longer are the ones that get called up first; is that correct?

A. Yes.

On cross-examination, Nigro testified:

Q. Mr. Nigro, you don't have any independent recollection of telling the defendant that he didn't have to show up on September 9th of 1985; do you?

A. No.

Q. And your notes don't reflect that you told him he did not have to show up on September 9th of 1985?

A. No, the notes don't specifically say that.

The court sustained the objection of the State to the offer of proof, finding, "This witness has no independent recollection of telling the defendant that he did not need to appear, and I think that's it."

The defendant contends that this ruling was erroneous and that Nigro should have been allowed to testify.

The admission or exclusion of evidence is a matter within the sound discretion of the trial court, whose ruling on an evidential question will be upheld unless such ruling constitutes an abuse of discretion. *State v. Kern*, 224 Neb. 177, 397 N.W.2d 23 (1986); *State v. Ryan*, 226 Neb. 59, 409 N.W.2d 579 (1987).

Few rights are more fundamental than that of an accused to present witnesses in his own defense. *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).

In *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L.

Ed. 2d 1019 (1967), the U.S. Supreme Court said:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

The State claims that Nigro was incompetent to testify as to what he told the defendant regarding his obligation to appear in court because Nigro could not recall with certainty the content of his communications with the defendant. The trial court apparently agreed with the State's position and, therefore, excluded Nigro's testimony concerning any contact with the defendant.

Of course, a defendant in a criminal case has no constitutionally protected right to present irrelevant evidence or adduce evidence from an incompetent witness. However, defendant unquestionably established Nigro's firsthand observations regarding communications between Nigro and the defendant, although Nigro was unable to recall with precision the content of the communications. As noted in McCormick on Evidence § 10 at 24-25 (E. Cleary 3d ed. 1984):

> While the law is exacting in demanding firsthand observation, it is not so impractical as to insist upon preciseness of attention by the witness in observing, or certainty of recollection in recounting the facts. Accordingly, when a witness uses such expressions as "I think," "My impression is," or "In my opinion," this will be no ground of objection if it appears that he merely speaks from an inattentive observation, or an unsure memory.

Rather than exclude a witness' testimony when the witness is unable to precisely recall events, the modern trend is to allow the witness to testify, allowing the fact finder to consider the witness' memory as one factor affecting the weight to be given

the testimony. See, *State In Interest of R. R.*, 79 N.J. 97, 398 A.2d 76 (1979); *Weeks v Feltner*, 99 Mich. App. 392, 297 N.W.2d 678 (1980) (witness' testimony that she "believed" that a window was closed on a particular night was admissible; witness' memory affects only the weight to be given her testimony); *State v. Pridgen*, 313 N.C. 80, 326 S.E.2d 618 (1985) (witness' testimony that the defendant's photograph most closely resembled the perpetrator, but that she "couldn't be sure," was admissible; equivocal nature of testimony goes only to its weight). See, also, 2 J. Wigmore, Evidence in Trials at Common Law § 658(b)(2) at 895 (J. Chadbourn rev. 1979):

> "Belief" or "impression" may signify the degree of positiveness of the witness' recollection; i.e. may signify that he obtained entirely clear and positive impressions at the time, but that since then his memory has faded, and his recollection today is so weak that he is not able to call it more than an "impression" or to say more than "I think." The deficiency comes merely in the quality of his recollection. Here again, the law makes no objection on such grounds. It welcomes whatever quality of recollection he is able to bring.

(Emphasis omitted.)

Nigro testified that he was almost certain that he told, and likely did tell, McSwine that his case would not be called on September 9, 1985. This testimony was relevant to the issue of McSwine's "willful" failure to appear. Neb. Rev. Stat. § 29-908 (Reissue 1985). The trial court improperly excluded Nigro's testimony, and this ruling prejudiced McSwine. The defendant's conviction on count I for failure to appear must therefore be reversed, and the defendant tried anew on this charge.

The defendant's third assignment of error relates to the records of his previous convictions that were used to prove that he was a habitual criminal. The defendant attempted to attack these convictions collaterally on the ground the records did not show the defendant had been advised at the time he pleaded to the prior offenses that those convictions could be used to enhance the penalty for a future conviction.

A warning that "continued felonious conduct could be detrimental to a felon's freedom" has never been a requirement

at any point in the sentencing procedure. In *State v. Oliver*, 230 Neb. 864, 869, 434 N.W.2d 293, 297 (1989), we held: "[T]o 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."

> It has also been the rule in this State that a defendant cannot collaterally attack a prior conviction in an enhancement proceeding. . . . 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.

(Citations omitted.) *Id.*

In *State v. Slezak*, 226 Neb. 404, 411 N.W.2d 632 (1987), the defendant claimed his prior guilty pleas were not entered knowingly, intelligently, and voluntarily, thereby making his prior convictions invalid. This court held: "[T]he State's burden in proving a valid prior conviction for enhancement purposes is only to show that the defendant had counsel or knowingly and voluntarily waived counsel at the time of such conviction." *Id.* at 407, 411 N.W.2d at 634.

The record shows that McSwine had counsel at the time of his prior guilty pleas. The fact that he was not warned of possible enhancement does not invalidate the prior convictions, nor does it make the finding that he is a habitual criminal in the present case improper.

We have considered the separate brief filed by the defendant pro se and find that none of the contentions made therein have merit.

The judgment on count I is reversed and the cause remanded for a new trial; the judgment on count II is affirmed.

JUDGMENT ON COUNT I REVERSED AND REMANDED FOR A NEW TRIAL. JUDGMENT ON COUNT II AFFIRMED.

BOSLAUGH, J., dissenting in part.

I dissent from that part of the opinion which holds that it was an abuse of discretion for the trial court to refuse to admit the

offered testimony of the witness Nigro.

Assuming that the testimony offered was relevant, I do not agree that it was an abuse of discretion to refuse to permit a witness to testify who was unable to testify either from present recollection or past recollection recorded.

This is not a case involving a careless observer, an inattentive witness, or a witness who is unable to remember the exact words which were spoken in a conversation. Nigro was unable to remember *whether* he told the defendant he did not need to appear for trial on September 9, 1985.

The two conditions of the recognizance, that the defendant not leave Lancaster County and that he appear for trial on September 9, 1985, were related. The purpose was to ensure that the defendant would be available to the court. There is no suggestion that Nigro told the defendant that he could leave the state.

Nigro stated flatly that he had no independent recollection of telling the defendant that he did not need to appear for trial on September 9, 1985, and that his notes did not specifically show that he had done so.

There is a vast difference between telling a defendant that it is probable that his case will not be tried on a date certain and telling him that he does not need to appear on the date the case has been set for trial, especially after the defendant has taken an oath in open court that he will not depart the county and will appear for trial on the date stated.

Here, the witness was not only unable to recall what he may have told the defendant, but he was unable to state that he remembered telling the defendant he did not need to appear for trial on the date set by the trial court. Under these circumstances it was within the discretion of the trial court to refuse the offer of proof.

STATE OF NEBRASKA, APPELLEE, V. ROGER L. STALDER, APPELLANT.

438 N.W.2d 498

Filed April 21, 1989. No. 88-481.

1. **Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling denying a motion to suppress evidence, this court affords the lower court great deference. This court will not overrule the trial court's decision unless it was clearly wrong given the totality of the circumstances.
2. **Constitutional Law: Search and Seizure.** The test for determining whether a warrantless search of an automobile violates the fourth amendment depends on the facts and circumstances of each case, and is based on the reasonableness of the search.
3. **Search and Seizure: Police Officers and Sheriffs.** Taking an inventory of the contents of an automobile to ensure the return of all the personal property to the defendant and to protect the police against false claim of loss is a salutary practice whether required by rule or common practice.
4. **Jury Instructions.** It is the duty of the trial court to properly instruct the jury on the law applicable to the case.

Appeal from the District Court for Richardson County: ROBERT T. FINN, Judge. Reversed and remanded for a new trial.

Louie M. Ligouri for appellant.

Robert M. Spire, Attorney General, and Denise Frost for appellee.

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

GRANT, J.

This is an appeal from the district court for Richardson County. The defendant-appellant, Roger L. Stalder, was charged by information with the offense of being a felon in possession of a firearm with a barrel less than 18 inches in length, in violation of Neb. Rev. Stat. § 28-1206 (Reissue 1985). Defendant pled not guilty. Before trial, he filed a motion to suppress the admission of a handgun obtained and seized as a result of a search of his vehicle. The trial court overruled the defendant's motion.

The matter was tried before a jury on April 4, 1988. The jury returned a verdict of guilty, and on May 5, 1988, the defendant was sentenced to 2 years in the Nebraska Penal and

Correctional Complex. Defendant appeals, contending the district court erred (1) in overruling his motion to suppress the handgun seized during the search of his vehicle and (2) in instructing the jury that the presence of the handgun in his vehicle was prima facie evidence that the handgun was in his possession. We reverse and remand for a new trial.

On the afternoon of November 3, 1987, a Nebraska State Patrol officer observed the defendant traveling in excess of the speed limit on a gravel county road in Richardson County. The officer stopped the vehicle. Defendant was alone in his car. After obtaining the defendant's driver's license, the officer radioed for a warrant search and was informed that an active warrant for the arrest of defendant was on file. Another officer was called to the scene, and the defendant was placed under arrest.

At the point where defendant was stopped, there were no shoulders on either side of the roadway. After he was placed under arrest, the defendant asked what was going to happen to his car. When he was told it probably would be towed, the defendant requested that his vehicle be taken to a nearby farmyard rather than be towed. The officers then contacted the owner of the farm, and, after securing the farmer's permission to park defendant's car in the farmyard, one of the officers drove the defendant's vehicle from the roadway and into the farmyard.

After he parked defendant's car in the farmyard, the assisting officer conducted "a brief inventory search of the vehicle to attempt to secure it . . . ." The officer testified that he could lock the doors of the vehicle, but that the rear window had a "roll-down handle on the outside which could not be secured." This meant that the car could not be secured because entry could be made by rolling down the rear window.

The officer then conducted a search of the vehicle to see if there were "any type of valuables in the vehicle." He sat in the driver's seat and lifted the lid on the console between the driver's seat and the passenger seat. The console was not locked or latched. After the officer lifted the console lid, he saw a silver .22-caliber semiautomatic handgun in a holster, with a clip of ammunition next to it. The barrel of the pistol was

approximately 2 inches long. The officer then tried to open the glove compartment, but it was locked, and he did not search further. The officer did not find any items of value in the car other than the gun and clip, which were handed over to the arresting officer. Defendant's car was left in the farmyard, and defendant was taken from the scene for processing.

Defendant later filed a motion to suppress the evidence seized during the search of his vehicle on the grounds that his vehicle had been "subjected to a warrantless search in violation of the Fourth and Fourteenth Amendments of the United States Constitution and in violation of Section 7 of Article I of the Constitution of the State of Nebraska." After hearing, the district court overruled the motion to suppress, and the case went to trial before a jury. During the trial, defendant again objected to the introduction of the handgun as evidence, and his objection was overruled. Defendant was convicted and timely appealed. In this court he assigned the errors set out above.

In connection with defendant's first assignment of error, we have held that in reviewing a trial court's ruling denying a motion to suppress evidence, this court affords the lower court great deference. This court will not overrule the trial court's decision unless it was clearly wrong given the totality of the circumstances. *State v. Dixon*, 222 Neb. 787, 387 N.W.2d 682 (1986).

Insofar as defendant rests his contention for suppression of the handgun evidence on the "warrantless search of his motor vehicle," as stated in his first assignment of error, the decision in cases such as the one before us does not depend on the issuance of a warrant or not, but on the reasonableness of the search. As stated by Justice Black in his concurring and dissenting opinion in *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971), and as quoted in *South Dakota v. Opperman*, 428 U.S. 364, 372-73, 96 S. Ct. 3092, 49 L. Ed. 2d 1000 (1976):

> "[T]he Fourth Amendment does not require that every search be made pursuant to a warrant. It prohibits only '*unreasonable* searches and seizures.' The relevant test *is not the reasonableness of the opportunity to procure a*

> *warrant*, but the reasonableness of the seizure under all the circumstances. The test of reasonableness cannot be fixed by *per se* rules; each case must be decided on its own facts."

(Emphasis in original.) We must determine if the search was unreasonable in defendant's case.

We have held that inventory searches are permissible after an arrest. *State v. Hill*, 214 Neb. 865, 336 N.W.2d 325 (1983). We have also held that an arrestee's permission is not required to conduct an inventory search and that evidence discovered incident to an inventory search is admissible in court. *State v. Wallen*, 185 Neb. 44, 173 N.W.2d 372 (1970), *cert. denied* 399 U.S. 912, 90 S. Ct. 2211, 26 L. Ed. 2d 568. See, also, *South Dakota v. Opperman, supra*; *Colorado v. Bertine*, 479 U.S. 367, 107 S. Ct. 738, 93 L. Ed. 2d 739 (1987); *Cooper v. California*, 386 U.S. 58, 87 S. Ct. 788, 17 L. Ed. 2d 730 (1967), *reh'g denied* 386 U.S. 988, 87 S. Ct. 1283, 18 L. Ed. 2d 243.

In *State v. Wallen, supra* at 46-47, 173 N.W.2d at 374, we held:

> Taking an inventory of the contents of the automobile to insure the return of all the personal property to the defendant and to protect the patrol against false claim of loss while in the custody of law enforcement officers is a salutary practice whether required by rule or common practice.

Defendant contends that his motion to suppress should have been granted because his vehicle was never impounded by the officers and there was no showing that the officers had followed a standard procedure in making what the officers called an inventory search.

The record shows that defendant's vehicle was not impounded, in the sense that the car was towed to a police lot for safekeeping. We do not believe that "impoundment" is necessary to establish the validity of an inventory search in all situations.

As stated in *South Dakota v. Opperman, supra* at 428 U.S. at 373: "In applying the reasonableness standard adopted by the Framers, this Court has consistently sustained police intrusions into automobiles impounded *or otherwise in lawful police*

custody where the process is aimed at securing or protecting the car and its contents." (Emphasis supplied.)

In the case before us, there is no doubt that the car was in lawful police custody. The driver of the car was under arrest and had been separated from his car. The car was partially in a driving lane, and there was no shoulder available for parking the car out of the way of possible traffic. The officers had a duty to secure the car while they further processed its owner, the defendant.

Upon being told the car would probably have to be towed, defendant asked if the car could be stored temporarily in the farmyard adjoining the road until it could be picked up by his wife. Using common sense, the officers obtained permission from the landowner to use the farmyard and drove defendant's car into the yard. This saved defendant the expense of towing his car from the rural area and saved the officers substantial time by eliminating the need to have one of the officers wait until the other found and engaged a tow truck.

Then, after the assisting officer drove the car into the yard, he discovered he could not secure it because he could not lock the rear window. If the car was to be left in the farmyard, the officer had a duty to secure the car, as best he could under the circumstances, from possible theft of the car owner's property in the car. The officer then began a brief inventory search, looking for valuables. In an unlocked console box he found the handgun in question. The officer did not attempt to further investigate the locked glove compartment, thus further establishing the fact that he made the least intrusion possible under the circumstances.

In *South Dakota v. Opperman*, 428 U.S. 364, 369, 96 S. Ct. 3092, 49 L. Ed. 2d 1000 (1976), the U.S. Supreme Court stated:

> When vehicles are impounded, local police departments generally follow a routine practice of securing and inventorying the automobiles' contents. These procedures developed in response to three distinct needs: the protection of the owner's property while it remains in police custody, *United States v. Mitchell*, 458 F. 2d 960, 961 (CA9 1972); the protection of the police against claims or disputes over lost or stolen property,

United States v. Kelehar, 470 F. 2d 176, 178 (CA5 1972); and the protection of the police from potential danger, *Cooper v. California, supra*, at 61-62. The practice has been viewed as essential to respond to incidents of theft or vandalism. See *Cabbler v. Commonwealth*, 12 Va. 520, 522, 184 S. E. 2d 781, 782 (1971), cert. denied, 405 U. S. 1073 (1972); *Warrix v. State*, 50 Wis. 2d 368, 376, 184 N. W. 2d 189, 194 (1971). In addition, police frequently attempt to determine whether a vehicle has been stolen and thereafter abandoned.

In the case before us, although the car was not officially "impounded," nonetheless it was in lawful police custody to a sufficient degree to make the reasons set out above applicable to the situation confronting the officers in rural Richardson County. The actions of the state troopers did not constitute an unreasonable search and seizure in view of all the circumstances present.

Further, as was the case in *State v. Wallen*, 185 Neb. 44, 173 N.W.2d 372 (1970), there is no evidence in the record that the inventory was a subterfuge for an unlawful search for evidence to convict for crime. See, *Heffley v. State*, 83 Nev. 100, 423 P.2d 666 (1967); *State v. Montague*, 73 Wash. 2d 381, 438 P.2d 571 (1968). The record shows that the officers' actions were prudent under the circumstances.

With regard to defendant's contention that the State made no showing that the officers had followed a standard procedure in conducting the inventory search, a somewhat more difficult problem is before us.

The record makes no reference to any standard operating procedures which the officers followed. In *South Dakota v. Opperman, supra* at 374-75, the U.S. Supreme Court noted that inventory searches were "carried out in accordance with *standard procedures* in the local police department," and, in a concurring opinion to *Opperman*, Justice Powell stated, "[T]he search here was . . . conducted strictly in accord with the regulations of the Vermillion Police Department." 428 U.S. at 380. In *Colorado v. Bertine*, 479 U.S. 367, 369, 107 S. Ct. 738, 93 L. Ed. 2d 739 (1987), the Court referred to "local police procedures, which require a detailed inspection and inventory

of impounded vehicles."

The concern with following standard procedures is, of course, a concern over a police officer in the field following his own unbridled discretion. We share that concern. Nonetheless, in the case before us, the searching officer made as little intrusion into the car as possible, and his limited intrusion was based on a search for valuables because he could not secure the car itself from entry through the rear window.

The trial court, in effect, found there was no unreasonable search and seizure. The trial court's decision to deny the motion to suppress was not clearly wrong under the circumstances.

Defendant also assigns as error the action of the trial court in instructing the jury that the presence of the handgun in the defendant's vehicle was prima facie evidence that he was in possession of the handgun. This instruction sets out Neb. Rev. Stat. § 28-1212 (Reissue 1985), which provides: "The presence in a motor vehicle other than a public vehicle of any firearm . . . shall be prima facie evidence that it is in the possession of, and is carried by, all persons occupying such motor vehicle at the time such firearm or instrument is found . . . ." The defendant bases his argument on two points: (1) that he was not in the car when the gun was found, and (2) the assumption that this statute is unconstitutional in that it forced him to establish his innocence.

With regard to the first point, defendant's contention, at first blush, appears to be frivolous, but he presents a difficult question. The statute clearly states that a prima facie case arises as to possession of a proscribed firearm in occupants of an automobile "at the time such firearm . . . is found." Recognizing that criminal statutes must be strictly construed, *State v. Douglas*, 222 Neb. 833, 388 N.W.2d 801 (1986), the fact remains that the strict construction advocated by defendant would render the statute meaningless in many cases.

We note first of all that § 28-1212 is not a statute defining a crime, but is a statute concerning evidentiary proof of a crime. In that situation, the strict construction above referred to is not controlling.

We recognize that the statute, read literally, applies only to those occupying the car at the time the firearm was found. If strictly construed, the statute would not apply to defendant in

this case because, as defendant contends, when the gun was found, defendant did not occupy the car. Similarly, if a person were stopped after a high-speed chase and immediately got out of his car and approached the arresting officer, any firearm found instants later in the car would not be presumptive evidence of possession against that person because he was not an occupant of the car *at the time* the gun was found. Such an interpretation would make the statute of limited application.

Accordingly, we follow the reasoning set out in *People v. Crenshaw*, 202 Misc. 179, 183, 117 N.Y.S.2d 202, 206 (1951), wherein that court stated, in considering a very similar statute:

> In other words, this court gives legal sanction to the pertinency of section 1898-a of the Penal Law, as affecting persons not found physically inside an automobile at the time the designated weapon, instrument or appliance is found therein, only when other circumstances are present as would denote their constructive occupancy of such vehicle. Accordingly, the promulgation of the rule of constructive occupancy would be restricted to and become operative only in relation to persons who were known occupants of an automobile immediately preceding the finding of the prohibited weapon therein, irrespective of the locale of their arrest, or the time intervening therefor, *provided* the automobile in question has been under continuous custody or surveillance during the interval of the flight of the accused and the finding of the weapon, as to make such constructive occupancy uninterrupted and directly connecting the known occupants with the found prohibited weapon.

In the *Crenshaw* case, the police found the gun in a car the occupants had been removed from, but which had been left unattended for 40 minutes while the police questioned the occupants. The court held that the occupants were not chargeable with occupancy of the car during the 40-minute interval, and the statute could not be used.

In the case before us, the defendant's car was never left unattended before the gun was found. At all times, both the defendant and the car were in view of the arresting officers. We determine that defendant was in constructive occupancy of the

car, under all the facts of this case, and § 28-1212 may be applied against him.

Defendant's second assignment is directed to the instruction setting out the statute. The instruction given by the court provided:

> The statutes of the State of Nebraska at the time alleged in [the] information provided in substance as follows:
>
> Any person who possesses any firearm with a barrel less than eighteen inches in length . . . and who has previously been convicted of a felony . . . commits the offense of possission [sic] of firearms by a felon . . .
>
> and
>
> The presence in a motor vehicle other than a public vehicle of any firearm or instrument . . . shall be prima facie evidence that it is in the possession of, and is carried by, all persons occupying such motor vehicle at the time such firearm or instrument is found . . . .
>
> Any person found guilty of the violation of such statute shall be punished as provided by law.

At the instruction conference, the only objection to this instruction was stated to be:

> The basis of my objection to that part of the instruction is that the testimony of the officer who found the weapon was that Mr. Stalder [the defendant] was not in or occupying the motor vehicle at the time such firearm was found, but on the contrary, Mr. Stalder was occupying a separate vehicle; that being the vehicle of Officer Bybee.

That contention was discussed above.

Nonetheless, although there was no other objection to the instruction, the fact remains that it is the duty of the trial court to properly instruct the jury on the law applicable to the case, whether requested to do so or not. *State v. Breaker*, 178 Neb. 887, 136 N.W.2d 161 (1965); *State v. Bachkora*, 229 Neb. 421, 427 N.W.2d 71 (1988).

We note first of all that combining the statutory definition of the crime in question with the statutory evidentiary provisions concerning "possession," and then stating that a person violating "such statute shall be punished as provided by law," leads to some confusion, because the evidentiary statute does

not call for any punishment. The two concepts would be clearer if separated.

When instructions are given as to presumptions in a criminal case, those instructions must conform to the requirements of Neb. Evid. R. 303, Neb. Rev. Stat. § 27-303 (Reissue 1985), regarding presumptions in criminal cases. Whether § 27-303 be construed to refer to presumptions or to permitted inferences, it is clear that § 27-303 should be applied when a jury is instructed as to § 28-1212, as in this case. Section 27-303(1) provides that presumptions "including statutory provisions that certain facts are prima facie evidence of other facts or of guilt, are governed by this rule." Such statutory provisions are involved in this case. Section 28-1212 provides: "The presence in a motor vehicle . . . of any firearm . . . shall be prima facie evidence that it is in the possession of . . . all persons occupying such motor vehicle . . . ." Section 27-303 must be complied with in this case.

There is no doubt that sufficient evidence was presented by the State to warrant the submission of an instruction, insofar as subsections (1) and (2) of § 27-303 are concerned. The subsections provide generally when such instructions may be given.

Section 27-303(3) provides:

> Whenever the existence of a presumed fact against the accused is submitted to the jury, the judge shall give an instruction that the law declares that the jury may regard the basic facts as sufficient evidence of the presumed fact *but does not require it to do so*. In addition, if the presumed fact establishes guilt or is an element of the offense or negatives a defense, the judge *shall instruct the jury that its existence must, on all the evidence, be proved beyond a reasonable doubt.*

(Emphasis supplied.)

In the case at bar, the court did not comply with the requirements of § 27-303(3), in that the instruction given did not inform the jury that, while it could "regard the basic facts as sufficient evidence of the presumed fact," it was not required to do so, nor did the instruction given inform the jury that while presence of the gun is "prima facie" evidence of possession, the fact of possession must, "on all the evidence, be proved beyond

a reasonable doubt." In other words, the fact that the statute is applicable does not necessarily mean the defendant was in possession of the gun. The fact of possession must be determined by all the evidence in the case.

In fact, in the instant case, the jury was not instructed or given any information at all as to the meaning of "prima facie"—a concept that sometimes eludes scholars in the law, or, at least, leads to differences of opinion. The concept of "prima facie evidence" is usually one for the trial judge to use in determining if there is sufficient evidence to send the case to the jury.

We note the court's failure to follow the requirements of § 27-303(3) as plain error, and the cause must be remanded for new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

STATE OF NEBRASKA, APPELLEE, V. RUSSELL L. LEHL, APPELLANT.

438 N.W.2d 505

Filed April 21, 1989. No. 88-549.

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

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

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

Robert M. Spire, Attorney General, and Kimberly A. Klein for appellee.

BOSLAUGH, WHITE, CAPORALE, and GRANT, JJ., and RIST, D.J.

BOSLAUGH, J.

The defendant, Russell L. Lehl, was convicted by a jury of unlawful possession of methamphetamine and was sentenced to imprisonment for 1 to 2 years. He has appealed and contends that the evidence was insufficient to support the verdict, that evidence was taken from his person by an illegal search, and that the sentence imposed was excessive.

The record shows that on August 15, 1987, at approximately 8 a.m., the Lincoln Police Department received a call that a complainant was having trouble removing the defendant from the complainant's apartment in Lincoln, Nebraska. At the apartment, the police found the defendant lying on a couch, apparently asleep. The police were unsuccessful in attempting to waken the defendant by shaking and shouting at him, by tapping on the bottom of his feet, and by trying to stand him up. The defendant was breathing, had a heartbeat, and had what appeared to be fresh needle marks on one arm. Because the police were unsure of the defendant's condition, medical assistance was requested, and the defendant was taken to Lincoln General Hospital. About 5 minutes later, the police received a call that assistance was needed because the defendant was combative. When the police arrived at the emergency room, they found the defendant arguing with the staff and trying to get out of bed. The police attempted to restrain the defendant and eventually found it necessary to handcuff the defendant to the bed in order to restrain him.

As part of the physical examination of the defendant, the attending physician, Dr. Laura Acklie, removed the defendant's shoes and socks and found a syringe in his right sock. After discovery of the syringe, a search was made of the defendant's clothing. A cellophane or plastic bag containing a crystalline residue was found in the defendant's pocket.

Dr. Acklie testified that upon his arrival, the defendant was combative and "under some kind of influence of substances," presumably alcohol because of the heavy odor noted on his person. Dr. Acklie noted fresh "track marks" in the antecubital

areas of both arms of the defendant. While the doctor was removing the defendant's socks so that a neurological examination could be made, a syringe fell out of one sock. Dr. Acklie testified that she was familiar with the street use of methamphetamine and that the drug could be injected.

A forensic drug chemist testified that screening tests on the white residue in the plastic bag indicated the presence of methamphetamine and nicotinamide. The witness testified that it was not unusual to find nicotinamide present with the methamphetamine, as it is commonly used as an adulterant, or a cutting agent, in controlled substance powders.

The defendant testified that on August 14, 1987, he went to work and then to a bar from about 9 p.m. until 1 a.m., and then to a party where he stayed until approximately 7 a.m. During this time he was drinking both whiskey and beer, and he later stated that he drank almost two cases of beer. The defendant said that he was intoxicated when he left the bar. After leaving the party, a friend took the defendant to the apartment where the defendant was staying with another friend. The defendant had no recollection of the officers' being at the apartment and trying to awaken him, and only remembered waking up in the hospital. The defendant denied having bought drugs or having "done" drugs on the evening of August 14, but did state that he could have, and just could not remember. The defendant claimed that if he had injected drugs, he would have remembered; however, he also admitted that he was "awful drunk." The defendant admitted that he had used drugs in the past, but when asked how the plastic bag with a white residue came to be on his person, he stated he had no knowledge of how it got there. The syringe was received in evidence over objection that it was irrelevant, immaterial, and inflammatory.

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. Camacho, ante* p. 522, 437 N.W.2d 151 (1989). The evidence

which has been summarized was sufficient to support a finding of guilt beyond a reasonable doubt.

The defendant contends that the syringe may have been discovered through an illegal search. The evidence shows that the syringe was discovered when the physician removed the defendant's socks so that a neurological examination could be performed. After the accidental discovery of the syringe, which was an item of drug paraphernalia, and knowing of the presence of fresh needle marks on the defendant's arms, the police had probable cause to make a search of the defendant's person. The assignment of error regarding an illegal search is without merit.

The final assignment of error is that the sentence imposed was excessive.

Possession of methamphetamine, a Schedule II drug, is a Class III felony under Neb. Rev. Stat. § 28-416(2)(b) (Cum. Supp. 1988), with a sentence of 1 to 20 years' imprisonment, a fine of $25,000, or both. A sentence imposed within statutorily prescribed limits will not be disturbed on appeal in the absence of an abuse of discretion. *State v. Camacho, supra*; *State v. Masur*, 230 Neb. 620, 432 N.W.2d 815 (1988).

The defendant is 29 years of age. He has a lengthy record of prior offenses. In addition to having fines and jail sentences, the defendant was sentenced to imprisonment for 1 year for felony theft. In view of the defendant's record and the nature of the offense, the sentence imposed was not excessive.

The judgment is affirmed.

AFFIRMED.

STEVEN EARL SHAFFER, APPELLEE, V. DELORES JEAN GUBBELS SHAFFER, APPELLANT.

438 N.W.2d 507

Filed April 21, 1989. No. 88-714.

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

Ronald J. Albin for appellant.

David A. Domina, of Domina, Gerrard, Copple & Stratton, P.C., for appellee.

Jane R. Mapes, guardian ad litem.

HASTINGS, C.J., SHANAHAN, and FAHRNBRUCH, JJ., and NORTON, D.J., and RONIN, D.J., Retired.

PER CURIAM.

The sole issue on appeal in this dissolution of marriage action is the custody of the two minor children of the parties.

After finding that both parties were fit and proper parents, the trial court, after giving consideration to the special needs of each child, granted custody of the older child to the mother and the younger child to the father. We affirm.

As a general rule, in dissolution of marriage cases involving minor children, efforts should be made to not separate siblings. However, there are instances where the particular needs of each child are sufficiently different that separation of children is in the best interests of each child. See *Grace v. Grace*, 221 Neb. 695, 380 N.W.2d 280 (1986). In placing a child's custody with a parent in a dissolution proceeding, a court's primary and paramount consideration is the best interests of the child. *Gerber v. Gerber*, 225 Neb. 611, 407 N.W.2d 497 (1987). In *Gerber* we also held at 618, 407 N.W.2d at 502:

> Some factors or circumstances which may be considered in a court's determination of a child custody issue include considerations of the fitness of the parents; the respective environments offered by each parent; the emotional relationship between a child and each parent; the child's age, general health, welfare, and social behavior; the

> effect on a child if a particular parental relationship is continued or disrupted; parental attitude and stability of character; parental capacity to furnish physical care, education, and other reasonable needs of a child; and, when appropriate, the desires and wishes of a child.

See, also, Neb. Rev. Stat. § 42-364 (Reissue 1988) (custody determination); *Moeller v. Moeller*, 215 Neb. 360, 338 N.W.2d 749 (1983); *Wible v. Wible*, 209 Neb. 708, 310 N.W.2d 515 (1981).

Determinations as to the custody of and visitation with minor children in a dissolution of marriage case are matters initially entrusted to the discretion of the trial judge, whose determinations, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion; keeping in mind, however, that the trial judge observed and heard the witnesses and accepted one version of the facts rather than the other. *Rice v. Rice, ante* p. 428, 436 N.W.2d 518 (1989); *Griffith v. Griffith*, 230 Neb. 314, 431 N.W.2d 609 (1988).

In our de novo review of this case, we have carefully considered the best interests of each of the Shaffer children and the factors delineated in *Gerber*. Our review does not disclose that the trial judge abused his discretion in granting custody of the older child to his mother and the younger child to his father.

Therefore, the decree of dissolution entered by the trial judge is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM J. GAGLIANO, APPELLANT.

438 N.W.2d 783

Filed April 21, 1989. No. 88-739.

1. **Expert Witnesses: Effectiveness of Counsel: Proof.** Generally, expert testimony is not admissible as proof that assistance of counsel in a criminal case was ineffective.

2. **Criminal Law: Expert Witnesses.** The right of an indigent defendant to the appointment of an expert witness at State expense generally rests in the discretion of the trial court.
3. **Postconviction: Proof: Appeal and Error.** A defendant seeking postconviction relief has the burden of establishing a basis for such relief, and the findings of the district court will not be disturbed on appeal unless clearly erroneous.
4. **Postconviction: Effectiveness of Counsel: Proof.** When a defendant, in a postconviction motion, alleges a violation of his constitutional right to effective assistance of counsel as a basis for relief, the standard for determining the propriety of the claim is whether the attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the criminal law in the area. Further, defendant must make a showing of how the defendant was prejudiced in the defense of his case as a result of his attorney's actions or inactions.
5. **Constitutional Law: 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 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.
6. **Effectiveness of Counsel: Proof.** A convicted defendant seeking a reversal of the conviction or sentence for the reason that counsel's assistance was deficient must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.
7. **Effectiveness of Counsel: Proof: Witnesses.** To sustain a claim of ineffective assistance of counsel based on counsel's failure to interview witnesses, the record must establish the identity and testimony of the witnesses counsel failed to interview.
8. **Pleas: Postconviction.** Where the record discloses that a plea of guilty was understandingly and voluntarily entered, it is not subject to postconviction relief.

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

Maurice A. Green, of Burger, Bennett & Green, P.C., for appellant.

Robert M. Spire, Attorney General, and Kenneth W. Payne for appellee.

BOSLAUGH, WHITE, CAPORALE, and GRANT, JJ., and RIST, D.J.

WHITE, J.

Defendant, William J. Gagliano, appeals from an order of the district court for Frontier County denying his motion for postconviction relief. The defendant bases his motion on a claim of ineffective assistance of counsel.

The defendant was originally charged with arson in the first degree, manufacture of a controlled substance, and possession of marijuana of more than 1 pound. Pursuant to a plea arrangement, defendant pleaded guilty to one count of second degree arson and one count of possession of marijuana of more than 1 pound. The bill of exceptions establishes that the court fully complied with the procedures set out in *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986), in accepting the defendant's guilty pleas. Defendant was sentenced to the Nebraska Penal and Correctional Complex for a period of not less than 5 nor more than 10 years' imprisonment on the arson charge and for a period of 1 year's imprisonment on the possession charge, the sentences to be served concurrently.

Prior to the hearing on his motion for postconviction relief, defendant, an indigent, filed a motion requesting authorization to employ legal counsel as an expert witness. The defendant wanted to employ legal counsel as an expert witness to establish what conduct meets the standard of care a lawyer with ordinary training and skill in the criminal law in the area would possess. The district court, finding that "the requested testimony [by legal counsel] concerns an opinion of law which is a matter to be determined by the Court," denied the motion.

The defendant contends the court erred by overruling his motion for authorization to employ legal counsel and by failing to find that defendant was denied effective assistance of counsel.

Defendant's first assignment of error relating to his motion for authorization to employ legal counsel is without merit. In *State v. Ohler*, 219 Neb. 840, 366 N.W.2d 771 (1985), an appeal from a postconviction proceeding, one of the errors assigned was the "lower court's refusal to permit expert testimony regarding what a 'reasonably prudent criminal trial attorney would have done.' " *Id.* at 845, 366 N.W.2d at 775. This court held: "Generally, expert testimony is not admissible as proof that the assistance of counsel in a criminal case was ineffective."

Id. Further, the issue is analogous to one of the issues we addressed in *State v. Suggett*, 200 Neb. 693, 264 N.W.2d 876 (1978). In *Suggett*, an indigent defendant made a motion during postconviction proceedings for authority to retain a psychiatrist. The trial court denied the motion. We affirmed the court's decision, stating that "[t]he right of an indigent defendant to the appointment of an expert witness at State expense generally rests in the discretion of the trial court." *Id.* at 697, 264 N.W.2d at 879. See Annot., Right of Indigent Defendant in Criminal Case to Aid of State by Appointment of Investigator or Expert, 34 A.L.R.3d 1256, 1269 (1970). The record discloses no abuse of discretion on the part of the trial court.

In his second assignment of error the defendant alleges that the court failed to find that he was denied effective assistance of counsel by the court's failing to give sufficient weight to the facts that (1) counsel failed to attempt to suppress statements made by the defendant, (2) counsel failed to conduct a thorough investigation and interview witnesses, (3) counsel failed to assure that defendant's past criminal history was accurately reflected in the presentence investigation, and (4) counsel failed to provide the court with information detailing the extensive cooperation provided by the defendant to the authorities.

Addressing each allegation separately, we note that the appropriate standard of review for a claim of ineffective assistance of counsel is as follows:

> "A defendant seeking postconviction relief has the burden of establishing a basis for such relief, and the findings of the district court will not be disturbed on appeal unless clearly erroneous. [Citations omitted.] ' "When the defendant in a postconviction motion alleges a violation of his constitutional right to effective assistance of counsel as a basis for relief, the standard for determining the propriety of the claim is whether the attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the criminal law in the area. Further, the defendant must make a showing of how the defendant was prejudiced in the defense of his case as a result of his attorney's actions

> or inactions." ' " . . .
>
> . . . "[T]o 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."
>
> A convicted defendant seeking a reversal of the conviction or sentence for the reason that counsel's assistance was deficient must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

State v. Jones, ante p. 110, 112-13, 435 N.W.2d 650, 652 (1989).

The defendant first argues that he was denied effective assistance of counsel when his attorney failed to move to suppress statements made by the defendant while in police custody. With the exception of one statement, defendant fails to identify any other allegedly prejudicial statements which his attorney should have attempted to suppress. The one statement identified by the defendant was a statement made apparently after he jumped out of the window of the house and landed "basically in the arms of Sheriff Lannie Roblee. And at that time said, 'Well, I almost got it burned down.' " The record clearly shows that the statement was a noncustodial, volunteered statement. In the absence of evidence demonstrating that counsel failed to suppress statements prejudicial to the defendant, defendant's claim is not sustained on this point.

The thrust of defendant's second argument is that his pleas were involuntary because his attorney failed "to interview necessary witnesses and to secure all proper information in order to present an accurate assessment upon which to properly advise the Appellant . . . ." Though defendant alleges that his attorney failed to interview two witnesses, defendant never

identifies these alleged witnesses and never specifies the testimony these witnesses were to provide. No affidavits were filed, and neither witness was called to testify by the defendant at the postconviction hearing.

In *State v. Otey*, 212 Neb. 103, 107-08, 321 N.W.2d 453, 456 (1982), *cert. denied* 459 U.S. 1080, 103 S. Ct. 502, 74 L. Ed. 2d 641, this court said:

> "In *State v. Holtan*, [205 Neb. 314, 321, 287 N.W.2d 671, 676 (1980), *cert. denied* 449 U.S. 891, 101 S. Ct. 250, 66 L. Ed. 2d 117], we said: '[T]he defendant maintains that counsel was inadequate in that he did not subpoena witnesses from the state of Washington who would have testified as to his good character. The record, however, fails to disclose what, if anything, the witnesses would have testified to had they been called. . . . In the absence of evidence to disclose what the witnesses would have testified to, we are unable to establish any prejudice and therefore unable to establish any error.' Likewise, in *State v. Kelly*, [190 Neb. 41, 44, 205 N.W.2d 646, 648 (1973)], where the defendant claimed that his attorney had failed to interview and obtain witnesses to establish a defense based on consent, we said . . . 'The defendant utterly failed to establish this allegation. None of the four witnesses identified by him as supporting this defense were called to testify at this hearing nor was their failure to be called as witnesses explained. . . .' "

Since defendant fails to establish the identity and testimony of his alleged witnesses, his claim of ineffective assistance of counsel on this ground fails.

In addition to alleging that his counsel failed to interview witnesses, defendant contends that his counsel did not fully investigate all the circumstances leading to the criminal charges. The focus of defendant's contention here is not that counsel's failure to investigate rendered his pleas involuntary, but, rather, that the alleged failure resulted in stiffer sentences because his counsel did not secure an agreement of leniency, an issue addressed below. Further, as stated above, an examination of the record indicates that the defendant freely, knowingly, and intelligently entered guilty pleas to both counts. "Where the

record discloses that a plea of guilty was understandingly and voluntarily entered, it is not subject to post conviction relief." *State v. Terrell*, 220 Neb. 137, 141, 368 N.W.2d 499, 502 (1985) (citing *State v. Mayes*, 190 Neb. 833, 212 N.W.2d 621 (1973); *State v. Turner*, 186 Neb. 424, 183 N.W.2d 763 (1971), *disapproved on other grounds*, *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986)).

Defendant's last two arguments, as well as his allegations that counsel failed to investigate and to secure an agreement of leniency prior to sentencing, relate to the sentencing procedure. The record clearly shows that the defendant was given the opportunity to correct his criminal record during the sentencing hearing. Further, the defendant's attorney called Isaac Brown, a detective for the McCook Police Department, to testify at the sentencing hearing regarding the defendant's cooperation and involvement with the police in a drug investigation in Denver. The record also establishes that the defendant never informed his attorney of his cooperation with the police until after his assistance was rendered. These facts, coupled with counsel's successful plea bargain negotiation which resulted in dropping one count from the original charges and reducing another charge from first degree arson to second degree arson, are convincing evidence that the defendant was not denied effective assistance of counsel. The fact that the defendant does not favor the sentences he received does not constitute grounds for claiming he was denied effective assistance of counsel. These issues should have been raised on direct appeal. For the foregoing reasons, the defendant's second assignment of error is without merit.

The defendant has failed to meet his burden for postconviction relief. Our review of the record fails to disclose any evidence indicating a deficiency in counsel's performance or that any alleged deficiency was prejudicial to the defendant. There was no error committed on the part of the district court.

Accordingly, the decision of the district court denying defendant's motion for postconviction relief is affirmed.

AFFIRMED.

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

438 N.W.2d 788

Filed April 21, 1989. No. 88-786.

1. **Pleas.** In order to support a finding that a plea of guilty or nolo contendere has been entered freely, intelligently, voluntarily, and understandingly, the court must inform the defendant concerning (1) the nature of the charge, (2) the right to assistance of counsel, (3) the right to confront witnesses against the defendant, (4) the right to a jury trial, and (5) the privilege against self-incrimination.
2. **Sentences: Appeal and Error.** A sentence imposed within the limits prescribed by the statutes in question will not be disturbed on appeal in the absence of an abuse of discretion.
3. **Sentences.** In imposing an indeterminate sentence, the minimum limit fixed by the court shall not be less than the minimum provided by law nor more than one-third of the maximum term.

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

Charles F. Fitzke, Scotts Bluff County Public Defender, and Bernard J. Straetker for appellant.

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

HASTINGS, C.J., SHANAHAN, and FAHRNBRUCH, JJ., and NORTON, D.J., and RONIN, D.J., Retired.

FAHRNBRUCH, J.

Daniel J. Fulton alleges that the trial court failed to inform him of his constitutional rights at the hearing where the defendant entered a "no contest" plea to a charge of attempted assault in the first degree upon an 18-month-old child Fulton was babysitting.

Fulton also claims that his 2- to 4-year sentence of imprisonment is excessive.

We affirm Fulton's conviction but modify his sentence for reasons hereinafter stated.

At first, Fulton was charged with assaulting the 18-month-old child on February 19, 1987, in Scotts Bluff County, Nebraska. The child received second and third degree burns to her feet, legs, and buttocks from hot water in a

bathtub. A pathologist determined that the child had been held in hot water from 2 to 4 minutes.

Assault in the first degree is a Class III felony and carries a penalty of not less than 1 nor more than 20 years' imprisonment, up to a $25,000 fine, or both. There is a 1-year minimum sentence. Neb. Rev. Stat. §§ 28-308 and 28-105 (Reissue 1985). Pursuant to a plea agreement between the defendant, his court-appointed attorney, and the prosecutor, the Class III felony was reduced to attempted first degree assault, a Class IV felony carrying a penalty of up to 5 years' imprisonment, up to a $10,000 fine, or both. It was to this lesser charge that Fulton entered his plea of "no contest."

Fulton first assigns as error that "[t]he District Court failed to inform the defendant of his constitutional rights." However, in his argument, the defendant claims that his "plea was not voluntary and intelligent and that the Defendant was improperly induced into pleading no contest." Brief for appellant at 4.

In order to support a finding that a plea of guilty or nolo contendere has been entered freely, intelligently, voluntarily, and understandingly, the court must inform the defendant concerning (1) the nature of the charge, (2) the right to assistance of counsel, (3) the right to confront witnesses against the defendant, (4) the right to a jury trial, and (5) the privilege against self-incrimination. *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986).

The record is explicit that the trial judge, in the presence of the defendant's court-appointed counsel, informed Fulton of each of his foregoing rights. The defendant was also advised of the penalties that could be imposed upon the acceptance of his no contest plea. Any contention that he was not given this information before he entered his plea is wholly frivolous.

Fulton also argues that he "was improperly induced into pleading no contest." This argument is made in spite of the fact that when he entered his no contest plea he told the trial judge that no one had threatened him or promised him anything to induce him to enter the plea agreement. The defendant points to nothing in the record to substantiate any claim that he was improperly induced to enter his no contest plea.

Next, Fulton argues that his no contest plea was not voluntarily, intelligently, or understandingly entered. The record and presentence investigation reflect that the defendant at the time of his no contest plea was 26 years old; had gone "through the 12th grade"; had earned a GED; could read, write, and understand the English language; and had a 12th-grade reading ability and a 9th-grade math ability. The defendant placed in the midaverage range on an intelligence test. Before entering his no contest plea, Fulton was tested psychologically. Fulton discussed plea bargaining and the implications of it with a psychologist. The psychologist's report which was before the court at the time of Fulton's no contest plea showed that Fulton understood the nature of the proceedings against him and that he had the capacity to comprehend his own condition in reference to the proceedings and to make and assist in a rational defense.

At the time of the examination, it was found, Fulton was "well oriented in three spheres, converses with ease and clarity, displays an accurate fund of general knowledge, shows a certain amount of sophistication in the operations and reasons for the criminal justice system."

At the time of his no contest plea, Fulton told the trial judge that he understood the plea agreement and that the State had made no agreement in regard to sentencing. He also told the court that he understood each of the following when they were separately explained to him: (1) the possible penalties in the event he entered a plea of no contest; and (2) that in pleading no contest he would be giving up (a) a jury trial, (b) the right to the presumption of innocence and the right to have the State overcome it at trial, (c) the right to confront and cross-examine the State's witnesses, and (d) the right to compulsory attendance of defense witnesses. He also said he understood that if the court was satisfied that there was a factual basis for the charges, the court would find the defendant guilty of the crime with which the defendant was charged. The court explained to Fulton his right against self-incrimination, which the defendant said he understood. When asked if he was "satisfied with the way your counsel has represented your interests in this case and advised you and let you know what's

going on," the defendant answered, "Yes."

Fulton's claim that he did not voluntarily, intelligently, and understandingly enter his no contest plea is not supported by the record and is without merit. The record shows affirmatively that the defendant entered his plea voluntarily, intelligently, and understandingly, as the trial court found.

Having disposed of Fulton's first assignment of error, we now consider his second and last assignment of error that the sentence imposed upon him was excessive.

Fulton was convicted of a Class IV felony, which carries a penalty of up to 5 years' imprisonment, a $10,000 fine, or both. § 28-105. Fulton was sentenced to a term of 2 to 4 years' imprisonment, with credit for time spent incarcerated while awaiting final disposition of his case. Repeatedly, this court has held that a sentence imposed within the limits prescribed by the statutes in question will not be disturbed on appeal in the absence of an abuse of discretion. *State v. Camacho, ante* p. 522, 437 N.W.2d 151 (1989); *State v. Masur*, 230 Neb. 620, 432 N.W.2d 815 (1988).

The defendant argues that his sentence was excessive because his rehabilitative needs as demonstrated by the presentence investigation do not necessitate a lengthy incarceration. Additionally, the defendant argues that the sentence was excessive because it did not take into account Fulton's motivation for the offense and his past history of mental illness. Fulton had previously been admitted to hospitals for his mental illness. In 1984, Fulton's illness was diagnosed as schizophrenia, paranoid and chronic. There were references to these hospitalizations and diagnosis in the presentence report.

Fulton gave several versions as to how the 18-month-old victim was injured. He told a police officer that the child had climbed into the bathtub herself and turned on the hot water. In another version, he said she was inadvertently burned while he was bathing her. In a third version, Fulton said he was aggravated because the child earlier had bitten him and that she would not calm down, and said, "[S]he was always yelling or crying or screaming or something and uh it had given me kind of a headache. Being mad and having a headache do not mix."

The record clearly reflects the district court considered the

presentence investigation and then ordered further testing for 90 days at the Nebraska Penal and Correctional Complex, before sentencing Fulton. The court examined the factors found in Neb. Rev. Stat. § 29-2260 (Cum. Supp. 1988) for probation. Finally, the court considered that this particular crime was committed against a person who was totally defenseless and could not testify.

The court found that this type of assault was a manifestation of serious antisocial problems with Fulton and if he was unable to control his emotions and actions, then he should get some treatment. The court also took into consideration that if committed to the penal complex, Fulton would probably receive ongoing psychological treatment, it being recommended in the 90-day evaluation report. In sentencing Fulton, the trial court clearly considered the defendant's rehabilitative needs and his past mental illness, as well as his motivation, or lack thereof, for committing the offense. The court also found that a prison term was justified by the seriousness of the offense.

In 1982, the defendant was convicted of a third degree sexual assault on an incompetent, which assault was noninjury producing. He was sentenced to 1 year's probation on that charge. A sentence of probation in the present case is not warranted.

Neb. Rev. Stat. § 83-1,105(1) (Reissue 1987) provides that in imposing an indeterminate sentence on a defendant, "the minimum limit fixed by the court shall not be less than the minimum provided by law nor more than one-third of the maximum term . . . ." Fulton was sentenced to an indeterminate term of 2 to 4 years. The minimum imposed on a Class IV felony can be no more than 20 months.

Because Fulton's minimum sentence is not authorized, his sentence is hereby modified to a term of not less than 20 months nor more than 4 years in the custody of the Nebraska Department of Correctional Services. Fulton is to receive credit on said sentence for time served before sentence and up until the mandate is filed in this case.

AFFIRMED AS MODIFIED.

LYLE KOENIG ET AL., APPELLANTS AND CROSS-APPELLEES, V. SOUTHEAST COMMUNITY COLLEGE, A POLITICAL SUBDIVISION, ET AL., APPELLEES AND CROSS-APPELLANTS.

438 N.W.2d 791

Filed April 27, 1989. No. 86-709.

1. **Moot Question: Proof: Appeal and Error.** An appeal by the plaintiff may be dismissed where, during its pendency, without any fault of the defendant, an event occurs to prevent the appellate court from granting plaintiff any effectual relief in case of a decision in his favor, and an event of that nature may be shown by extrinsic evidence.
2. **Injunction.** Remedy by injunction is generally preventative, prohibitory, or protective, and equity will not usually issue an injunction when the act complained of has been committed and the injury has been done.
3. **Declaratory Judgments: Moot Question.** As in 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.
4. **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.
5. **Justiciable Issues.** A justiciable issue requires a present, substantial controversy between parties having adverse legal interests susceptible to immediate resolution and capable of present judicial enforcement.
6. **Moot Question: Appeal and Error.** Appellate courts do not sit to give opinions on moot questions, and an appeal will ordinarily be dismissed where no actual controversy exists between the parties. The general rule, however, does not necessarily apply to appeals or error proceedings involving matters of public interest.
7. _____: _____. The public interest exception to the rule precluding consideration of issues on appeal due to mootness requires a consideration of the public or private nature of the question presented, desirability of an authoritative adjudication for future guidance of public officials, and the likelihood of future recurrence of the same or a similar problem.

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

J. David Thurber and John R. Doyle, of Doyle & Doyle Law Office, for appellants.

Douglas L. Curry and Linda W. Rohman, of Erickson & Sederstrom, P.C., for appellees.

HASTINGS, C.J., GRANT, and FAHRNBRUCH, JJ., and HENDRIX and OLBERDING, D. JJ.

HENDRIX, D.J.

The plaintiffs, Lyle Koenig, Ron Starr, Lyle Altman, and Kim Telecky, appeal from an order of the district court for Lancaster County, Nebraska, denying injunction and declaratory relief. The defendants, Southeast Community College, Robert Eicher, president of Southeast Community College, and the Southeast Community College Board of Governors, cross-appeal as to the court's failure to sustain their demurrer to the amended petition. Because we order plaintiffs' appeal dismissed as moot, we need not deal with defendants' cross-appeal.

At issue are two resolutions passed by the Southeast Community College Board of Governors on April 26, 1986. The resolutions authorized the closure of the Fairbury campus, which had offered primarily academic programs, and further authorized the expenditure of funds necessary to transfer the programs to the Beatrice campus, which had previously offered primarily technical programs. At the time the action was brought, the defendants had started to reallocate space, renovate existing buildings, install equipment, and otherwise expend funds at the Beatrice campus. A temporary restraining order was issued. Trial was held on plaintiffs' request for a preliminary injunction on June 19, 20, and 24, 1986. At the conclusion of the hearing, the court denied the temporary injunction. A trial on the merits was held on July 14, 1986, the evidence consisting principally of the evidence presented at the hearing on temporary injunction, which was admitted by stipulation. The trial court rendered judgment for the defendants, determining (1) the resolutions were within the authority of the board of governors, (2) adoption of plans and letting of bids were not required, and (3) the fact that two members of the Southeast Community College Board of Governors were also members of the Southeast Community College Educational Foundation did not void the resolutions.

The defendants claim, among other things, that the issues are now moot because the actions objected to have been taken, the Fairbury campus closed and moved to the Beatrice campus, space reallocated, buildings renovated, equipment installed, and expenditures made. We will examine this threshold claim

first, since its resolution may be determinative of the cause in this court.

At the time of trial, the disputed resolutions were implemented only to a small degree. No supersedeas was requested or granted. At the time the matter was presented to this court, the resolutions had been fully implemented. Plaintiffs stated in their brief, "The closing and improvements at issue were decided upon and carried out . . . ." Brief for appellants at 30. The defendants stated in their brief, "[T]he actions the Appellants sought to restrain have been accomplished." Brief for appellees at 9. This court may consider agreed circumstances presented to it in brief or argument. An appeal by the plaintiff may be dismissed where, during its pendency, without any fault of the defendant, an event occurs to prevent the appellate court from granting plaintiff any effectual relief in case of a decision in his favor, and an event of that nature may be shown by extrinsic evidence.

In *City of Crete v. County of Saline*, 214 Neb. 200, 201, 332 N.W.2d 926, 927 (1983), this court said:

> During the course of oral argument before this court, the parties advised the court that in 1982, and subsequent to the filing of this suit, the county withdrew its designation of the land as an industrial area. . . . It is apparent from the statements made to this court that the issues involved in the instant case have now become moot and this court is without the ability to grant any relief to the city other than to render an advisory opinion.

At the heart of this action is the request for an injunction. The purpose of an injunction is the restraint of actions which have not yet been taken. Remedy by injunction is generally preventative, prohibitory, or protective, and equity will not usually issue an injunction when the act complained of has been committed and the injury has been done. *Propst v. Board of Educational Lands and Funds*, 156 Neb. 226, 55 N.W.2d 653 (1952); *Conrad v. Kaup*, 137 Neb. 900, 291 N.W. 687 (1940). In this case the matter is fait accompli, and the action has been taken. No court could now prohibit what has already taken place, nor is it likely that any court would restore the situation as it existed prior to the passage of the resolutions. As to

injunction, the case has become moot.

Separate inquiry must be made to determine whether the declaratory judgment prayer has also been rendered moot. *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 94 S. Ct. 1694, 40 L. Ed. 2d 1 (1974). The inability of the court to grant the injunction which the plaintiffs sought does not, by itself, render the declaratory action moot as well. *Mullendore v. School Dist. No. 1*, 223 Neb. 28, 388 N.W.2d 93 (1986). As in 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. 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. *Mullendore v. Nuernberger*, 230 Neb. 921, 434 N.W.2d 511 (1989). In order to grant declaratory relief, there must be a justiciable issue. A justiciable issue requires a present, substantial controversy between parties having adverse legal interests susceptible to immediate resolution and capable of present judicial enforcement. *Ellis v. County of Scotts Bluff*, 210 Neb. 495, 315 N.W.2d 451 (1982). At this stage of the litigation, judicial enforcement of any decree attempting to eliminate the reallocations, renovations, installations, expenditures, and transfer would be impossible. A declaratory judgment could no more prohibit what has taken place than could an injunction. The case is moot as to declaratory judgment as well as to injunction.

There is an exception to the general rule regarding moot questions which should be examined. That exception applies to cases involving matters of public interest. See, *Braesch v. DePasquale*, 200 Neb. 726, 265 N.W.2d 842 (1978), *cert. denied* 439 U.S. 1068, 99 S. Ct. 836, 59 L. Ed. 2d 34 (1979); *State ex rel. Bouc v. School Dist. of City of Lincoln*, 211 Neb. 731, 320 N.W.2d 472 (1982); *Williams v. Hjorth*, 230 Neb. 97, 430 N.W.2d 52 (1988). Appellate courts do not sit to give opinions on moot questions, and an appeal will ordinarily be dismissed where no actual controversy exists between the parties at the

time of the hearing. This general rule, however, does not necessarily apply to appeals or error proceedings involving matters of public interest. It is evident from the above cases, however, that the public interest required for the exception is not only public interest in the case at issue, but also public interest in the rules promulgated. The exception has not been invoked in cases which involve public matters but which do not involve a situation common with the public or its institutions generally. See, *City of Crete v. County of Saline*, 214 Neb. 200, 332 N.W.2d 926 (1983); *Henderson v. School Dist. of Scottsbluff*, 184 Neb. 858, 173 N.W.2d 32 (1969). The public interest exception to the rule precluding consideration of issues on appeal due to mootness requires a consideration of the public or private nature of the question presented, desirability of an authoritative adjudication for future guidance of public officials, and the likelihood of future recurrence of the same or a similar problem. *Vislisel v. Bd. of Adjustment of Cedar Rapids*, 372 N.W.2d 316 (Iowa App. 1985).

In this case there is presented a unique circumstance pertaining only to the particular institutions involved. The likelihood of a similar situation arising at any institution is remote. This is not the kind of case intended to be removed from the general rule regarding the determination of moot questions. The general rule should apply.

In view of the conclusion that the case is moot, the appeal should be dismissed.

APPEAL DISMISSED.

PATRICIA ANN HESER, APPELLANT AND CROSS-APPELLEE, V. MICHAEL PAUL HESER, APPELLEE AND CROSS-APPELLANT.

438 N.W.2d 795

Filed April 27, 1989. No. 87-156.

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

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

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

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

PER CURIAM.

The respondent-appellee, Michael Paul Heser, cross-appeals the division of property. The petitioner-appellant, Patricia Ann Heser, has dismissed her appeal.

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. See, *Fox v. Fox*, 230 Neb. 218, 430 N.W.2d 542 (1988); *Griffith v. Griffith*, 230 Neb. 314, 431 N.W.2d 609 (1988).

Upon a de novo review of this case, we find no patent unfairness in the distribution of property and debts of the parties. 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.

HENRY MASON, APPELLEE AND CROSS-APPELLANT, V. ROBERT E. SCHUMACHER AND ALBERTA A. SCHUMACHER, HUSBAND AND WIFE, APPELLANTS AND CROSS-APPELLEES.

439 N.W.2d 61

Filed April 27, 1989. No. 87-194.

1. **Courts: Judgments: Appeal and Error.** On appeal of a county court's judgment rendered in a bench trial of a law action, the district court reviews the "case for error appearing on the record made in the county court." Neb. Rev. Stat. § 24-541.06 (Reissue 1985). A county court's factual findings in a bench trial of a law action have the effect of a verdict and will not be set aside unless such findings are clearly erroneous.
2. _____: _____: _____. As appellate courts, reviewing a judgment in a bench trial of a law action in the county court, the Supreme Court and a district court do not reweigh evidence, but consider the judgment in the light most favorable to the successful party and resolve evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
3. **Landlord and Tenant.** The Uniform Residential Landlord and Tenant Act, Neb. Rev. Stat. §§ 76-1401 et seq. (Reissue 1986), does not exclude or otherwise alter common law, unless the common law is expressly displaced by the provisions of the act.
4. **Statutes.** Statutes which effect a change in the common law or take away a common-law right should be strictly construed.
5. **Landlord and Tenant: Abandonment.** Neb. Rev. Stat. § 76-1432(3) (Reissue 1986) does not abrogate or displace common law concerning abandonment of real estate leased for residential purposes.
6. **Landlord and Tenant: Abandonment: Circumstantial Evidence.** In the absence of a tenant's explicit abandonment of residential premises, legitimation of a landlord's self-help recovery of the leased premises during the first 30 days of the tenant's absence may depend on unequivocal but circumstantial proof of the tenant's abandonment.
7. **Landlord and Tenant: Abandonment: Intent.** Abandonment of leased premises occurs when a tenant, with the intention to terminate contractual rights to exclusive possession and control over leased premises, voluntarily relinquishes or vacates the leased premises.
8. **Landlord and Tenant: Abandonment: Intent: Circumstantial Evidence.** A tenant's intention to terminate the leasehold and abandon the premises may be circumstantially evidenced by conduct inconsistent with continued control over the leased premises.
9. **Property: Conversion: Words and Phrases.** Conversion is the unauthorized and wrongful dominion over personal property owned by another, which is exerted as a denial of or inconsistent with the owner's rights in the property or is asserted in derogation, exclusion, or defiance of another's ownership or title in personal property.
10. **Landlord and Tenant: Property: Conversion: Actions.** When a landlord

completely dispossesses a tenant of leased premises and either denies the tenant access to the tenant's personal property or asserts an interest in the tenant's property, an action for conversion will lie.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed in part, affirmed in part as modified, and in part reversed and remanded with direction.

Jeffrey A. Silver, of Silver and Wieland, for appellants.

Edward F. Pohren, of Dwyer, Pohren, Wood, Heavey & Grimm, for appellee.

BOSLAUGH, WHITE, SHANAHAN, AND FAHRNBRUCH, JJ., and WITTHOFF, D.J.

SHANAHAN, J.

In the county court for Douglas County, Henry Mason filed two petitions against Robert E. and Alberta A. Schumacher, Mason's former landlords, and sought (1) damages for conversion of his personal property and (2) liquidated and actual damages for unlawful ouster and wrongful withholding of his security deposit, pursuant to Nebraska's Uniform Residential Landlord and Tenant Act (URLTA), Neb. Rev. Stat. §§ 76-1401 et seq. (Reissue 1986). Schumachers cross-claimed for past-due rent and repairs to their duplex which had been rented to Mason. The county court consolidated the actions for trial, held that Mason had abandoned the leased premises with all his personal property on the premises when the abandonment occurred, and dismissed Mason's petitions. Also, the county court awarded judgment to Schumachers for $395, or 1 month's rent.

Pursuant to Neb. Rev. Stat. § 24-541.06 (Reissue 1985), Mason appealed to the district court, which, after finding that Mason had not abandoned the leased premises, held that (1) the county court's dismissal of Mason's conversion action was erroneous; (2) Mason was entitled to his security deposit less Schumachers' cost of repairs to the premises and delinquent rent due Schumachers; (3) Schumachers were not entitled to costs incurred in removing Mason's belongings from the premises; and (4) Mason was not entitled to damages for unlawful ouster. The district court, therefore, reversed the

decision of the county court and remanded the case for further proceedings in Mason's conversion action. Schumachers appeal and Mason cross-appeals.

STANDARD OF REVIEW

All actions involved in this appeal are law actions in a bench trial before the county court.

> On appeal of a county court's judgment rendered in a bench trial of a law action, the district court reviews the "case for error appearing on the record made in the county court." Neb. Rev. Stat. § 24-541.06 (Reissue 1985). A county court's factual findings in a bench trial of a law action have the effect of a verdict and will not be set aside unless such findings are clearly erroneous.

Holden v. Urban, 224 Neb. 472, 474, 398 N.W.2d 699, 701 (1987).

As appellate courts, reviewing a judgment in a bench trial of a law action in the county court, the Supreme Court and a district court do not reweigh evidence, but consider the judgment in the light most favorable to the successful party and resolve evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. See *Alliance Nat. Bank v. State Surety Co.*, 223 Neb. 403, 390 N.W.2d 487 (1986).

THE MOTLEY AND MULTIFORM UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT

Before a detailed factual background for the questions of first impression in this appeal, we observe that the Nebraska Legislature, in 1974, enacted the URLTA to "simplify, clarify, modernize, and revise" landlord-tenant law, as well as "[t]o make uniform the law among those states which enact" URLTA. § 76-1402. However, notwithstanding the statutory objective mentioned in § 76-1402, we note that the Uniform Residential Landlord and Tenant Act, approved by the National Conference of Commissioners on Uniform State Laws, has 43 sections which contain substantive provisions relevant to the landlord-tenant relationship for residential real estate and that 30 of those 43 sections have been amended by or deleted from the Nebraska act. See Unif. Residential Landlord and Tenant Act §§ 1.101 et seq., 7B U.L.A. 427 et seq. (1972).

Nevertheless, § 76-1403 provides that "[u]nless displaced by the provisions of [URLTA], the principles of law and equity . . . supplement its [URLTA's] provisions."

Section 76-1405(2) governs remedies under URLTA: "Any right or obligation declared by [URLTA] is enforceable by action unless the provision declaring it specifies a different and limited effect."

URLTA also relates to security deposits and their return by the landlord:

> (2) Upon termination of the tenancy property or money held by the landlord as prepaid rent and security may be applied to the payment of rent and the amount of damages which the landlord has suffered by reason of the tenant's noncompliance with the rental agreement or section 76-1421 [tenant to maintain dwelling]. The balance, if any, and a written itemization shall be delivered or mailed to the tenant within fourteen days after demand and designation of the location where payment may be made or mailed.
>
> (3) If the landlord fails to comply with subsection (2) the tenant may recover the property and money due him and reasonable attorney's fees.

§ 76-1416.

Section 76-1421(2) provides that a tenant shall "upon termination of the tenancy place the dwelling unit in as clean condition, excepting ordinary wear and tear, as when the tenancy commenced."

According to § 76-1424, "the tenant shall occupy his dwelling unit only as a dwelling unit."

Regarding a tenant's remedies for unlawful ouster by the landlord and return of a security deposit, § 76-1430 states:

> If the landlord unlawfully excludes or removes the tenant from the premises . . . the tenant may recover possession or terminate the rental agreement and, in either case, recover an amount equal to three months' periodic rent as liquidated damages, and a reasonable attorney's fee. If the rental agreement is terminated the landlord shall return all prepaid rent and security recoverable under section 76-1416.

A landlord's remedy for a tenant's nonpayment of rent is found in § 76-1431(2):

> If rent is unpaid when due and the tenant fails to pay rent within three days after written notice by the landlord of nonpayment and his intention to terminate the rental agreement if the rent is not paid within that period of time, the landlord may terminate the rental agreement.

A tenant's abandonment of leased premises is mentioned in § 76-1432(3), which provides:

> If the tenant abandons the dwelling unit, the landlord shall take immediate possession and shall make reasonable efforts to rent it at a fair rental. If the landlord rents the dwelling unit for a term beginning prior to the expiration of the rental agreement, it is deemed to be terminated as of the date the new tenancy begins. *Total absence from the premises without notice to landlord for one full rental period or thirty days, whichever is less, shall constitute abandonment.*

(Emphasis supplied.) The last sentence of § 76-1432(3) is not part of the uniform act drafted at the national level, but was added, and is apparently uniquely indigenous, to the Nebraska act. Quite obviously, § 76-1432(3) does not specify the form or content of a tenant's notice to the landlord in reference to the statutory abandonment by absence from the premises.

Section 76-1434 abolishes "[d]istraint for rent," that is, the extrajudicial remedy of a landlord's seizure and detention of a tenant's personal property until delinquent rent is paid, and provides that a landlord's lien or security interest in a tenant's household goods is not enforceable.

Section 76-1436 limits the landlord's rights to recover possession of rented premises: "A landlord may not recover or take possession of the dwelling unit by action or otherwise . . . except in case of abandonment, surrender, or as permitted in [URLTA]."

THE FACTS

Under a month-to-month oral lease entered in October of 1984, Henry Mason began renting one-half of Schumachers' duplex for $395 per month. Mason used the duplex as the residence for himself; his daughter, Carolyn Brown; and her

two children. The premises actually consisted of two separate living quarters; Mason lived in the upstairs "apartment," while his daughter lived in the basement "apartment." Mason paid his monthly rent through April 1986.

Some months before May 1986, Mason found another rental residence which was about the same size as Schumachers' duplex at a rent substantially less. Mason and his daughter decided to move to this recently found residence. As the result of Mason's delinquent payment for natural gas, Metropolitan Utilities District (MUD) discontinued gas service for Mason at the duplex on April 1, 1986. On April 15, Carolyn Brown completed a change-of-address card for postal service and designated May 4, 1986, as the effective date for the change in postal service and discontinuance of mail at the duplex, but the card was not received by Mason's postal carrier until mid-May. On April 24, in view of the delinquent water bill for the duplex, MUD discontinued water service to the Mason residence. Mason and his daughter used water from a neighbor's house and continued to live in the duplex despite the absence of gas and water service for their dwelling. Before moving from the duplex, Carolyn Brown attempted to contact the Schumachers "[f]our or five times" by telephone to tell them of the planned move, but her efforts were unsuccessful.

On May 7, Mason borrowed a truck and, with the help of two friends, began moving his and his daughter's possessions out of the Schumacher duplex. Mason had moved "a majority of the stuff from upstairs," but had not begun removing items from the basement, when rain suspended Mason's moving from the duplex. Consequently, although he had moved a good deal of his belongings, Mason left several items inside the duplex, including two new radial tires; four spare tires with rims; tools in a toolbox; two mattresses and box springs; three washing machines; a dryer; a stove; a refrigerator; two movie projectors; a dinette set; three vacuum cleaners; various pots, pans, and dishes; a crockpot; four fishing rods with reels; two pairs of boots; four leather jackets; and assorted items of clothing, and left a 1969 Chevrolet pickup truck on the premises. Many of those articles were purchased by Mason at "secondhand" stores. Mason never lived in the duplex after

May 7.

On May 9, Schumachers went to their duplex with the intention of collecting the May rent from Mason. On approaching the residence, Alberta Schumacher noticed that there were no curtains in the duplex's windows and mentioned to her husband, "Bob, the dog is gone," referring to Mason's little dog, which had always been playing in the front yard when Schumachers visited the duplex. Using his own set of keys, Robert Schumacher tried to enter the duplex, but found that his keys did not work in the locks. Robert Schumacher then removed a glass pane in the front door and reached inside to open the door for entry into the duplex.

Before entering the duplex, Schumachers had unsuccessfully attempted to phone Mason at his place of employment. Schumachers had then called MUD and learned that the water service for the duplex was terminated on April 24. On entering the duplex, Schumachers discovered that the place was in a state of disarray. While Robert Schumacher referred to Mason's property in the house as "trash," Schumachers, nevertheless, left a note in the duplex, directing Mason and his daughter to "pick up their items by May 12th, or we'd take them [the items] to the dump." Notwithstanding the time limit indicated in Schumachers' note, disposal of Mason's property began on May 9, when Robert Schumacher's brothers brought a pickup truck to the duplex and hauled away a gas range and a washing machine which had been in the basement of Mason's residence.

Schumachers "couldn't reach" Mason between May 9 and May 12, although their unsuccessful communicative efforts are not detailed in the record. On May 12, Schumachers returned to the duplex and saw that Mason's belongings were still in the duplex. Enlisting the aid of their daughter and two of Robert Schumacher's brothers, Schumachers removed all the remaining Mason belongings and took those items to the Douglas County landfill. Schumachers also called the Omaha police automobile impoundment division and requested that police tow away Mason's pickup, which was subsequently sold at public auction for $120. The city of Omaha received the proceeds from the sale of Mason's pickup.

Also on May 12, 1986, Carolyn Brown finally established

contact with Alberta Schumacher. When Brown told Mrs. Schumacher that she and Mason were going to remove the remainder of their personal property from the duplex, Mrs. Schumacher informed Brown that it was "too late" because all the belongings had been taken to the dump. Brown then went to the duplex to verify what Mrs. Schumacher had said and was unable to enter the premises because the doorknob had been removed. According to Robert Schumacher, however, the duplex was accessible on May 12 despite the absence of doorknobs, and he changed the duplex's locks on May 14.

During the week after removal of Mason's belongings, Schumachers attempted to clean and repair the duplex for reletting to another tenant. A number of window screens were replaced, the bathrooms were cleaned, holes in the walls were patched, a kitchen cabinet was fixed, and the garage door was repaired. By May 15, 1986, Mason had retained a lawyer, who wrote Schumachers and demanded return of Mason's security deposit, which the lawyer's letter indicated was $395. While Robert Schumacher knew about legal actions to recover possession of the duplex, he did not seek any legal remedy because he believed Mason had abandoned the duplex. Schumachers leased the duplex to a new tenant sometime at the end of May.

MASON'S LAWSUITS

Carolyn Brown assigned her conversion cause of action to Mason, whose conversion petition alleged that, without Mason's consent, Schumachers "forcibly entered the dwelling and removed numerous items of personal property" belonging to Mason "and have . . . detained, used and disposed of said items of property and otherwise treated such property as their own in derogation of [Mason's] rights," resulting in damage of $9,500. In his URLTA petition, Mason alleged that Schumachers "unlawfully ousted and excluded" him from the duplex, and claimed liquidated damages of $1,185, the trebled monthly rent, plus a reasonable attorney fee pursuant to § 76-1430. Mason also alleged that he had demanded his security deposit and that Schumachers had refused to return the deposit. At trial, however, Mason testified that he could not remember the amount of the security deposit. Robert

Schumacher testified that the security deposit was $181. However, no one testified that Schumachers failed to return Mason's security deposit. Although Schumachers' alleged expenses for cleanup and repair in the amount of $248, the only proof of Schumachers' expenses was $75 to remove Mason's belongings from the duplex, $60.45 for repair to the garage door of the duplex, and $40 to clean the duplex's interior.

COUNTY COURT'S DECISION

The county court determined that Mason's belongings left at the duplex were "of no utilitarian value and consisted of garbage trash, junk and worthless worn-out items," and concluded that Mason had abandoned the leasehold and his belongings, precluding Mason's conversion and ouster actions against Schumachers. The county court dismissed Mason's petitions and awarded a $395 judgment to Schumachers on their cross-petition.

APPEAL TO THE DISTRICT COURT

On Mason's appeal, the district court reversed the county court's decision. Referring to § 76-1432(3), which provides that "[t]otal absence from the premises without notice to landlord for one full rental period or thirty days, whichever is less, shall constitute abandonment," the district court held that Mason had not abandoned the leasehold when Schumachers removed Mason's belongings, but concluded that Mason was not entitled to liquidated damages under URLTA because he had already rented another residence at the time of Schumachers' activity in question. Consequently, the district court reversed the county court's dismissal of Mason's conversion petition and remanded the cause for further proceedings in the conversion action. The district court further held that Mason was entitled to his $181 security deposit, less any delinquent rent and Schumachers' expense in cleaning the duplex. The district court disallowed Schumachers' claim for expenses in hauling Mason's property to the dump.

ASSIGNMENTS OF ERROR

Schumachers appeal to this court, contending that the district court erred in concluding that URLTA provides "the exclusive definition of abandonment by the tenant" and that the district court erred in finding that Schumachers had

converted Mason's property. Mason cross-appeals, claiming that the district court erred in its refusal to award liquidated damages and an attorney fee under §§ 76-1430 (unlawful ouster) and 76-1416(3) (unreturned security deposit) and in its conclusion that Mason was liable for cleanup costs incurred by Schumachers.

THE MEANING OF ABANDONMENT: STATUTORY OR COMMON LAW?

Mason contends that abandonment by a tenant's 30-day absence, specified in § 76-1432(3), supersedes and excludes the common law pertaining to abandonment of leased residential premises. On the other hand, Schumachers maintain that the common law concerning abandonment applies during the first 30 days of a tenant's absence and that the statutory abandonment of § 76-1432(3) becomes conclusive after a tenant's 30-day absence.

As noted, URLTA does not exclude or otherwise alter common law, unless the common law is expressly displaced by URLTA provisions. See § 76-1403. "[S]tatutes which effect a change in the common law or take away a common law right should be strictly construed . . . ." *Paulsen v. Courtney*, 202 Neb. 791, 794, 277 N.W.2d 233, 235 (1979).

Nothing in the language of URLTA, generally or specifically, compels the conclusion that the Legislature intended that URLTA abrogate or displace common law concerning abandonment of real estate leased for residential purposes. Construing § 76-1432(3), we conclude that the 30-day abandonment provision benefits the landlord as well as the tenant regarding the landlord's recovery of leased premises without legal process in the event of a tenant's absence for the specified period. Without notice to the landlord, a tenant's absence from the premises for one full rental period or 30 days, whichever is less, constitutes abandonment of the premises under § 76-1432(3). However, a tenant may also abandon premises under common-law principles, entitling and obligating a landlord to take immediate possession of the premises and make reasonable efforts to obtain another tenant for the premises at a fair rental. Thus, under § 76-1432(3), abandonment affords qualified protection to a landlord against

a tenant's claim for wrongful ouster and provides the tenant with a defense that the landlord failed to mitigate damages after the tenant's abandonment of the leased premises. In the absence of a tenant's explicit abandonment of residential premises, legitimation of a landlord's self-help recovery of the leased premises during the first 30 days of the tenant's absence may depend on unequivocal but circumstantial proof of the tenant's abandonment. See, *Smith v. Favilla*, 23 Wash. App. 59, 593 P.2d 564 (1979); 51C C.J.S. *Landlord and Tenant* § 126(b) (1968).

COMMON-LAW ABANDONMENT

> "An abandonment of leased premises by the tenant constitutes an offer to terminate the lease, and an abandonment or surrender of the leased premises, together with an acceptance by the landlord . . . may constitute a surrender by operation of law." 51C C. J. S., Landlord and Tenant, § 125(1), p. 398. ". . . whether there has been an acceptance by the landlord of the tenant's abandonment of the premises is largely a matter of intention, and such an acceptance may be inferred from the acts of the landlord inconsistent with the continuance of the lease." 51C C. J. S., Landlord and Tenant, § 125(4), p. 402.

Waite Lumber Co., Inc. v. Masid Bros., Inc., 189 Neb. 10, 21, 200 N.W.2d 119, 126 (1972).

While acceptance of a tenant's abandonment was an issue in *Waite Lumber, supra*, crucial in the present case are, first, whether Mason abandoned the premises and, second, whether Schumachers accepted Mason's abandonment. Before enactment of URLTA, a landlord's self-help repossession of leased premises which the landlord believed to be abandoned, was considered under a rule of "good faith" by the landlord.

> "Where the tenant has actually abandoned the premises, the landlord is entitled to reenter and take charge and possession; and, even where he acts too hastily, but in good faith and under circumstances justifying a belief that the premises have been abandoned, he is guilty only of a technical violation of the tenant's contractual rights under the lease."

Mathiesen v. Bloomfield, 184 Neb. 873, 875, 173 N.W.2d 29, 30 (1969); *Langemeier, Inc. v. Pendgraft*, 178 Neb. 250, 132 N.W.2d 880 (1965). In *Mathiesen* and *Langemeier*, however, the court found an actual abandonment by the tenant and therefore did not apply the "good faith" rule to the landlord's repossession of the premises. With the enactment of URLTA, the continued vitality of *Mathiesen* and *Langemeier* may be questionable inasmuch as URLTA affords no protection to a landlord for a "good faith" ouster of a tenant.

Abandonment of leased premises occurs when a tenant, with the intention to terminate contractual rights to exclusive possession and control over leased premises, voluntarily relinquishes or vacates the leased premises. See, *Davis v. Odell*, 240 Kan. 261, 729 P.2d 1117 (1986); *Clark v. Morris*, 710 P.2d 1130 (Colo. App. 1985); *Smith v. Hegg*, 88 S.D. 29, 214 N.W.2d 789 (1974).

A tenant's intention to terminate the leasehold and abandon the premises may be circumstantially evidenced by conduct inconsistent with continued control over the leased premises. In determining whether a tenant had abandoned the leased dwelling unit or residence, the Supreme Court of Kansas, in *Davis v. Odell, supra*, construed the Residential Landlord and Tenant Act of Kansas, which did not contain a provision similar to § 76-1432(3) pertaining to abandonment resulting from a tenant's absence from the premises for a specified time. The court in *Davis* approvingly quoted from *Botkin v. Kickapoo, Inc.*, 211 Kan. 107, 505 P.2d 749 (1973), which was decided under common-law principles before the enactment of the Kansas landlord-tenant act:

> "Generally, abandonment is the act of intentionally relinquishing a known right absolutely and without reference to any particular person or for any particular purpose. Abandoned property is that to which the owner has voluntarily relinquished all right, title, claim and possession, with the intention of terminating his ownership, but without vesting it in any other person and with the intention of not reclaiming future possession or resuming its ownership, possession or enjoyment. In order to establish an abandonment of property, actual

relinquishment accompanied by intention to abandon must be shown. The primary elements are the intention to abandon and the external act by which that intention is carried into effect. Although an abandonment may arise from a single act or from a series of acts the intent to abandon and the act of abandonment must conjoin and operate together, or in the very nature of things there can be no abandonment. The intention to abandon is considered the first and paramount inquiry, and actual intent to abandon must be shown; it is not enough that the owner's acts give reasonable cause to others to believe that the property has been abandoned. Mere relinquishment of the possession of a thing is not an abandonment in a legal sense, for such an act is not wholly inconsistent with the idea of continuing ownership; the act of abandonment must be an overt act or some failure to act which carries the implication that the owner neither claims nor retains any interest in the subject matter of the abandonment. It is not necessary to prove intention to abandon by express declarations or by other direct evidence; intent to abandon property or rights in property is to be determined from all the surrounding facts and circumstances. It may be inferred from the acts and conduct of the owner and from the nature and situation of the property. Mere nonuse of property, lapse of time without claiming or using property, or the temporary absence of the owner, unaccompanied by any other evidence showing intention, generally, are [sic] not enough to constitute an abandonment. However, such facts are competent evidence of an intent to abandon and as such are entitled to weight when considered with other circumstances. . . ."

Davis v. Odell, supra at 269, 729 P.2d at 1124.

Although there was evidence that Mason had left some of his personal property at the duplex in May, the last period for which Mason paid rent was April. The situation involving Mason's personal property existed contemporaneously with Mason's acquisition of another residence apart from the duplex. Notwithstanding that the articles which Mason left at the duplex had some value, Mason's leaving those items at the

duplex, while he lived in another residence, may be viewed by a fact finder as evidence of Mason's intent to cease using the duplex as a residence. Postal service for Mason at the duplex was supposed to be discontinued on May 4. In that setting, one might conclude that Mason had removed enough property from the leased premises so that the duplex no longer served as a dwelling but was nothing more than a storage facility, contrary to the explicit mandate of § 76-1424: "Unless otherwise agreed, the tenant shall occupy his dwelling unit only as a dwelling unit." Whether we would arrive at the same conclusion reached by the county court regarding the issue of abandonment, were this appeal a trial de novo on the record, is irrelevant. From our review of the record for error, we cannot conclude that the county court's finding, namely, that Mason had abandoned the leased premises, is clearly erroneous. For that reason, we reverse the district court's judgment, which reversed the county court's judgment on the issue of abandonment, and remand this matter to the district court with direction to affirm the county court's judgment in favor of Schumachers in Mason's action for unlawful ouster from the duplex.

SECURITY DEPOSIT

Under § 76-1416(3), if a landlord fails to comply with a tenant's proper demand for return of a security deposit, the tenant may recover the amount of the deposit and a reasonable attorney fee. The party claiming damages must show entitlement to the damages. See *Nebraska Truck Serv. v. U.S. Fire Ins. Co.*, 213 Neb. 755, 331 N.W.2d 266 (1983). Mason is not entitled to a judgment for his security deposit, since the evidence failed to establish that Schumachers did not comply with Mason's request for return of the security deposit. Hence, the district court's judgment, awarding Mason judgment for the security deposit on the duplex, is reversed, and the district court is directed to affirm the county court's judgment, which disallowed Mason's recovery of the security deposit on the duplex.

CLEANUP COSTS AND DELINQUENT RENT

Schumachers cross-claimed for cleanup costs in the amount of $248, and for one month's delinquent rent of $395. However, Schumachers' proof established expenses of $175.45 only. A

tenant is obligated to return the premises to the landlord "in as clean condition, excepting ordinary wear and tear, as when the tenancy commenced." § 76-1421(2). Because Mason abandoned the premises, Schumachers were entitled and obligated to enter the duplex and make reasonable efforts to lease the duplex to another tenant at a fair rental. On termination of the rental agreement, the landlord may recover from the tenant actual damages for breach of the rental agreement plus past due rent, and may also be entitled to an attorney fee. See §§ 76-1435 and 76-1431(3). Schumachers are entitled to reimbursement for their expenses incurred in removing Mason's belongings from the duplex, because removal of the items was necessary for Schumachers' fulfillment of their statutory duty concerning an effort to relet the duplex to another tenant. See § 76-1432(3). We conclude that Schumachers did not prove $248 in damages, but proved damages of $175.45 for cleanup costs and proved entitlement to the rental of $395 for the month of May 1986. Therefore, as modified regarding the amount of the recoverable cleanup costs, namely, $175.45, the district court's judgments for Schumachers concerning the cleanup costs and Mason's delinquent rent for May 1986 are affirmed without allowance of an attorney fee.

CONVERSION

As we have already noted, the Nebraska Legislature has significantly altered the national version of the Uniform Residential Landlord and Tenant Act, but has not codified the legal rights and corresponding obligations pertaining to a tenant's personal property remaining on the landlord's residential premises previously rented by the tenant. A very cursory review of the Uniform Residential Landlord and Tenant Act throughout the nation reveals at least eight states have statutorily clarified the various landlord-tenant rights regarding property remaining on residential premises abandoned or surrendered by the tenant and have prescribed a procedure concerning custody or retention and disposition of the tenant's personal property. See, Alaska Stat. § 34.03.260 (1985); Cal. Civ. Code §§ 1983 et seq. (West 1985); Fla. Stat. Ann. §§ 715.10 et seq. (West 1988); Kan. Stat. Ann.

§ 58-2565(d) (1983); Minn. Stat. Ann. § 504.24 (West Supp. 1989); Nev. Rev. Stat. § 118A.460 (1987); Okla. Stat. Ann. tit. 41, § 130 (West 1986); Va. Code Ann. § 55-248.38:1 (1986). In the absence of a statute concerning disposition of a tenant's personal property left on residential premises previously leased, the respective rights of landlord and tenant are determined by the common law governing the tort of conversion. See § 76-1403.

Conversion is the unauthorized and wrongful dominion over personal property owned by another, which is exerted as a denial of or inconsistent with the owner's rights in the property or is asserted in derogation, exclusion, or defiance of another's ownership or title in personal property. See, *Cattle Nat. Bank v. York State Bank*, 229 Neb. 720, 428 N.W.2d 624 (1988); *Roth v. Farmers Mut. Ins. Co.*, 220 Neb. 612, 371 N.W.2d 289 (1985); *PWA Farms v. North Platte State Bank*, 220 Neb. 516, 371 N.W.2d 102 (1985); 18 Am. Jur. 2d *Conversion* § 1 (1985). "The 'tort of conversion has been confined to those major interferences with the chattel, or with the plaintiff's rights in it, which are so serious, and so important, as to justify the forced judicial sale to the defendant which is the distinguishing feature of the action.' " *Polley v. Shoemaker*, 201 Neb. 91, 95, 266 N.W.2d 222, 225 (1978) (quoting W. Prosser, Handbook of the Law of Torts, *Conversion* § 15 (4th ed. 1971)).

When a landlord completely dispossesses a tenant of leased premises and either denies the tenant access to the tenant's personal property or asserts an interest in the tenant's property, an action for conversion will lie. *Polley v. Shoemaker, supra.* See, also, § 76-1434 (landlord's lien on household goods is not enforceable, and distraint for rent is abolished).

By the unauthorized taking of Mason's property to the landfill or dump, Schumachers undeniably exerted dominion over Mason's property, contrary to Mason's property rights. The defense of abandonment, asserted by Schumachers in response to Mason's conversion claim, is less plausible than the abandonment defense asserted in Mason's URLTA action because, unlike their landlord's interest in the leased real estate, Schumachers had no reversionary interest or right to eventual possession of Mason's personal property. See *Glass v. Wiener*,

104 A.D.2d 967, 968, 480 N.Y.S.2d 760, 761 (1984): "A landlord has no absolute right to retain or destroy personal property belonging to a tenant. Even where a tenant is legally dispossessed, the landlord's rights extend only to the real property. He acquires no concomitant right to use or retain the tenant's personal property." See, also, *Price v. Hoyle*, 82 Misc. 2d 174, 368 N.Y.S.2d 126, 129 (1975): "Whether the plaintiff [tenant] abandoned the premises or was locked out, the defendants [landlords] have no right whatever to the plaintiff's personal property." See, further, *Hopkin v. Goetz*, 132 Vt. 581, 326 A.2d 12 (1974).

Robert Schumacher testified that he considered Mason's items left behind to be "trash," but apparently believed Mason's belongings had sufficient value to warrant attempts to contact Mason during the 3 days in which Schumachers prepared to remove Mason's belongings from the duplex. Furthermore, as noted in *Stankiewicz v. Hawkes*, 33 Conn. Supp. 732, 734, 369 A.2d 253, 254 (1976):

> The numerous personal belongings which she [the tenant] left behind, items such as winter clothing, sheets, blankets and pillow cases, bureaus, a table and chairs, bespeak an expectation of early return and not of permanent removal. The plaintiff's property rights are not measured by the state of her finances. However humble her possessions, they were hers to use. The fact that the defendant [landlord] considered those possessions rags and junk gave him no right to exercise dominion over them. The removal of the plaintiff's property from the apartment and its exposure to the elements, under the circumstances of this case, constituted a conversion.

We therefore conclude that the evidence was insufficient to support the county court's determination that Mason's personal property had been abandoned. Mason is entitled to maintain his action for Schumachers' unlawful conversion of his personal property. The district court's judgment, reversing the county court's clearly erroneous decision in dismissing Mason's conversion petition, is affirmed with direction that the cause be remanded to the county court for a new trial on Mason's conversion action. In view of the trial court's

characterization of Mason's property as "trash," retrial before another fact finder is a consideration.

AFFIRMED IN PART, AFFIRMED IN PART AS MODIFIED, AND IN PART REVERSED AND REMANDED WITH DIRECTION.

FAHRNBRUCH, J., not participating.

EARL L. SMITH, APPELLANT, V. GLORIA R. SMITH, APPELLEE.

438 N.W.2d 796

Filed April 27, 1989. No. 87-302.

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

Miles W. Johnston, Jr., of Johnston & Wherry, for appellant.

David A. Battiato, of Steven D. Burns, P.C., for appellee.

HASTINGS, C.J., CAPORALE, and GRANT, JJ., and BURKHARD and HANNON, D. JJ.

PER CURIAM.

Petitioner, Earl L. Smith, and respondent, Gloria R. Smith, were married on April 17, 1979, in Lincoln, Nebraska. There were no children born of the marriage. Petitioner filed his petition for dissolution of marriage in the district court for Lancaster County, Nebraska, on June 3, 1986. Trial was held on February 3, 1987. By decree of February 26, 1987, the district court dissolved the marriage, distributed the property, directed payment of debts, and ordered that the respondent should have judgment against petitioner in the amount of $6,000, payable in three equal installments of $2,000 each, on July 1, 1987, and January 1 and July 1, 1988, with interest at the legal rate.

Petitioner appealed to this court, assigning as error that the trial court failed to consider the factors found in Neb. Rev. Stat. § 42-365 (Reissue 1988) in making a division of the

property of the parties. Petitioner states that the trial court abused its discretion (1) by not excluding certain real estate (duplex property) from consideration in dividing the property, (2) by failing to consider petitioner's contributions to the marital property in dividing said property, and (3) by determining that to offset the division of property petitioner shall be required to make cash payments to respondent. Petitioner concluded that there was no justification for the $6,000 payment awarded to respondent.

We have reviewed this case de novo on the record, as we are required to do. We have determined that the trial court did not abuse its discretion in the division of property or in ordering the $6,000 payment by petitioner to respondent. Accordingly, the judgment of the district court is affirmed.

AFFIRMED.

PHYSICIANS MUTUAL INSURANCE COMPANY, APPELLEE, V. BETTIE SCOTT, APPELLANT.

439 N.W.2d 72

Filed April 27, 1989. No. 87-413.

1. **Fair Employment Practices: Appeal and Error.** This court reviews Nebraska Equal Opportunity Commission disparate treatment cases de novo on the record.
2. **Fair Employment Practices: Discrimination: Proof.** In an individual case of discrimination based on the disparate treatment theory, the employee alleging disparate treatment first has the burden of proving a prima facie case. If the employee succeeds, the burden shifts to the employer to articulate some legitimate, nondiscriminatory reason for the treatment of the employee. If the employer carries this burden, the employee must then prove by a preponderance of the evidence that the legitimate reasons offered by the employer were not its true reasons, but were a pretext for discrimination.
3. _____: _____: _____. A prima facie case of a racially motivated discharge may be established when (1) the employee is a member of a protected minority;

(2) the employee was qualified for the job from which he or she was discharged; (3) the employee was discharged; and (4) after the employee's discharge, the position was filled by a member of an unprotected class. These guidelines are not always rigidly applied, but are sometimes used as a method of evaluating the evidence in disparate treatment cases.

4. _____: _____: _____. The prima facie case focuses upon the primary factual inquiries of any disparate treatment case, i.e., whether the defendant intentionally discriminated against plaintiff, and whether the employer treats people less favorably than others because of race, color, religion, sex, or national origin.
5. _____: _____: _____. An employee's poor performance may preclude the employee from establishing that the employee was qualified for the position at the time of the employee's discharge.
6. _____: _____: _____. The fact that a company leaves enforcement of discipline to the discretion of supervisors does not in and of itself establish racial discrimination.
7. **Fair Employment Practices: Discrimination.** A change or even a difference in managers is not a defense to claims of racial discrimination. Nevertheless, the change or differences in managers may suggest a basis other than racial discrimination for a difference in treatment.
8. **Fair Employment Practices: Courts: Appeal and Error.** The standard of review in the district court in a disparate treatment case is de novo on the record. The district court may not vacate, modify, or set aside an order of the Nebraska Equal Opportunity Commission unless "[t]he findings of the commission in support of such order are unreasonable or arbitrary or are not supported by a preponderance of the evidence." Neb. Rev. Stat. § 48-1120(3)(b) (Reissue 1984).
9. **Testimony: Appeal and Error.** An appeals court is not precluded from independently determining what weight credible testimony should be given when evaluating the record as a whole.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Affirmed.

Robert V. Broom, of Broom and Johnson, for appellant.

A. Stevenson Bogue and Patrick J. Barrett, of McGrath, North, O'Malley & Kratz, P.C., for appellee.

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

FAHRNBRUCH, J.

Claiming she was fired as a result of racial discrimination, Bettie Scott, a black woman, appeals a Douglas County District Court ruling that the termination of her employment at Physicians Mutual Insurance Company in Omaha was

nondiscriminatory. We affirm the district court ruling.

Originally, the appellant filed a complaint with the Nebraska Equal Opportunity Commission (NEOC). The NEOC found in Scott's favor, ordered Physicians Mutual to pay past and future wages, pay attorney fees, and reinstate Scott to her employment. Additionally, the NEOC ordered Physicians Mutual to

> "cease and desist its practice of allowing its supervisors unfettered discretion to exercise subjective judgments in regard to the disciplining of its employees and be required further, to promulgate objective standards . . . so that [Physicians Mutual] supervisors and employees, alike, may know what actions will result in disciplinary actions being taken."

Physicians Mutual appealed to the Douglas County District Court, where the NEOC order was vacated and set aside. Scott then appealed to this court. She claims the district court erred in (1) finding that Physicians Mutual met its burden of proving that Scott's termination was for legitimate nondiscriminatory reasons and that disparate treatment did not exist, (2) finding that Physicians Mutual's reason for terminating Scott was not merely pretextual, (3) failing to give appropriate deference to the credibility findings of the NEOC hearing examiner, (4) failing to apply the correct legal analysis in assessing and evaluating the evidence, and (5) giving weight to certain irrelevant facts and evidence and in failing to give proper weight to probative facts.

This court reviews NEOC disparate treatment cases de novo on the record. *Lincoln County Sheriff's Office v. Horne*, 228 Neb. 473, 423 N.W.2d 412 (1988); *Father Flanagan's Boys' Home v. Goerke*, 224 Neb. 731, 401 N.W.2d 461 (1987).

The legal theory under which appellant attempts to prove her case is one of disparate treatment, i.e., the appellee, because of appellant's race, intentionally treated her less favorably than other similarly situated employees and thereby discriminated against the appellant. See, *Payne v. ICG R.R.*, 48 Fair Empl. Prac. Cas. (BNA) 80 (W.D. Tenn. 1987); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S.

248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981).

In an individual case of discrimination based on the disparate treatment theory, the employee alleging disparate treatment first has the burden of proving a prima facie case. If the employee succeeds, the burden shifts to the employer to articulate some legitimate, nondiscriminatory reason for the treatment of the employee. If the employer carries this burden, the employee must then prove by a preponderance of the evidence that the legitimate reasons offered by the employer were not its true reasons, but were a pretext for discrimination. *Lincoln County Sheriff's Office v. Horne, supra*; *Father Flanagan's Boys' Home v. Goerke, supra*; *McDonnell Douglas Corp. v. Green, supra*.

While *McDonnell Douglas* was a hiring case, its four factors for establishing a prima facie case have been extended to discharge situations. See *Texas Dept. of Community Affairs v. Burdine, supra*, a gender discrimination case.

A prima facie case of a racially motivated discharge may be established when (1) the employee is a member of a protected minority; (2) the employee was qualified for the job from which he or she was discharged; (3) the employee was discharged; and (4) after the employee's discharge, the position was filled by a member of an unprotected class. See, *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 96 S. Ct. 2574, 49 L. Ed. 2d 493 (1976); *McDonnell Douglas, supra*; *Gray v. Frito-Lay, Inc.*, 35 Fair Empl. Prac. Cas. (BNA) 598 (S.D. Miss. 1982); *Marks v. Prattco, Inc.*, 607 F.2d 1153 (5th Cir. 1979). These guidelines are not always rigidly applied, but are sometimes used as a method of evaluating the evidence in disparate treatment cases. See, *Texas Dept. of Community Affairs v. Burdine, supra*; *Payne v. ICG R.R., supra*; *U.S. Postal Service Bd. of Govs. v. Aikens*, 460 U.S. 711, 103 S. Ct. 1478, 75 L. Ed. 2d 403 (1983); *Beaven v. Com. of Ky.*, 783 F.2d 672 (6th Cir. 1986).

"[T]he prima facie case focuses upon the primary factual inquiries of any disparate treatment case: ' "[whether] the defendant intentionally discriminated against plaintiff" ', and whether the employer treats people less favorably than others because of race, color, religion, sex or national origin." (Citations omitted.) *Beaven v. Com. of Ky., supra* at 675. (A

prima facie case was established where the plaintiff presented evidence that he belonged to a protected class, had performed his job satisfactorily until his firing, and was dismissed from his job.)

Both the NEOC and the district court found that Scott established a prima facie case of discrimination. The district court also found that Physicians Mutual articulated a legitimate, nondiscriminatory reason for the discharge. The NEOC found that the reason for the discharge was a pretext for racial discrimination.

Using the *McDonnell Douglas* guidelines for evaluating the evidence, we find that Scott was (1) a member of a protected minority and (2) discharged from employment with Physicians Mutual. Still applying the *McDonnell Douglas* method of evaluating the evidence, we also find that Scott was not satisfactorily performing her job for a period of time before and at the time of her discharge and that Scott's position was filled by a member of the same protected class of which Scott was a member.

A number of cases hold that an employee's poor performance may preclude the employee from establishing that the employee was qualified for the position at the time of the employee's discharge. See, *Bell v. Fremar Corp.*, 36 Fair Empl. Prac. Cas. (BNA) 547 (D.D.C. 1984) (black employee terminated for lack of requisite interest in and personality for job and for failure to perform job duties); *Silvas v. Dow Chemical Co.*, 36 Fair Empl. Prac. Cas. (BNA) 105 (S.D. Tex. 1984) (Mexican-American female terminated for poor performance was not discharged for racially or sexually motivated reasons); *Jacobs v. Bolger*, 587 F. Supp. 374 (W.D. La. 1984), *aff'd* 759 F.2d 20 (5th Cir. 1985) (black male terminated for inordinate tardiness and undependable work record); *Sack v. Kimberly-Clark Corp.*, 33 Fair Empl. Prac. Cas. (BNA) 624 (E.D. Wis. 1982) (age discrimination case).

It is the contention of Physicians Mutual that the sole reason for Scott's discharge was her poor job performance.

At the time Scott was terminated from her employment with Physicians Mutual she was an informal team leader of a six-person crew working the third shift in the mail-processing

center. She was moved into the position at her own request. The crew, consisting of four black employees and two white employees, operated on a team concept. While Scott worked on the third shift, Thomas McCarthy was her supervisor.

The night Scott was terminated, she was working in the presort division of the mail center. She was boxing the mail. According to McCarthy, under certain conditions, a boxer has the responsibility to help band the mail. McCarthy testified that on the night Scott was fired, the boxer should have also banded the mail. This was because one of the other presort workers had only been on the machine a few times and the machine was automatically shutting off due to mail stacking in the mail trays, McCarthy testified. This stacking of mail occurred when the mail was not getting banded. Scott claims that she was both boxing and banding that night. She stated that some of the mail could be put into the boxes without banding. She testified that she was doing her fair share of the work.

McCarthy's observation of Scott, as reflected in an October 10 memo to Scott's file, states that Scott "did not help out and do any banding at all, therefore, the feeder operator was feeding and banding . . . the other person banding was inexperienced and had to do more than could be expected."

Physicians Mutual's policy allowed each individual supervisor discretion in determining what formal or informal disciplinary steps were appropriate to discipline employees. Supervisors had been informed that the following types of discipline were to be used: (1) verbal warnings, (2) written warnings, (3) probation, and (4) termination. The disciplinary measure to be used in individual cases was left to the judgment of the supervisor. Discipline did not have to follow any particular sequence, but could begin anywhere the supervisor felt was appropriate, depending on the seriousness of the offense.

The fact that a company leaves enforcement of discipline to the discretion of supervisors does not in and of itself establish racial discrimination. *Tate v. Weyerhaeuser Co.*, 723 F.2d 598 (8th Cir. 1983), *cert. denied* 469 U.S. 847, 105 S. Ct. 160, 83 L. Ed. 2d 97 (1984).

Physicians Mutual also had a policy that distinguished

between long-term and short-term employees. A short-term employee was more likely to be placed on probation than was a long-term employee. The short-term employee was given probation to permit that employee time to improve, but with a long-term employee who knew the job but did not perform adequately, the company felt that probation was not necessarily the correct step to follow prior to termination. Scott was considered a long-term employee.

The evidence discloses that on December 12, 1983, McCarthy spoke to Scott and another employee on her crew about problems they were having working together. On May 20, 1984, McCarthy spoke with Scott and others working the third shift about poor job performance. McCarthy told them that unless production improved they could be placed on probation or, if that did not work, they could be terminated. On August 1, 1984, Scott received a written warning because of poor production and incomplete work. On August 3, 1984, McCarthy spoke with Scott and two coworkers about a mistake made by them the previous night. McCarthy informed them that they could be fired. Scott signed a written memo which stated that she could be fired if she made the same type of error again.

On the night of October 9, 1984, McCarthy worked in presort and observed Scott. He noted her lack of concern for her work slowed production. In an October 10, 1984, memo to Scott's personnel file, McCarthy stated that he observed Scott work for 30 minutes and determined that she did not do her fair share, which also slowed production. Scott was involuntarily terminated by McCarthy in the middle of her shift. Our review of Scott's disciplinary record reflects that at and for a period of time before her discharge, Scott was not performing her job satisfactorily. McCarthy testified that although he did not record it in his reports, several employees complained about Scott's work performance. One of Scott's coworkers testified that at times Scott's work was "bad" and slow and that on a couple of occasions he talked with McCarthy about it.

On Scott's disciplinary action report addressing her discharge, McCarthy wrote that the termination was necessary because (1) her paperwork had been poor with no improvement

made; (2) on several occasions her machine was left dirty; and (3) her production had been very low. McCarthy continued: "The teamwork concept is used in presort, due to poor production I've been working with presort to find ways to get production at a proper level, I've observed Betty [sic] leaving the machine often and basically working at a slow rate of speed, thus causing the rest of the team to suffer." None of the reasons cited by McCarthy at the time of Scott's discharge evidence an intent to discriminate on the basis of race.

Scott presented evidence of other employees' personnel and disciplinary records. While the NEOC considered these records, it should be noted that the records of those employees not supervised by McCarthy are not necessarily relevant. See, *Tate v. Weyerhaeuser Co., supra.*

From *Tate*, it can be gathered that a change or even a difference in managers is not a defense to claims of racial discrimination. Nevertheless, the change or differences in managers may suggest a basis other than racial discrimination for a difference in treatment.

At least two coworkers worked directly with Scott the night she was discharged. One of Scott's white, female coworkers, who testified in Scott's behalf, stated that in her estimation based on observation, Scott was performing her job as expected on the night she was terminated. This employee worked in the presort area only if help was needed, perhaps once a month. This coworker, who "messed up" on the job, was placed on probation, and then quit, testified that there was a "good deal of hatred" between herself and McCarthy. She also testified that she was in a "dream state" or let her mind wander while working at Physicians Mutual. The second coworker, a black male, could not be located to testify.

Scott acknowledges receiving some of the forms of discipline set forth above and, in fact, admitted not appropriately performing her job on at least one occasion. Scott testified that she was upset with the lack of fairness in procedure because she had no knowledge that she was not performing well. Her personnel record and her testimony on cross-examination reflect she did have notice.

At the time she was discharged, Scott did not mention

anything about discrimination. Scott also did not mention anything about discrimination during her exit interview with the vice president of personnel. A couple of days after her termination, in a nonwork setting, Scott mentioned to a Physicians Mutual black supervisor that she felt that she had been treated unfairly. Again, there was no reference by either party to discrimination.

During a later conversation with this same supervisor, again in a nonwork setting, the topic of discrimination arose. Scott testified that the supervisor asked her if she felt that she might have been discriminated against by McCarthy. Scott replied, "No." Later, after Scott reflected upon her situation, she decided that she had been discriminated against because she was black.

Scott testified that before she was terminated she felt Physicians Mutual was a fair place to work. Scott had been accommodated by being granted a transfer to the night shift so that she could satisfy her schedule. Additionally, Scott testified that McCarthy had gone out of his way to help her on occasion.

In large part, Scott's contention that she was fired as a result of racial discrimination is based upon irrelevant evidence and a faulty perception of the law. As an example, Scott was never accused of tardiness. Yet, in support of her discrimination charge, she complains that a coworker was not disciplined for being tardy. The evidence is undisputed that the coworker was a student taking night classes. Because of her school schedule she was given leave to arrive at work after the shift started. The complaint about this coworker has no relevancy. Scott claims she never knew that her work performance was deficient, although admittedly she was warned on more than one occasion that she, along with others, could be fired because of poor production.

Scott claims she was discriminated against on account of race because she was not placed on probation before being fired. The record is uncontroverted that six other persons, three white and three black, were fired without being placed on probation. Scott also misconceives the law when she urges she was qualified to perform the work to which she was assigned. Perhaps she was at one time, but her poor performance prior to

her discharge is crucial and makes irrelevant her earlier qualification for the position. See *Bell v. Fremar Corp.*, 36 Fair Empl. Prac. Cas. (BNA) 547 (1984).

Under the facts presented, Scott has failed to prove that at the time of her termination, she was qualified to perform her job. This missing element, along with the fact that a black male was hired to fill Scott's position, precluded Scott from establishing a prima facie case of racial discrimination.

The record reflects overwhelmingly that Scott failed to prove a prima facie case of racial discrimination. Even if Scott had established a prima facie case, she failed to prove by a preponderance of the evidence that the reason for her discharge from employment articulated by Physicians Mutual was not legitimate or the true reason Scott was fired, but a pretext for racial discrimination.

The evidence simply does not support a finding that Physicians Mutual treated Scott less favorably than other similarly situated employees. Scott's first and second assignments of error have no merit.

Scott's final three assignments of error can be consolidated. They claim in substance that the district court did not give appropriate weight or legal analysis to the evidence. In making its findings the district court noted that it was fully aware that the hearing examiner had the opportunity to observe the witnesses and their demeanor and to make judgments as to their credibility, particularly as to McCarthy. Taking into consideration the fact that the hearing examiner observed and heard the witnesses, the district court still found that the conclusions of the hearing examiner were not supported by a preponderance of the evidence.

The standard of review in the district court is de novo on the record. The district court may not vacate, modify, or set aside an order of the NEOC unless "[t]he findings of the commission in support of such order are unreasonable or arbitrary or are not supported by a preponderance of the evidence." Neb. Rev. Stat. § 48-1120(3)(b) (Reissue 1984). See, also, *Harris v. Misty Lounge, Inc.*, 220 Neb. 678, 371 N.W.2d 688 (1985). Reviewing courts are not precluded from disregarding credibility or actual findings of the original finder of fact. See, *N.L.R.B. v. Payless*

Cashway Lbr. St. of So. St. Paul, Inc., 508 F.2d 24 (8th Cir. 1974); *N.L.R.B. v. Bausch & Lomb, Inc.*, 526 F.2d 817 (2d Cir. 1975) (on appeal, credibility decisions may be overturned if evidence to the contrary is overwhelmingly compelling); *Portable Electric Tools, Inc. v. N.L.R.B.*, 309 F.2d 423 (7th Cir. 1962) (an appeals court is not precluded from independently determining what weight credible testimony should be given when evaluating the record as a whole).

The rulings of the NEOC are not supported by the record. The order of the district court vacating the order of the NEOC is affirmed for the reasons herein stated.

AFFIRMED.

WHITE, J., not participating.

OMAHA HEALTH FACILITIES, INC., APPELLANT, V. DEPARTMENT OF HEALTH, STATE OF NEBRASKA, APPELLEE.

439 N.W.2d 78

Filed April 27, 1989. No. 87-553.

1. **Administrative Law: Public Health and Welfare: Appeal and Error.** An appeal from a judgment of the district court affirming a decision of the Certificate of Need Appeal Panel is reviewed in this court de novo on the record. However, this does not mean that the court ignores the findings of fact made by the appeal panel and the fact that it saw and heard the witnesses who appeared before it at its hearing.
2. **Administrative Law: Public Health and Welfare: Proof: Appeal and Error.** In an appeal of a decision to deny a certificate of need, the person requesting the appeal shall bear the burden of proving that the project meets the applicable criteria.

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

James W.R. Brown and Thomas R. Brown, of Fitzgerald & Brown, and Lem T. Jones, Jr., of Jones & Lehr, P.C., for appellant.

Robert M. Spire, Attorney General, and Marilyn B. Hutchinson for appellee.

HASTINGS, C.J., CAPORALE, and GRANT, JJ., and BURKHARD and WITTHOFF, D. JJ.

HASTINGS, C.J.

Omaha Health Facilities, Inc. (applicant), has appealed from the judgment of the district court, which affirmed the order of the Certificate of Need Appeal Panel. That panel had affirmed the action of the Certificate of Need Review Committee, which accepted the recommendation of the Department of Health of the State of Nebraska (department) in denying applicant's request for a certificate of need to build a nursing care facility in Douglas County.

Assigned as error is the action of the district court in (1) holding that the formula set out in Neb. Admin. Code tit. 182, ch. 2, § 006.09 (1983) provides the need calculation for long-term hospital beds as well as for skilled nursing facilities and intermediate-care facility beds, (2) failing to hold that the provisions of the Nebraska State Health Plan 1982-1987 (Neb. Dept. of Health 1982) control when there is a conflict between its provisions and the provisions in the regulations, and (3) failing to hold that the need for the facility was shown.

An appeal from a judgment of the district court affirming a decision of the Certificate of Need Appeal Panel is reviewed in this court de novo on the record. See, *Department of Health v. Columbia West Corp.*, 227 Neb. 836, 420 N.W.2d 314 (1988); Neb. Rev. Stat. § 84-918 (Reissue 1987). However, this does not mean that the court ignores the findings of fact made by the appeal panel and the fact that it saw and heard the witnesses who appeared before it at its hearing. *Department of Health v. Lutheran Hosp. & Homes Soc.*, 227 Neb. 116, 416 N.W.2d 222 (1987).

In an appeal of a decision to deny a certificate of need, the person requesting the appeal shall bear the burden of proving that the project meets the applicable criteria. Neb. Rev. Stat. §§ 71-5848 and 71-5865 (Reissue 1986).

The applicant's proposed facility is a 180-bed long-term-care facility to be located near 180th and Dodge Streets in Douglas County. The application sought certification for skilled nursing and intermediate-care beds. The facility would serve persons

located within 30 minutes' travel time of the location.

Applications for health care facilities are controlled by the Nebraska Health Care Certificate of Need Act, Neb. Rev. Stat. §§ 71-5801 et seq. (Reissue 1986). Section 71-5802 provides as follows:

> The Legislature hereby declares that it is the purpose of sections 71-5801 to 71-5872 to conserve the limited health care resources of personnel and facilities in order to provide quality health care to all citizens of the state, to minimize unnecessary duplication of facilities and services, to encourage development of appropriate alternative methods of delivering health care, to promote wherever appropriate a more competitive health care delivery system, to encourage the provision of high-quality health care which is available and accessible to all citizens of the state, and to maximize the effectiveness of expenditures made for health care.

No one is permitted to construct or otherwise acquire a health care facility without having first applied for and received the necessary certificate of need. § 71-5830. The Nebraska Department of Health is required to adopt regulations to prescribe the form and manner of consideration of applications for certificates of need. § 71-5836. Provisions are made under the authority of § 71-5842 for the creation of a Certificate of Need Review Committee. It is the responsibility of this committee to "[m]ake the decision with respect to each application for a certificate of need," § 71-5844, and before issuing a certificate of need, it shall consider the need for the health care facilities, the services related to health care facilities, and the clinical equipment as projected in various state plans. § 71-5858. The department is also required to adopt rules to provide criteria for the need to be served by health care facilities that the particular population has. § 71-5853. See, also, 182 Neb. Admin. Code, ch. 2, § 005.01A (1983), which provides that an applicant "must establish that there is an unmet need for health care services for a specific population" in order to obtain a certificate of need.

Also involved in this case is the Nebraska State Health Plan 1982-1987 (Neb. Dept. of Health 1982), which was adopted on

November 19, 1982, under the authority of federal health law. See § 71-5852. Such plan is an attempt to define health policy for the State of Nebraska, and as provided by the foregoing section, the department may incorporate as part of its rules and regulations any part of such plan. This section further provides that such rules and regulations shall provide criteria for the relationship of the health services being reviewed to the state health plan, "*but exceptions to the state health plan shall be made when justification is shown by a preponderance of the evidence.*" (Emphasis supplied.) § 71-5852.

Any action of the Certificate of Need Review Committee in issuing or denying a certificate of need may be appealed to a Certificate of Need Appeal Panel, which, following a hearing, shall issue a final written decision affirming or reversing the determination of the Certificate of Need Review Committee. §§ 71-5859 to 71-5866. That decision is subject to judicial review as provided by Neb. Rev. Stat. §§ 84-917 to 84-919 (Reissue 1981 & Cum. Supp. 1986). See § 71-5866.

As previously stated, the application has been denied at all levels and is here on appeal for a de novo review of the record.

At the heart of this controversy is the procedure to be employed in arriving at the health care needs in a particular community. The formulas provided in both the state health plan and the regulations appear to be the same. Quoting from the regulations, the following appears:

> No long-term care beds may be added if the number of beds in the applicant's service area exceeds the need for that area determined by aggregating the bed needs estimated for each sex and age group from the following methodology:

$$\text{Long-Term Bed Need} = \frac{\text{Population x Utilization Rate Goal}}{\text{Minimum Occupancy Rate Goal}}$$

Neb. Admin. Code tit. 182, ch. 2, § 006.09C (1983). That formula was originally established in the Nebraska State Health Plan 1982-1987, *supra* at V-433, where it is stated:

> The methodology for estimating the need for long-term care beds was approved by the SHCC and applied by two

of the three health systems agencies. In this approach bed need is estimated on the basis of the following formula.

$$\text{Long-Term Bed Need} = \frac{\text{Population x Utilization Rate Goal}}{\text{Minimum Occupancy Rate Goal}}$$

The utilization rate goal is a statistically produced figure which is an estimate of the number of people within a given age and sex group per thousand residents of a population area who will be needing long-term-care beds. The minimum occupancy rate goal is an arbitrarily fixed percentage figure of desirable occupancy, in this case 90 percent. In other words, the department, through the use of health economists, statisticians, and others, has concluded that in order to have a sufficient number of beds available at any one time, the total available beds shall approximate 111 percent of the projected daily need. For example, if the population is 3,000 and the utilization rate goal is 300, applying the formula, long-term bed need will be 3 (thousand) $\times 300 = 900$ divided by .90 (90 percent minimum occupancy rate goal) and will result in a figure of 1,000.

However, the problem arises because of the applicant's insistence that a 10-percent add-on figure for long-term patients in hospitals must be utilized in arriving at actual projected bed needs. This comes from language in the health plan which reads:

> An estimate of residents in hospital long-term care units must be made to fully account for residents of long-term care units. Hospital long-term care units have generated approximately 10 percent of total long-term care patient days, but the percent varies by area. Residents in hospital long-term care beds must be accounted for when establishing total bed needs.

Nebraska State Health Plan 1982-1987, V-437, V-440 (Neb. Dept. of Health 1982).

On the other hand, the department points to language further on which states:

> Also, the breakdown between nursing home and hospital long-term care beds should not be taken too literally. . . . The Greater Nebraska Health Systems Plan has

> recommended that swing beds be examined if the nursing homes are full and the area hospital(s) is (are) operating below capacity - this would be the preferred option to new nursing home construction. This reinforces the position that total bed needs in Table 5-123 should be emphasized rather than the breakdown between nursing homes and hospital long-term care beds.

Id. at V-440.

Obviously, in our example, if the 10-percent add-on were employed, the long-term bed need for 900 users would be 1,100 rather than the 1,000 as originally calculated; i.e., $1{,}000 \times 1.1 = 1{,}100$. The applicant argues that this must be done because § 71-5852 requires that the department shall "provide criteria for . . . [t]he relationship of the health services being reviewed to the state health plan . . . ."

The regulations make no mention of the use of a 10-percent add-on figure for hospital patients. Thus, the department argues, the regulations control because as provided at 182 Neb. Admin. Code, ch. 2, § 005.01B (1983): "Projections in section 006 of these regulations shall take priority over those in the state health plan in the case of conflicts between those documents."

Applicant contends that the plan was adopted before the regulations were promulgated. However, important to the court is that portion of § 71-5852 which reads, "but exceptions to the state health plan shall be made when justification is shown by a preponderance of the evidence."

Stephen Frederick, a health economist employed by the department and who authored the plan, testified that the 10-percent ratio of hospital long-term beds in use and those long-term beds of nursing homes was utilized to predict an accurate figure for the *state as a whole*. However, he said this figure did not relate directly to the individual service areas such as the one with which we are here concerned. The add-on figure was used to get at a base statewide and was not carried over into the utilization goals of the regulations.

The decision on the part of the department not to use the 10-percent add-on in the regulations was supported by a preponderance of the evidence. The procedure provided for in

the regulations takes precedence over the plan and is applicable.

Having concluded that the 10-percent add-on figure is not to be employed in applying the formula for determining long-term bed need, it is only necessary to plug in the projected bed use figures without adding an additional figure for hospital residents, and apply the .90 divisor. In making our computations, we have used the data provided by the applicant which are more favorable to it than those of the department. Those figures were provided by Donnelley Marketing Services, by the University of Nebraska, and by the U.S. Census Bureau. Donnelley population projections reveal a projected bed use for Douglas County in 1990 of 2,951; the University of Nebraska population projections for the same time and area produce a projected bed use of 2,558; and the U.S. revised census figures estimate a projected bed use of 3,122. Dividing each figure by .90 results in long-term bed needs of 3,279, 2,842 and 3,469, respectively. Comparing these figures with the number of beds actually available in 1985 of 3,399, which figure is not in dispute, either there is an excess of 120 or 557 beds, or, according to the revised census estimate, there is a shortage of 70 beds. However, to grant the present application would result in available beds in excess of the projected needs in any event.

The judgment of the district court is correct and is affirmed.

AFFIRMED.

MARY K. SANCHEZ, APPELLANT, V. LOUIS B. SANCHEZ, APPELLEE.

439 N.W.2d 82

Filed April 27, 1989. No. 87-796.

1. **Child Support: Modification of Decree: Appeal and Error.** The standard of review in a modification of child support in a divorce action is de novo on the record, and the decision of the trial court will be affirmed in the absence of an abuse of discretion.
2. **Child Support: Modification of Decree: Proof.** A party seeking modification of child support payments in a dissolution action has the burden of showing not only a change in circumstances, but also that such change is a material or substantial change, and not within the contemplation of the parties at the time the decree was entered.

3. **Child Support: Modification of Decree.** An application to modify a decree to reduce child support is not a retrial of the original case or a review of the equities of the original decree.

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

Maureen A. Doerner for appellant.

Louis B. Sanchez, pro se.

HASTINGS, C.J., SHANAHAN, and FAHRNBRUCH, JJ., and NORTON, D.J., and RONIN, D.J., Retired.

PER CURIAM.

Mary K. Sanchez appeals from a decree of the district court reducing the amount of child support on the application of the appellee, Louis B. Sanchez, to modify the original decree of dissolution of marriage between the parties entered in August 1981.

The original decree awarded the custody of the three minor children of the parties to the appellant and ordered the appellee to pay the sum of $260 per month for the support of each child. After a hearing, the trial court reduced the child support award to $153 per month for each child.

The standard of review by this court in a modification of child support in a divorce action is de novo on the record, and the decision of the trial court will be affirmed in the absence of an abuse of discretion. *Wilson v. Wilson*, 224 Neb. 589, 399 N.W.2d 802 (1987); *Wagner v. Wagner*, 224 Neb. 155, 396 N.W.2d 282 (1986).

A party seeking modification of child support payments in a dissolution action has the burden of showing not only a change in circumstances, but also that such change is a material or substantial change, and not within the contemplation of the parties at the time the decree was entered. *Graber v. Graber*, 220 Neb. 816, 374 N.W.2d 8 (1985); *Ohler v. Ohler*, 220 Neb. 272, 369 N.W.2d 615 (1985); *Grothendick v. Grothendick*, 175 Neb. 726, 123 N.W.2d 646 (1963).

The appellee alleges that the material changes in circumstances from the original decree entered in August 1981

to the time of his application for reduction of child support were that he was unable to financially support himself and pay $780 per month as child support based upon his income, that his living expenses have increased, and that his wife was presently employed.

We find from the record that the evidence is undisputed that the appellee had continuous employment with the Douglas County correctional facility and has received a promotion in his position and that both his earning capacity and income have increased.

We also find that the appellant was employed at the time of the original decree and that she sustained personal injuries in an automobile accident in April 1982, and was necessarily unemployed until September 15, 1986, when she was able to resume part-time work at approximately half the income she was receiving at the time of the decree.

Our court has held, in *Tworek v. Tworek*, 218 Neb. 808, 359 N.W.2d 764 (1984), that an application to modify a decree to reduce child support is not a retrial of the original case or a review of the equities of the original decree.

Upon de novo review of this case, we find that the appellee failed to sustain his burden of proof that a material or substantial change in circumstances had occurred since the entry of the original decree, and that the trial judge abused his discretion in reducing the amount of the child support.

The appellant's cross-petition requests an accounting of the amount of child support paid by the appellee and that a determination be made of the amount of arrearages. The evidence adduced indicated that the appellee had made child support payments and payments for various other items directly to the appellant. The trial court, in its nunc pro tunc order of August 14, 1987, found that the amount of child support arrearage was the sum of $2,485 as of July 31, 1987, and that $654.39 had been paid by the appellant on behalf of the appellee, which was also made a judgment against the appellee.

The order of the trial court reducing the amount of the child support is reversed and the appellee's petition to modify the original decree is dismissed. The order of the trial court finding the amount of arrearage to be the sum of $2,485 as of July 31,

1987, and the credit given the appellant for the payment of the $654.39 on behalf of the appellee are correct. The findings of the trial court as to the appellant's cross-petition are affirmed.

AFFIRMED IN PART, AND IN PART REVERSED AND DISMISSED.

STATE OF NEBRASKA, APPELLEE, V. RANDY PIERCE, APPELLANT.

439 N.W.2d 435

Filed April 27, 1989. No. 88-360.

1. **Criminal Law: Motions to Dismiss: Evidence.** On a defendant's motion to dismiss for insufficient evidence of the crime charged against the defendant, the State is entitled to have all its relevant evidence accepted or treated as true, every controverted fact as favorably resolved for the State, and every beneficial inference reasonably deducible from the evidence.
2. **Criminal Law: Directed Verdict.** In a criminal case a court can direct a verdict only when (1) there is a complete failure of evidence to establish an essential element of the crime charged, or (2) evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained.
3. **Criminal Law: Statutes.** A statutory characterization or definition of a crime is self-subsistent or self-contained if the statute proscribing criminal conduct specifies all the essential parts or constituents of the crime.
4. **Intent: Words and Phrases.** Intent is the state of the actor's mind when the actor's conduct occurs. *Intentionally* means willfully or purposely, and not accidentally or involuntarily.
5. _____: _____. The intent involved in conduct is a mental process and may be inferred from the conduct itself, the actor's language in reference to the conduct, and the circumstances surrounding an incident.
6. **Criminal Law: Intent: Proof: Circumstantial Evidence.** When an element of a crime involves existence of a defendant's mental process or other state of mind of an accused, such elements involve a question of fact and may be proved by circumstantial evidence.
7. **Criminal Law: Sentences: Words and Phrases.** The grade of a criminal offense determines which punishment or penalty may be imposed on conviction for the crime.
8. **Criminal Law: Trial.** Regarding the grades of criminal mischief as a violation of Neb. Rev. Stat. § 28-519(1)(a) (Reissue 1985), existence of a pecuniary loss and the extent or amount of pecuniary loss, specified in § 28-519(2), (3), and (4), are questions for the fact finder.

9. **Criminal Law: Trial: Indictments and Informations.** A specific monetary amount, alleged in conjunction with "pecuniary loss" resulting from criminal mischief in violation of Neb. Rev. Stat. § 28-519 (Reissue 1985), informs the court and a defendant that the prosecution involves a felony and potential felony punishment on conviction for criminal mischief.
10. **Criminal Law: Words and Phrases.** "Pecuniary loss," used in Neb. Rev. Stat. § 28-519(2), (3), and (4) (Reissue 1985), means monetary loss suffered by another as the result of the defendant's conduct which constitutes criminal mischief under § 28-519.
11. **Verdicts: Appeal and Error.** A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict.
12. **Jury Instructions.** All instructions, read conjunctively, must correctly state the law, adequately state the issues, and not mislead the jury.
13. **Jury Instructions: Appeal and Error.** A trial court, whether requested or not, must instruct the jury on the law of the case, and failure to do so constitutes prejudicial error.
14. **Trial: Motions for Mistrial.** A mistrial may be warranted where unfairness has been injected into a jury trial and so permeates the proceedings that no amount of admonition to the jury can remove the unfairness to a party.
15. **Prosecuting Attorneys: Trial.** Prosecutors are charged with the duty of conducting criminal trials in such a manner that an accused may have a fair trial.
16. **Constitutional Law: Prosecuting Attorneys: Trial.** A prosecutor's comment on a defendant's silence in the defendant's trial is a violation of an accused's right to remain silent under the 5th and 14th amendments to the U.S. Constitution and under article I, § 12, of the Nebraska Constitution.
17. _____: _____: _____. The prohibition against a prosecutor's comment on a defendant's right to remain silent applies throughout a trial, including the opening statement and closing argument during the trial.
18. _____: _____: _____. In an opening statement for a jury trial, a prosecutor's comment concerning the necessity of the defendant's testimony or an expression concerning the plausibility or credibility of anticipated testimony from a defendant violates an accused's right to remain silent at trial.
19. _____: _____: _____. An accused's right to remain silent at trial, accorded by the 5th and 14th amendments to the U.S. Constitution and article I, § 12, of the Nebraska Constitution, is not limited to a statement concerning a defendant's failure to testify at trial, but includes the prosecutor's use of any language or device which compels a defendant to testify.
20. **Prosecuting Attorneys: Trial: Evidence: Jurors.** A prosecutor's argument must be based on evidence introduced rather than on matters not in evidence which serve to divert jurors from the consideration whether the accused is guilty of the crime charged.
21. **Prosecuting Attorneys: Trial: Jurors.** A prosecutor's appeal to the self-interest of jurors as taxpayers is improper.

Appeal from the District Court for Dakota County: ROBERT E. OTTE, Judge. Reversed and remanded for a new trial.

William L. Binkard 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.

A jury convicted Randy Pierce of criminal mischief in violation of Neb. Rev. Stat. § 28-519(1)(a) (Reissue 1985). The court sentenced Pierce under § 28-519(2), Class IV felony punishment for criminal mischief resulting in pecuniary loss exceeding $300.

Pierce assigns as error the district court's failure to grant defendant's motion for a directed verdict of acquittal, failure to instruct properly on "pecuniary loss" relative to the crime of "criminal mischief," failure to direct a verdict on the issue of pecuniary loss relative to the grades of criminal mischief, failure to declare a mistrial based on the prosecutor's assertion in opening statement that the defendant would testify, and failure to declare a mistrial based on the prosecutor's statement in closing argument that the defendant was represented by court-appointed counsel.

APPLICABLE STATUTE

Insofar as the prosecution of Pierce is concerned, the applicable statute, § 28-519, states:

> (1) A person commits criminal mischief if he or she:
>
> (a) Damages property of another intentionally or recklessly . . . .
>
> (2) Criminal mischief is a Class IV felony if the actor intentionally causes pecuniary loss in excess of three hundred dollars . . . .
>
> (3) Criminal mischief is a Class II misdemeanor if the actor intentionally causes pecuniary loss in excess of one hundred dollars.
>
> (4) Criminal mischief is a Class III misdemeanor if the actor intentionally or recklessly causes pecuniary loss in an amount of one hundred dollars or less, or if his or her action results in no pecuniary loss.

OPENING STATEMENT

In his opening statement, the prosecutor told the jury that Pierce "will testify but we do not know which version of the facts to which he will testify." At that time, Pierce's attorney requested a mistrial on account of the prosecutor's remark as a violation of Pierce's constitutional right to remain silent. After the court denied Pierce's mistrial motion, the jury received no instruction concerning the prosecutor's remark.

EVIDENCE AT TRIAL

Keith Lynch was an employee of a liquor store. Apparently, bad feelings existed between Pierce and Lynch as the result of Pierce's attempt to pass forged checks at the liquor store.

On October 10, 1987, when Lynch had left the liquor store and was driving his Chevrolet pickup, he noticed another vehicle following closely behind his pickup. After a short distance, Lynch recognized Pierce as the driver of the following vehicle. Pierce pulled his car alongside Lynch's pickup and yelled obscenities at Lynch. Pierce continued following Lynch's pickup, eventually pulled alongside Lynch, and drove his car into the pickup, denting the pickup's left front fender and bending its bumper. Without stopping after impact, Pierce drove away.

An automobile repairman testified that the fair and reasonable cost of repair to Lynch's pickup as a result of the collision with Pierce's car was $595.94. The record does not reflect any evidence regarding the market value of Lynch's vehicle. Pierce testified in his own case.

At the conclusion of all evidence, Pierce moved for a directed verdict based on the absence of evidence regarding the value of Lynch's pickup. The court overruled Pierce's motion.

CLOSING ARGUMENT

During closing argument, the prosecutor mentioned that an indigent defendant has a constitutional right to court-appointed counsel "paid for by the taxpayers . . . as was done in this case." Pierce requested a mistrial. The court refused to grant a mistrial and immediately admonished the jury that the prosecutor's remark was "improper, completely irrelevant" and instructed the jury "to completely disregard the comment."

INSTRUCTIONS

Pierce objected to any instruction which did not refer to the damaged property's market value in relation to "pecuniary loss." Pierce moved for a directed verdict on the issue of "pecuniary loss" relative to the grades of criminal mischief. The court overruled Pierce's directed verdict motion and instructed the jury that the State must prove, beyond a reasonable doubt, that Pierce intentionally damaged Lynch's property and caused Lynch to sustain a pecuniary loss in excess of $300. The court defined pecuniary loss as "loss in the form of money, property, commercial interest, or anything else, the primary significance of which is economic loss."

DIRECTED VERDICT

> On a defendant's motion to dismiss for insufficient evidence of the crime charged against such defendant, the State is entitled to have all its relevant evidence accepted or treated as true, every controverted fact as favorably resolved for the State, and every beneficial inference reasonably deducible from the evidence.

State v. Watkins, 227 Neb. 677, 681-82, 419 N.W.2d 660, 663 (1988); *State v. Lane*, 227 Neb. 687, 419 N.W.2d 666 (1988). In a criminal case a court can direct a verdict only when (1) there is a complete failure of evidence to establish an essential element of the crime charged, or (2) evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained. *State v. Brown*, 225 Neb. 418, 405 N.W.2d 600 (1987).

CRIMINAL MISCHIEF: THE SUBSTANTIVE OFFENSE

Regarding the criminal charge against Pierce, the offense of criminal mischief is statutorily defined in § 28-519(1): "A person commits criminal mischief if he or she: (a) Damages property of another intentionally or recklessly." The statutory characterization or definition of "criminal mischief" is self-subsistent or self-contained, that is, the statute proscribing "criminal mischief" specifies all the essential parts or constituents of the crime, which is committed if the actor intentionally or recklessly damages the property of another. "Pecuniary loss," mentioned in § 28-519(2), (3), and (4), is not an element of the criminal offense designated as "criminal

mischief." Rather, "pecuniary loss" determines the grade of the offense and relates to the punishment which may be imposed on conviction for the offense of criminal mischief, an aspect of Pierce's case which will be discussed later in this opinion.

Intent is the state of the actor's mind when the actor's conduct occurs. *State v. Craig*, 219 Neb. 70, 361 N.W.2d 206 (1985). "*Intentionally* means willfully or purposely, and not accidentally or involuntarily." *State v. Schott*, 222 Neb. 456, 462, 384 N.W.2d 620, 624 (1986). The intent involved in conduct is a mental process and may be inferred from the conduct itself, the actor's language in reference to the conduct, and the circumstances surrounding an incident. *State v. Schott, supra*. "When an element of a crime involves existence of a defendant's mental process or other state of mind of an accused, such elements involve a question of fact and may be proved by circumstantial evidence." *State v. Hoffman*, 227 Neb. 131, 140, 416 N.W.2d 231, 237 (1987).

The fact of the dented fender and bent bumper on Lynch's pickup certainly establishes that Pierce caused damage to Lynch's property in the collision between the vehicles. Whether Pierce intentionally caused the damage to Lynch's pickup was a question for the jury in view of Pierce's apparent animosity toward Lynch and the circumstances of the collision, including Pierce's yelling obscenities at Lynch and circumstances surrounding the vehicular impact. The State presented evidence with probative value to sustain a finding of Pierce's guilt of criminal mischief. We conclude that the evidence against Pierce and the evidentiary inferences for the State warranted submission of the case to the jury. The district court correctly overruled Pierce's request for a directed verdict of acquittal.

NATURE OF PECUNIARY LOSS

As noted above, "pecuniary loss" is not an element of the crime "criminal mischief." According to § 28-519(1)(a), the crime of criminal mischief is committed when one intentionally or recklessly damages another's property, regardless of pecuniary loss which may or may not result from the defendant's conduct.

The function of "pecuniary loss" in relation to the crime of criminal mischief is establishment of the grade of the offense to

determine which punishment or penalty may be imposed on conviction for criminal mischief. Although pecuniary loss is not an essential element or constituent of the criminal conduct called "criminal mischief," pecuniary loss is important in a prosecution for criminal mischief because, under § 28-519(2), (3), and (4), the greater the extent of pecuniary loss, the more severe the punishment which may be imposed on conviction for criminal mischief.

Similar to the preceding analysis concerning the grades of criminal mischief is this court's analysis regarding the grades of theft, namely, the "grading of theft offenses" under Neb. Rev. Stat. § 28-518 (Reissue 1985). As expressed in *State v. Reed*, 228 Neb. 645, 651-52, 423 N.W.2d 777, 781-82 (1988):

> By statute, crimes are classified between serious and minor offenses, all distinguished by the possible penalties that may be imposed. . . . Neb. Rev. Stat. § 28-518 (Reissue 1985) grades theft offenses into four different classes dependent upon the value of the thing (property) involved. For example, theft of property valued at over $1,000 is a Class III felony and theft of property valued at $100 or less is a Class II misdemeanor. In the event of a defendant's conviction in theft cases, the sentencing judge must know the value of the property as a guide to the possible maximum and minimum sentences. In jury trials, the jury must find the value of the property taken and convey that fact to the judge in its verdict. § 29-2026.01. [When the indictment charges an offense against the property of another by larceny, embezzlement, or obtaining under false pretenses, the jury, on conviction, shall ascertain and declare in its verdict the value of the property stolen, embezzled, or falsely obtained. Neb. Rev. Stat. § 29-2026.01 (Reissue 1985).]

See, also, *State v. Redding*, 213 Neb. 887, 331 N.W.2d 811 (1983) (four grades of larceny or theft with common elements except the value of the goods stolen).

In the light of our discussion about the substantive offense of criminal mischief, we point out that the grades of criminal mischief do not constitute the greater and lesser-included offenses within the crime of criminal mischief. Rather, criminal

mischief is a substantive criminal offense for which, on conviction, punishment varies according to the pecuniary loss specified in the grades of the substantive offense. As noted in *State v. Olsan, ante* p. 214, 219, 436 N.W.2d 128, 132 (1989):

> "A lesser included offense is one which is necessarily established by proof of the greater offense." *State v. Colgrove*, 197 Neb. 375, 376, 248 N.W.2d 780, 781 (1977). To be a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater offense without simultaneously committing the lesser offense. *State v. Lovelace*, 212 Neb. 356, 322 N.W.2d 673 (1982).

Regarding the grades of criminal mischief as a violation of § 28-519, existence of pecuniary loss and the extent or amount of pecuniary loss, specified in § 28-519(2), (3), and (4), are questions for the fact finder. Cf., *State v. Hayes*, 187 Neb. 325, 190 N.W.2d 621 (1971) (value of property involved in grand larceny-theft; jury question); *State v. Weik*, 206 Neb. 217, 292 N.W.2d 289 (1980) (value of property is a fact question for the jury in a prosecution for grand larceny-theft). A specific monetary amount, alleged in conjunction with "pecuniary loss" resulting from criminal mischief in violation of § 28-519, informs the court and a defendant that the prosecution involves a felony and potential felony punishment on conviction for criminal mischief.

Thus, on a reading of § 28-519, the criminal mischief statute, it is clear that different grades of criminal mischief depend on pecuniary loss, that is, the amount of monetary damage caused by the criminal mischief. However, § 28-519 does not prescribe a method to determine pecuniary loss.

In *State v. Weik, supra*, and *State v. Carroll*, 186 Neb. 148, 181 N.W.2d 436 (1970), this court held that the rules for establishing value in civil cases are applicable to distinguish between grand and petit larceny, that is, the grades for the crime designated "theft."

Pierce suggests that "pecuniary loss" in reference to criminal mischief should be ascertained by the rule governing damages recoverable in a civil action for injury to personal property,

namely, the rule expressed in *Chlopek v. Schmall*, 224 Neb. 78, 396 N.W.2d 103 (1986). In *Chlopek*, we enunciated a rule which, in substance, allowed recovery of damages determined by the reasonable cost of repair for damage to personal property, provided, if the damaged property could not be repaired, or if the cost of repair exceeded the fair market value of the damaged item, the property's lost market value determined the amount of damages recoverable. *Chlopek* also authorized recovery of damages for lost use of personal property during repair or until a suitable replacement was obtained for the unrepairable property.

If the rule expressed in *Chlopek* were transposed into § 28-519(1)(a), that is, a case of criminal mischief based on intentional or reckless damage to another's property, the State's prima facie case would have to include evidence of the reasonable cost of repair and market value for the damaged property. However, damaged property, which is the subject of § 28-519(1)(a), is not restricted to personal property, but may include real property as well. Also, by its very nature, damaged real estate may defy repair or an estimate of repair; for example, agricultural grassland damaged by vandalism as a form of criminal mischief. Reference to market value, before and after the criminal mischief, may be a standard, and sometimes the only standard, to determine pecuniary loss involving the illustrative grassland inasmuch as repair of the real property is impossible. Still other property, such as a tree in a public park, may be damaged or destroyed. The before and after value of the park, with and without the damaged or destroyed tree, is an impracticable determinative of damage. In the example of the damaged or destroyed tree in a public park, perhaps a more appropriate determinative of damage is the reasonable replacement cost of the damaged or destroyed tree. At other times, various forms of pecuniary loss caused by criminal mischief are not practicably expressible in terms of the restitutory measures for loss and recoverable damages in civil actions because the property damaged may lack a readily ascertainable market or replacement value. See *State v. Palmer*, 207 Mont. 152, 673 P.2d 1234 (1983). Thus, the extent of pecuniary loss will necessarily depend on the nature of the

property damaged by the conduct characterized as criminal mischief. As becomes readily apparent, if rules pertaining to recoverable civil damages are applied to determine pecuniary loss in a criminal mischief case, the extent of pecuniary loss will vary as the object of criminal mischief varies from case to case. Although appropriate reference to the civil rules may provide some assistance relative to ascertaining pecuniary loss from injury or damage to particular property, indiscriminate transposition of all civil damage rules for application in criminal mischief cases may create more problems than would be ostensibly solved by such transposition. All of this leads to the conclusion that there is no universal and comprehensive formula or method to determine the extent of pecuniary loss in relation to criminal mischief, namely, intentional or reckless damage to another's property in violation of § 28-519(1)(a).

Therefore, we hold that "pecuniary loss," used in § 28-519(2), (3), and (4), means monetary loss suffered by another as the result of the defendant's conduct which constitutes criminal mischief under § 28-519.

"A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict." *State v. Brown*, 225 Neb. 418, 428, 405 N.W.2d 600, 606 (1987); *State v. Robertson*, 223 Neb. 825, 394 N.W.2d 635 (1986).

In Pierce's case, the State introduced evidence that Lynch had sustained a monetary loss through the cost of repair for Lynch's damaged pickup. Pierce had the opportunity, either through cross-examination of the State's witnesses or by introduction of evidence in his own case, to contradict the State's evidence of pecuniary loss or otherwise show that Lynch's monetary loss was not in the extent or degree asserted by the State. The evidence was sufficient, under proper instruction, to support a verdict against Pierce on the issue of felony pecuniary loss.

All instructions, read conjunctively, must correctly state the law, adequately state the issues, and not mislead the jury. *State v. Ryan*, 226 Neb. 59, 409 N.W.2d 579 (1987). A trial court, whether requested or not, must instruct the jury on the law of the case, and failure to do so constitutes prejudicial error. *State*

v. Clayburn, 223 Neb. 333, 389 N.W.2d 314 (1986).

In view of the characterization or definition we have used concerning "pecuniary loss" in reference to criminal mischief in violation of § 28-519, the court's instruction on the grade of Pierce's criminal mischief is incorrect. The instruction did not conform with the meaning of "pecuniary loss," which we have set forth above, and permitted the jury to speculate about various losses, including a loss of a commercial interest "or anything else" which involved "economic loss." Consequently, the instruction in Pierce's case was incomplete and misleading, constituting prejudicial error.

MISTRIAL BASED ON PROSECUTORY MISCONDUCT

Prosecutory duty.

Prosecutors are charged with the duty of conducting criminal trials in such a manner that an accused may have a fair trial. *State v. Olsan, ante* p. 214, 436 N.W.2d 128 (1989); *Pierce v. State,* 173 Neb. 319, 113 N.W.2d 333 (1962).

Mistrial.

The disposition of Pierce's appeal requires our deciding whether the prosecutor's remark in his opening statement and his comment during the closing argument were unfairly prejudicial and warranted a mistrial.

> A mistrial results in nullification of a pending jury trial. In order to prevent defeat of justice or to further justice during a jury trial, a mistrial is generally granted at the occurrence of a fundamental failure preventing a fair trial in the adversarial process. Some examples are an egregiously prejudicial statement by counsel, the improper admission of prejudicial evidence, or the introduction of incompetent matters to the jury, to the extent that any damaging effect cannot be removed by proper admonition or instruction to the jury. [Citations omitted.]
>
> Courts have considerable discretion in passing on the motions for mistrial, to the end that justice be more nearly effectuated.

State v. Archbold, 217 Neb. 345, 351, 350 N.W.2d 500, 504 (1984).

As further noted in *State v. Archbold, supra* at 355, 350

N.W.2d at 506-07:

> A mistrial may be warranted where unfairness has been injected into a jury trial and so permeates the proceedings that no amount of admonition to the jury can remove the unfairness to a party. . . . Therefore, a mistrial may be the only recourse on those occasions when admonition to the jury cannot eradicate the unfair prejudice to a party, or, as expressed in *Dunn v. United States*, 307 F.2d 883, 886 (5th Cir. 1962), "Otherwise stated, one 'cannot unring a bell'; 'after the thrust of the saber it is difficult to say forget the wound'; and finally, 'if you throw a skunk into the jury box, you can't instruct the jury not to smell it'."

Defendant's right to remain silent.

A prosecutor's comment on a defendant's silence in the defendant's trial is a violation of an accused's right to remain silent under the 5th and 14th amendments to the U.S. Constitution and under article I, § 12, of the Nebraska Constitution. *State v. Donald*, 199 Neb. 70, 256 N.W.2d 107 (1977); *Griffin v. California*, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965).

The prohibition against a prosecutor's comment on a defendant's right to remain silent applies throughout a trial, including the opening statement and closing argument during the defendant's trial. *State v. Turner*, 433 A.2d 397 (Me. 1981). In an opening statement for a jury trial, a prosecutor's comment concerning the necessity of the defendant's testimony or an expression concerning the plausibility or credibility of anticipated testimony from a defendant violates an accused's right to remain silent at trial. For example, a prosecutor's comments or expressions in opening statements were improper in the following: *Meadows v. State*, 291 Ark. 105, 111, 722 S.W.2d 584, 587 (1987) (question, " 'What's he going to say after all this evidence is presented?' "); *Smith v. State*, 358 So. 2d 1137 (Fla. App. 1978) (comment that the basic issue was witness credibility—whether the jury would believe the State's witnesses or the defendant); *Knopp v. State*, 233 Ind. 435, 120 N.E.2d 268 (1954) (comment that the defendant was afraid to take the witness stand because the defendant knew what the prosecutor would do to him on cross-examination); *State v.*

Turner, supra at 401 (comment that the " 'defendant will surely try to raise doubts in your mind' " about the perpetrator's identity in the crime charged); *Bird v. State*, 527 S.W.2d 891, 893 (Tex. Crim. App. 1975) (in a murder trial and in reference to a firearm with a silencer, the prosecutor turned to the defendant and asked, " '[W]here did you get it?' ").

The fact that Pierce actually testified renders the prosecutor's remark no less objectionable and reprehensible. In *Coleman v. The State*, 111 Ind. 563, 565, 13 N.E. 100, 101 (1887), during opening statement the prosecutor told the jury: " 'You should watch the evidence closely. We do not know that the defendant will go upon the stand. He has not been sworn; I noticed that. If he should go upon the stand you should watch—' " at which point defense counsel objected. Later, the defendant testified on his own behalf. The Indiana Supreme Court stated:

> The effect of the remarks must have been either to coerce the defendant to testify, as has been said, "with a halter about his neck," or to induce him to remain silent, with knowledge that the jury had been challenged in the outset to observe whether or not he would go upon the stand, under the goad of the prosecutor's statement.

Id. at 566, 13 N.E. at 101. See, also, *State v. Lindsey*, 578 S.W.2d 903 (Mo. 1979) (prosecutor's statement in opening, " 'Mr. Lindsey doesn't have to go forward with any evidence if he doesn't wish to. He doesn't have to take the stand if he doesn't want to' " (emphasis omitted); held, a defendant's right to remain silent prohibits not only a prosecutor's comment on the defendant's failure to testify but also a prosecutor's comment which compels a defendant to testify).

An accused's right to remain silent at trial, accorded by the 5th and 14th amendments to the U.S. Constitution and article I, § 12, of the Nebraska Constitution, is not limited to a statement concerning a defendant's failure to testify at trial, but includes the prosecutor's use of any language or device which compels a defendant to testify.

In Pierce's case, then, at issue is the prosecutor's comment in his opening statement that Pierce "will testify but we do not know which version of the facts to which he will testify." Did the prosecutor's statement violate Pierce's constitutional right to

remain silent and inject unfair prejudice into Pierce's trial?

The prosecutor's remark immediately made Pierce's credibility an issue in the case before introduction of any evidence. Moreover, the prosecutor's remark presented a dilemma: Pierce could remain silent and thereby give credence to, or even substantiate, the invidious innuendo that he had previously given inconsistent versions of the incident on which the criminal charge was based, or Pierce could take the witness stand and recount a version without any inconsistency, thereby responding to the prosecutor's intimation of inconsistency but subjecting himself to cross-examination. If Pierce failed to take the stand, the jury might conclude that his silence buttressed the prosecutor's remark about Pierce's multiple versions of the incident, that is, Pierce did not have a consistent credible account of the incident and remained silent to avoid entanglement in a web of inconsistency as an indication of guilt. On the other hand, if Pierce did take the stand, but failed to provide an absolutely consistent account of the incident, the jury might indulge in the belief that Pierce's guilt or innocence turned on consistency in Pierce's testimony rather than the State's meeting its burden to prove Pierce's guilt by evidence beyond a reasonable doubt. In this manner, the State suggested the hypothesis to the jury: If Pierce's testimony involved any inconsistency, his guilt was established.

"[W]e do not know which version of the facts to which he will testify." In that statement, the prosecutor informed the jury that Pierce had expressed more than one version or account of the incident in question. How did the prosecutor know that Pierce had expressed more than one version? The very insinuation of multiple versions could lead a jury to believe that Pierce, before trial, had admitted his criminality in the charged offense. At that point, in-court evidence would be relegated to irrelevance because Pierce had already admitted his guilt.

We conclude that the prosecutor's statement in his opening address to the jury compelled Pierce to testify and was a violation of Pierce's constitutional right to remain silent. We do not decide whether any appropriate cautionary instruction might have eliminated the prejudice from the prosecutor's statement inasmuch as no instruction was given concerning the

prosecutor's comment. See *State v. Ross*, 220 Neb. 843, 846, 374 N.W.2d 228, 230 (1985): " '[A]n objection followed by admonition or instruction is typically presumed to be sufficient to dispel prejudice.' " (Quoting from *United States v. Young*, 470 U.S. 1, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985).) See, also, *State v. Borchardt*, 224 Neb. 47, 395 N.W.2d 551 (1986). Therefore, the prosecutor's misconduct in his opening statement to the jury prevented a fair trial for Pierce, whose motion for mistrial should have been granted under the circumstances. Consequently, we set aside Pierce's conviction for criminal mischief.

Court-appointed counsel.

Although we have set aside Pierce's conviction, nonetheless, in view of a prospective retrial of Pierce's case, we are obliged to make a further observation regarding the prosecutor's comments during summation to the jury lest similar conduct occur on retrial. During summation, the prosecutor referred to the fact that, as a matter of constitutional right, Pierce's court-appointed counsel was "paid for by the taxpayers." A prosecutor's argument must be based on evidence introduced rather than on matters not in evidence which serve to divert jurors from the consideration whether the accused is guilty of the crime charged. *State v. Perry*, 274 Minn. 1, 142 N.W.2d 573 (1966). A prosecutor's appeal to the self-interest of jurors as taxpayers is improper. *State v. Majors*, 182 Kan. 644, 323 P.2d 917 (1958). See, also, *Commonwealth v. Joyner*, 469 Pa. 333, 365 A.2d 1233, 1234 (1976) (prosecutor's argument that the jury has " 'borne witness to the unbelievable length our system of justice goes to protect the rights of an accused person' " was improper (emphasis omitted)); *State v. Perry, supra* at 11, 142 N.W.2d at 579 (prosecutor's argument that " '[t]his whole thing [defendant's trial], the whole burden of this whole affair, is carried by taxpayers . . . . This is a solely supported tax function,' " was improper); *State v. Majors, supra* at 647, 323 P.2d at 920 (prosecutor's statement, " 'It cost a lot of money for the taxpayers of Atchison County to put on this trial,' " was improper); *State v. Muskus*, 158 Ohio St. 276, 282, 109 N.E.2d 15, 18 (1952) (prosecutor's statement that it made him " 'boil to know that we have to waste Stark county taxpayers' money to

try a fellow like that' " was error).

The prosecutor's reference to the fact of court-appointed counsel for Pierce is so far removed from relevance to the issue of Pierce's guilt that the only explanation is the prosecutor's attempt to inject unfair prejudice into the minds of the jurors-taxpayers who were asked to determine whether Pierce was guilty of the criminal charge. Consequently, we find that the prosecutor's remark about payment of taxes in reference to court-appointed counsel for Pierce was improper argument.

In Pierce's case, however, the court admonished the jury to "completely disregard the comment" concerning Pierce's court-appointed attorney. Thus, although we do not condone the prosecutor's improper appeal to the jury's self-interest as taxpayers, we are unable to conclude that the prosecutor's remark in final argument, in the light of the precautionary instruction given, resulted in sufficient prejudice to require a mistrial. See *State v. Ross, supra.*

While some may consider prosecutory misconduct only as a violation of procedural precepts pertaining to a fair trial, we again call attention of prosecutors to our recent reminder in *State v. Olsan, ante* p. 214, 436 N.W.2d 128 (1989), and our earlier reminder in *State v. Borchardt, supra* at 57, 395 N.W.2d at 558: " 'In appearing in his professional capacity before a tribunal, a lawyer shall not: (1) State or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.' " (Quoting from Canon 7, DR 7-106(C)(1) of the Code of Professional Responsibility.)

CONCLUSION

Evidence is sufficient to sustain Pierce's conviction for criminal mischief in violation of § 28-519(1)(a) and also to sustain the finding of fact necessary for imposition of the felony punishment prescribed by § 28-519(2). However, the prosecutor's comment during the opening address to the jury was prejudicial and prevented a fair trial of Pierce—prejudicial error which necessitates reversal of Pierce's conviction for criminal mischief. Further, the erroneous instruction on pecuniary loss necessitates our setting aside the jury's finding concerning the extent of pecuniary loss from Pierce's alleged

criminal mischief. The error in Pierce's case is a "trial error" which does not bar Pierce's retrial after reversal of his conviction. See *Burks v. United States*, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978). See, also, *Lockhart v. Nelson*, ____ U.S. ____, 109 S. Ct. 285, 102 L. Ed. 2d 265 (1988). Hence, we set aside Pierce's conviction for criminal mischief and remand this matter to the district court for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

HASTINGS, C.J., and BOSLAUGH, J., concur.

STATE OF NEBRASKA, APPELLEE, V. ROBERT T. BROCKMAN, APPELLANT.

439 N.W.2d 84

Filed April 27, 1989. No. 88-664.

1. **Criminal Law: Pretrial Procedure: Motions to Suppress: Appeal and Error.** In a criminal trial, after a pretrial hearing and order overruling a defendant's motion to suppress evidence, the defendant must object at trial to admission of the evidence which was the subject of the motion to suppress in order to preserve a question concerning admissibility of that evidence for review on appeal.
2. **Appeal and Error.** An issue not presented to or passed upon by the trial court is ordinarily not appropriate for consideration on appeal.
3. **Police Officers and Sheriffs: Prisoners: Medical Assistance.** Police officers have a duty to seek medical care for persons who are in need of such care while in their custody.
4. **Constitutional Law: Police Officers and Sheriffs: Search and Seizure.** The plain view doctrine permits an officer to immediately seize, without a warrant, contraband inadvertently coming into the officer's view if the officer has a right to be where he can see the contraband.
5. **Effectiveness of Counsel: Proof.** To sustain a claim of ineffective assistance of counsel, the defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense.
6. **Constitutional Law: Juries: Discrimination: Prosecuting Attorneys.** Although a criminal defendant has no right to a petit jury composed in whole or in part of persons of her or his own race, the equal protection clause of U.S. Const. amend. XIV bars a prosecutor from challenging potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant.

7. **Juries: Discrimination: Prosecuting Attorneys: Proof.** In order to make a prima facie case of discrimination in the selection of a jury, a criminal defendant must show that (1) she or he is a member of a cognizable racial group, (2) the prosecutor used peremptory challenges to remove members of the defendant's race from the venire, and (3) the facts and other relevant circumstances give rise to an inference that the prosecutor used those challenges to exclude potential jurors because of their race.
8. _____: _____: _____: _____. Once the defendant has made a prima facie case of discrimination in the selection of a jury, the burden shifts to the State to provide a neutral explanation for the peremptory challenges related to the particular case to be tried.
9. **Trial: Juries: Discrimination: Appeal and Error.** The trial court's findings that there was no discrimination in the selection of a jury are not to be reversed on appeal unless clearly erroneous.

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 T. Brockman, pro se.

Robert M. Spire, Attorney General, and Kenneth W. Payne for appellee.

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

FAHRNBRUCH, J.

Robert T. Brockman appeals his jury conviction and resulting sentence for possession of cocaine with intent to deliver. We affirm Brockman's conviction and sentence.

On appeal, Brockman argues that evidence was seized from his person pursuant to an invalidly executed search warrant. Before trial, Brockman moved to suppress the evidence found on his person. After an evidentiary hearing, the motion to suppress was overruled.

A jury found Brockman guilty of possession of cocaine with intent to deliver, in violation of Neb. Rev. Stat. § 28-416(1)(a) (Cum. Supp. 1988), a Class II felony. A Class II felony carries a penalty of 1 to 50 years' imprisonment. Neb. Rev. Stat. § 28-105 (Reissue 1985). Brockman was sentenced to an indeterminate term of 3 to 5 years' imprisonment.

On February 12, 1988, Omaha police officers executed a daytime search warrant at an Omaha, Nebraska, residence. At the residence, the defendant, who was described in the warrant, was arrested, handcuffed, and subjected to a pat-down search. In Brockman's right pants pocket, a police officer found a substantial sum of money.

After being searched, Brockman collapsed from what was later discovered to be a drug overdose. While waiting for a rescue squad, officers searched Brockman more thoroughly and discovered another substantial sum of money in his socks. Officers also learned the defendant's full name and that a misdemeanor warrant for his arrest was outstanding. When the rescue squad arrived, Brockman was transported to Saint Joseph Hospital. Omaha police officers accompanied him in the ambulance.

At the hospital, Brockman was examined in the emergency room by a physician, Dr. Grace Auten. In the course of the examination, Dr. Auten discovered a clear bag containing a white substance between Brockman's buttocks. A police officer who was present during the examination removed the bag for content analysis. A police hold was placed upon the defendant at the hospital. Later, a chemist analyzed the bag's contents and determined it to be "crack" cocaine.

Immediately before trial, the defendant moved to suppress evidence seized as a result of the execution of the search warrant. In his oral motion, Brockman claimed that the search was not pursuant to a valid warrant, that the search exceeded the authority of the warrant, and that there was no probable cause for the search.

The trial court found that the police officers had sufficient probable cause to search the defendant at the hospital and that there was no necessity for a search warrant at that time. The motion to suppress was denied.

In his appeal, Brockman assigns one error: that the trial court erred in not sustaining his motion to suppress the evidence obtained as a result of the search warrant. His argument is based upon this court's holding in *State v. Holman*, 229 Neb. 57, 424 N.W.2d 627 (1988). In *Holman*, we held that "for the purposes of determining whether a search complied with the

terms of a daytime search warrant, 'daytime' extends from dawn to darkness." *Id.* at 59, 424 N.W.2d at 628.

Brockman did not raise this argument at his trial court suppression hearing. Accordingly, the district court had no opportunity to rule on the issue. An issue not presented to or passed upon by the trial court is ordinarily not appropriate for consideration on appeal. See, *State v. Blair*, 230 Neb. 775, 433 N.W.2d 518 (1988); *State v. Narcisse, ante* p. 805, 438 N.W.2d 743 (1989). However, because other issues must be discussed, we will assume, without deciding, that the daytime warrant was illegally executed after dark.

Three separate items were seized from Brockman and entered into evidence at trial: (1) the money found in Brockman's right pants pocket, (2) the money found in Brockman's socks, and (3) the cocaine found by the doctor at the hospital. No objection was made to introduction at trial of the cocaine or of the money found in Brockman's right pants pocket. The money found in Brockman's socks was objected to; however, we find that any error in its admission was harmless. A large sum of money found on Brockman's person was admitted without objection. The admission of the money from Brockman's socks was, at most, cumulative. See *State v. Thompson, ante* p. 771, 438 N.W.2d 131 (1989).

In a criminal trial, after a pretrial hearing and order overruling a defendant's motion to suppress evidence, the defendant must object at trial to admission of the evidence which was the subject of the motion to suppress in order to preserve a question concerning admissibility of that evidence for review on appeal. *State v. Sock*, 227 Neb. 646, 419 N.W.2d 525 (1988); *State v. Roggenkamp*, 224 Neb. 914, 402 N.W.2d 682 (1987). By not objecting at trial, Brockman failed to preserve for appeal the issue of the admissibility of the money found in his pants pocket and the cocaine. Brockman requests that we consider the introduction of the cocaine as plain error on the record as the fruit of an illegal search. Even if we assume that the search pursuant to the warrant was illegal, there is no basis upon which to reverse Brockman's conviction.

Brockman's collapse due to a drug overdose created an emergency situation requiring medical attention. At that time,

Brockman was in police custody. Police officers have a duty to seek medical care for persons who are in need of such care while in their custody. See *Lutheran Medical Center v. City of Omaha*, 229 Neb. 802, 429 N.W.2d 347 (1988). Therefore, the officers would have been derelict in their duty had they not called the rescue squad and continued to ensure that Brockman received medical treatment.

By the time Brockman reached the hospital, police officers had run a records check on Brockman and determined that an outstanding warrant existed for his arrest. Hospital personnel were advised of the warrant, and a police hold was placed on Brockman so that he could not leave the hospital. Pursuant to this warrant, officers were properly maintaining custody of the defendant, regardless of the validity of the original search. Further, Brockman's need for emergency medical care is an intervening circumstance sufficient to attenuate the connection between the original execution of the search warrant and the seizure of the cocaine. See *State v. Thompson, supra.*

In *Thompson*, we held that a police officer's recognition of the defendant as a robbery suspect operated as an intervening circumstance to attenuate the earlier illegal stop of the vehicle in which Thompson was a passenger. Because the officer's actions after recognizing the defendant were based on a source completely independent of and unrelated to the illegal stop, the connection between the stop and the defendant's arrest was so attenuated as to dissipate the taint of the illegal stop.

Here, when the cocaine was found, Brockman was being examined by a physician after his collapse from a drug overdose. The police officer's presence at that time was mandated by his duty to provide medical care to a person in his custody. The police officer had a right to be where he was when the doctor found the cocaine. Finding of this contraband upon Brockman's person was inadvertent and completely independent of and unrelated to the possibly illegal execution of a search warrant. Any taint of a possibly illegally executed search pursuant to a warrant was attenuated by the intervening circumstance of Brockman's collapse and need for medical attention.

At the time the doctor found the cocaine upon Brockman's

person, the defendant was committing one of two crimes in the police officer's presence: (1) possession of cocaine, or (2) possession of a controlled substance with intent to deliver. Both of those crimes are felonies. § 28-416. The officer had probable cause to believe that at least one of those crimes was being committed and had probable cause to arrest Brockman. People do not normally carry a bag of white powder concealed between their buttocks unless it is contraband. The U.S. Constitution does not require that a policeman simply shrug his shoulders and allow a crime to occur or to continue. See *State v. Micek*, 193 Neb. 379, 227 N.W.2d 409 (1975).

At the suppression hearing, the trial court found that a search warrant was unnecessary at the time the cocaine was found. The court stated: "The officer observed the suspected contraband at a time when he was at a place where he was supposed to be, and there was probable cause to search the defendant at that point." This ruling by the trial court was correct. The cocaine seizure falls within the "plain view doctrine." Summarized, the plain view doctrine permits an officer to immediately seize, without a warrant, contraband inadvertently coming into the officer's view if the officer has a right to be where he can see the contraband. See, *State v. Trahan*, 229 Neb. 683, 428 N.W.2d 619 (1988); *State v. West*, 223 Neb. 241, 388 N.W.2d 823 (1986). There is no plain error on the record.

In a pro se supplemental brief, the defendant complains about his initial arrest, detention, resultant searches, and the trial court's refusal to suppress them. We interpret these complaints as assignments of error that the trial court failed to suppress the evidence seized in the search.

Defendant's combined complaints in his pro se supplemental brief concerning the admissibility of evidence obtained as a result of searches upon him have been considered elsewhere in this opinion and merit no further consideration. Brockman's pro se complaint that his lawyer was ineffective because he filed an oral rather than a written motion to suppress evidence is likewise meritless. The trial court denied the suppression motion after an evidentiary hearing in which the validity of the search warrant heretofore referred to was challenged. To

sustain a claim of ineffective assistance of counsel, the defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense. *State v. Ellefson, ante* p. 120, 435 N.W.2d 653 (1989); *State v. Kitt, ante* p. 52, 434 N.W.2d 543 (1989). Brockman has not met either of these requirements.

Lastly, in his pro se brief, Brockman assigns as error that he is black and was illegally tried before an all-white jury. In addressing this complaint, we are bound by the following rules:

> Although a criminal defendant has no right to a petit jury composed in whole or in part of persons of her or his own race . . . the equal protection clause of U.S. Const. amend. XIV bars a prosecutor from challenging potential jurors "solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." . . . In order to make a prima facie case of discrimination in the selection of a jury, a criminal defendant must show that (1) she or he is a member of a cognizable racial group, (2) the prosecutor used peremptory challenges to remove members of the defendant's race from the venire, and (3) the facts and other relevant circumstances give rise to an inference that the prosecutor used those challenges to exclude potential jurors because of their race. Once the defendant has made a prima facie case, the burden shifts to the State to provide a neutral explanation for the challenges related to the particular case to be tried. The explanation need not rise to the level of a challenge for cause, but neither may the prosecutor rebut defendant's prima facie case by stating that potential jurors were struck based on the intuitive judgment that they would be partial to defendant because of their shared race.

(Citations omitted.) *State v. Rowe*, 228 Neb. 663, 667-68, 423 N.W.2d 782, 786 (1988).

> By asking the State to articulate its reason for questioned strikes, a trial court implicitly finds a criminal defendant has met her or his burden of proving a prima facie case of discrimination in the selection of a jury. The trial court's

> findings that there was no discrimination in the selection of a jury are not to be reversed on appeal unless clearly erroneous.

(Syllabuses of the court.) *State v. Rowe, supra.*

In this case, Brockman, a black, under the rules enunciated, established a prima facie case of discrimination in the selection of the jury. The prosecutor peremptorily struck the only two black members from the panel of 24 jurors.

When called upon by the court to articulate his reasons for striking the two black jurors, the prosecutor stated that one of the black jurors lives close to where the defendant resided at the time he was booked. With respect to the second black juror, the prosecutor related:

> [W]hen he was called out of the panel and came up and gave his address and where he worked and so forth, I noticed that he had a rather obvious earring hanging out of his left ear. And if we were picking a jury in California, or whatever, that probably wouldn't make much of a difference. But here in Omaha, it at least in my way of thinking indicates that he is somewhat of a nonconformist or a free spirit. And I don't believe on a possession of narcotics case that I would want to have a juror that dresses in that fashion.

The prosecutor also pointed out that there was an alternate juror in the case, that each side had one strike, and that a black person served as an alternate juror. The trial court overruled defense counsel's motion for a mistrial which was based upon alleged discrimination in selection of the jury.

It is inherent in the trial court's order overruling Brockman's motion for a mistrial claiming discrimination in the selection of his jury that the trial court found the prosecutor did not strike the two black jurors because of their race, but rather on neutral grounds. We cannot say that the trial court's ruling was clearly erroneous. Brockman's assignment of error in regard to the selection of the jury that tried him is not supported by the record.

The judgment of the district court is correct. The defendant's conviction and sentence are affirmed.

AFFIRMED.

ANNETTE C. KING, APPELLANT, V. MARK H. KING, APPELLEE.

438 N.W.2d 796

Filed April 27, 1989. No. 88-771.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Affirmed.

Benjamin M. Belmont, of Lustgarten & Roberts, P.C., for appellant.

Robert F. Martin, P.C., for appellee.

HASTINGS, C.J., SHANAHAN, and FAHRNBRUCH, JJ., and NORTON, D.J., and RONIN, D.J., Retired.

PER CURIAM.

Petitioner, Annette C. King, has appealed from the judgment of the district court which ordered a dissolution of the marriage of the parties and awarded custody of their minor child to the respondent, Mark H. King. As the sole assignment of error, petitioner attacks the custody award.

Child custody determinations are matters initially entrusted to the sound discretion of the trial court, and, on appeal, that court's determination will be affirmed in the absence of an abuse of discretion. *Hibbard v. Hibbard*, 230 Neb. 364, 431 N.W.2d 637 (1988). Having reviewed the record de novo, which we are required to do, we find the action of the trial court in the awarding of custody was fair, reasonable, and in the best interests of the child, and was not the result of an abuse of discretion.

Accordingly, the judgment of the district court is affirmed.

AFFIRMED.

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