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JAMES M. OSBORNE AND KAREN M. OSBORNE, HUSBAND AND WIFE, APPELLANTS, V. MARIAN L. BRUNKEN, APPELLEE.

441 N.W.2d 182

Filed June 9, 1989. No. 87-873.

1. **Appeal and Error.** On appeal of a law action from the county court to the district court and thereafter to the Supreme Court, each review is for error appearing on the record made in the county court. In a law action, factual determinations made in the county court will not be set aside by the district court or Supreme Court unless the findings are clearly wrong. When it comes to conclusions of law, the reviewing courts have an obligation to reach an independent conclusion.
2. **Contracts: Property: Vendor and Vendee.** A contract to deliver the possession of a residence in which the air-conditioning system is to be in working condition requires the seller only to deliver possession with the system in the same operating condition existing at the time the agreement was signed.
3. **Breach of Contract: Property: Vendor and Vendee: Damages.** Where a seller breaches an agreement to maintain a mechanical system in working condition from time of sale to time of the buyer's possession, the buyer is entitled to recover the lesser of (1) the reasonable cost of placing the property in the condition it was in at time of sale or (2) the value the property would have had were it in the condition it was in at time of sale, minus its actual value, both measured as of time of possession.

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

Arthur R. Langevardt for appellants.

Michael E. Sullivan for appellee.

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

FAHRNBRUCH, J.

Appellants, James M. and Karen M. Osborne, filed this law action in the Adams County Court to collect damages for an allegedly defective air-conditioning system in a residence they purchased under written contract from appellee, Marian L. Brunken, and Jacob B. Brunken.

The Osbornes were awarded an $856.55 judgment in the county court. Mrs. Brunken appealed the judgment to the Adams County District Court. Jacob Brunken, apparently her ex-husband, did not appeal, and the county court judgment

against him has become final.

The district court, acting in its appellate capacity, reversed the judgment and dismissed appellants' petition as against Marian Brunken. We affirm the rulings of the Adams County District Court.

On appeal of a law action from the county court to the district court and thereafter to the Supreme Court, each review is for error appearing on the record made in the county court. In a law action, factual determinations made in the county court will not be set aside by the district court or Supreme Court unless the findings are clearly wrong. When it comes to conclusions of law, the reviewing courts have an obligation to reach an independent conclusion. *Communications Workers of America v. Abrahamson*, 228 Neb. 335, 422 N.W.2d 547 (1988). See, also, Neb. Rev. Stat. §§ 24-541.06(1) (Cum. Supp. 1988) and 25-1911 (Reissue 1985).

On April 30, 1984, the Osbornes entered into a purchase agreement with Jacob and Marian Brunken to buy the Brunken home in Hastings, Nebraska. The purchase agreement recited in part:

> This offer is based upon my personal inspection or investigation of the premises and not upon any representation or warranties of condition by the Seller or his agent. Seller agrees to maintain, until delivery at closing, the heating, air conditioning, water heater, sewer, plumbing, electrical systems, and any built-in appliances in working condition.

The Osbornes were to close the sale and take possession of the property on or before July 31, 1984. The sale was closed and they took possession on July 7, 1984. The Osbornes did not move into the house until the first of August, since they were extensively remodeling the house in the interim. In mid-August, Mrs. Osborne turned on the air-conditioner. She testified that it ran, but did not cool the residence. She called Hastings Plumbing and Heating to add Freon to the unit.

After the Freon was added, Mrs. Osborne again turned on the air-conditioner. After running about 20 to 30 minutes, the air-conditioner "froze up" and discontinued running as "it kicked the breakers," according to Mrs. Osborne. She called

Hastings Plumbing again, and the employee who had put Freon into the unit returned, but could not get the unit working. Mrs. Osborne testified no cold air came into the house.

After four companies looked at the unit, the Osbornes obtained no firm bid for repairs of the system. They elected to install a new, larger air-conditioning unit, change the duct work, and install a dry well or floor drain. The Osbornes expended $3,151.91 for the new unit, the duct work, and labor. They then filed this action to recover that amount. The county court awarded the Osbornes the cost of the new ducts and their installation. It allowed nothing toward the purchase of a new air-conditioner, its installation, or the dry well installed to collect condensation from the air-conditioner.

Before signing the purchase agreement, the Osbornes inspected the home on two occasions. Mr. Osborne looked at the air-conditioning unit and saw that it was in place. He turned the switch and the blower worked. He testified that he asked Mrs. Brunken if the air-conditioner worked and "[s]he assured it cooled quite adequately." The Osbornes then entered into the purchase agreement with the Brunkens.

Mrs. Brunken testified that on July 6, 1984, when her dishwasher was being repaired, she checked all the appliances in the house, including the air-conditioner. She said she turned on the air-conditioning for about 20 to 30 minutes, and it ran and cooled. She further testified that the air-conditioning system was working on April 30, 1984, when she signed the purchase agreement and that it was in working condition and cooled the house while she lived there in June 1984. Mrs. Brunken said the air-conditioner ran no differently on July 7, 1984, than it had earlier in the summer or as it had always run since it was installed when the house was built some 19 years previously. Throughout those 19 years, the air-conditioner maintained the same ability to cool, according to Mrs. Brunken.

The issue is whether Brunken breached the condition of the purchase agreement requiring the air-conditioning system to be maintained in a working condition until the Osbornes took possession of the house. The Osbornes' petition alleged no fraud.

In *Rosenberry v. Beck*, 205 Neb. 664, 289 N.W.2d 523

(1980), and *Gunset v. Mossman*, 196 Neb. 529, 243 N.W.2d 783 (1976), this court considered language in purchase agreements almost identical to that in the agreement in the case before us. In *Rosenberry*, this court quoted from *Gunset* the following language defining "working condition":

> "The only reasonable interpretation of the words 'working condition' under the facts of this case is that the defendant agreed to deliver possession of the furnace in the same operating condition existing at the time the agreement was signed. The clause in dispute was not a warranty. Since no allegation is made that the boiler's condition worsened from the date the agreement was signed to the date the plaintiffs obtained possession, the plaintiffs received all they bargained for."

Rosenberry, supra at 666, 289 N.W.2d at 525.

When the Adams County District Court on appeal held in favor of Mrs. Brunken, it in effect determined that the trial court's judgment favoring the Osbornes was clearly wrong because the evidence was insufficient as a matter of law to support it. We agree with the district court for two reasons, either of which is sufficient to deny judgment in favor of the Osbornes. First, there was no allegation and no proof that the air-conditioning system worsened from the date the agreement was signed to the date the Osbornes took possession of the property. Mr. Osborne testified that prior to signing the purchase contract, he turned on the switch and the blower worked. Mrs. Brunken testified that on April 30, during June, and on July 6, 1984, the air-conditioner worked and that it worked no differently on July 7, 1984, when possession was given the Osbornes, than it had for the previous 19 years. After receiving possession of the property, the Osbornes did not turn on the air-conditioner for some 5 weeks. The evidence, as a matter of law, is insufficient to show that the unit was not damaged between the date of possession and the 5 weeks thereafter.

The thrust of the expert testimony adduced by the appellants only claimed that the air-conditioning system was improperly designed and installed and was inadequate to cool the house. When the expert first looked at the air-conditioning condensing

unit, it had been partially disassembled. The evidence reflects that another repairman hired by the Osbornes had partially dismantled the condensing unit. The expert testified: "And to even operate it, you would of had to spend at least two to three hours working on it to get it where it would operate again." He did not testify, as required in *Rosenberry*, that the working condition of the air-conditioning system worsened from the date the agreement was signed to the date the Osbornes took possession of the property. As a matter of law, the evidence was insufficient to show that the Osbornes did not receive that for which they bargained. As a matter of law, the evidence was insufficient to prove that the sellers breached their duty under the written contract to maintain the air-conditioner in working condition.

The second reason for setting aside the trial court's judgment favoring the Osbornes is that even if appellants had proved liability on the part of the sellers, as a matter of law, the evidence was insufficient to prove proper damages.

Where a seller breaches an agreement to maintain a mechanical system in working condition from time of sale to time of the buyer's possession, the buyer is entitled to recover the lesser of (1) the reasonable cost of placing the property in the condition it was in at time of sale or (2) the value the property would have had were it in the condition it was in at time of sale, minus its actual value, both measured as of time of possession. *Fink v. Denbeck*, 206 Neb. 462, 293 N.W.2d 398 (1980). See, also, NJI2d 4.49.

The trial judge was clearly wrong in awarding appellants the cost of installing new and larger duct work. There was no evidence that the duct work had worsened between the time of the purchase agreement and possession of the property by the Osbornes. The evidence was insufficient as a matter of law to prove the cost of repairing the old unit had it been proved to have not been in working condition at the time appellants were given possession of the property. Moreover, the Osbornes were not entitled to a new, larger, more efficient air-conditioning unit and new duct work. Even had the breach of contract been proven, there was no evidence of the diminution in value of the property between the date of sale and the date the Osbornes

took possession of the property.

The trial judge was clearly wrong in awarding the appellants a judgment. The Adams County District Court was correct in reversing the trial court's judgment as to Mrs. Brunken and in dismissing the lawsuit as to her.

None of the appellants' assignments of error have merit. The judgment of the Adams County District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ANTHONY SORBELLO, APPELLANT.

440 N.W.2d 696

Filed June 9, 1989. No. 88-007.

1. **Sentences: Appeal and Error.** A sentence within the limits prescribed by statute will not be set aside as excessive, absent an abuse of discretion on the part of the sentencing judge.
2. _____: _____. This court will not disturb on appeal a direction that multiple conviction sentences be served consecutively unless the record reveals an abuse of discretion.
3. **Sentences.** The law is well established in this state that in considering a proper sentence, the trial court is not limited in its discretion by a mathematically applied set of factors. It is necessarily a subjective judgment and includes the observations of the sentencing judge as to the demeanor, attitude, and all facts and circumstances surrounding the life of the defendant. The sentencing judge has broad discretion as to the source and types of evidence or information that may be used as assistance in determining the kind and extent of punishment to be imposed, and the judge may consider probation officer reports, police reports, affidavits, and other information, including his own observations.
4. **Pretrial Procedure: Records: Appeal and Error.** This court cannot review on appeal the appropriateness of the district court's denying a motion in limine if the defendant has not established a record to show an assignment of error.

5. **Convictions: Appeal and Error.** In determining the sufficiency of 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.
6. **Sentences.** Before the court may determine an appropriate sentence, it must examine the background of the defendant and the character of the crime committed.

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

J. Joseph McQuillan and Mark A. Weber, of Walentine, O'Toole, McQuillan & Gordon, for appellant.

Robert M. Spire, Attorney General, and Douglas J. Peterson for appellee.

HASTINGS, C.J., WHITE, and FAHRNBRUCH, JJ., and FUHRMAN and WHITEHEAD, D. JJ.

WHITEHEAD, D.J.

Following a jury trial in the district court for Douglas County, Nebraska, the defendant, Anthony Sorbello, was found guilty of two counts of theft by unlawful taking. The defendant was the manager of the South Omaha branch of the Douglas County Treasurer's Office. On February 23, 1987, Frank Tomasek paid $698 in sales tax on a new vehicle. At trial, Tomasek stated he could not identify the person to whom he paid the sales tax, but subsequent testimony provided by James Heafey, an office employee of the county treasurer at the South Omaha branch, revealed the defendant received the sales tax money from Tomasek. Heafey also testified that he observed the defendant process the transaction with Tomasek, and he noted that the defendant did not validate the sales tax, which was standard procedure in the county treasurer's office. Testimony also revealed that on February 24, 1987, George Jonaitis was at the county treasurer's office to register a newly purchased vehicle. Jonaitis testified that he paid $715 in sales tax to the Douglas County treasurer and identified the defendant as the individual who received his sales tax money. The sales tax money was never recorded in the treasurer's

office, and testimony revealed that on February 23 and 24, 1987, the defendant was the only individual who received sales tax moneys on a validating machine designated as "Machine E." Further testimony revealed that the transactions of Jonaitis and Tomasek had transpired on Machine E.

The court, after reviewing the presentence investigation, sentenced the defendant to imprisonment in the Nebraska Penal and Correctional Complex for a term of 2 years on each count, the sentences to run consecutively. The defendant appealed. We affirm.

The defendant's first assignment of error is that the sentences imposed by the district court were excessive.

Theft by unlawful taking is a Class IV felony, which carries a maximum prison term of 5 years, a fine of up to $10,000, or both. Neb. Rev. Stat. §§ 28-511 and 28-518 (Reissue 1985). Clearly, the sentences are within the limits of the statute. Rules firmly establish in this jurisdiction that a sentence imposed within limits prescribed by statute shall not be disturbed on appeal, absent an abuse of discretion on the part of the sentencing judge. *State v. Henn*, 223 Neb. 280, 388 N.W.2d 846 (1986); *State v. Dillon*, 222 Neb. 131, 382 N.W.2d 353 (1986).

Also, this court will not disturb on appeal a direction that multiple conviction sentences be served consecutively unless the record reveals an abuse of discretion. *State v. Benzel*, 220 Neb. 466, 370 N.W.2d 501 (1985); *State v. Chapple*, 197 Neb. 4, 246 N.W.2d 714 (1976). Before the court may determine an appropriate sentence, it must examine the background of the defendant and the character of the crime committed.

In Neb. Rev. Stat. § 29-2260 (Cum. Supp. 1986), the Legislature charged the courts of Nebraska with the responsibility of imprisoning an offender for the protection of the public welfare when "[a] lesser sentence will depreciate the seriousness of the offender's crime or promote disrespect for the law." In a review of the presentence investigation, the district court in this case could have reasonably been convinced that the sentences imposed were necessary to protect societal interests and to make sure the seriousness of the crimes committed by the offender was not depreciated. The defendant held a position of high public trust. As the manager of the

South Omaha Douglas County Treasurer's Office, he was given responsibility to collect and protect public funds. This trust was seriously violated. In spite of the evidence against the defendant, he continually denies that he did anything wrong. We find that the defendant's sentences were a proper exercise of the district court's discretion.

The defendant's second assignment of error is that the district court should have granted the defendant's motion in limine in regard to prior bad acts and that it was error to permit the prosecution to mention them in his opening statement. In the matter at hand, there is nothing before the court to make such a determination. This court cannot review on appeal the appropriateness of the district court's denying a motion in limine if the defendant has not established a record to show an assignment of error. *State v. Harris*, 205 Neb. 844, 290 N.W.2d 645 (1980). In ruling against the defendant in the *Harris* case, the court stated:

> The fact of the matter is that we do not have a record before us which would in any way indicate to us what it was that Harris' counsel said or what the prosecution said in closing. Where it is claimed that an attorney is guilty of misconduct in arguing a case to a jury and it is desired to raise a question on that point for a decision of the Supreme Court, it is necessary that objection be made to the trial court at the time and an adverse ruling had thereon and that the same be made a part of the record by a proper bill of exceptions. Johnson v. Nebraska Public Power Dist., 187 Neb. 421, 191 N.W.2d 594 (1971); Pieper v. City of Scottsbluff, 176 Neb. 561, 126 N.W.2d 865 (1964); Sandomierski v. Fixemer, 163 Neb. 716, 81 N.W.2d 142 (1957).

205 Neb. at 850-51, 290 N.W.2d at 650.

In the case at hand, the bill of exceptions contains no information that the defendant objected during the time of trial to any statement of prior bad acts made by the prosecutor. The record also fails to reveal any statements made by the prosecutor in opening or during closing. Therefore, the record does not permit the court to consider this assignment of error.

The defendant's third assignment of error is that the district

court failed to direct verdicts in favor of the defendant at the end of the plaintiff's case.

In determining the sufficiency of 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. *State v. Masur*, 230 Neb. 620, 432 N.W.2d 815 (1988); *State v. Anderson*, 229 Neb. 427, 427 N.W.2d 764 (1988). We conclude that the jury could find the defendant guilty beyond a reasonable doubt based upon the evidence previously recited.

We have carefully examined all the defendant's assignments of error set forth in his brief and find they have no merit. The defendant's convictions and sentences are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ERNEST E. THOMAS, APPELLANT.

441 N.W.2d 186

Filed June 9, 1989. No. 88-215.

1. **Motions to Suppress: Proof: Appeal and Error.** The State bears the burden in a suppression hearing to show by a preponderance of the evidence that the defendant's statements were voluntary and, therefore, admissible. To be admissible, the statements must have been given freely, voluntarily, and without promises or inducements on the part of the State. Voluntariness will be tested by the totality of the circumstances, and the finding of the trial court will not be set aside unless clearly wrong.
2. **Criminal Law: Police Officers and Sheriffs.** A police officer's stating that the defendant faced a possibility of jail time if convicted is no threat, but simply a statement of the law.
3. **Confessions: Evidence.** To be admissible in evidence, a confession must be free and voluntary and must not be extracted by any force, threat, or violence, nor may it have been obtained by any direct or implied promise, however slight, nor by the exertion of improper influence.

4. **Trial: Evidence: Appeal and Error.** The admission or exclusion of evidence is a matter left largely to the discretion of the trial court, and its ruling will be upheld absent an abuse of discretion.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Affirmed.

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

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

HASTINGS, C.J., WHITE, and FAHRNBRUCH, JJ., and FUHRMAN and WHITEHEAD, D. JJ.

FUHRMAN, D.J.

Ernest E. Thomas, convicted by a jury of unlawful possession with intent to deliver a controlled substance, was sentenced to serve a term of 16 months to 3 years. Thomas appeals, claiming that the trial court erred in overruling his motion to suppress statements made by the defendant to police officers. We affirm.

On September 29, 1987, Omaha police officers served a search warrant at defendant's residence at 3721 Ohio Street in Omaha, Nebraska, and conducted a search. At the residence, the officer in charge asked defendant if he was selling marijuana, and defendant stated he was not. When the search uncovered marijuana in the house, the officer told the defendant he was lying, and the defendant admitted he was lying.

Thomas was arrested and taken to the police station, where, after informing defendant of his *Miranda* rights, the interrogating officer stated that the police were interested in knowing who defendant's supplier was. The officer also stated the defendant was facing a possible jail sentence and that if he would reveal the source of the marijuana there might be a possibility that it could help him when he appeared in court. Thomas did not give the police the name of the supplier.

The defendant claims the statements made by the defendant to police officers should have been suppressed on the basis that they were elicited by improper inducements.

The State bears the burden in a suppression hearing to show by a preponderance of the evidence that the defendant's statements were voluntary and, therefore, admissible. To be admissible, the statements must have been given freely, voluntarily, and without promises or inducements on the part of the State. Voluntariness will be tested by the totality of the circumstances, and the finding of the trial court will not be set aside unless clearly wrong. *State v. Norfolk*, 221 Neb. 810, 381 N.W.2d 120 (1986); *State v. Irwin*, 191 Neb. 169, 214 N.W.2d 595 (1974). See, also, *State v. Sutton*, 231 Neb. 30, 434 N.W.2d 689 (1989).

Nothing contained in the police officers' statements, especially when considered that they were separated in time and physical location, amounts to a threat. A police officer's stating that the defendant faced a possibility of jail time if convicted is no threat, but simply a statement of the law.

Thomas further contends that the police officer made an improper promise to him when he suggested that if the defendant revealed the source, there might be a possibility that it could help him when he appeared in court.

To be admissible in evidence, a confession must be free and voluntary and must not be extracted by any force, threat, or violence, nor may it have been obtained by any direct or implied promise, however slight, nor by the exertion of improper influence. *State v. Jones*, 208 Neb. 641, 305 N.W.2d 355 (1981). The admission or exclusion of evidence is a matter left largely to the discretion of the trial court, and its ruling will be upheld absent an abuse of discretion. *State v. Norfolk, supra.*

The officer's comment that the revealing of the defendant's source might possibly help him when he appeared in court does not warrant overturning the district court's finding and determination that Thomas' statement was voluntarily made. The district court's refusal to suppress Thomas' statement was not clearly erroneous. The judgment is, therefore, affirmed.

AFFIRMED.

FIRST SECURITY BANK & TRUST, APPELLANT, V. NEW HAMPSHIRE INSURANCE COMPANY, APPELLEE.

441 N.W.2d 188

Filed June 9, 1989. No. 89-176.

1. **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.
2. **Insurance: Bonds: Fraud.** Discovery of a loss under a fidelity bond occurs when the insured learns facts or obtains knowledge which would justify a careful and prudent person in charging another with dishonesty or fraud.
3. **Insurance: Fraud.** A loss is discovered once an insured has obtained facts that would cause a reasonable person to recognize that there had been dishonesty or fraud resulting in loss.
4. **Insurance: Fraud: Words and Phrases.** Discovery of a loss requires discovery of both the loss and the dishonesty.
5. **Insurance.** To constitute discovery of the loss, the insured must have more than a mere suspicion that a covered loss has occurred.
6. **Insurance: Contracts: Fraud: Liability: Time.** Where the liability of the insurer is expressly limited in an indemnity or fidelity contract to losses discovered within a specified time, there is no liability unless the fraud, dishonesty, or negligence causing the loss not only occurs but is discovered within the time limit, and the mere fact that the discovery of a fraud during that period is prevented by the concealment thereof will not extend the period of indemnity.
7. **Insurance: Notice.** The provisions of Neb. Rev. Stat. § 44-358 (Reissue 1988) have no application to insurance policy provisions requiring the giving of notice of loss.

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

James B. Cavanagh, of Erickson & Sederstrom, P.C., for appellant.

John R. Baylor, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellee.

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

BOSLAUGH, J.

The plaintiff, First Security Bank & Trust, commenced this action to recover losses it alleged it sustained as the result of

dishonest and fraudulent acts of James Gillette, an employee and officer of the bank at the time the acts took place. The plaintiff's second amended petition alleged that the losses were covered under the terms of a bankers blanket bond and an excess bank employee dishonesty blanket bond issued to the plaintiff by the defendant, New Hampshire Insurance Company.

The defendant filed a motion to make the second amended petition more definite and certain and to strike redundant or irrelevant matter from the petition. The motion also contained language that, "in the alternative," the defendant demurred to paragraph 10 of the petition, all of the allegations in respect to the excess bank employee dishonesty blanket bond, and all "conclusionary statements" in regard to a cause of action for violation of lending limits contained in the petition.

The plaintiff failed to attach copies of the bonds involved to the petition, but sufficient language of the bonds is alleged in the petition and a subsequent stipulation between the parties so that the issues raised by the demurrer can be determined.

Each bond contained a provision that the bond insured against "loss sustained by the Insured at any time *but discovered during the Bond Period*." (Emphasis supplied.) Each bond also contained a provision that "[a]t the earliest practicable moment *after discovery of any loss* hereunder the Insured shall give the Underwriter written notice thereof and shall also *within six months after such discovery* furnish to the Underwriter affirmative proof of loss with full particulars." (Emphasis supplied.)

The stipulation alleged that each bond was canceled and terminated at noon on April 20, 1983.

The petition did not allege a specific date on which the plaintiff *discovered* the alleged losses, but did allege the following:

> 8. In January and February, 1983 the plaintiff was first advised by state and federal regulators and law enforcement agencies that James Gillette may have been involved in activities which were apparent violations of the federal statutes although the factual basis for the claimed violations was not revealed. On February 1, 1983 the

plaintiff gave notice to the defendant of the advisement from the regulators, and gave further notice on April 13, 1983.

9. Plaintiff submitted a formal proof of loss to the defendant on March 29, 1984 which was the soonest that the plaintiff had sufficient factual information which it could submit with regard to the defalcations of James Gillette. Prior to that time, the plaintiff did not have sufficient factual information for the following reasons:

a) The methods employed by Gillette to remove funds from the plaintiff or loan monies to Newt Copple were done in such a manner as to conceal the true nature of the transaction;

b) Documents were removed from the plaintiff's custody or destroyed by Gillette making it difficult, if not impossible, to reconstruct the transactions;

c) Much of the knowledge of the true nature of the transactions was known only to Gillette, Newt Copple, and federal and state regulators or law enforcement agencies, which were conducting criminal investigations and a Grand Jury investigation;

d) The confidentiality of criminal investigations and Grand Jury proceedings made it impossible for the plaintiff to obtain information as to the true nature of the activities of Gillette;

e) It was not until information regarding the criminal investigations became public that the plaintiff was able to formulate factual information as to Gillette's activities.

10. The delay, if any, of the plaintiff filing a proof of loss within any time constraints established by the Bonds is excused, waived and any purported time constraints are of no effect for the following reasons:

a) The plaintiff's inability, through no fault of its own, to file a formal proof of loss setting forth the particulars of any defalcation or fraud;

b) Much of the factual basis for the claims could not reasonably have been known by the plaintiff to file a proof of loss because of the secrecy and confidentiality of the criminal investigations;

c) Any time restriction within which to file a formal proof of loss with particulars is against public policy and contrary to Nebraska Statute, §44-357;

d) Any delay in filing a formal proof of loss has not in any manner prejudiced the rights of the defendant or its ability to investigate or defend;

e) The plaintiff has at all times acted in good faith;

f) The time period for filing a formal proof of loss should be tolled.

The trial court treated the defendant's motion as a general demurrer and found that coverage was limited to losses discovered within the bond period, that the provisions of the bonds regarding proof of loss were mandatory, that the plaintiff's allegations that it was excused from compliance with the provisions of the bonds were not effective, that Neb. Rev. Stat. §§ 44-357 and 44-358 (Reissue 1988) were not applicable, that the provisions of the bonds were not void as against public policy, and that the second amended petition failed to state a cause of action. The plaintiff elected to stand upon its petition, and the petition was dismissed. The plaintiff has appealed.

Since the appeal is from the orders of the trial court sustaining the defendant's demurrer and dismissing the petition, this court must accept 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.' " *Security Inv. Co. v. State*, 231 Neb. 536, 538, 437 N.W.2d 439, 442 (1989), citing *Weiner v. Hazer*, 230 Neb. 53, 430 N.W.2d 269 (1988). Additionally,

> "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."

Security Inv. Co. at 538, 437 N.W.2d at 442, citing *Schuyler State Bank v. Cech*, 228 Neb. 588, 423 N.W.2d 464 (1988).

In order to state a cause of action on the bonds, it was incumbent upon the plaintiff to allege facts showing that (1) the

losses had been *discovered* within the bond period; (2) written notice of the losses had been given to the underwriter at the earliest practicable moment after *discovery* of the losses; and (3) proof of loss with full particulars had been furnished to the underwriter within 6 months after *discovery* of the losses.

The term "discovery," as used in fidelity insurance policies and particularly in bankers blanket bonds, has been defined in a large number of cases.

In *Pacific-Southern Mortg. Trust Co. v. Ins. Co. of N.A.*, 166 Cal. App. 3d 703, 709-11, 212 Cal. Rptr. 754, 757-58 (1985), the court stated:

> When "discovery of the loss" occurs has been the subject of a great deal of litigation (see Woods, William H., "Conditions to Recovery: Notice, Proof of Loss and Timeliness of Filing Suit" in Bankers and Other Financial Institution Blanket Bonds (A.B.A. 1979) p. 395). "Discovery" has been variously defined as occurring when "facts giving rise to a later claim are discovered by the insured, when a claim is made against the insured that may result in a judgment, or when a claim or judgment is settled" (*USLIFE Savings & Loan Assn. v. National Surety Corp.*, 115 Cal.App.3d 336, 346, 171 Cal.Rptr. 393; *Continental Ins. Co. v. Morgan, Olmstead, Kennedy & Gardner, Inc.*, 83 Cal.App.3d 593, 607, 148 Cal.Rptr. 57), or as "knowledge which would justify a careful and prudent [person] in charging another with fraud or dishonesty" (*Hidden Splendor Mining Co. v. General Ins. Co. of America* (10th Cir. 1966) 370 F.2d 515, 517, and cases cited therein).
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> To constitute "discovery" of the loss, the insured must have more than a mere suspicion that a covered loss has occurred (*Pacific Coast A. Bureau v. Insurance Co.*, 115 Cal.App. 583, 586, 2 P.2d 218; *L.A. Athletic Club v. U.S. Fidelity etc. Co.*, 41 Cal.App. 439, 447, 183 P. 174). There must be discovery of both the loss and the dishonesty (*Fidelity S. & L. Ass'n v. Aetna Life & Cas. Co.* (9th Cir.1981) 647 F.2d 933, 938). However, "discovery" does not depend on the insured's knowledge or discovery of the full scope and exact details of the affair (*City Loan & Sav.*

> *Co. v. Employers Liability Assur. Corp. Ltd.* (N.D.Ohio 1964) 249 F.Supp. 633, 658, aff'd without opinion, 356 F.2d 941 (6th Cir.), and cases cited therein), nor encompass a later understanding of previously known facts or a later recognition of coverage within the terms of the fidelity bond (*USLIFE Savings & Loan Assn. v. National Surety Corp., supra*, 115 Cal.App.3d 336, 346, 171 Cal.Rptr. 393).
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> . . . .
>
> We think the term "discovery of the loss" is not ambiguous. By its plain meaning, it means that time when the insured discovers it has suffered a *loss*, not that time when it discovers it has a *potential loss*.

(Emphasis in original.)

In *Utica Mut. Ins. v. Fireman's Fund Ins. Companies*, 748 F.2d 118, 121-23 (2d Cir. 1984), the court stated:

> Compliance with the notice requirements set forth in an insurance contract is a condition precedent to recovery under New York law, and failure by the insured to comply with such requirements relieves the insurer of liability. *See Gardner-Denver Co. v. Dic-Underhill Constr. Co.*, 416 F.Supp. 934, 936 (S.D.N.Y.1976) (citing *Security Mut. Ins. Co. v. Acker-Fitzsimons Corp.*, 31 N.Y.2d 436, 440, 340 N.Y.S.2d 902, 905, 293 N.E.2d 76, 79 (1972)).
>
> An insurance company is entitled to require notice at the earliest time practicable after a loss has occurred. Prompt notice permits the insurer to investigate the facts on which the claim is predicated and to adjust its books in order to maintain a proper reserve fund in light of the insured's claim. New York law permits an insurance company to assert the defense of non-compliance without showing that the lack of timely notice prejudiced the insurer in any way. *Id.*
>
> The fidelity bond involved in this case required Utica to notify Fireman's Fund of any loss "as soon as practicable," which simply means that notice had to be given within a reasonable time of the discovery of loss. *See Mighty Midgets, Inc. v. Centennial Ins. Co.*, 47 N.Y.2d 12, 19, 416 N.Y.S.2d 559, 563, 389 N.E.2d 1080, 1084

(1979). Whether Utica complied with the notice provisions, therefore, depends on when Utica *discovered* that there had been misconduct resulting in a loss.

. . . .

Courts have consistently held that a loss is discovered once an insured has obtained facts that would cause a reasonable person to recognize that there had been dishonesty or fraud resulting in loss. *See, e.g., American Sur. Co. v. Pauly*, 170 U.S. 133, 147, 18 S.Ct. 552, 557, 42 L.Ed. 977 (1898); *Fidelity & Deposit Co. v. Hudson United Bank*, 653 F.2d 766, 774 (3d Cir. 1981); *Perkins v. Clinton State Bank*, 593 F.2d 327, 334-35 (8th Cir.1979); *Hidden Splendor Mining Co. v. General Ins. Co.*, 370 F.2d 515, 517 (10th Cir.1966). New York law, which governs in this case, also requires that the time of discovery be determined according to an objective test, based on the conclusions that a reasonable person would draw from the facts known to the insured. *See Security Mut. Ins.*, 31 N.Y.2d at 441-43, 340 N.Y.S.2d at 906-07, 293 N.E.2d at 78-90.

. . . .

Although Utica is correct that mere suspicions do not trigger the notice requirement, an insured cannot disregard the known facts. "[W]hen the insured learns the facts constituting the alleged dishonesty his prior suspicions, if any, are converted to knowledge which he cannot ignore and which constitutes 'discovery.' " *Perkins*, 593 F.2d at 335 (quoting *Alfalfa Elec. Coop. Inc. v. Travelers Indem. Co.*, 376 F.Supp. 901, 906 (W.D.Okla.1973)).

. . . .

Adopting Utica's arguments concerning when a loss is discovered would broaden the definition of discovery and would effectively eliminate the insured's duty to inquire into the facts. It would permit the insured to avoid making a reasonable assessment of the information presented, and would undermine the ability of the insurer to make a timely investigation and adjust its reserve funds.

(Emphasis in original.)

In *United States Fidelity & Guar. Co. v. Empire State Bank*, 448 F.2d 360, 364-66 (8th Cir. 1971), the court said:

> On the discovery issue, both parties cite Jefferson Bank & Trust Co. v. Central Surety & Insurance Corp., 408 S.W.2d 825 (Mo.1966), as enunciating the controlling principles of law. In *Jefferson*, the Missouri Supreme Court adopted the following language taken from Wachovia Bank & Trust Co. v. Manufacturers Casualty Insurance Co., 171 F.Supp. 369 (M.D.N.C.1959): " 'In order to constitute a "discovery" in accordance with the terms of the policy * * * there must be facts known, at the time it is asserted that the discovery was made, which would lead a reasonable person to an assumption that a shortage existed. The facts must be viewed as they would have been by a reasonable person at the time discovery is asserted, and not as they later appeared in the light of subsequently acquired knowledge. * * * [T]he mere discovery of certain facts which later lead to other facts which reveal the existence of a shortage does not necessarily constitute a discovery. *Knowledge available to the insured must rise above a mere suspicion of loss.* The fact that an investigation after the termination of the policy leads to the disclosure of an actual defalcation does not raise a previous suspicion to the leval [sic] of a discovery. Inefficient business procedures, or irregularities and discrepancies in accounts, if as consistent with the integrity of employees as [with] their dishonesty, does not constitute a discovery, even though dishonest acts may later be found to exist.' (emphasis and bracketed word added) [408 S.W.2d at 831, quoting 171 F. Supp. at 375-376]" Discovery thus imports an awareness of the *significance* of known facts. The Missouri Supreme Court particularly noted in *Jefferson* that "* * * not only must the facts be known, but they also must be recognized for what they are * * *." 408 S.W.2d at 831.
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> . . . .
>
> Suspicion alone does not satisfy the test of discovery. Jefferson Bank & Trust Co., *supra*.

In *Perkins v. Clinton State Bank*, 593 F.2d 327, 333-35 (8th

Cir. 1979), the court said:

> The meaning of "discovery" in timely notice provisions has been judicially construed in several cases dealing with losses due to dishonest employees. *See, e. g., American Surety Co. v. Pauly*, 170 U.S. 133, 144-47, 18 S.Ct. 552, 42 L.Ed. 977 (1898); *United States Fidelity & Guaranty Co. v. Empire State Bank*, 448 F.2d 360, 364-65 (8th Cir. 1971); *Federal Deposit Insurance Corp. v. Aetna Casualty & Surety Co.*, 426 F.2d 729, 738-39 (5th Cir. 1970); *Hidden Splendor Mining Co. v. General Insurance Co.*, 370 F.2d 515, 519 (10th Cir. 1966); *American Employers' Insurance Co. v. Cable*, 108 F.2d 225, 226-27 (5th Cir. 1939); *Midland Bank & Trust Co. v. Fidelity & Deposit Co.*, 442 F.Supp. 960, 971-73 (D.N.J. 1977); *Alfalfa Electric Cooperative, Inc. v. Travelers Indemnity Co.*, 376 F.Supp. 901, 906 (W.D.Okl.1973); *National Mutual Casualty Co. v. Cypret*, 207 Ark. 11, 179 S.W.2d 161, 164 (1944); *Fidelity & Deposit Co. v. Cunningham*, 181 Ark. 954, 28 S.W.2d 715, 719 (1930). Arkansas law accords with the generally accepted definition of discovery as construed in connection with blanket employee fidelity bonds, and has been stated by the Arkansas Supreme Court as follows: "Under the terms of a bond indemnifying the assured against the larceny or embezzlement of the principal and requiring notice by the assured to the insurer on their becoming aware of same, to render the notice necessary, more than mere suspicion is required; circumstances must have existed and been known by the assured, which would have induced the belief in an ordinarily prudent person that a larceny or embezzlement had been committed." *Fidelity & Deposit Co. v. Cunningham*, 181 Ark. 954, 28 S.W.2d at 719.
>
> From the foregoing authorities, "discovery" of fraud or dishonesty is deemed to occur when the insured actually becomes aware of sufficient facts which would lead a reasonable person to believe that an insured loss has occurred. Mere suspicion of an insured loss by the insured is not sufficient to trigger the notice requirement. *See Federal Deposit Insurance Corp. v. Lott*, 460 F.2d 82,

> 86-87 (5th Cir. 1972). . . . The well established rule is that the insured under a blanket employee's fidelity bond is not bound to give notice until he has acquired knowledge of some specific fraudulent or dishonest act. As early stated: "[N]either negligence nor inattention, nor any failure to discover what by diligence might have been discovered, nothing, in fact, short of actual discovery by the bank of dishonesty or a positive breach of an imperative condition, will defeat claims for loss caused by that dishonesty, unless it is otherwise provided in the contract." *American Employers' Insurance Co. v. Cable*, 108 F.2d at 227.
>
> As Judge Bright observed in *United States Fidelity & Guaranty Co. v. Empire State Bank, supra*, it is not only knowledge of the facts but the facts must be such that a reasonable insured would understand the significance of them connoting the commission of a fraud. 448 F.2d at 365.
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> . . . .
>
> . . . A facile understanding of the definition of "discovery" under a fidelity bond has been stated to be: "An oversimplification of the definition is that when the insured learns the facts constituting the alleged dishonesty his prior suspicions, if any, are converted to knowledge which he cannot ignore and which constitutes 'discovery.' " *Alfalfa Electric Cooperative, Inc. v. Travelers Indemnity Co.*, 376 F.Supp. at 906.
>
> Thus, the test of discovery under the present bonding agreement, which insured the Bank against the negligent release of escrow documents based on false misrepresentations, must relate to a reasonable person's subsequent awareness of facts which would convert his negligent appreciation of the facts into actual knowledge of the alleged dishonesty.

In *Nat'l Newark & Essex Bank v. American Insurance Co.*, 76 N.J. 64, 80-81, 385 A.2d 1216, 1224 (1978), the court said:

> Of course, there is a vast difference between a fire insurance policy and a fidelity bond. While discovery of the insured loss under the former is self-evident and not

difficult to date, serious difficulties inhere in pinpointing the exact time of discovery of a loss under the latter. "Discovery" of a loss under a fidelity bond occurs when the insured learns facts or obtains knowledge which would justify a careful and prudent person in charging another with dishonesty or fraud. *American Surety Co. v. Pauly*, 170 *U. S.* 133, 18 *S. Ct.* 552, 42 *L. Ed.* 977 (1898); *Federal Deposit Ins. Corp. v. Aetna Casualty & Surety Co.*, 426 *F.* 2d 729, 739 (5 Cir. 1970); *Alfalfa Electric Coop., Inc. v. Travelers Indemnity Co.*, 376 *F. Supp.* 901, 906 (W. D. Okl. 1973); *Prior Lake State Bank v. National Surety Corp.*, 248 *Minn.* 383, 80 *N. W.* 2d 612, 616 (1957). Mere suspicions of irregularities or improper conduct do not require the insured to report such acts. *American Surety Co. v. Pauly, supra*; *Prior Lake State Bank v. National Surety Corp., supra*; *Federal Deposit Insurance Corp. v. Lott*, 460 *F.* 2d 82, 86-87 (5 Cir. 1972).

It is apparent from the allegations of the petition that the plaintiff had not "discovered" a loss when it received advice that James Gillette may have violated certain federal statutes. The allegations in paragraph 9 of the petition suggest that discovery did not take place until about March 29, 1984, when the proof of loss was filed, nearly a year after the bonds had been canceled and terminated.

It is only actual, discovered losses which, when they have been reported to the insurer, are sufficient to constitute notice of loss. Mere suspicions are not discovered losses. Mere suspicions, when reported to the insurer, do not alert the insurer that an actual loss has occurred. Suspicions do not disclose specific, articulable facts which demonstrate discovery of a loss has occurred. A report of anything short of an actual discovered loss is insufficient to alert the insurer that a loss has been discovered. In this case, when the plaintiff notified the defendant that Gillette may have violated certain federal statutes, it did not put the defendant on notice that an actual loss had been discovered. The notice served only to report mere suspicions of a possible loss. The petition fails to allege any subsequent notice to the defendant upon discovery of an actual loss.

A proof of loss filed nearly a year after the bonds had been canceled and terminated could not satisfy the requirement that the proof of loss be filed within 6 months after discovery of a loss that had to be discovered during the bond period.

In *Dunbar v. National Surety Corporation*, 140 Neb. 833, 834, 2 N.W.2d 116, 117 (1942), the plaintiff sued on a fidelity bond which covered losses " 'discovered during the term of this bond or within fifteen months after the date of any termination of the surety's liability.' " The plaintiff attempted to excuse his failure to discover the loss within the time specified in the policy by alleging that he " 'did not and could not discover said fraud until July, 1939, after a complete audit of his books and accounts.' " *Id.* at 835, 2 N.W.2d at 117.

This court held that the policy provision was controlling and that the defendant's demurrer to the petition should have been sustained.

In referring to the policy provision concerning discovery of the loss, this court said:

> This provision relates alone to the time for discovering losses suffered by employer through wrongful acts of the employee and is a proper subject of contract. It requires of the employer vigilance and performance of obligations at the source of knowledge and at the place for acquiring necessary information. The employer had supervisory authority to direct his bookkeeper and cashier in the duties of her employment. He had the means of discovering peculations and the obligation to do so was imposed on him. The books of account that recorded his business transactions were open to him. In the fidelity bond the time limit for the discovery of losses occasioned by the dishonesty of the employee was a reasonable and valid provision affecting the extent of liability of the surety, the amount of premiums required for fidelity or insurance risks and lessening the expenses of investigating losses. The law applicable to this provision of the bond has been stated as follows:
>
> "It is well settled that where the liability of the insurer is expressly limited in an indemnity or fidelity contract to losses discovered within a specified time, there is no

> liability unless the fraud, dishonesty or negligence causing the loss not only occurs but is discovered within the time limit, and the mere fact that the discovery of a fraud during that period is prevented by the concealment thereof by the defaulter will not extend the period of indemnity. The insured is bound to discover the loss during the prescribed period, and if he fails to do so the insurance company is not liable." 14 R. C. L. 1267, sec. 443.
>
> On the face of the petition in which the bond is included, the following facts are clearly shown: The bond or policy terminated February 9, 1936. The 15-month period thereafter for discovery of the losses expired in May, 1937. The losses were not discovered by plaintiff until July, 1939. In view of these facts the petition was demurrable because it shows on its face that plaintiff did not discover his losses within the 15-month period limited by the contract—a condition precedent to recovery.

Dunbar, supra at 836-37, 2 N.W.2d at 117-18.

In this case, the plaintiff failed to allege discovery of the loss within the period of the bonds, a fact essential to recovery on the bonds.

In *American Surety Co. v. Bankers' Savings & Loan Ass'n*, 59 F.2d 577 (8th Cir. 1932), a suit on a fidelity bond in which the plaintiff had failed to give prompt notice of discovery of a loss, the court said at 580:

> Plaintiff complains that the bond contained no forfeiture clause. Such clause was not necessary. We are dealing with an agreement in writing. By the terms thereof, under certain conditions, a recovery might be had against defendant. In this case, the conditions were not met or performed. Therefore no recovery may be had.
>
> A further contention of plaintiff is that the provisions of section 44-322, Compiled Statutes of Nebraska 1929, prevent defendant from taking advantage of the fact that notice was not given as required by the terms of the policy. The statute does not apply. In the nature of things, the failure to give notice could not have existed at the time of the loss, or have contributed thereto.

In *Ach v. Farmers Mut. Ins. Co.*, 191 Neb. 407, 215 N.W.2d

518 (1974), we held that Neb. Rev. Stat. § 44-358 (Reissue 1988) had no application to a policy provision requiring prompt notice of the occurrence of a loss. In that case we said:

> It is clear that the provisions of section 44-358, R. R. S. 1943, have no application to policy provisions requiring the giving of notice of loss. The provision of the statute on which the plaintiffs rely is: "The breach of a warranty or condition in any contract or policy of insurance shall not avoid the policy nor avail the insurer to avoid liability, *unless such breach shall exist at the time of the loss* and contribute to the loss, anything in the policy or contract of insurance to the contrary notwithstanding." (Emphasis supplied.) This provision was considered by this court in Clark v. State Farmers Ins. Co., 142 Neb. 483, 7 N. W. 2d 71. We there said: "The second sentence means that a breach of a warranty or condition which exists at the time of a loss and contributes to the loss may avoid the policy or enable the insurer to avoid liability. The sentence relates to those breaches which exist 'at the time of the loss.' It does not relate to a breach of the terms of a policy which could only arise after the loss has occurred. It does not deny the insurer the right to rely upon the conditions of its policy which the insure[d] is required to perform as a condition of recovery after the loss has occurred. It relates to the question of a recoverable loss and not to the question of procedure to be followed in collecting for the loss after it has occurred. Clearly a notice of loss and proofs of loss can only be given after the loss has occurred."

Ach, supra at 408-09, 215 N.W.2d at 519-20.

There is no merit to the plaintiff's contention that the policy provision requiring proof of loss within 6 months after discovery of the loss is contrary to the public policy of this state.

The judgment of the district court is affirmed.

AFFIRMED.

W. BURTON SMITH, APPELLANT, V. JANET SHARON SMITH, APPELLEE.

441 N.W.2d 197

Filed June 16, 1989. No. 87-569.

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

Robert F. Peterson and Kelly S. Breen, of Laughlin, Peterson & Lang, for appellant.

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

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

PER CURIAM.

Petitioner-appellant assigns as error the trial court's refusal to modify the alimony payments previously awarded respondent-appellee.

As required, we have reviewed the trial court's action de novo on the record. From that review we determine that the trial court did not abuse its discretion in denying appellant's application. The judgment of the trial court is affirmed.

Appellee is allowed the sum of $500 for her attorney's services in this court.

AFFIRMED.

DAVID DARR, APPELLANT, V. D.R.S. INVESTMENTS, A PARTNERSHIP, ET AL., APPELLEES.

441 N.W.2d 197

Filed June 16, 1989. No. 87-613.

1. **Equity: Appeal and Error.** In an equitable action, review by the Nebraska Supreme Court is de novo on the record; where evidence is in conflict, the court considers and may give weight to the fact that the trial court saw and heard the witnesses and observed their demeanor while testifying.
2. **Contracts: Partnerships: Reformation: Fraud: Proof.** Reformation may be decreed where there has been a mutual mistake or where there has been a

unilateral mistake caused by the fraud or inequitable conduct of the other partner. Proof of such mistake must be shown by clear, convincing, and satisfactory evidence.

3. **Contracts: Partnerships.** Because partnerships result from contract, the rights and liabilities of the parties among themselves are subject to such agreements as they may make.

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

Douglas L. Kluender, of Healey, Wieland, Kluender, Atwood & Jacobs, for appellant.

Randall L. Goyette and Dallas D. Jones, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellees.

BOSLAUGH, WHITE, CAPORALE, and GRANT, JJ., and RIST, D.J.

RIST, D.J.

This is an action for the dissolution of a partnership and for an accounting with respect to such dissolution.

On August 2, 1976, the plaintiff and defendants James Stephens and Erwin Rung entered into an agreement creating a partnership known as D.R.S. Investments (DRS). Each partner contributed $1,500 in cash to the partnership.

The purpose of the partnership as stated in the agreement was to own, build, rent, sell, or otherwise dispose of real or personal property. The partnership in fact built a building upon land owned by J.E.D. Construction (JED), a corporation, in which corporation all the partners were equal stockholders, the partnership leasing the land from the corporation for 35 years with a 10-year renewal option and leasing back some of the building space to JED. Funds were borrowed by the partnership for the construction of the building, the corporation and partnership mortgaging the land and building to secure the same.

The partnership agreement provided for equal sharing of the partners in net profits and net losses, the same to be credited or charged to the drawing account of each partner. The agreement further provided that the books of the partnership were to be

maintained on a cash basis and closed on December 31 of each year.

Paragraph 10 of the agreement provided:

> Any partner may retire from the partnership at the end of a calendar year, provided he has given sixty (60) days advance written notice of his intention to the other partners. Such a retirement shall cause a dissolution of the partnership, but the remaining partners shall have the right to continue the partnership business provided the continuing partnership pays to the retiring partner the value of his interest in the partnership. *For this purpose the value of the interest of a retiring partner shall be the amount of his capital account, plus or minus any credit or debit balance in his drawing account, all determined at the end of such calendar year in accordance with the accounting methods regularly used by the partnership.*

(Emphasis supplied.)

During 1976, all accounting appears to have been done on a cash basis. Beginning in 1977, however, on the recommendation of its accountant, the partnership accounting for income tax purposes was done on an accrual basis, resulting in tax losses in all subsequent years, which the partners reported on their respective income tax returns. The record shows the purpose of using accrual accounting was to provide income tax losses that would exceed any such losses if reported on a cash basis.

The partnership agreement was prepared by an attorney for the partnership, the record not reflecting whether any partner or partners had any particular input into it. The record shows the parties considered the agreement, after it was prepared, without any detailed study or consideration and signed it.

On May 10, 1982, plaintiff wrote the defendant partners, giving notice of his intention to retire from the partnership at the end of 1982 because of a disability, and asked whether they elected to pay his interest in the partnership or whether they wished to liquidate the assets and make final distribution. Later that year the defendant partners wrote plaintiff, accepting his retirement and advising him that they intended to continue the partnership and that they would pay him the value of his interest as determined under paragraph 10 of the partnership

agreement. They further advised that a meeting would be held January 11, 1983, to determine that value as of the end of 1982. Such meeting was held, but the plaintiff did not attend. Subsequent thereto, defendant partners offered plaintiff $1,500 for his interest in the partnership, which he rejected.

At some point during this period, plaintiff also disposed of his interest in JED.

On March 1, 1985, plaintiff commenced this action for dissolution and accounting. The defendants in their answer pleaded the provisions of paragraph 10, that plaintiff had a negative balance in his capital account in the amount of $7,866.66, and that he owed the partnership this amount for which they counterclaimed against him. Plaintiff, in his reply, denied defendants' determination of his interest, alleged that paragraph 10 of the partnership agreement did not express the intent of the parties and should be reformed to reflect the correct intent and that it was unconscionable, denied the counterclaim, and renewed the prayer of his petition.

Trial was held to the court on January 26, 1987, and on April 14 of that year the trial court found no clear and convincing evidence existed that prior to the execution of the partnership agreement, there was any agreement respecting the valuation of a partner's interest other than expressed in paragraph 10 of the agreement; that each party had contributed $1,500 to the partnership and built the building on land owned by JED with lease and lease-back arrangements as previously set forth in this opinion; that the customary accounting method of the partnership was on an accrual basis; that at the end of 1982, each partner's capital account reflected a negative balance of $7,866.66; that there was no mutual mistake; that the agreement was conscionable; and that the plaintiff owed the defendants the sum of $7,866.66. The trial court entered judgment for defendants and against plaintiff for that amount.

On appeal, plaintiff assigns as error (1) the failure of the trial court to reform the partnership agreement, and (2) the trial court's award of judgment to defendants in the absence of a partnership provision authorizing such award.

This being an equitable action, we review it de novo on the record; where evidence is in conflict, we consider and may give

weight to the fact that the trial court saw and heard the witnesses and observed their demeanor while testifying. *Thomas v. Marvin E. Jewell & Co., ante* p. 261, 440 N.W.2d 437 (1989).

With respect to plaintiff's claim that the partnership agreement should be reformed for mutual mistake with respect to the provision determining the value of a retiring partner's share in the partnership, the rule is well established that such reformation may be decreed where there has been a mutual mistake or where there has been a unilateral mistake caused by the fraud or inequitable conduct of the other partner. Proof of such mistake must be shown by clear, convincing, and satisfactory evidence. *Ridenour v. Farm Bureau Ins. Co.*, 221 Neb. 353, 377 N.W.2d 101 (1985).

Reformation is decreed in order to set forth the real agreement of the parties when the written instrument does not represent their true intent. Such reformation may be decreed with respect to a mutual mistake, and in that situation the erroneous written agreement is conformed to the antecedent agreement of the parties entered into prior to the execution of the erroneous written agreement. *Ridenour v. Farm Bureau Ins. Co., supra*; *Johnson v. Stover*, 218 Neb. 250, 354 N.W.2d 142 (1984).

An examination of the record reflects that until plaintiff's retirement, there was no expression by any of the parties as to what a retiring partner should receive. There is no evidence that the defendant partners ever understood or agreed to plaintiff's conception of what his retirement rights were. From the beginning of the partnership to the time of plaintiff's retirement, the only evidence of what the parties intended is what is expressed in the partnership agreement. The partners now differ over its meaning. The evidence supports the trial court's finding that there is no mutual mistake warranting reformation of the contract.

Plaintiff asserts that reformation should be had because the agreement with respect to the valuation of his interest as a retiring partner is unconscionable. His claim is the parties did not contemplate any system of accounting that would result in a negative amount being due from a retiring partner and that

equity requires the valuation of his partnership interest by taking into account the appreciated value of the partnership assets. What constitutes appropriate accounting will be dealt with later in this opinion. Suffice it to say at this point that parties creating a partnership have a wide selection of methods to value a retiring partner's interest. If they choose one that does not include a determination of appreciated value, that is a choice they are free to make.

In this case, the partnership agreement makes no reference to such appreciated value but, rather, provides for a capital account plus or minus profits or losses of the partnership upon a cash basis accounting.

We take note of the testimony of the accountants who testified in effect that unless an agreement specified an accounting with appreciated asset values, such values would not be considered in any normal accounting practice or procedure.

In *G & S Investments v. Belman*, 145 Ariz. 258, 700 P.2d 1358 (1984), the estate of a deceased partner disputed the valuation of that partner's interest under a buy-out provision by the remaining partners. The partnership agreement called for payment of the deceased partner's capital account with certain adjustments. The deceased partner's estate claimed a right to share in the appreciated value of the partnership assets. The Arizona Court of Appeals disagreed, holding that the words "capital account" were not ambiguous where the contract called for cash basis accounting, as such words have a recognized meaning that does not include appreciated value, and that a buy-out provision may involve a different amount than might be realized in a total dissolution and sale of assets. The court said,

> Because partnerships result from contract, the rights and liabilities of the partners among themselves are subject to such agreements as they may make. . . .
>
> Partnership buy-out agreements are valid and binding although the purchase price agreed upon is less or more than the actual value of the interest at time of death. . . .
>
> . . . .
>
> We do not have the power to rewrite [the buy-out provision] based upon subjective notions of fairness

> arising long after the agreement was made or because the agreement did not turn out to be an advantageous one. Modern business practice mandates that the parties be bound by the contract they enter into, absent fraud or duress. . . . It is not the province of this court to act as a post-transaction guardian for either party.

145 Ariz. at 267-68, 700 P.2d at 1367-68. Such holding is applicable to the situation in this case.

We find from the record that all the partners of DRS were experienced businessmen and that they saw and had opportunity to read the partnership agreement and to discuss it before signing it. Plaintiff cannot now have changes in it because he was inattentive to what he signed. We further find there is no evidence of fraud or overreaching.

Regardless of what appreciation of the assets may have accrued, it was proper for the parties at the inception of the partnership to have determined the method of accounting which did not include any such future appreciation. The trial court correctly held that the partnership contract was not unconscionable and that appreciated values were not appropriate in this case.

Plaintiff's argument that the agreement provides only for the payment of a positive amount to a retiring partner and that the contract is silent with respect to any negative balance appears to suggest that the agreement is incomplete in this regard and that the provisions of the Uniform Partnership Act, Neb. Rev. Stat. §§ 67-301 et seq. (Reissue 1986), may apply. The trial court found paragraph 10 of the agreement clear and unambiguous in this regard, and we agree. The agreement requires profits and losses to be credited or debited to a partner's capital account through the use of a drawing account. It follows that if losses exceed the original capital account investment of a partner, there is an amount due and owing the partnership from a retiring partner for losses exceeding the original capital account balance. No recourse to the Uniform Partnership Act is necessary.

The remaining issue is whether the use of accrual accounting was appropriate under the partnership contract to determine the plaintiff's interest in the partnership. The agreement calls

for the use of cash basis accounting. Defendants claim that the partnership in fact used accrual accounting and that such is the "method regularly used by the partnership" as that phrase appears in paragraph 10 of the agreement. There is no question that from 1977 on, for income tax purposes, accrual accounting was used. The question now is whether that use for income tax purposes is binding upon the partnership in all accounting procedures required under the agreement.

The record is clear that the partnership accountant recommended accrual accounting for specific use with respect to income tax reporting, since it would give greater deductions to the partners on their individual returns than would cash basis accounting. All of the parties accepted this with respect to income tax reporting. We also determine from the testimony of the accountants that individuals or entities are entirely at liberty to select one method of accounting for income tax purposes and another method of accounting for other purposes.

Since the partnership agreement provided for cash basis accounting, a proper construction of the agreement would require this method of accounting to apply unless the parties by their subsequent actions evidenced a clear choice to have the partnership accounting done on an accrual basis for all purposes. Given the uncontradicted record that accrual accounting was solely motivated by income tax considerations, that the partnership could lawfully and properly use accrual accounting for that purpose only and cash basis accounting for other purposes, that the agreement provides for the use of cash basis accounting for partnership purposes, and that prior to this dispute accrual accounting was used only for income tax purposes, we find the valuation of a retiring partner's capital account should be determined upon a cash basis as provided in the agreement. With respect to what constitutes cash basis accounting, we hold the same is to be done in accordance with accepted accounting procedures and the terms of the agreement.

We therefore find that the trial court erred in accepting an accounting of plaintiff's capital account on an accrual basis and that the same should be determined upon a cash basis.

We reverse and remand this cause to the trial court for

determination of plaintiff's interest as a retiring partner under appropriate cash basis accounting as of December 31, 1982, and for disposition accordingly.

REVERSED AND REMANDED WITH DIRECTIONS.

WHITE, J., dissenting.

I would reverse. The case is a classic example of otherwise business-wise persons signing an agreement containing words whose meanings are not readily known to them, and whose application, except in the case of the lone survivor, is disastrous.

It is obvious that the partnership was not formed in anticipation of a yearly profit. The partnership was intended to lose money (whether real or bookkeeping money), and the anticipated gain was to be made in liquidation, consisting of asset appreciation and recovery of claimed depreciation costs.

Two phrases in the agreement are the source of the trouble: "capital accounts" and "cash basis" accounting.

Capital generally consists of the difference between the book value of assets and liabilities. We know that each partner contributed $1,500 to the partnership, that no withdrawals were made, and that a fair reading of the record supports a finding that the difference between asset value and liabilities is in the $60,000 range.

We note that the rules for the cash basis accounting were not specified in the agreement, but consisted of charges to partnership income as determined by the firm's accountant. The elimination of two items alone would establish a plus figure for the value of appellant's interest; neither is a cash item, i.e., depreciation of the partnership building and a charge of accrued debts to a corporation wholly owned by the partners. (The propriety of the last item as an allowable deduction was sharply disputed by the two accountants who testified.)

The fairness of a system whereby depreciation is charged against a capital account but appreciation is not aside, the suggestion that there is not a mutual mistake proven when three partners enter into a pact, which as interpreted provides for financial suicide on the part of two of them, is not realistic.

In the absence of a meeting of the minds as to dissolution, I would remand the matter to the district court for dissolution proceedings in accordance with the Uniform Partnership Act.

CAPORALE, J., joins in this dissent.

DEPARTMENT OF HEALTH, STATE OF NEBRASKA, APPELLANT, V. OMAHA ASSOCIATES, A LIMITED ILLINOIS PARTNERSHIP, ET AL., APPELLEES.

441 N.W.2d 579

Filed June 16, 1989. No. 87-715.

1. **Administrative Law: Appeal and Error.** In an appeal to the Supreme Court from an administrative agency's decision, the Supreme Court tries factual questions de novo on the record and reaches a conclusion independent of the conclusion reached by the administrative agency, provided, where credible evidence is in conflict on a material issue of fact, the Supreme Court considers and may give weight to the fact that the administrative agency heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Administrative Law: Public Health and Welfare: Proof: Appeal and Error.** In an appeal of a decision to grant a certificate of need, the person appealing the decision shall bear the burden of proof that the application does not meet the applicable criteria.

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

Robert M. Spire, Attorney General, and Marilyn B. Hutchinson for appellant.

Joseph E. Casson and Beverly Petersen Jennison, of Casson, Harkins & LaPallo, and John R. Holdenried and Barbara E. Person, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for appellees.

HASTINGS, C.J., SHANAHAN, and FAHRNBRUCH, JJ., and NORTON, D.J., and RONIN, D.J., Retired.

SHANAHAN, J.

Omaha Associates, a limited partnership in the State of Illinois, and Aksarben Nursing Centers, Inc., a Minnesota corporation, appellees, seeking approval of the simultaneous purchase and lease of the 174-bed Omaha nursing home facility of The Hillhaven Corporation, filed an application with the Department of Health (department) requesting the issuance of a certificate of need (CON), which, by virtue of Neb. Rev. Stat. § 71-5830(1) (Reissue 1986), was required for the proposed transaction. Accepting the department's recommendations, the CON review committee denied the appellees' application for a

CON. Appellees then appealed to the CON appeal panel. See Neb. Rev. Stat. § 71-5860 (Reissue 1986). The parties stipulated that the issues before the appeal panel were whether the appellees had met their burden to prove: (1) that the proposed project was the least costly or most effective alternative; (2) that the increase in costs, if any, was justified in part by improvements in the financing and delivery of health services which would foster competition and promote quality assurance for consumers; (3) that financing was available and the project was financially feasible; (4) that the proposed project was designed to provide or support high quality care; and (5) that the proposed project would foster competition and increase the range of choices available to consumers. Based on these issues, the CON appeal panel reversed the decision of the CON review committee and granted the requested CON. Pursuant to Neb. Rev. Stat. § 71-5866 (Reissue 1986), the department appealed to the district court for Lancaster County, which affirmed the decision of the CON appeal panel and issuance of a CON to the appellees. In its appeal to this court, the department claims that (1) the CON appeal panel exceeded its statutory authority and jurisdiction, (2) the appeal panel's decision is unsupported by appropriate evidence, (3) the decision of the appeal panel is contrary to law, and (4) the decision is arbitrary and capricious.

STANDARD OF REVIEW AND BURDEN OF PROOF

The department's appeal from a decision of the CON appeal panel, which has granted a CON, is governed by the Administrative Procedure Act. § 71-5866. In an appeal to the Supreme Court from an administrative agency's decision, the Supreme Court tries factual questions de novo on the record and reaches a conclusion independent of the conclusion reached by the administrative agency, provided, where credible evidence is in conflict on a material issue of fact, the Supreme Court considers and may give weight to the fact that the administrative agency heard and observed the witnesses and accepted one version of the facts rather than another. See, Neb. Rev. Stat. § 84-918 (Reissue 1987); *Department of Health v. Grand Island Health Care*, 223 Neb. 587, 391 N.W.2d 582 (1986); *Department of Health v. Columbia West Corp.*, 227

Neb. 836, 420 N.W.2d 314 (1988).

Because our review is de novo, we bear in mind the burden of proof when a CON has been issued. "In an appeal of a decision to grant a certificate of need, the person appealing that decision shall bear the burden of proof that the application does not meet the applicable criteria." Neb. Rev. Stat. § 71-5865 (Reissue 1986); *Department of Health v. Grand Island Health Care, supra*. Hence, the department has the burden of proof in the present case, namely, the burden of establishing that the applicants appellees have not satisfied the requirements for a CON.

THE FACTS

Hillhaven, the current owner-operator of the 14-year-old nursing home facility which appellees seek to purchase and lease, acquired the facility in 1978 for a purchase price of $2.3 million. Dating back to November 1983, Hillhaven has had a somewhat strained relationship with the department. On February 14, 1985, the department's director issued a 10-page citation to Hillhaven, severely criticizing Hillhaven's care of its residents and the sanitary conditions within the nursing home facility. As a basis for the departmental citation, the department's director noted observations by the department's "surveyors," apparently a euphemism for *inspectors*, which included improper care of incontinent patients, haphazard and improper positioning of patients, presence of numerous cockroaches within the facility, improper food preparation, and inadequate staffing. As a result of the alleged violations, the department prohibited admission or readmission of patients to Hillhaven.

On February 25, 1985, the department, on account of the violations alleged against Hillhaven, filed a petition to place Hillhaven in the hands of a receiver. This action was unsuccessful. Hillhaven continued as the operator of the nursing home and took action to remedy the violations or deficiencies alleged by the department. On April 10, 1985, the department withdrew its allegations against Hillhaven and permitted admission of residents to the nursing home. On that same day, however, the department issued a new citation to

Hillhaven documenting further deficiencies in the operation of the nursing home.

After the department lifted the ban on admissions, Hillhaven unilaterally restricted admissions to avoid further action by the department. Disputes with the department regarding the level of care provided by Hillhaven apparently had drastic effects on Hillhaven's profitability. In 1984-85, Hillhaven sustained "large financial losses."

In May 1986, Hillhaven contracted to sell its nursing home facility to Zev Karkomi, who in turn assigned his contractual interest to Omaha Associates, a partnership composed of Karkomi and Harvey Angell. Omaha Associates then leased the nursing home facility to Raymond Tutwiler, who assigned his leasehold interest to Aksarben Nursing Centers, a corporation formed by Tutwiler. Aksarben proposed to contract with RET & Associates, another entity operated by Tutwiler, for management services in the Hillhaven facility. Both Tutwiler and Karkomi have extensive experience with nursing home operations.

Karkomi proposed to pay Hillhaven $3.3 million for the land, building, and equipment, plus $50,000 for Hillhaven's inventory and an additional $150,000 in consideration of Hillhaven's promise not to compete. Omaha Associates gave Hillhaven a promissory note for $3.1 million, which was secured by a mortgage to Hillhaven. Omaha Associates' note bore a variable interest rate, ranging from 10.68 percent in the initial year to 13.12 percent in subsequent years for the note, which resulted in monthly payments ranging from $27,582.46 to $33,130.56. At the end of 15 years, Omaha Associates' note called for a balloon payment in the amount of $3,145,631. The note further provided that Omaha Associates had the option of prepayment without penalty at any time. Omaha Associates' lease to Tutwiler had a 10-year term with annual rent varying from $381,060 in the 1st year to $455,401 in the 10th year and obligated the lessee to pay "all taxes, assessments, licenses and permit fees, charges for public utilities, and all governmental charges." The Tutwiler lease also restricted the use of the premises to "skilled care and/or intermediate care nursing home" and required that the lessee maintain good standing with

the department. Tutwiler subsequently assigned his leasehold interest to Aksarben Nursing Centers, which intended to hire RET & Associates, a nursing home management company, to handle the operation of the Hillhaven facility. All the transactions, however, were conditioned on appellees' success in acquiring a CON.

Meanwhile, the financial losses and problem care persisted at Hillhaven. In October of 1986, Hillhaven sustained a loss in excess of $47,000. Hillhaven's average nursing hours per resident per day were 3.9, when the average for nursing homes in the state was 2 to 2.5. Notwithstanding the greater than average nursing hours per resident, the general quality of nursing care for Hillhaven's residents was inferior by the standards of the department. Hillhaven's present management had difficulty in providing adequate care even though Hillhaven had a relatively low occupancy rate. In spite of Hillhaven's efforts, including $350,000 for capital improvement of its facility, the department remained dissatisfied with the management of the nursing home and issued a "Statement of Deficiencies" to be corrected by Hillhaven as a result of an October 1986 state inspection. At the time of the hearings on the requested CON, however, Hillhaven was under no sanctions by the department.

At the hearings before the CON review committee and appeal panel, appellees maintained that new management of the Hillhaven facility would restore profitability to the operation and provide high quality care to Hillhaven's residents. Tutwiler believed that the facility was in a good location, adjacent to Bergan Mercy Hospital, and was, therefore, attractive to the private sector in need of a nursing home. Tutwiler testified that, although the facility would be burdened with additional capital costs as a result of the purchase, the savings that new management could implement in the operational area, along with an increase in revenue attributable to a modestly higher occupancy rate, would result in a private pay patient rate increase no greater than a rate increase planned by Hillhaven.

Regarding medicare, Tutwiler indicated that the appellees would increase the beds allocated to medicare utilization from

10 beds to approximately 25 and would accept residents who required skilled care but who had been previously denied admission at Hillhaven. The increased utilization would cause a decrease in Hillhaven's medicare rate, which exceeded $100 per day, to approximately $75 per day.

APPLICABLE CRITERIA FOR ISSUANCE OF A CON

The review criteria at issue in appellees' application for a CON are found in 182 Neb. Admin. Code, ch. 2, § 005 (1983). The department admitted that because the proposed transaction involved the purchase of an already existing nursing home, the applicants were not required to establish an unfulfilled need for the proposed services at the Hillhaven facility. Instead, the department contends that the appellees' application for a CON should be denied because appellees have not met the following requirements in the department's rules for issuance of a CON:

> 005.02A Alternatives.
>
> . . . .
>
> 005.02A2 The applicant must demonstrate that the proposed project is the least costly of the alternatives for meeting the need established under part 005.01A above, or if it is not the least costly, that it is the most effective alternative for meeting such need. . . .
>
> 005.02B Cost.
>
> 005.02B1 Any increase in costs or charges (to any class of payers or to all payers) resulting from the proposed project must be justified by the needs of the population established under part 005.01A above which will be met by the project. In estimating increases in costs or charges which will result from the proposed project, capital costs, operating costs, projected utilization of the proposed services, and any other factors bearing on future costs or charges shall be considered.
>
> 005.02B2 Increases in costs may be justified in part where improvements or innovations in the financing and delivery of health services will foster competition and promote quality assurance and cost effectiveness for consumers and payers.

005.02C Financial Feasibility.

005.02C1 The resources and proposed means of financing the proposed project must in fact be available.

005.02C2 It must be reasonably certain that the proposed project will be financially feasible for the period of life of the assets.

005.02D Continuity and Quality.

. . . .

005.02D4 The proposed project must be designed to provide or support high quality care. The quality of care provided by the applicant in the past may be considered in determining whether high quality care will be provided by the proposed project.

. . . .

005.02F Competition/Sharing.

005.02F1 Except as provided in subparts 005.02F2 and 005.02F3 below, the proposed project must increase the range of choices available to consumers and third-party payers with respect to the price and use of services, and must have the effect of fostering price competition among providers of health services.

005.02F2 In the case of leases or acquisitions of existing health care facilities, except as provided in subpart 005.02F3 below, the proposed lease or acquisition must not have the effect of reducing price competition among providers.

005.02F3 Where it is demonstrated that competition would not serve to promote quality assurance and cost effectiveness, the proposed project must optimize sharing and minimize unnecessary duplication in the health care delivery system.

To qualify for a CON, the applicant must meet all of the applicable criteria. § 005. Therefore, we must examine each of the preceding criteria to determine whether the department has met its burden to show that the appellees have failed to satisfy the requirements to obtain a CON.

Alternatives

At the administrative level, appellees disputed the applicability of § 005.02A2 concerning alternatives to the proposed plan. The appeal panel found that the criterion was applicable and satisfied by appellees. On appeal, the department contends that the criterion was not met.

After briefs were filed in this appeal, we decided *Department of Health v. Columbia West Corp.*, 227 Neb. 836, 420 N.W.2d 314 (1988). *Columbia West* involved the proposed purchase of an already existing nursing home and, in that respect, is similar to the case now before us. In *Columbia West*, as here, showing an unfulfilled need was not a prerequisite to issuance of a CON involving an existing nursing home. After noting that "§ 005.02A2 appears to be primarily concerned with new construction projects," we held "that where, as here, the need for an existing health care facility is not disputed and a willing buyer and a willing seller have agreed upon a price for that facility, § 005.02A2 is not a relevant review criterion in the application for a certificate of need." 227 Neb. at 840, 420 N.W.2d at 316-17. Therefore, in view of *Columbia West*, we will not concern ourselves with whether the proposed project is the least costly or most effective alternative.

Potential Increase in Costs

While appellees contend that private pay rates will increase no more than the current owner proposes, medicaid costs after the purchase will increase by about $3.60 per day. However, appellees' application also indicates that they plan to implement a number of new programs, including an Alzheimer's disease unit, improved physical therapy, and a respiratory therapy unit. Furthermore, given Hillhaven's history of problems and the complaints by the department, a change in management apparently will be conducive to improved quality of care for the nursing home residents. Consequently, we find that any increase in the cost is justified by the innovations in delivery of health care planned by appellees.

Financial Feasibility

Appellees propose to purchase a facility valued near $4.4

million for $3.3 million. The appellees have demonstrated that financing is available as the result of the secured note in favor of Hillhaven. In view of the lease, which will produce rental revenues for Omaha Associates sufficient to satisfy the monthly payments on the Hillhaven note, the project appears reasonably financially sound for Omaha Associates. Without examining in detail the qualifications of those operating Aksarben Nursing Centers and RET & Associates, we find that the planned increase in facility efficiency and the proposed increase in occupancy make it reasonably certain that the project will be financially feasible. Therefore, the appellees have satisfied the criterion in § 005.02C.

Continuity and Quality

Tutwiler, the president of RET & Associates, has 16 years of experience in the nursing home industry, including 8 years of upper-level management experience. Pat Edwards, RET & Associates' proposed "quality assurance nurse" for the facility, has experience as a state surveyor for the department, teaches nursing courses for the state, and has served as quality assurance director for two large nursing home operations. On the basis of the information presented, we find that the operational and managerial experience of RET & Associates, coupled with the new services planned at Hillhaven, meet the requirement that the proposed project is designed to provide high quality care.

Competition

Because the transaction at issue in the present case involves the acquisition and lease of an existing health care facility, only §§ 005.02F2 and 005.02F3 of the department's rules may be pertinent. Neither the department nor the appellees claim that competition would be detrimental to the nursing home's quality assurance or cost effectiveness. Therefore, § 005.02F3 is inapplicable. To satisfy the competition criterion (§ 005.02F2), the proposal "must not have the effect of reducing price competition among providers." Higher quality care at Hillhaven would quite likely become a matter of substantial interest to other nursing homes in the area which hope to attract or retain residents. Factors which will likely influence a

prospective nursing home resident to choose one facility over another include the cost and quality of care at any given facility. Rather than reduce price competition among nursing homes, we find that appellee's prospective activity and operation at the Hillhaven facility will not adversely affect price competition. Therefore, the appellees have met the competition criterion.

As a result of the analysis above, we conclude that the department has failed to meet its burden of proof and, therefore, the department's assigned errors are without merit. See § 71-5865. Thus, we reach the same conclusions reached by the district court. The judgment of the district court, affirming the CON appeal panel's order and decision that the appellees have satisfied the applicable requirements for issuance of a CON, is affirmed.

AFFIRMED.

ROBBIE DENISE GATEWOOD, APPELLEE, V. CITY OF BELLEVUE, A POLITICAL SUBDIVISION, APPELLANT.

441 N.W.2d 585

Filed June 16, 1989. No. 87-719.

1. **Political Subdivisions Tort Claims Act: Appeal and Error.** The findings of fact of the trial court in a proceeding under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 13-901 et seq. (Reissue 1987), will not be set aside unless such findings are clearly incorrect.
2. _____: _____. In a review of a bench trial under the Political Subdivisions Tort Claims Act, this court must consider the evidence in the light most favorable to the successful party, resolving any conflicts in the evidence in favor of that party and giving to that party the benefit of all reasonable inferences that can be deduced from the evidence.
3. **Proximate Cause: Negligence.** Contributory negligence is conduct for which plaintiff is responsible, amounting to a breach of the duty which the law imposes upon persons to protect themselves from injury, and which, concurring and cooperating with actionable negligence for which defendant is responsible, contributes to the injury complained of, as a proximate cause.
4. **Evidence: Negligence.** Where evidence is in conflict and such that reasonable minds may draw different conclusions therefrom, the questions of negligence and comparative and contributory negligence are factual determinations.

5. **Negligence.** The question of comparative negligence is for the determination of the fact finder.
6. **Emergency Vehicles: Negligence.** The statute granting emergency privileges to police vehicles clearly imposes a duty of due regard or due care upon the drivers of emergency vehicles, and in a negligence action their conduct will be measured against that of a reasonable person exercising due care under the same emergency circumstances.
7. **Motor Vehicles: Negligence: Rules of the Road.** A driver is guilty of negligence as a matter of law if he fails to see one who is favored over him under the rules of the road.

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

Thomas M. Locher and Jack A. Dike, of Hansen, Engles & Locher, P.C., for appellant.

James J. Frost and Raymond R. Aranza, of North & Black, P.C., for appellee.

HASTINGS, C.J., SHANAHAN, and FAHRNBRUCH, JJ., and NORTON, D.J., and RONIN, D.J., Retired.

NORTON, D.J.

The appeal in this matter arises out of a tort claims action involving the City of Bellevue, Nebraska. Following trial, the plaintiff, Robbie Denise Gatewood, was awarded a money judgment for personal injuries suffered and expenses incurred as the result of an automobile accident between an automobile driven by her and a police cruiser belonging to the City of Bellevue (City) and being driven by Officer James J. Rybar, a police officer employed by the City. We affirm.

The evidence in this case indicates that on May 12, 1984, at approximately 1:30 p.m., the plaintiff was driving an automobile belonging to her employer in a northerly direction along and upon U.S. Highway 73-75 (73-75) and was at that time approaching the intersection of that highway with Chandler Road in Sarpy County, Nebraska. At the intersection with Chandler, 73-75 has four northbound traffic lanes. Directly west of this intersection, Chandler intersects with Railroad Avenue, where there are two southbound traffic lanes. Approximately 110 feet west of that intersection, Chandler intersects with 13th Street, which has three lanes of traffic. All

together, within a space of roughly 300 feet, Chandler intersects with nine lanes of north or south traffic and two lanes of southbound traffic that merge into Chandler. All traffic at these intersections is regulated by traffic lights.

At about the same time, Rybar was operating the police cruiser in an area west and north of the intersection of Chandler and 73-75. He had just received a report of an intrusion at a location east of that intersection. In response, he turned on his signal lights, activated his siren, proceeded south to Chandler, and there turned to the east. According to his testimony, his speed as he traveled east along Chandler toward the 13th Street intersection was between 35 and 45 miles per hour and at times in excess of the speed limit. As he approached the 13th Street intersection, he noted that the traffic light controlling eastbound traffic was green, but as he entered that intersection the light changed to amber or yellow. He proceeded through that intersection and on into the intersection of Chandler and Railroad Avenue. The light for eastbound traffic was then red. He went from that intersection into the intersection of Chandler and 73-75. As he did so, he noted traffic in the three western northbound traffic lanes of 73-75. He did not observe any traffic in the fourth or easternmost lane. His testimony was that he made eye contact with the drivers of the vehicles stopped in the three west lanes, and traveling across those lanes, he continued into the fourth and easternmost lane against the red light.

In the meantime, the plaintiff had been proceeding along 73-75, and as she approached the intersection with Chandler she was traveling in the far east lane of traffic, with no other traffic between her and the intersection in her lane of traffic. Before she reached the intersection, the light controlling the flow of traffic in her lane turned green, and she proceeded into the intersection, where her car was struck by the police cruiser.

Excluding the plaintiff and Rybar, 11 other individuals testified during the course of this trial. A fair evaluation of their individual testimony would be that their observations regarding the speed of the police cruiser before and at the time it entered and traveled through the intersection of Chandler and 73-75 displayed a wide variation. There were also conflicts with

regard to the speed of the plaintiff and whether or not the siren on the police cruiser had been activated. The testimony of the plaintiff was that she did not see the police cruiser until it was virtually in contact with her car. Rybar offered testimony with regard to his speed and acknowledged that he never did see the plaintiff until the accident had occurred. He also testified that from the west side of the intersection of Chandler with Railroad Avenue his view was unimpeded for 1 to 1½ blocks south along 73-75, that he did not see any cars on that highway other than the ones stopped in the three west northbound lanes, and that he could not recall if he had looked to the south as he entered the intersection with 73-75 other than to make eye contact with the drivers of the stopped vehicles.

The plaintiff, having complied with the provisions of the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 13-901 et seq. (Reissue 1987), thereafter filed her petition in the district court for Sarpy County, Nebraska, claiming that the sole and proximate cause of the accident and the resulting injuries and damages sustained by her was the negligence of Rybar. The defendant filed its answer, denying negligence and alleging that the plaintiff was contributorily negligent to a degree sufficient to bar her recovery as a matter of law. The specifications of contributory negligence included failing to keep a proper lookout, failing to have her vehicle under reasonable control, failing to yield the right-of-way to an emergency vehicle, and excessive speed. The defendant also filed a counterclaim for damages to the police cruiser, alleging that those damages were the sole and proximate result of the negligence of the plaintiff as previously noted.

The judgment, which was entered by the district court, found that the police cruiser was responding to an emergency call and was proceeding east on Chandler; that the plaintiff was operating her vehicle in a northerly direction on 73-75; that the cruiser entered the intersection of the streets on a red light, with siren and lights activated; that the plaintiff had a green light in her lane of traffic; that the west three northbound lanes of 73-75 contained vehicles which had stopped for a red light; and that Rybar, after having ascertained by making visual contact that the vehicles in the west three lanes would remain stopped,

proceeded through the fourth lane without making visual contact with the plaintiff. The court further found that the issue in regard to liability was governed by that part of Neb. Rev. Stat. § 39-640 (Reissue 1988) which provides as follows: "(2) This section shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons using the highway." On the basis of this statute and the evidence, the court then found that Rybar had failed to drive with due regard to the vehicle of the plaintiff, ordered judgment for the plaintiff, and dismissed the defendant's counterclaim. No specific findings were made with regard to the negligence of Rybar other than set forth above, nor were findings made with respect to the allegations of negligence and/or contributory negligence on the part of the plaintiff.

In its appeal, the City assigns 10 errors on the part of the trial court, which in view of our decision can be reduced into three for consideration, to wit: (1) The trial court erred in overruling appellant's motion to dismiss Gatewood's petition when the evidence established Gatewood was contributorily negligent in a degree sufficient to bar her recovery as a matter of law; (2) the trial court erred (a) in finding appellant's police officer failed to drive with due regard to appellee's vehicle; (b) in not finding appellant's police cruiser was entitled to the preferential right-of-way granted by Neb. Rev. Stat. §§ 39-608 and 39-640 (Reissue 1988); and (c) in not finding appellant's officer's negligence, if any, was less than gross as compared to that of Gatewood; and (3) the trial court erred in not finding (a) Gatewood had only a qualified right to proceed on a green light, subject to those vehicles already lawfully in the intersection, and her actions in proceeding into the intersection constituted contributory negligence; (b) Gatewood's contributory negligence was a proximate cause or a proximately contributing cause of the accident; and (c) Gatewood's contributory negligence was more than slight as compared to any negligence on the part of appellant's officer.

The findings of fact of the trial court in a proceeding under the Political Subdivisions Tort Claims Act, §§ 13-901 et seq., will not be set aside unless such findings are clearly incorrect.

Phillips v. City of Omaha, 227 Neb. 233, 417 N.W.2d 12 (1987); *Lee v. City of Omaha*, 209 Neb. 345, 307 N.W.2d 800 (1981). See, *Maple v. City of Omaha*, 222 Neb. 293, 384 N.W.2d 254 (1986); *Crawford v. Ham*, 209 Neb. 802, 311 N.W.2d 896 (1981). In a review of a bench trial under the Political Subdivisions Tort Claims Act, this court must consider the evidence in the light most favorable to the successful party, resolving any conflicts in the evidence in favor of that party and giving to that party the benefit of all reasonable inferences that can be deduced from the evidence. *Phillips v. City of Omaha, supra*. See, *Lee v. City of Omaha, supra*; *Crawford v. Ham, supra*. Contributory negligence is conduct for which plaintiff is responsible, amounting to a breach of the duty which the law imposes upon persons to protect themselves from injury, and which, concurring and cooperating with actionable negligence for which defendant is responsible, contributes to the injury complained of, as a proximate cause. *Maple v. City of Omaha, supra*; *Steinauer v. Sarpy County*, 217 Neb. 830, 353 N.W.2d 715 (1984); *Stephen v. City of Lincoln*, 209 Neb. 792, 311 N.W.2d 889 (1981). Where evidence is in conflict and such that reasonable minds may draw different conclusions therefrom, the questions of negligence and comparative and contributory negligence are factual determinations. *Maple v. City of Omaha, supra*. The question of comparative negligence is for the determination of the fact finder. *Maple v. City of Omaha, supra*. The statute granting emergency privileges to police vehicles clearly imposes a duty of due regard or due care upon the drivers of emergency vehicles, and in a negligence action their conduct will be measured against that of a reasonable person exercising due care under the same emergency circumstances. *Maple v. City of Omaha, supra*. See, also, *Lee v. City of Omaha, supra*. A driver is guilty of negligence as a matter of law if he fails to see one who is favored over him under the rules of the road. *Steinauer v. Sarpy County, supra*.

From our analysis of the evidence and the record, we determine the trial court could find that Rybar, while operating a vehicle belonging to the City and responding to an emergency call, entered Chandler at a point west of the intersection of Chandler and 73-75 and then proceeded east toward that

intersection, and that as he entered the intersection of Chandler with 13th Street the traffic light changed from green to amber. He proceeded through that intersection with lights and siren activated, and toward the intersection of Chandler and Railroad Avenue, entering that intersection against a red light. Railroad Avenue is separated from 73-75 by a median approximately 16 feet wide tapering to a point at the south edge of Chandler. At this point, by his own admission, Rybar had vision south for a block to a block and one-half. At that time he noted only vehicles in the three westerly lanes of northbound traffic on 73-75, which had stopped for a red light that had changed to green. He made visual contact with the drivers of the vehicles in those lanes and proceeded into the intersection against the red light. He traveled across three lanes, an approximate distance of 60 feet, and entered the fourth lane, where his cruiser collided with the automobile being operated by the plaintiff.

As previously noted, the evidence is in sharp conflict as to Rybar's rate of speed at this time. By his own admission, he traveled at a rate at times in excess of the speed limit while traversing Chandler prior to the 13th Street intersection. Likewise, we know from his own testimony that he entered plaintiff's lane of traffic at a rate of speed of at least 20 to 25 miles per hour. Other evidence placed his speed at that point at 45 to 50 miles per hour. Under the facts detailed above, considering the complexity of the intersection involved, and considering the evidence most favorably for the plaintiff, we cannot say that the finding of the trial court that Rybar failed to drive with due regard to the vehicle of the plaintiff is clearly incorrect. As Rybar had ascertained that vehicles were located in three of the four lanes of 73-75, it could be said that he was not exercising reasonable due care in the operation of the cruiser when he entered the fourth lane at a rate of speed that might not permit him to avoid a collision with an automobile traveling in that lane, and that he should first have made a visual survey of that lane to the south of the intersection before entering. His failure to do so could have led the trial court to conclude that Rybar was negligent in at least one of the specifications of negligence charged against him.

Section 39-608, as adopted in 1973, grants to the driver of an emergency vehicle the right to proceed past a steady red light, but he must exercise the due care also mentioned in § 39-640. In this case, Rybar had a favored position. The failure of the plaintiff to see him is negligence on her part as a matter of law, and there can be no question that this failure contributed to some degree to the collision. Since the question of comparative negligence is for the fact finder, it is implicit in the judgment rendered by the trial court that the fact finder considered and rejected the defendant's claim of contributory negligence on the part of the plaintiff sufficient to bar her recovery. In reviewing this finding by the trial court, we must resolve in her favor all the conflicts in the evidence and grant to her all reasonable inferences that can be deduced therefrom. Doing so, we are not prepared to say that in this case her negligence was more than slight when compared with the negligence of Rybar, nor that his negligence was less than gross when compared with the negligence of the plaintiff. We note that the record presented to us in this appeal is partially silent with regard to evidence bearing on damages, and we must therefore conclude that the trial court took into consideration the negligence of the plaintiff in fixing the damages awarded.

Having disposed of the question of contributory negligence on the part of the plaintiff, we determine it follows that a dismissal of the defendant's counterclaim was proper. If the negligence of the plaintiff will not support a finding for the defendant under her petition, it certainly will not sustain judgment for the defendant on its counterclaim.

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

AFFIRMED.

ROBERT J. WILLIS, APPELLANT, V. CITY OF LINCOLN, A MUNICIPAL CORPORATION, DOING BUSINESS AS LINCOLN TRANSPORTATION SYSTEM, APPELLEE.

441 N.W.2d 846

Filed June 16, 1989. No. 87-825.

1. **Political Subdivisions Tort Claims Act: Notice.** For substantial compliance with the written notice requirements of the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 13-901 et seq. (Reissue 1987), within 1 year from the act or omission on which the claim is based, the written notice of claim must be filed with an individual or office designated in the act as the authorized recipient for notice of claim against a political subdivision.
2. **Political Subdivisions Tort Claims Act: Constitutional Law: Notice.** The notice of claim requirement of the Political Subdivisions Tort Claims Act does not violate the uniformity clause of the Nebraska Constitution or the equal protection clause of the U.S. Constitution.

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

T.J. Hallinan and Gordon D. Ehrlich, of Law Offices of Cobb & Hallinan, P.C., for appellant.

Richard D. Sievers, of Bruckner, O'Gara, Keating, Sievers & Hendry, P.C., for appellee.

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

SHANAHAN, J.

Robert J. Willis filed his negligence action against the City of Lincoln under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 13-901 et seq. (Reissue 1987), on account of bodily injury to Willis in his wheelchair, which was being placed aboard a Lincoln Transportation System (LTS) "Handi-Van," a service supplied by the city. In its answer, the city specifically denied that Willis had satisfied the requirements for a suit under the Political Subdivisions Tort Claims Act and filed a motion for summary judgment, alleging that Willis had failed to comply with the notice requirement contained in § 13-919(1), which in part 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." Section 13-905 of the Political Subdivisions Tort Claims Act pertinently provides:

> All tort claims under [the Political Subdivisions Tort Claims Act] shall be filed with the clerk, secretary, or other official whose duty it is to maintain the official records of the political subdivision, or the governing body of a political subdivision may provide that such claims may be filed with the duly constituted law department of such subdivision. It shall be the duty of the official with whom the claim is filed to present the claim to the governing body.

Because Willis' appeal involves only the notice provisions of the Political Subdivisions Tort Claims Act, the circumstances around Willis' injury are but briefly mentioned. Willis alleged that on June 22, 1984, he was seated in his wheelchair and was receiving assistance from an LTS driver while boarding one of LTS' "Handi-Vans," when, due to the driver's negligence, the wheelchair tipped over backward, causing injuries to Willis' back. On the day of the accident, the LTS driver filled out a two-page "Lincoln Transportation System Onboard Accident or Incident Report," which the driver filed at the LTS office.

Shortly after Willis' accident, Joel Gray, LTS' operations and maintenance superintendent, received a copy of the van driver's report about the accident and later forwarded the report to the LTS accident review board for determination whether disciplinary action should be taken against the driver involved in the Willis accident. Howard Fletcher, risk manager for the city, received a copy of the driver's report 3 to 4 days after the accident. Fletcher's office coded the reported accident as a "possible bodily injury" claim and sent a copy of the driver's report to General Adjustment Bureau (GAB), the claims adjustment service for the company which had issued a liability policy to the city. The report on the Willis accident was then placed in the city's files with no further action anticipated.

Willis took no steps in pressing his claim against the city until March 1, 1985, when Willis' lawyer sent LTS the following letter:

Lincoln Transportation System
710 J Street
Lincoln, Nebraska 68508

Re: Robert J. Willis

Gentlemen:

Would you please have your insurance representative get in touch with me relative to the above identified individual. He was injured when he was being taken off one of your handi-buses in a wheelchair, and it was allowed to tip over backwards at which time he injured his back. This was June 22, 1984.

Thank you for the attention you will give this matter.

Very truly yours,
/s/ Kenneth Cobb

After receipt of Cobb's letter in early March of 1985, Gray called Fletcher to give Fletcher the file number assigned to the Willis accident. Gray could not recall whether he sent Fletcher a copy of Cobb's letter. The only letter received by Fletcher, who did not recall receiving a copy of Cobb's letter, was a letter on July 31, 1986, from the city attorney, which correspondence accompanied transmittal of a copy of Willis' petition filed against the city. Neither the city clerk nor the city's law department received a copy of Cobb's letter within the year after Willis' accident.

According to Cobb, sometime around April 18, 1985, an unidentified LTS employee told Cobb that Dick Knight of AID Insurance Company would be handling Willis' claim. Cobb and Knight had a number of telephone conversations during the ensuing year while Knight attempted to "find a file on the claim." On March 6, 1986, Cobb forwarded medical reports on Willis to AID Insurance, which reports AID returned to Cobb on March 24, 1986, with the notation "we are unable to locate a file." Cobb had no further contact with AID Insurance Company, but made phone calls to Gray and Fletcher, and was informed that Ed Svendsen of GAB was actually the insurance adjuster handling Willis' claim. Svendsen phoned Fletcher and Jim Faimon of the city attorney's office to determine whether Willis' written claim had been filed with the city clerk or the city

attorney within 1 year from the date of the accident. In his answers to interrogatories, Willis asserted that Svendsen denied the claim by telephone on April 16, 1986, when Svendsen stated that Willis' claim was denied because "the statute of limitations had run."

The district court determined that Willis had not complied with the notice requirements of the Political Subdivisions Tort Claims Act, granted summary judgment to the city, and dismissed Willis' action.

Willis claims that the district court erred by failing (1) to hold that Willis substantially complied with the filing requirement of § 13-905(1), (2) to estop the city from invoking the notice requirements of the Political Subdivisions Tort Claims Act, and (3) to declare the notice requirement of § 13-919(1) unconstitutional.

> A summary judgment is properly granted when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue concerning any material fact or the ultimate inferences deducible from such fact or facts and that the moving party is entitled to judgment as a matter of law. [Citations omitted.] In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. [Citation omitted.]

Union Pacific RR. Co. v. Kaiser Ag. Chem. Co., 229 Neb. 160, 162-63, 425 N.W.2d 872, 875 (1988).

Willis' appeal presents no conflict in evidence regarding the recipient of Willis' written claim, or more appropriately, persons who never received Willis' claim. Notice of a claim by Willis was not filed with the city clerk or the city's law department within 1 year from the date of the accident. See §§ 13-905 and 13-919(1). Willis does not aver that his written claim was ever sent to any person designated in § 13-905.

SUBSTANTIAL COMPLIANCE WITH NOTICE REQUIREMENTS

Willis contends that Cobb's letter to LTS constituted

substantial compliance with the notice requirements of the Political Subdivisions Tort Claims Act and, consequently, that he is entitled to maintain his action against the city. In so arguing, Willis relies in part on *Chicago Lumber Co. v. School Dist. No. 71*, 227 Neb. 355, 366, 417 N.W.2d 757, 764 (1988):

> The Political Subdivisions Tort Claims Act reflects a limited waiver of governmental immunity and prescribes the procedure for maintenance of a suit against a political subdivision. [Citation omitted.] As a condition precedent to commencement of a suit brought under the Political Subdivisions Tort Claims Act, one must timely file a proper claim with the appropriate political subdivision. See, *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).

After holding that the plaintiff in *Chicago Lumber* had sent its "claim" to the proper person designated by the Political Subdivisions Tort Claims Act, this court considered whether the claim afforded sufficient notice to the political subdivision and stated:

> In the light of decisions antedating the Political Subdivisions Tort Claims Act, it is evident that the notice required by [§ 13-905] does not have to state the indicated information, circumstances, or facts with the fullness or precision required in a pleading. [Citation omitted.] The purpose of [§ 13-905] is not to require a statement of fact to the extent that the governmental subdivision's absolute liability is verbally demonstrated in the documentary or written claim. Rather, the written claim required by [§ 13-905] notifies a political subdivision concerning possible liability for its relatively recent act or omission, provides an opportunity for the political subdivision to investigate and obtain information about its allegedly tortious conduct, and enables the political subdivision to decide whether to pay the claimant's demand or defend the litigation predicated on the claim made. [Citation omitted.]
>
> We hold, therefore, that the notice requirements for a claim filed pursuant to the Political Subdivisions Tort

> Claims Act are liberally construed so that one with a meritorious claim may not be denied relief as the result of some technical noncompliance with the formal prescriptions of the act. [Citations omitted.] Therefore, substantial compliance with the statutory provisions pertaining to a claim's content supplies the requisite and sufficient notice to a political subdivision in accordance with [§ 13-905], when the lack of compliance has caused no prejudice to the political subdivision. [Citations omitted.]

227 Neb. at 368-69, 417 N.W.2d at 765-66. See, also, *West Omaha Inv. v. S.I.D. No. 48*, 227 Neb. 785, 420 N.W.2d 291 (1988); *Franklin v. City of Omaha*, 230 Neb. 598, 432 N.W.2d 808 (1988).

Our previous decisions regarding substantial compliance with the notice provisions of the Political Subdivisions Tort Claims Act concern cases in which a political subdivision contended that the *content* of a filed claim was deficient as notice to the governmental subdivision. "[S]ubstantial compliance with the statutory provisions pertaining to a claim's content supplies the requisite and sufficient notice to a political subdivision in accordance with [§ 13-905] . . . ." *Chicago Lumber, supra* at 369, 417 N.W.2d at 766. In Willis' case, the city does not contend that the content of Cobb's letter is inadequate notice. Thus, we express no opinion whether Cobb's letter contains a "claim" in compliance with § 13-905. See, *West Omaha Inv. v. S.I.D. No. 48, supra*; *Peterson v. Gering Irr. Dist.*, 219 Neb. 281, 284, 363 N.W.2d 145, 147 (1985): "Despite plaintiffs' characterization of the document as a 'claim,' it made no demand against the district; rather, it only alerted the district to the possibility of a claim." Further, the city does not argue that Willis' claim, if filed, was not finally disposed of within 6 months after filing and was withdrawn by Willis to commence suit against the city in conformity with § 13-906 (suit permitted without governing body's final disposition of claim). Rather, the city contends, and the district court held, that the deficiency regarding Willis' claim is found in the fact that a "claim" was not filed with a recipient designated by § 13-905 pertaining to the filing of a claim

against a political subdivision.

Willis seeks extension of the substantial compliance doctrine, as such doctrine relates to the content of a written claim, to include notice of claim which has never been sent to or received by any person or entity designated by the Political Subdivisions Tort Claims Act for the filing of notice of a tort claim against a political subdivision. A notice which has been filed with a person or recipient designated by the act and which contains appropriate information to satisfy the notice requirement of the act provides a political subdivision with an opportunity to investigate, and possibly settle, a tort claim. *Chicago Lumber Co. v. School Dist. No. 71*, 227 Neb. 355, 417 N.W.2d 757 (1988). However, a notice of claim given to one who is not designated to receive notice under the Political Subdivisions Tort Claims Act may prevent a political subdivision's opportunity to investigate and settle claims inasmuch as an unauthorized recipient of notice very likely lacks power to initiate an investigation into the claim with a view toward settlement or formulation of a defense in litigation over an unsettled claim.

Therefore, we hold that for substantial compliance with the written notice requirements of the Political Subdivisions Tort Claims Act, within 1 year from the act or omission on which the claim is based, the written notice of claim must be filed with an individual or office designated in the act as the authorized recipient for notice of claim against a political subdivision. A notice of claim filed only with one unauthorized to receive a claim pursuant to § 13-905 does not substantially comply with the notice requirements of the Political Subdivisions Tort Claims Act. Willis' notice of claim, which was not sent to or received by an entity designated by § 13-905, does not substantially comply with the notice requirements of the Political Subdivisions Tort Claims Act.

ESTOPPEL

Willis next argues that the city should be estopped from raising Willis' failure to comply with the notice requirements concerning a claim under the Political Subdivisions Tort Claims Act.

> The doctrine of equitable estoppel is based on grounds of public policy and good faith, and is interposed to prevent injustice and inequitable consequences. *Koop v. City of Omaha*, 173 Neb. 633, 114 N.W.2d 380 (1962). . . .
>
> "Ordinarily, the doctrine of equitable estoppel cannot be invoked against a municipal corporation. . . . Exceptions are made only where right and justice so demand. The doctrine is to be applied with caution and only in exceptional cases under circumstances demanding its application to prevent manifest injustice." *Christian v. Geis*, 193 Neb. 146, 149, 225 N.W.2d 868, 870 (1975). . . .
>
> "The essential elements of equitable estoppel are: As to the party estopped, '* * * (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts.' As to the other party, '* * * (4) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice.' "

Osmera v. School Dist. of Seward, 216 Neb. 261, 265-66, 343 N.W.2d 886, 890 (1984) (quoting *Pester v. American Family Mut. Ins. Co.*, 186 Neb. 793, 186 N.W.2d 711 (1971)). See, also, *Weiner v. Hazer*, 230 Neb. 53, 430 N.W.2d 269 (1988).

Willis does not precisely identify the city's conduct resulting in availability of the estoppel doctrine. Rather, Willis maintains that the city "took active measures to direct appellant's handling of his claim." Brief for appellant at 20. Willis' estoppel argument appears to emanate from the information, given to Cobb by an unidentified LTS employee on April 18, 1985, that Dick Knight of AID Insurance Company would act as the insurance adjuster on Willis' claim. Putting aside

questions concerning the foundational uncertainties and proof regarding the agency of the "unidentified" LTS employee, the preceding purported and incorrect information given to Cobb on April 18, 1985, had no impact whatever on the questioned notice of claim, which had been sent to LTS on March 1, 1985, approximately 6 weeks before the conduct claimed as the basis for estoppel. Assuming applicability of estoppel in Willis' case, reliance, as an element for estoppel, cannot be based on conduct or statements which occur after the alleged reliance. No one informed Willis or his lawyer that proper filing of a claim was unnecessary under the Political Subdivisions Tort Claims Act. Moreover, the Political Subdivisions Tort Claims Act contains a clear procedure for filing a tort claim against a municipality, information ostensibly possessed by Willis' lawyer. In the present case, the city was not estopped from denying Willis' compliance with the notice requirement of the Political Subdivisions Tort Claims Act.

CONSTITUTIONALITY OF NOTICE REQUIREMENTS

Willis' final contention is that the written notice requirement of the Political Subdivisions Tort Claims Act violates the equal protection clause of the U.S. Constitution and the uniformity clause of the Nebraska Constitution by treating plaintiffs injured by political subdivisions differently from those injured by private tort-feasors. See, U.S. Const. amend. XIV; Neb. Const. art. III, § 18. Willis urges reconsideration of our holding in *Campbell v. City of Lincoln*, 195 Neb. 703, 240 N.W.2d 339 (1976), where this court held that the notice requirements of the Political Subdivisions Tort Claims Act did not violate aforementioned constitutional guarantees or protection.

In the absence of interference with a "fundamental right" or discrimination against a "suspect" class, a classification within or by a statute and resultant disparate treatment or effect on similarly situated individuals will be upheld against an "equal protection attack" if the classification is rationally related to a legitimate governmental purpose. *Kadrmas v. Dickinson Public Schools*, ____ U.S. ____, 108 S. Ct. 2481, 101 L. Ed. 2d 399 (1988); *School Dist. No. 46 v. City of Bellevue*, 224 Neb.

543, 400 N.W.2d 229 (1987); *Farm Bureau Life Ins. Co. v. Luebbe*, 218 Neb. 694, 358 N.W.2d 754 (1984). The classification at issue in Willis' case, namely, a claimant against a nongovernmental tort-feasor vis-a-vis a claimant against a political subdivision as a governmental tort-feasor, does not involve a suspect class or a fundamental right and, therefore, must be upheld if the classification bears some rational relation to a legitimate governmental purpose. *Day v. Memorial Hosp. of Guymon*, 844 F.2d 728 (10th Cir. 1988); *Lacey v. Bekaert Steel Wire Corp.*, 799 F.2d 434 (8th Cir. 1986); *Campbell v. City of Lincoln, supra*.

> The constitutional safeguard [equal protection clause of the 14th amendment to the U.S. Constitution] is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

McGowan v. Maryland, 366 U.S. 420, 425-26, 81 S. Ct. 1101, 6 L. Ed. 2d 393 (1961). See, also, *Kadrmas v. Dickinson Public Schools, supra*; *Farm Bureau Life Ins. Co. v. Luebbe, supra*.

In *Campbell v. City of Lincoln, supra*, this court rejected constitutional attacks on the notice requirements of the Political Subdivisions Tort Claims Act, attacks which were based on denial of equal protection guaranteed by the 14th amendment to the U.S. Constitution and uniformity guaranteed by article III, § 18, of the Nebraska Constitution, stating:

> The plaintiff contends that the act is unreasonable and does not operate uniformly because it puts persons injured by governmental torts in a different class than those injured by private torts, and imposes special notice requirements and limitations of actions for claims against governmental subdivisions to which tort claims against private persons are not subject.
>
> The act creates one single class of tort-feasors — all political subdivisions — which includes "villages, cities of

all classes, counties, school districts, public power districts, and all other units of local government." The act applies equally and uniformly to all tort claims against a political subdivision. The fact that public agencies, generally speaking, differ from private persons or corporations in many respects is obvious. Under many circumstances that difference has been held to be sufficient in itself to afford a proper subject for legislative classification....

The taxpaying public has an interest in seeing that prompt and thorough investigation of claims is made where a political subdivision is involved. The public does not have such an interest as to claims against private persons or corporations. The taxpayers who provide the public treasury with funds have an interest in protecting that treasury from stale claims. That interest may well be intensified where the political subdivision has not been protected by insurance. It is clear under the act that while the procurement of insurance coverage is authorized, it is not required, and there are provisions for loans by the State Treasurer to a political subdivision in the event insufficient funds are available to pay awards or judgments under the act. The Nebraska Political Subdivisions Tort Claims Act, in creating a special class of tort-feasors consisting of all political subdivisions as defined, does not violate Article III, section 18, of the Nebraska Constitution....

The requirement of notice imposed by the act is a factor here only with respect to activities previously classified as proprietary. This court long ago held that the primary purpose of notice provisions in connection with actions against political subdivisions was "to afford to the municipal authorities prompt notice of the accident and injury in order that an investigation may be made while the occurrence is still fresh and the municipal authorities placed in a position to intelligently consider the claim, allow it if deemed just, or in the alternative to adequately protect and defend the public interest." Bethscheider v. City of Hebron, 137 Neb. 909, 291 N.W. 684. See, also,

> Knapp v. City of Omaha, 172 Neb. 78, 108 N.W.2d 419.
>
> Other courts, under similar or related circumstances, have held that notice requirements as conditions precedent to suit against a municipal corporation are not unreasonable and unconstitutional, even though no notice is required in suits against private corporations for similar tort claims.

Campbell v. City of Lincoln, 195 Neb. 703, 709-11, 240 N.W.2d 339, 342-43 (1976).

Willis cites cases from other jurisdictions which have struck down the written notice requirement in a statute authorizing a tort claim against a political subdivision of the state; for example, *Miller v. Boone County Hospital*, 394 N.W.2d 776 (Iowa 1986), where the Supreme Court of Iowa expressed:

> Failure to commence an action within six months unless a notice is given within 60 days arbitrarily bars victims of governmental torts while victims of private torts suffer no such bar. We conclude such arbitrary treatment violates the equal protection guarantees of our federal and state constitutions.

394 N.W.2d at 780.

Although we have examined the authorities mentioned by Willis to support his constitutional attacks on the notice requirement of the Political Subdivisions Tort Claims Act, we find *Day v. Memorial Hosp. of Guymon*, 844 F.2d 728 (10th Cir. 1988), persuasive constitutional justification for the notice requirement concerning a tort claim against a governmental body or entity:

> Notice of claim provisions have been found to serve several legitimate state interests. Most commonly the statutes are said to allow: a prompt investigation while the evidence is still fresh; the opportunity to repair or remedy dangerous conditions; quick and amicable settlement of meritorious claims; and preparation of fiscal planning to meet any possible liability. [Citation omitted.] Other purposes include the discouragement of unfounded claims, minimizing the amount of damages and litigation costs, and allowing continued provision of local services and the maintenance of fiscal stability. [Citations

> omitted.] These are legitimate governmental interests which conceivably promote the general welfare by ensuring the stability of government entities. Tort claims against the government have the potential to affect the orderly provision of necessary services to the general public. Given these factors, it cannot be said that the enactment of the notice requirement was an irrational means of pursuing legitimate state objectives. [Citation omitted.] The requirement that tort victims give notice to the government . . . may serve to reduce spurious claims and to allow the government to prepare its defense. Such a provision may further ensure that the proper officials are notified of dangerous conditions and are aware of their duty to act.

844 F.2d at 731.

Thus, we conclude that the notice of claim requirement contained in the Political Subdivisions Tort Claims Act is relevant and related to a legitimate governmental purpose. Requiring a tort claim-notice to be filed with appropriate governmental authority allows a political subdivision with a wide range of activities to consolidate responsibility concerning investigation and settlement of claims against the political subdivision and thereby reduce exposure to expensive litigation. A notice of claim requirement also alerts a political subdivision to dangerous activities which may continue undetected in the absence of such notice, that is, until commencement of litigation. Requiring notice within 1 year after a claim's accrual assures that the subdivision will be able to conduct an investigation when the occurrence is still reasonably current or fresh in the minds of observers, and may provide the political subdivision with an early opportunity to remedy a situation dangerous to the public and avoid similar future claims. While all the foregoing concerns may also exist to some extent regarding claims against nongovernmental tort-feasors, those concerns are particularly compelling in reference to claims against political subdivisions, whose services are frequently essential to the public safety and welfare. As a result, the economic stability of Nebraska's political subdivisions, potentially jeopardized by numerous tort claims difficult to

investigate or disprove, is a matter of substantial interest to the people and taxpayers of the political subdivision.

A requirement that a political subdivision be notified of any tort claim within 1 year after a claim's accrual is not irrationally or unreasonably related to the protection of important public interests. See *Day v. Memorial Hosp. of Guymon, supra*. We, therefore, reaffirm our conclusion in *Campbell* and hold that the notice of claim requirement of the Political Subdivisions Tort Claims Act does not violate the uniformity clause of the Nebraska Constitution or the equal protection clause of the U.S. Constitution.

The district court committed no error when it granted summary judgment to the city and dismissed Willis' action. Therefore, the decision of the district court is affirmed.

AFFIRMED.

JOSEPH N. LINDQUIST, PERSONAL REPRESENTATIVE OF THE ESTATE OF MARY ANN STEVENS, DECEASED, APPELLEE, V. BEULAH E. BALL, APPELLANT.

441 N.W.2d 590

Filed June 16, 1989. No. 87-830.

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. **Acknowledgments: Deeds: Parties.** An acknowledgment of a deed before an interested party is void.
4. **Conveyances: Real Estate: Parties: Acknowledgments: Homesteads.** Any conveyance of real estate executed and delivered is valid between the parties, even though it is not lawfully acknowledged, if the real estate is not the homestead of the grantor.
5. **Acknowledgments: Deeds: Homesteads.** Before a court may find an

unacknowledged deed valid, it must be shown where raised: (1) that the property at issue was not the homestead of the grantor, and (2) that the grantor, being competent, voluntarily executed and delivered the deed.

6. **Homesteads: Summary Judgment: Appeal and Error.** Whether property is homestead property is an issue of material fact requiring reversal of a summary judgment.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Frank Meares for appellant.

Mark J. Daly, of Nelson & Harding, for appellee.

HASTINGS, C.J., SHANAHAN, and FAHRNBRUCH, JJ., and NORTON, D.J., and RONIN, D.J., Retired.

FAHRNBRUCH, J.

Beulah E. Ball appeals a Douglas County District Court summary judgment which held void a warranty deed Ball claims was executed and delivered to her by Mary Ann Stevens before Stevens died. Ball's cross-petition for slander of title was dismissed. We reverse in part, affirm in part, and remand for a trial.

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. *Five Points Bank v. White*, 231 Neb. 568, 437 N.W.2d 460 (1989); *West Town Homeowners Assn. v. Schneider*, 231 Neb. 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. *Five Points Bank v. White, supra*; *Renner v. Wurdeman*, 231 Neb. 8, 434 N.W.2d 536 (1989).

Stevens died on July 29, 1984. Ball, on August 9, 1984, filed with the Douglas County register of deeds a warranty deed

purportedly executed by Stevens on May 30, 1984. That deed purports to convey Stevens' home to Ball for "Two Dollars and other valuable consideration, of love, affection and caring." The deed was claimed to have been signed and acknowledged by Stevens with the grantee, Ball, acting as notary.

Joseph N. Lindquist, personal representative of Stevens' estate, brought an action to quiet title in the plaintiff to the property described in the deed. In her cross-petition, Ball claims her title to the real estate was slandered by the plaintiff.

In granting summary judgment, the trial court found that the deed was invalid because it was acknowledged before a notary who was an interested party. The court also found that Lindquist had an uncontroverted valid reason for bringing the quiet title action. No evidence was adduced that any filings were for the purpose of slandering the title to the real estate. Ball's cross-petition was dismissed.

On appeal, Ball assigns three errors, which can be consolidated into one: The trial court erred in sustaining Lindquist's motion for summary judgment on the petition and cross-petition, because issues of material fact exist.

An acknowledgment of a deed before an interested party is void. See *Nat. Bank of Commerce Trust & Savings Assn. v. Rhodes*, 207 Neb. 44, 295 N.W.2d 711 (1980). Ball admittedly was an interested party and signed the acknowledgement in question as a notary. In that situation, any purported acknowledgement is void. However, this does not necessarily mean that the deed is also void.

Any conveyance of real estate executed and delivered is valid between the parties, even though it is not lawfully acknowledged, if the real estate is not the homestead of the grantor. See, *Mazanec v. Lincoln Bonding & Ins. Co.*, 169 Neb. 629, 100 N.W.2d 881 (1960); *O'Neill Production Credit Assn. v. Mitchell*, 209 Neb. 206, 307 N.W.2d 115 (1981); *Wilson v. Wilson*, 85 Neb. 167, 122 N.W. 856 (1909).

Before a court may find an unacknowledged deed valid, it must be shown where raised: (1) that the property at issue was not the homestead of the grantor, and (2) that the grantor, being competent, voluntarily executed and delivered the deed. In the case before us, the trial court apparently made no

determination as to whether the property at issue was Stevens' homestead.

The record reflects that at the time of her death, Stevens was a widow. The record further shows that the property was purchased in her name in 1972. Whether the property was used by Stevens and her husband as a homestead after the property was purchased is not disclosed by the record. If used by Mrs. Stevens and her late husband as their homestead, and if not abandoned, the real estate would still be Mrs. Stevens' homestead on May 30, 1984. To convey it would require an acknowledgment by Mrs. Stevens before a disinterested notary. See, *United States Nat. Bank v. Simonds*, 133 Neb. 42, 274 N.W. 187 (1937); *Lewis v. McAdams*, 130 Neb. 62, 263 N.W. 480 (1935). If it was a homestead on May 30, 1984, the deed acknowledged before Ball is void. If the property was not Mrs. Stevens' homestead, only the acknowledgment is void. Then Ball would be entitled to prove the execution and delivery of the deed to make it valid as between the parties.

Whether the property is homestead property is an issue of material fact requiring reversal of the summary judgment. See *Horn v. Gates*, 155 Neb. 667, 53 N.W.2d 84 (1952). The order of the district court is reversed and the cause remanded for a trial on the issue of the deed's validity.

With respect to Ball's claim that summary judgment should not be sustained because of a factual issue regarding slander of title, Neb. Rev. Stat. § 76-296 (Reissue 1986) must be examined. That section provides:

> No person shall use the privilege of filing notices hereunder for the purpose of slandering the title to real estate and in any action brought for the purpose of quieting title to real estate, if the court shall find that any person has filed a claim for the purpose only of slandering title to such real estate, the court shall award the plaintiff all of the costs of such action, including attorney fees to be fixed and allowed to the plaintiff by the court, and all damages that plaintiff may have sustained as a result of such notice of claim having been filed for record.

There is no evidence that the plaintiff filed the quiet title action for the purpose of slandering the title to the real estate.

An abstract of title, admitted into evidence, shows Stevens as the legal owner of the property at the time of her death. Ball being both the grantee and notary provides good cause to challenge the deed in question. Had he not made the challenge, Lindquist might well have been held negligent in administering Stevens' estate.

The evidence shows that Lindquist believed the estate was the owner of the property at the time Ball filed her purported deed. There was no evidence to the contrary. Filing the quiet title action was appropriate, and Ball's cross-petition was properly dismissed.

The order of the district court is reversed and the cause remanded for trial as to plaintiff's petition, and is affirmed as to defendant's cross-petition.

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

STATE OF NEBRASKA, DEPARTMENT OF HEALTH, APPELLEE, V. JOHN HINZE, APPELLANT.

441 N.W.2d 593

Filed June 16, 1989. No. 87-906.

1. **Contempt: Appeal and Error.** A judgment of criminal contempt is reviewed by the Supreme Court in the same manner as a criminal case. The review is solely on the record, and the judgment of the trial court will be affirmed if the findings are supported by the evidence.
2. **Public Health and Welfare: Words and Phrases.** The very use of the title "Doctor" to the average mind implies peculiar skill and knowledge, and invites faith and confidence, and it is entirely proper to protect the public from ignorant or incompetent men or women professing to be competent physicians.
3. **Public Health and Welfare.** There exists no vested right to practice medicine; rather, it is a conditional right subordinate to the police power of the State to protect and preserve the public health.
4. **Public Health and Welfare: Constitutional Law.** The State's compelling interest in regulating the health and welfare of its citizens outweighs any incidental infringement of the free speech of individuals who are not licensed to practice medicine.
5. _____: _____. The practice of medicine itself is not protected by the first

amendment. Therefore, reasonable regulation of medical practice does not conflict with first amendment protections.

6. _____: _____. The first amendment is not an umbrella shielding the verbal charlatan from responsibility for his conduct; nor does it impede the State in the proper exercise of its regulatory functions.

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

Douglas Veith, of Veith, P.C., Bertolini, Schroeder and Blount, for appellant.

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

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

FAHRNBRUCH, J.

John Hinze appeals the Douglas County District Court's order finding him in criminal contempt of a prior court order enjoining Hinze from practicing medicine without a license. Hinze was fined $500 and sentenced to 60 days in jail. We affirm.

A judgment of criminal contempt is reviewed by the Supreme Court in the same manner as a criminal case. The review is solely on the record, and the judgment of the trial court will be affirmed if the findings are supported by the evidence. See *In re Contempt of Liles*, 217 Neb. 414, 349 N.W.2d 377 (1984).

On November 10, 1986, Hinze was permanently enjoined from engaging in the practice of medicine without a license issued by the State of Nebraska Department of Health. This injunction was a result of Hinze's having established a "clinic" at which he diagnosed and treated ailments of individuals. The defendant was specifically enjoined from:

> 1. Publicly professing to be a physician or publicly professing to assume the duties incident to the practice of medicine;
>
> 2. Prescribing and/or furnishing medicine for any illness, disease, ailment, injury, pain, deformity, and any physical or mental condition, or treating the same by surgery;

3. Holding himself out to the public as being qualified in the diagnosis or treatment of diseases, ailments, pain, deformity, or any physical or mental condition, or injuries of human beings;

4. Suggesting, recommending, or prescribing any form of treatment for the intended palliation, relief or cure of any physical or mental ailment of any person;

5. Maintaining an office for the examination or treatment of persons afflicted with ailments, diseases, injuries, pain, deformity, or any physical or mental condition of human beings; and

6. Attaching to his name any word or abbreviation indicating that he is engaged in the treatment or diagnosis of ailments, diseases, injuries, pain, deformity, infirmity, or any physical or mental condition of human beings.

These court-imposed prohibitions essentially track Neb. Rev. Stat. § 71-1,102 (Reissue 1986).

The court ordered that the injunction remain in effect until such time as Hinze obtained a license to practice medicine in this state from the Department of Health.

On January 23, 1987, Duane Newland, an investigator for the Bureau of Examining Boards of the Nebraska Department of Health, attended a seminar conducted by the defendant at a Lutheran church in Hastings. Newland and 40 to 50 other people each paid $45 to attend this seminar. The defendant, who was introduced as "Dr. John Hinze," informed the gathering that he would be providing information with regard to homeopathic and naturopathic remedies. He did not explain that he uses the title "Doctor" because he holds a doctorate degree in "pharmacy" from the University of Tennessee and a degree in naturopathy from a Canadian college.

Hinze informed the group that Nebraska did not yet have a licensing procedure for homeopathic or naturopathic treatments. He urged those present to contact their state senators and voice support for such a licensing procedure. Finally, Hinze relayed a few generalities about the practice of homeopathy before opening the seminar to specific questions of the participants.

One woman in attendance told Hinze that her son had been

"run over" by a car and was experiencing seizures. She asked what type of treatment could be used for her son. Hinze advised the mother that the child could be given arnica in a dosage of "30X to 200X." He also suggested that silica could be applied to the scars the child had received.

Another woman asked Hinze about dark circles under her children's eyes. He explained that dark circles under a person's eyes are often associated with poor digestion and allergies. Hinze cited a study in which undigested food apparently was found to cause allergies. The defendant then suggested that the woman give her children fennel, anise, mints, and gentian to help digest proteins.

A third woman stated that she knew children who were infested with pinworms. The defendant suggested that carrots, pumpkin seed, and gentian be used to treat the pinworms.

Another woman attending the seminar told Hinze that her husband suffered from high cholesterol and high blood pressure. The defendant explained that high cholesterol is caused by eating sugar which the liver is unable to process. Hinze suggested that the woman give her husband dandelion root to stimulate his liver.

One seminar attendant told Hinze that she suffered from sinus headaches triggered by smoke, perfume, and pressure. Hinze explained that an acupuncture meridian running through the liver might be a contributing factor to her headaches. He suggested dandelion tea as a remedy.

Finally, Newland told Hinze that he was having kidney problems and was taking medication called Bactrim. The defendant told Newland he could drink water and cranberry juice sweetened with sugar. Hinze said that Bactrim was crystallizing in Newland's kidneys. He also said Newland could use cornsilk and uva-ursi to treat the kidney problems.

Also attending the seminar was Les McGerr. McGerr sells herbs and vitamins and is a business partner of Hinze's. McGerr was at the seminar to take orders for the homeopathic herbs and remedies suggested for the participants' ailments.

Based upon these facts, the district court found Hinze in contempt of court for willfully violating paragraphs 1, 2, 3, 4, and 6 of the injunction against practicing medicine without a

license.

Hinze assigns the trial court's finding him in contempt as error. He argues that he was generally discussing the area of naturopathic medicine at an open, public seminar and that the contempt finding infringes upon his right to freedom of speech.

Hinze initially argues that he did not violate the injunction against practicing medicine without a license. The evidence proves this argument to be without merit.

Paragraph 1 of the injunction prohibits Hinze from publicly professing to be a physician or publicly professing to assume the duties incident to the practice of medicine. Paragraph 3 enjoins Hinze from holding himself out to the public as being qualified in the diagnosis or treatment of diseases, ailments, pain, deformity, or any physical or mental condition, or injuries of human beings.

Hinze violated these prohibitions at his seminar by soliciting participants' ailments, suggesting specific remedies for specific ailments, by informing the group that he had previously treated a similar complaint, and by using the title "Doctor" without explanation of his educational background. When all circumstances are considered, the trial court could find that the defendant willfully led members of the public into believing that he was qualified to diagnose and treat physical ailments. This same conduct also violates paragraphs 2, 4, and 6 of the injunction.

Paragraph 2 prohibits prescribing and/or furnishing medicine for any illness, disease, ailment, injury, pain, deformity, and any physical or mental condition, or treating the same by surgery. Paragraph 4 prohibits suggesting, recommending, or prescribing any form of treatment for the intended palliation, relief, or cure of any physical or mental ailment of any person.

At the seminar, Hinze fielded specific questions on participants' illnesses and ailments. He responded to those questions with specific remedies and at one time included dosages. Hinze discussed reasons behind ailments suffered by members of the audience and explained how the recommended treatment would work. Hinze obviously intended to provide relief for the participants' medical problems. Further, Hinze's

business partner was available to sell the recommended remedies to seminar participants.

Finally, by calling himself "Dr. Hinze," without explaining his educational background, the defendant violated paragraph 6 by attaching to his name any word or abbreviation indicating that he is engaged in the treatment or diagnosis of physical or mental condition of human beings. Hinze argues that his doctorate in pharmacology gives him the "right" to use the title of "Doctor." In *Carpenter v. State*, 106 Neb. 742, 748, 184 N.W. 941, 943-44 (1921), this court explained that "[t]he very use of the title 'Doctor' to the average mind implies peculiar skill and knowledge, and invites faith and confidence, and it is entirely proper to protect the public from ignorant or incompetent men or women professing to be competent physicians."

The evidence establishes that the defendant was not acting as a pharmacist but, rather, as a practitioner of the healing arts. The circumstances surrounding the seminar lead to the conclusion that Hinze referred to himself as a "Doctor" in order to lead members of the audience to believe that he was qualified to diagnose and treat physical ailments.

The trial court's finding that Hinze violated the injunction against practicing medicine without a license is supported by the record.

The final issue for consideration is Hinze's claim that the trial court's finding him in contempt violates his first amendment right to freedom of speech. This contention is without merit.

There exists no vested right to practice medicine; rather, it is a conditional right subordinate to the police power of the State to protect and preserve the public health. See *Reisinger v. Com., State Bd. of Med. Ed., etc.*, 41 Pa. Commw. 553, 399 A.2d 1160 (1979), citing *Watson v. Maryland*, 218 U.S. 173, 30 S. Ct. 644, 54 L. Ed. 987 (1910).

> As long as the requirements of learning, skill and examination for obtaining a license to practice medicine bear a direct, substantial and reasonable relationship to the practice of medicine, a Naturopath or anyone else intending to practice the act of healing can be required to meet the standards set for the medical profession.

Reisinger, supra, 399 A.2d at 1164, citing *Stuart v. Wilson*, 211

F. Supp. 700 (N.D. Tex. 1962), *aff'd* 371 U.S. 576, 83 S. Ct. 547, 9 L. Ed. 2d 537 (1963).

Many courts have ruled that the State's compelling interest in regulating the health and welfare of its citizens outweighs any incidental infringement of the free speech of individuals who are not licensed to practice medicine. In *People v. Jeffers*, 690 P.2d 194 (Colo. 1984), the defendant appealed an order convicting him of practicing medicine without a license. The defendant claimed that prohibiting him from practicing medicine without a license "chilled" forms of speech protected by the Constitution of the United States.

The Colorado Supreme Court found that the State could, pursuant to its police power, regulate the practice of medicine and prohibit unlicensed people from providing medical treatment. The court explained that "[t]he practice of medicine itself is not protected by the first amendment. Therefore, reasonable regulation of medical practice does not conflict with first amendment protections." *Id.* at 198.

In *People v. Ray*, 119 Ill. App. 3d 180, 456 N.E.2d 179 (1983), the defendant claimed that his conviction for practicing medicine without a license violated his right to freedom of speech. The Illinois court concluded that any infringement of Ray's freedom of speech was incidental and was outweighed by the State's compelling interest in the regulation of the practice of medicine to preserve and protect the health, safety, and welfare of the citizens.

The California Court of Appeal considered a case in which the first amendment was argued to protect one already practicing medicine. In *Shea v. Board of Medical Examiners*, 81 Cal. App. 3d 564, 146 Cal. Rptr. 653 (1978), a medical doctor's license to practice medicine was revoked after he engaged in monologues with hypnotized patients. During the monologues, Shea described various sexual acts in very explicit detail and in graphic nonmedical terms. The court found that it is within the police power of the State to enact laws to protect the health, safety, and welfare of society; that the constitutional protection afforded to speech applies only to the extent that it does not impair the patient-physician relationship; that the challenged speech was outside the ambit of constitutional

protection; and that the physician's argument that revocation of his license under such circumstances would have a " 'chilling effect upon the right of freedom of speech and the right to practice medicine' " had no merit. *Shea, supra* at 577, 146 Cal. Rptr. at 661.

The court further stated that assuming, for the purpose of argument only, that the constitutional rights of the physician were infringed, "the First Amendment is not an umbrella shielding the type of verbal conduct in which the doctor engaged. It does not insulate the verbal charlatan from responsibility for his conduct; nor does it impede the State in the proper exercise of its regulatory functions." *Shea, supra* at 577, 146 Cal. Rptr. at 662.

Finally, in *Idaho Ass'n, etc. v. U. S. Food and Drug Admin.*, 582 F.2d 849 (4th Cir. 1978), *cert. denied* 440 U.S. 976, 99 S. Ct. 1547, 59 L. Ed. 2d 795 (1979), the U.S. Court of Appeals for the Fourth Circuit considered the first amendment claims of several naturopathic practitioners and students. The court found that the plaintiffs had failed to state a cause of action upon which relief could be granted. In making this finding, the court stated:

> We conclude that the naturopaths' various constitutional claims depend on a single underlying contention: that a state must recognize naturopathy as a discipline distinct from the orthodox practice of medicine whose practitioners are entitled to licensing requirements different from those imposed on other physicians. . . . In light of the decisions of the Supreme Court that we have reviewed, we find that the naturopaths' basic claim has been firmly, repeatedly, and authoritatively rejected.

Idaho Ass'n, supra at 853-54.

It is clear that Hinze has no constitutional right to practice medicine without a license. In the exercise of its police power, the State of Nebraska has chosen not to recognize naturopathy as a legitimate branch of medicine. Until the Legislature of this State reverses that position by establishing a licensing procedure, Hinze is enjoined from practicing naturopathy in any of its various forms. Any infringement on Hinze's freedom of speech created by this injunction is, at most, incidental and is

outweighed by this State's compelling interest in protecting the health and welfare of the citizens of Nebraska. See, *Carpenter v. State*, 106 Neb. 742, 184 N.W. 941 (1921); *Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657 (1977); *Gee Wo v. State*, 36 Neb. 241, 54 N.W. 513 (1893).

The decision of the district court finding Hinze in contempt of court is clearly supported by the evidence. Hinze's conviction and sentence are affirmed.

AFFIRMED.

JOHN PREISENDORF, JR., APPELLEE, V. GALE METTENBRINK AND LADONNA METTENBRINK, HUSBAND AND WIFE, APPELLANTS.

441 N.W.2d 203

Filed June 16, 1989. No. 87-963.

1. **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.
2. **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.
3. **Appeal and Error.** Defenses not raised or litigated in the trial court cannot be urged for the first time on appeal.
4. **Contracts: Consideration.** There is sufficient consideration for a promise if there is any benefit to the promisor or any detriment to the promisee.

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

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

Thomas L. Kovanda, of Anderson, Vipperman, Hall, Kovanda & Wetzel, for appellee.

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

FAHRNBRUCH, J.

Gale and LaDonna Mettenbrink, husband and wife, appeal a decision of the Hall County District Court after a bench trial that they owe $13,500 for the extension of an option to buy farmland owned by John Preisendorf, Jr. We affirm with directions.

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. 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. *Stiles v. Skylark Meats, Inc.*, 231 Neb. 863, 438 N.W.2d 494 (1989); *State v. Smith*, 231 Neb. 740, 437 N.W.2d 803 (1989).

In January of 1975, Preisendorf leased 560 farmland acres for 5 years to Gem Cattle Company, Inc. Between 1975 and 1980, by agreement, a quarter section of the property was sold. In 1980, Gale Mettenbrink, who was one of the owners of Gem Cattle, personally obtained the option to purchase the remaining Preisendorf farmland. The option on the remaining farmland was to be exercised by Mettenbrink between January 1 and May 1 of 1980.

In December of 1979, Preisendorf received a letter from Mettenbrink's then partner, Calvin Fryar, indicating an intention to exercise the option. Preisendorf forwarded requested documents to Fryar's attorney in Texas. In the meantime, Mettenbrink bought Fryar's interest in the option. Preisendorf received no further indication that Mettenbrink intended to exercise the option until after the May 1 deadline had passed. Sometime after May 1, 1980, Mettenbrink contacted Preisendorf about exercising the option. Preisendorf was reluctant to extend the option period.

In 1976, Preisendorf had installed irrigation equipment for

Mettenbrink. The bill for this equipment installation was eventually paid by Niels McDermott, another partner of Mettenbrink's, after Preisendorf agreed to discount the amount owed. Also, during the term of the lease, Preisendorf agreed not to cash several lease payment checks until Mettenbrink told Preisendorf there was sufficient money in Mettenbrink's bank account to cover them. All of the lease checks were eventually "made good"; however, inability to cash the checks caused Preisendorf to twice threaten foreclosure. Because of past difficulty in collecting payment from Mettenbrink, Preisendorf was reluctant to extend the option period. He relayed his reluctance, and the reasons therefor, to Mettenbrink. Eventually, the parties agreed by telephone and in person that Mettenbrink would pay an additional sum for the option.

On May 13, 1980, Mettenbrink arrived at Preisendorf's farm and ultimately gave Preisendorf a check for $13,500. LaDonna Mettenbrink signed as the check's maker. Preisendorf agreed to "hold the check" until Mettenbrinks had money to cover it. After several attempts to collect, and reassurance by Mettenbrink that the check would be paid, Preisendorf presented the check to the bank for payment. He was informed that Mettenbrink had stopped payment on the check. This suit followed.

Mettenbrink testified he stopped payment on the check because his records disclosed that his irrigation equipment account with Preisendorf had been paid in full. He said that he had received no bills from Preisendorf for several years. Mettenbrink testified that at the time he gave Preisendorf the check, he thought that the account was paid in full. Mettenbrink admitted that he paid the $13,500 because Preisendorf wanted more money, since the option deadline had passed.

After receiving the check from the Mettenbrinks, Preisendorf executed the deed to the property and instructed his wife to sign and deliver the deed to a local bank. At the bank, Mrs. Preisendorf received a cashier's check for $50,298, the amount stated on the deed. That same day, Mettenbrink transferred the property to his parents, Mr. and Mrs. Elmer Mettenbrink. The deed recited consideration of $123,000.

The court found that the parties entered into a separate agreement whereby Preisendorf agreed to renew the option and Mettenbrink agreed to pay an additional $13,500. The trial court also found that the agreement was supported by sufficient consideration. Judgment was entered in favor of Preisendorf in the amount of $13,500.

On appeal, Mettenbrinks assign three errors: (1) that the evidence is insufficient to support the findings of the trial court; (2) that there is no consideration for the $13,500; and (3) that the doctrine of merger should apply to defeat Preisendorf's claim.

In their pleadings in the district court, Mettenbrinks did not allege merger as an affirmative defense. The trial court made no ruling on whether the doctrine applies in this case. Defenses not raised or litigated in the trial court cannot be urged for the first time on appeal. *Guaranteed Foods v. Rison*, 207 Neb. 400, 299 N.W.2d 507 (1980); *Smith v. Wrehe*, 199 Neb. 753, 261 N.W.2d 620 (1978). See, also, *Fredericks v. Western Livestock Auction Co.*, 225 Neb. 211, 403 N.W.2d 377 (1987).

The trial court did not err in failing to apply the doctrine of merger.

Mettenbrinks also claim as error the trial court's finding that Preisendorf agreed to renew the land option in exchange for $13,500. The appellants attempt to characterize the payment as one for irrigation services they had already paid in full. Mettenbrinks argue that the evidence is conflicting regarding the purpose for the $13,500 payment. However, both parties testified that Preisendorf wanted the additional money in exchange for renewing the option.

The record indicates that Preisendorf had performed many favors for Mettenbrink, several of which were costly for Preisendorf. He was not willing to extend another favor without receiving compensation. Mettenbrink admitted that Preisendorf told him he had lost money on the irrigation services and that he wanted extra money because the May 1 deadline had passed.

It is clear from the record that both parties understood the $13,500 payment was in exchange for renewing the option. Any conflict in the evidence was resolved by the trial court in favor

of Preisendorf, and that resolution is not clearly wrong. The trial court did not err in finding that Preisendorf agreed to renew the option in exchange for $13,500.

Finally, Mettenbrinks assert that the court erred in finding that there was consideration for the $13,500 payment. There is sufficient consideration for a promise if there is any benefit to the promisor or any detriment to the promisee. *Kearney Centre Inv. v. Thomas*, 229 Neb. 21, 424 N.W.2d 620 (1988); *Blanchard v. White*, 217 Neb. 877, 351 N.W.2d 707 (1984).

For there to be consideration for Mettenbrink's promise to pay $13,500, Mettenbrink must have received a benefit or Preisendorf a detriment. Clearly, Mettenbrink received a benefit in that Preisendorf renewed the land option. This renewal allowed Mettenbrink to purchase land he knew to be worth at least $100,000 for an amount less than half the land's actual value. The trial court did not err in finding that sufficient consideration existed for the $13,500 payment.

Both Gale and LaDonna Mettenbrink participated in and received the benefits of the renewed option. The court in its findings found both Mettenbrinks liable. It is plain from the record and evidence that the failure to place an s on the word defendant in the judgment portion of the decree was a typographical omission.

The decision is affirmed, but the trial court is ordered to enter judgment against both Gale and LaDonna Mettenbrink.

AFFIRMED WITH DIRECTIONS.

DON BLAZEK, SR., DOING BUSINESS AS BLAZEK AUTO PARTS, APPELLANT, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLEE.

441 N.W.2d 205

Filed June 16, 1989. No. 87-1019.

1. **Judgments: Res Judicata.** A 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.

2. _____: _____. A consent decree or consent judgment operates on the merits, and is as final and binding upon the parties as a decree rendered after a hearing on the merits.
3. _____: _____. A consent judgment is given greater force than an ordinary judgment and, generally, may not be modified or set aside except for fraud or mutual mistake.
4. _____: _____. Except where an important public policy would be violated, judgments entered by agreement or consent are generally given a conclusive effect and are res judicata.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed.

John W. Steele, of Schumacher & Achelpohl, for appellant.

Herbert M. Fitle, Omaha City Attorney, James E. Fellows, and Wendy E. Hahn for appellee.

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

BOSLAUGH, J.

The plaintiff, Don Blazek, Sr., doing business as Blazek Auto Parts, commenced this action to obtain a declaratory judgment declaring that the part of the Omaha Municipal Code which regulates the automotive salvage business is unconstitutional. The defendant, City of Omaha, filed an answer and a motion for summary judgment. The trial court found that the plaintiff lacked standing to challenge the ordinance, that the action was barred by res judicata, and that the defendant's motion should be sustained. The plaintiff has appealed.

The first amended petition alleged that the plaintiff operates a licensed used car business and automotive parts business in Omaha, Nebraska; that the plaintiff buys used, abandoned, and wrecked automobiles for the purpose of repairing and reconditioning them; that it is often necessary to take the used cars apart to see if they are repairable; that the plaintiff has attempted to comply with the ordinance but is unsure of his rights and has been repeatedly threatened with prosecution for operating a salvage business in violation of the ordinance; and that the ordinance is unconstitutionally vague, overbroad, and not uniformly enforced or subject to being uniformly enforced.

The plaintiff prayed for a judgment declaring the ordinance unconstitutional and enjoining the defendant from prosecuting the plaintiff under the ordinance.

The evidence received at the hearing on the motion for summary judgment consisted of the records in six previous cases involving controversies between the defendant and the plaintiff concerning the ordinance.

On May 30, 1986, the city commenced an action against the plaintiff to enjoin him from operating an automobile salvage business on the premises without a permit. The petition alleged that the plaintiff was then operating an automobile salvage business in violation of the ordinance; that the plaintiff's permit to operate the business had been revoked on October 14, 1985; that the plaintiff's application for a new permit was denied on February 11, 1986; that the plaintiff's petition in error to review the denial of a permit had been dismissed on May 22, 1986; and that the plaintiff continued to operate his salvage business in violation of the ordinance.

The action commenced May 30, 1986, resulted in a consent decree entered on June 12, 1986, which permanently enjoined the plaintiff from operating an automotive salvage business without a permit from the city. The finding of the trial court that this action was barred by res judicata was based upon the judgment entered on June 12, 1986.

The plaintiff contends that res judicata is not applicable because the validity of the ordinance was not an issue in the prior action, and a prior consent decree may not be used as a basis for res judicata.

The fact that the validity of the ordinance was not raised in the prior action is not controlling. Res judicata applies to both the issues raised and issues which could have been raised in the prior litigation. If the ordinance was invalid, that could have been raised by the plaintiff as a defense to the relief the city requested and obtained in the prior action.

A 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. *Farmers State Bank v. Germer*, 231 Neb. 572, 437 N.W.2d 463 (1989).

A consent decree or consent judgment operates on the

merits, and is as final and binding upon the parties as a decree rendered after a hearing on the merits. *State ex rel. Beck v. Lush*, 170 Neb. 376, 103 N.W.2d 136 (1960). A consent judgment is given greater force than an ordinary judgment and, generally, may not be modified or set aside except for fraud or mutual mistake. *McArthur v. Thompson*, 140 Neb. 408, 299 N.W. 519 (1941); *Kanouff v. Norton*, 160 Neb. 593, 71 N.W.2d 89 (1955); *Detter v. Erpelding*, 176 Neb. 600, 126 N.W.2d 827 (1964); *Lawson v. Lawson*, 185 Neb. 164, 174 N.W.2d 202 (1970).

Except where an important public policy would be violated, judgments entered by agreement or consent are generally given a conclusive effect and are res judicata. See, *Loup County v. Rumbaugh*, 151 Neb. 563, 38 N.W.2d 745 (1949); Annot., 91 A.L.R.3d 1170 (1979).

It is unnecessary to consider the other assignments of error. The judgment of the district court is affirmed.

AFFIRMED.

AUDRONE MEYLAN, INDIVIDUALLY AND ON BEHALF OF BRITT MEYLAN AND WAYNE MEYLAN, JR., AS THEIR PARENT AND NATURAL GUARDIAN, APPELLANT, V. MUTUAL BENEFIT LIFE INSURANCE COMPANY, A CORPORATION, APPELLEE.

441 N.W.2d 598

Filed June 16, 1989. No. 88-053.

1. **Summary Judgment.** Summary judgment is an extreme remedy and should be awarded only when an issue is clear beyond all doubt. A summary judgment is properly granted when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue concerning any material fact or the ultimate inferences deducible from such fact or facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing an order granting a summary judgment, this court must take the view of the evidence most favorable to the party against whom it operates and give that party the benefit of all favorable inferences which may be drawn from the evidence.

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

Charles L. Titus and Patricia M. Dugan, of Erickson & Sederstrom, P.C., for appellant.

Raymond M. Crossman, Jr., of Crossman & Hosford, for appellee.

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

FAHRNBRUCH, J.

The widow of Wayne Meylan, Sr., individually and on behalf of his children, appeals a Douglas County District Court's summary judgment denying them the benefits of an alleged $500,000 insurance policy. Meylan was killed in an airplane accident.

The court in effect found that a Mutual Benefit Life Insurance Company (MBL) policy was never effective because Meylan, before he died, failed to undergo a required paramedical physical examination. We affirm.

Summary judgment is an extreme remedy and should be awarded only when an issue is clear beyond all doubt. A summary judgment is properly granted when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue concerning any material fact or the ultimate inferences deducible from such fact or facts and that the moving party is entitled to judgment as a matter of law. In reviewing an order granting a summary judgment, this court must take the view of the evidence most favorable to the party against whom it operates and give that party the benefit of all favorable inferences which may be drawn from the evidence. *Carnes v. Schram, ante* p. 282, 440 N.W.2d 451 (1989); *Five Points Bank v. White,* 231 Neb. 568, 437 N.W.2d 460 (1989).

In May 1987, J. Guy Ziegler, an MBL agent, contacted Meylan about purchasing life insurance. Meylan was interested, and the two men met in Meylan's office on May 20, 1987. Part 1 of MBL's insurance application form was completed at that time. Ziegler informed Meylan that part 2, requiring a paramedical examination of Meylan, was also required before the company would consider Meylan's

application for insurance. Meylan's office manager, Dottie Dorr, gave Ziegler a $1,151.35 check for the first premium on the policy. It was stipulated that Meylan never received a copy of the prepayment receipt. The receipt states that the paramedical examination is required as a precondition to insurance coverage.

Ziegler forwarded the check and part 1 of the application to MBL's home office for processing. He also scheduled a paramedical examination of Meylan for 9 a.m. on Tuesday, May 26, 1987. The examination was to take place in Meylan's office. Meylan was unable to keep the appointment. He rescheduled the exam for 11 a.m. on the same day, but was unavailable when the examiners arrived at his office. Ziegler made several telephone calls to Meylan's office and sent one letter with names and a telephone number Meylan could call to reschedule the examination. Meylan died in an airplane accident June 26, 1987, without having taken the paramedical examination.

This action was filed after MBL declined to pay the benefits listed in part 1 of Meylan's application. MBL refused payment because Meylan did not undergo the paramedical examination required as a precondition of insurance. The district court found no issue of material fact existed and granted MBL summary judgment as a matter of law.

In her appeal, appellant assigns one error: that the trial court erred in awarding summary judgment as material issues of fact exist. The appellant argues that whether there was a contract is a question of fact. All of the facts are uncontroverted, and the issue became a question of law.

Although Meylan did not receive a copy of the prepayment receipt, which set forth the paramedical examination requirement, the evidence is uncontroverted that he was told by the insurance agent that a physical was required before the company could insure him. By not taking a paramedical examination, Meylan failed to satisfy a precondition of insurance, and the insurance policy never came into existence.

The trial court was correct in finding that no issue of material fact exists and in entering summary judgment for MBL.

AFFIRMED.

DELBERT W. HARPHAM, APPELLANT, V. GENERAL CASUALTY COMPANY, APPELLEE.

441 N.W.2d 600

Filed June 16, 1989. No. 88-752.

1. **Workers' Compensation: Appeal and Error.** The admission of evidence is within the discretion of the Workers' Compensation Court, whose determinations in this regard will not be reversed upon appeal absent an abuse of that discretion.
2. _____: _____. Factual findings by the Workers' Compensation Court have the same effect as a jury verdict in a civil case and will not be set aside unless clearly wrong.
3. **Workers' Compensation.** As the trier of fact, the Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given testimony.
4. **Workers' Compensation: Appeal and Error.** If there is reasonable, competent evidence to support the findings of fact of the Workers' Compensation Court, its judgment will not be modified or set aside on appeal for insufficiency of the evidence.
5. _____: _____. The Workers' Compensation Court's determination as to an employee's ability to return to work in which he or she was previously skilled is a factual question which will not be disturbed on appeal to this court unless clearly wrong.
6. **Workers' Compensation: Attorney Fees: Time.** Where there is no reasonable controversy regarding an employee's claim for workers' compensation, Neb. Rev. Stat. § 48-125 (Reissue 1988) authorizes award to the employee of an attorney fee and a 50-percent payment for waiting time on delinquent payments; whether a reasonable controversy exists is a question of fact.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

T.J. Hallinan, of Cobb, Hallinan & Ehrlich, P.C., for appellant.

John R. Hoffert, of Knudsen, Berkheimer, Richardson & Endacott, for appellee.

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

CAPORALE, J.

In this workers' compensation case the plaintiff-appellant, Delbert W. Harpham, challenges the failure of the Workers' Compensation Court to order his compensation carrier, defendant-appellee General Casualty Company, to pay

additional benefits. He asserts, in summary, that the compensation court erred in (1) admitting certain videotaped evidence, (2) limiting his cross-examination in connection with those videotapes, (3) relying upon the same tapes to reach its determination, and (4) failing to award him an attorney fee.

Harpham is a 54-year-old man possessed of a general equivalency diploma earned while serving in the Navy. He had spent most of his adult life, a period of approximately 25 years, as a truckdriver. During the course of these years, Harpham was involved in several accidents, sustaining a variety of injuries to his back, neck, and arms. By no later than 1979, Harpham was aware that he suffered from cervical arthritis, and he ultimately decided to change occupations and operate laundromats for a living. He acquired two such facilities and performed all associated maintenance chores himself.

On February 7, 1986, he was alone at work at one of his laundromats dismantling a washing machine for repair when, in attempting to loosen a recalcitrant agitator shaft, he "just jerked on it" when he "was on [his] tiptoes over the top of it so that [his] shoulders were kind of like over the middle" of the machine. At this, Harpham experienced sharp pain at the base of his neck near his shoulders. In Harpham's words, "[I]t was just sharp and it shot like, you know, over below or maybe below my shoulder blade or in that area and down my [left] arm . . . [a]ll the way to my fingers." Harpham testified that he continues to suffer intermittent pain in his lower neck and left arm, that he has never regained full use of his left arm and hand, and that he is essentially unable to use his left hand and arm for any but the lightest of tasks. He also stated that he has been unable to engage in washing machine maintenance activities at his laundromats since the subject accident and was forced to sell at least one laundromat.

Dr. James Bobenhouse, a board certified neurologist, examined Harpham approximately 10 days after the injury was sustained, and last saw him in May of 1987, about 6 months before the trial from which this appeal is taken. He testified that at that time, Harpham suffered from pain and muscle weakness associated with spinal disk injuries incurred in an attempt to lift a washing machine tub at work.

Dr. Benjamin Gelber, a board certified neurological surgeon, first examined Harpham in connection with the subject injury in June 1986, some 5 months after the injury. According to Gelber, Harpham at that time suffered from either a ruptured or herniated disk at the level of his highest thoracic and lowest cervical vertebras, as well as a less severe problem slightly higher in his spine. Gelber subsequently examined Harpham on several occasions and concluded, based on Harpham's reported continuing difficulties, that he suffered permanent impairment. Gelber also noted, however, that objective sensory testing demonstrated that Harpham was not giving Gelber "an accurate story about his pain or an accurate report" about Gelber's testing.

Dr. Douglass Decker, a neurologist who examined Harpham in April of 1987, made essentially the same observation. In Decker's opinion, were Harpham's condition truly as described by him, "[i]t would be nearly impossible" for Harpham to use his left arm.

General Casualty stopped paying compensation benefits to Harpham in late February or early March of 1987. A licensed private investigator engaged by General Casualty surreptitiously videotaped Harpham on March 3 and 4, 1987, at a lawnmower repair shop and at one of Harpham's laundromats. The investigator testified that in making these videotapes, she observed Harpham

> bending at the torso, lying on his left and right side, using his right and left hands with tools and assisting in helping — assisting in removing a riding lawn mower from the back of a pickup, pushing a riding lawn mower on to a cart which he had attached to the pickup, lifting pieces of metal which looked like shelving to me, opening and closing the car door a number — on a number of occasions.

According to the investigator, Harpham did not hesitate in his movements, and appeared to move his neck and left arm through a normal range of motion without pain.

Three of these tapes, which had not been spliced or altered in any way, were received into evidence over Harpham's objection and viewed by the compensation court. These tapes show

Harpham using his left arm and hand to accomplish a variety of tasks, including carrying a child's wagon using only that arm; lying on the ground on his left side to examine the undercarriage of a garden tractor; vigorously using his left arm, while lying on his right side, to apply a large socket wrench to the undercarriage of the same garden tractor; lowering a garden tractor to the ground from the bed of a pickup truck; and washing windows at a laundromat. The net impression is of an able-bodied man able to use his left arm and hand, as well as his neck and head, normally, vigorously, and throughout an apparently normal range of motion without apparent pain or hesitation.

Harpham first complains that the compensation court erred in admitting the three surveillance tapes into evidence. We hold that the admission of evidence is within the discretion of the compensation court, whose determinations in this regard will not be reversed upon appeal absent an abuse of that discretion. This rule follows from an examination of the statutes governing evidentiary matters in the compensation court.

Nebraska's statutory rules of evidence do not apply to the compensation court. Neb. Rev. Stat. § 27-1101 (Reissue 1985). Rather, subject to the limits of constitutional due process, the Legislature has granted the compensation court the power to prescribe its own rules of evidence and related procedure. Neb. Rev. Stat. § 48-164 (Reissue 1988) provides in relevant part: "The Nebraska Workers' Compensation Court shall regulate and provide . . . the nature and extent of the proofs and evidence and the method of taking and furnishing the same for the establishment of the right to compensation." Neb. Rev. Stat. § 48-168 (Reissue 1988) provides:

> The Nebraska Workers' Compensation Court shall not be bound by the usual common-law or statutory rules of evidence or by any technical or formal rules of procedure, other than as herein provided, but may make the investigation in such manner as in its judgment is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of the Nebraska Workers' Compensation Act.

Pursuant to these statutes, this court has determined that the

evidentiary rules of the compensation court may not be more restrictive than those of trial courts, *Fite v. Ammco Tools, Inc.*, 199 Neb. 353, 258 N.W.2d 922 (1977), but may be less so, *Friedeman v. State*, 215 Neb. 413, 339 N.W.2d 67 (1983).

Neb. Rev. Stat. § 48-163 (Reissue 1988) provides in relevant part:

> The compensation court or any judge thereof may, upon the motion of either party or upon its or his or her own motion, require the production of any books, papers, payrolls, medical reports, X-rays, photographs or plates, or any facts or matters which may be necessary to assist in a determination of the rights of either party in any matter pending before such compensation court or any judge thereof.

Neb. Rev. Stat. § 48-162 (Reissue 1988) provides in relevant part:

> In the examination of any witness and in requiring the production of books, papers, and other evidence, the compensation court shall have and exercise all of the powers of a judge, magistrate, or other officer in the taking of depositions or the examination of witnesses, including the power to enforce his or her orders by commitment for refusal to answer or for the disobedience of any such order.

Clearly, determinations by the compensation court in matters of evidence are entitled to the same deference shown to such determinations when made by other courts of the State of Nebraska. As this court recently noted in the context of a conversion action, the appropriate standard for review of an assignment of error directed at the exclusion or admission of evidence is one of abuse of discretion. *Blanchette v. Keith Cty. Bank & Trust Co.*, 231 Neb. 628, 437 N.W.2d 488 (1989).

General Casualty laid sufficient foundation for admission of the subject tapes. Its investigator testified that she was familiar with the use of the equipment which she had used, that the equipment was in good working order, and that the images recorded on tape accurately reflected what she herself observed at the time.

Harpham's assertion that he was somehow unfairly

prejudiced by the practice at trial of fast-forwarding the tapes past places where he did not appear on the screen is absurd on its face and without merit. His related contention that he was unfairly prejudiced by the court's failure to view several other tapes in General Casualty's hands, which assertedly showed no physical activity by Harpham, is also spurious. What was at issue was Harpham's ability to use his left arm. Showing that there were times when Harpham did not use his left arm would not have established that he is unable to do so. Conversely, showing that there were times when Harpham used his left arm established his ability to do so and the magnitude of that ability.

Harpham next complains that the compensation court unfairly limited his cross-examination of General Casualty's private investigator regarding the subject tapes, claiming that he should have been allowed to question her more fully regarding what she observed while making the videotapes. When Harpham questioned the investigator about what she observed, General Casualty objected that the "films are the best evidence and we all saw what we saw." The compensation court ruled that if Harpham's question was "about what we observed [in viewing the tapes] . . . we will determine for ourselves what we saw"; if the question was about "observations [the investigator] made that are not shown [in the subject tapes]," then the question would be permitted. It was obviously no abuse of discretion for the compensation court so to rule. Harpham did not pursue the matter any further. Harpham's assignment of error in this connection is thus without merit.

Harpham next complains that the compensation court erred in relying upon the tapes it saw to reach its determination, particularly in light of contradictory expert testimony. Harpham is likewise mistaken in these contentions. We have already established that the subject tapes were properly admitted as competent evidence of Harpham's physical capabilities. In challenging the compensation court's reliance upon this evidence, Harpham in effect challenges the court's evaluation and weighing of the evidence before it. As the trier of fact, the compensation court is the sole judge of the credibility of witnesses and the weight to be given testimony. *Gardner v. Beatrice Foods Co.*, 231 Neb. 464, 436 N.W.2d 542 (1989).

Regarding facts determined and findings made by the compensation court, Neb. Rev. Stat. § 48-185 (Reissue 1988) precludes this court's substituting its view of facts for that of the compensation court if the record contains evidence to substantiate the factual conclusions reached by the compensation court. *Gardner v. Beatrice Foods Co., supra.* Factual findings by the compensation court have the same effect as a jury verdict in a civil case and will not be set aside unless clearly wrong. *Quinn v. Archbishop Bergan Mercy Hosp., ante* p. 92, 439 N.W.2d 507 (1989); *Gloria v. Nebraska Public Power Dist.,* 231 Neb. 786, 438 N.W.2d 142 (1989). If there is reasonable, competent evidence to support the findings of fact of the Workers' Compensation Court, its judgment will not be modified or set aside on appeal for insufficiency of the evidence. *Gloria v. Nebraska Public Power Dist., supra.*

The Workers' Compensation Court's determination as to an employee's ability to return to work in which he or she was previously skilled is a factual question which will not be disturbed on appeal to this court unless clearly wrong. *Kalhorn v. City of Bellevue,* 227 Neb. 880, 420 N.W.2d 713 (1988); *Nice v. IBP, inc.,* 226 Neb. 538, 412 N.W.2d 477 (1987). In this instance, the compensation court clearly was not wrong.

Finally, Harpham complains that the compensation court failed to award him an attorney fee. Where there is no reasonable controversy regarding an employee's claim for workers' compensation, Neb. Rev. Stat. § 48-125 (Reissue 1988) authorizes award to the employee of an attorney fee and a 50-percent payment for waiting time on delinquent payments. *Rodriquez v. Prime Meat Processors,* 228 Neb. 55, 421 N.W.2d 32 (1988). However, whether a reasonable controversy exists is a question of fact, and this court is bound by the findings of the compensation court on rehearing to the extent that such findings have support in the evidence. *Rodriquez v. Prime Meat Processors, supra.* In this instance, the compensation court's finding that a reasonable controversy existed as to whether Harpham was entitled to additional benefits is clearly supported by the evidence; indeed, in view of the fact that Harpham has failed to establish that he is entitled to further

benefits, a contrary finding would not find sufficient support to withstand appellate challenge. Harpham's final assignment of error is, like those before it, without merit.

AFFIRMED.

RUSSELL PENDERGRASS, APPELLEE, v. DEBORAH K. PENDERGRASS-LIETO, APPELLANT.

441 N.W.2d 208

Filed June 16, 1989. No. 88-762.

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

Mary C. Wickenkamp for appellant.

William C. Warnes, P.C., for appellee.

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

PER CURIAM.

Deborah K. Pendergrass-Lieto appeals the Sarpy County District Court's order modifying a District of Columbia dissolution decree to grant custody of two of her daughters to their father, Russell Pendergrass.

The parties previously had joint custody of the girls. The modification decree provided for reasonable visitation of the girls with their mother. The District of Columbia decree was registered in the Sarpy County District Court. The court properly obtained jurisdiction of the custody issues under the Nebraska Child Custody Jurisdiction Act, Neb. Rev. Stat. §§ 43-1201 to 43-1225 (Reissue 1988).

We have held that 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. *Dilsaver v. Dilsaver, ante* p. 236, 439 N.W.2d 796 (1989); *Shaffer v. Shaffer,* 231 Neb. 910, 438 N.W.2d 507 (1989); *Griffith v. Griffith,* 230 Neb. 314, 431 N.W.2d 609 (1988).

We have reviewed the record de novo. The trial court did not abuse its discretion in nullifying the joint custody arrangement and granting the girls' custody to their father with reasonable rights of visitation in the mother.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LAWRENCE E. JONES, APPELLANT.

441 N.W.2d 605

Filed June 16, 1989. No. 88-784.

1. **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.
2. **Motions to Strike.** Ordinarily, when an objection to or motion to strike evidence is sustained and the jury is instructed to disregard it, such instruction is deemed sufficient to prevent prejudice.
3. **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.
4. **Sentences.** In imposing a sentence, a trial court should consider, among other things, the nature of the offense and the amount of violence involved in the commission of the crime.
5. _____. The seriousness of the offense is one of the important factors in setting a sentence, as is evidence of a defendant's character or previous conduct.

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

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

Robert M. Spire, Attorney General, and Donald E. Hyde for appellee.

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

HASTINGS, C.J.

Defendant has appealed from sentences of 12 to 25 years and 5 to 10 years imposed following convictions by a jury of a September 10, 1987, first degree sexual assault and robbery involving the same victim. After those convictions, defendant, as the result of a plea bargain, also entered pleas of nolo contendere, and defendant was convicted of attempted robbery, robbery, and first degree sexual assault which involved different victims and dates from those listed above. At the same sentencing proceedings, in addition to the first mentioned sentences, he was sentenced to terms of imprisonment of 1 year, 5 to 10 years, and 10 to 20 years, all five sentences to run consecutively to each other and to be served "in the Lincoln Regional Center and/or the Nebraska Penal and Correctional Complex" because defendant was found to be a treatable mentally disordered sex offender. He has appealed the convictions resulting from the jury trial and the five sentences, assigning as errors that the trial court failed to grant his motion for mistrial and imposed excessive sentences. We affirm.

The facts of the case involving the September 10 sexual assault and robbery are uncontested. The victim testified that at approximately 8:55 that evening, a person whom she identified as the defendant knocked on the door of her house and asked to be admitted so that he could call a cab. She said she would make the call for him. After the victim returned to the door to tell the defendant where the cab would pick him up, the defendant grabbed her arm and forced his way into the house.

Once inside the house, the defendant tackled the victim; he told her to shut up or he would stick her. He ripped off her robe and probed her vagina with his finger, sucked on her left breast and then her right breast, and penetrated her vagina with his tongue. He then heard a car approach and went to look out the window of the door because the victim had been telling him that her husband would be coming home. The defendant then stood over the victim; as she attempted to get up, he told her not to move or he would stick her. As he was standing over her, he saw

her purse on the dining room table. He opened it and removed money from it.

The defendant then went back to the victim and put his penis in the vagina of the victim, then in her mouth, and then forced her onto her hands and knees and rubbed his penis against her anus.

The claimed error regarding the motion for a mistrial occurred during examination by the prosecution of a forensic serologist, Dr. Reena Roy, concerning the comparison of pubic hairs of the victim with those obtained from the defendant. The testimony was as follows:

> Q. Did you find any hairs in the evidence that was submitted to you?
>
> A. Yes.
>
> Q. Did you conduct an examination of those hairs in comparison tests?
>
> A. Yes.
>
> Q. Did the material that was submitted to you contain known samples of head and pubic hair from the defendant, Lawrence Jones?
>
> A. Mr. Jones's pubic and head hair standards were submitted under a different case, which was . . .

At this point the defendant's counsel objected and moved for a mistrial, which motion was overruled by the trial court. However, the court immediately admonished the jury, stating, "The—The motion is denied. The jury will disregard any comments in the last response by Dr. Roy." Following a repeat of the same question, the witness answered, "Yes."

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. Sardeson*, 231 Neb. 586, 437 N.W.2d 473 (1989); *State v. Byrd*, 231 Neb. 231, 435 N.W.2d 898 (1989); *State v. Jackson*, 231 Neb. 207, 435 N.W.2d 893 (1989). As noted recently in *State v. Pierce,* 231 Neb. 966, 977, 439 N.W.2d 435, 443 (1989), quoting *State v. Archbold,* 217 Neb. 345, 350 N.W.2d 500 (1984):

> "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".' "

See, also, *State v. Jackson, supra*; *State v. Fraser*, 230 Neb. 157, 430 N.W.2d 512 (1988); *State v. Borchardt*, 224 Neb. 47, 395 N.W.2d 551 (1986).

As stated by this court in *State v. Archbold, supra* at 351, 350 N.W.2d at 504:

> 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.

Ordinarily, however, when an objection to or motion to strike improper evidence is sustained and the jury is instructed to disregard it, such instruction is deemed sufficient to prevent prejudice. See, *State v. Jackson, supra*; *State v. DeGroot*, 230 Neb. 101, 430 N.W.2d 290 (1988); *State v. Borchardt, supra*; *State v. Ross*, 220 Neb. 843, 374 N.W.2d 228 (1985); *State v. Archbold, supra*; *State v. O'Kelly*, 193 Neb. 390, 227 N.W.2d 415 (1975); *State v. Dittrich*, 191 Neb. 475, 215 N.W.2d 637 (1974). " 'The test is this: Did the inadvertent remark, which the jury was instructed to disregard, when viewed against the backdrop of all the evidence, so taint the entire proceedings that the accused did not have a fair trial?' " *State v. Dittrich, supra* at 478, 215 N.W.2d at 639, quoting *State v. Johnson*, 60 Wash. 2d 21, 371 P.2d 611 (1962).

The trial judge immediately admonished the jury to disregard Dr. Roy's comment. In the overall context of the trial,

the admonishment should have been sufficient to eradicate any unfair prejudice to the defendant. It cannot be said that Dr. Roy's inadvertent comment so tainted the entire proceedings that the accused did not have a fair trial.

In *State v. Dittrich, supra* at 479, 215 N.W.2d at 640, this court concluded that "the evidence of defendant's guilt was conclusive and the objectionable statement could not have been a determinate factor in the verdict." In this case, the defense was not guilty by reason of insanity. There was substantial evidence that the defendant was the person who sexually assaulted and robbed the victim, which evidence was not seriously challenged during the trial. Thus, it can be said that the objectionable statement from Dr. Roy could not have been a determining factor in the verdict. There is no merit to defendant's first assignment of error.

Defendant's claim of excessiveness of the sentences is also meritless.

First degree sexual assault is a Class II felony, Neb. Rev. Stat. § 28-319 (Reissue 1985), punishable by imprisonment for not less than 1 nor more than 50 years, Neb. Rev. Stat. § 28-105(1) (Reissue 1985).

Robbery is a Class II felony, Neb. Rev. Stat. § 28-324 (Reissue 1985), punishable by imprisonment for not less than 1 nor more than 50 years, § 28-105(1).

Attempted robbery is a Class III felony, Neb. Rev. Stat. §§ 28-201 (Reissue 1985) and 28-324(1), punishable by imprisonment for not less than 1 nor more than 20 years, § 28-105(1).

The defendant, sentenced for four Class II felonies and one Class III felony, could have been sentenced to imprisonment for not less than 5 nor more than 220 years. The trial court sentenced the defendant to imprisonment for not less than 33 nor more than 65 years. The sentences are all within the limits prescribed by statute. A sentence imposed within statutorily prescribed limits will not be disturbed on appeal in the absence of an abuse of discretion. *State v. Fulton*, 231 Neb. 918, 438 N.W.2d 788 (1989); *State v. Lehl*, 231 Neb. 906, 438 N.W.2d 505 (1989); *State v. Camacho*, 231 Neb. 522, 437 N.W.2d 151 (1989).

In imposing a sentence, a trial court should consider, among other things, the nature of the offense and the amount of violence involved in the commission of the crime. *State v. Trevino*, 230 Neb. 494, 432 N.W.2d 503 (1988); *State v. Thomas*, 229 Neb. 635, 428 N.W.2d 221 (1988); *State v. Antillon*, 229 Neb. 348, 426 N.W.2d 533 (1988). The seriousness of the offense is one of the important factors in setting a sentence, as is evidence of a defendant's character or previous conduct. *State v. Salas*, 231 Neb. 471, 436 N.W.2d 547 (1989); *State v. Antillon, supra.*

These crimes were serious, assaultive, and brutal. In addition to the crimes listed herein, defendant was convicted of first degree sexual assault, robbery, and false imprisonment in the district court for Sarpy County. It is clear that, as the sentencing judge stated, the defendant is extremely dangerous.

There having been no abuse of discretion on the part of the district court, its judgment is affirmed.

AFFIRMED.

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

441 N.W.2d 608

Filed June 16, 1989. No. 88-815.

Motor Vehicles: Trespass: Words and Phrases. An automobile, by itself, is not a "place" as to which notice against trespass may be given within the meaning of Neb. Rev. Stat. § 28-521(1)(c) (Reissue 1985).

Appeal from the Separate Juvenile Court of Lancaster County: WILFRED W. NUERNBERGER, Judge. Reversed and remanded with directions to dismiss.

Dennis R. Keefe, Lancaster County Public Defender, and Craig L. Nelson for appellant.

James Elworth, Deputy Lancaster County Attorney, for appellee.

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

GRANT, J.

This was an adjudication on a supplemental petition and motion to revoke probation, alleging that the defendant-appellant juvenile, W.D., committed the crime of second degree criminal trespass, in violation of Neb. Rev. Stat. § 28-521 (1)(c) (Reissue 1985), and, as a result, violated an order of probation entered April 30, 1986. After a trial in the separate juvenile court of Lancaster County, defendant was found guilty beyond a reasonable doubt of the offense charged. Defendant's motion for new trial was overruled, and he was placed on probation for this offense.

Defendant timely appealed to this court, contending the proof adduced at trial was insufficient to establish the corpus delicti of the crime of second degree criminal trespass and was otherwise insufficient to support the adjudication entered by the separate juvenile court. We reverse.

The uncontroverted evidence at trial showed that on the afternoon of May 19, 1988, Melissa Nieder saw defendant enter her automobile through the unlocked right front passenger door. The automobile was parked in a lot located immediately west of her apartment complex. Nieder saw defendant in the automobile from her living room window and also after she went out to the parking lot. She testified that defendant approached the car, crouched, opened the door, and appeared to reach up toward a crystal hanging from the rearview mirror. Defendant "took off running" when Nieder confronted him in the parking lot. Defendant admitted to a Lincoln police officer that he entered Nieder's automobile for the purpose of placing a tennis ball in the vehicle. Nieder testified that she owned no tennis balls or equipment. Defendant was under the age of 16 on the date of the alleged offense.

Neb. Rev. Stat. § 43-247(1) (Reissue 1988) provides that the juvenile court shall have jurisdiction of any juvenile "who has committed an act . . . which would constitute a misdemeanor . . . under the laws of this state, or violation of a city or village ordinance."

Section 28-521(1) provides:

> A person commits second degree criminal trespass if, knowing that he is not licensed or privileged to do so, he enters or remains in any place as to which notice against trespass is given by:
>
> . . . .
>
> (c) Fencing or other enclosure manifestly designed to exclude intruders.

Second degree criminal trespass is a misdemeanor.

We stated in *In re Interest of Richter*, 226 Neb. 874, 875, 415 N.W.2d 476, 477 (1987), that "[w]hile a penal statute is to be construed strictly, it is to be given a sensible construction in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served." In the absence of anything indicating otherwise, statutory language is to be given its plain and ordinary meaning. *Id.*

We note that Neb. Rev. Stat. §§ 28-520, 28-521, and 28-522 (Reissue 1985), relating to criminal trespass, are in pari materia and must be construed together. *McGowen v. Nebraska State Bank*, 229 Neb. 471, 427 N.W.2d 772 (1988); *State v. Howard*, 193 Neb. 45, 225 N.W.2d 391 (1975); *State v. Williams*, 188 Neb. 802, 199 N.W.2d 611 (1972). Section 28-520 provides that "[a] person commits first degree criminal trespass if, knowing that he is not licensed or privileged to do so, he enters . . . any building or occupied structure, or any separately secured or occupied portion thereof." Section 28-522, in describing the affirmative defenses to prosecutions for criminal trespass under §§ 28-520 and 28-521, specifically refers to "building[s] or occupied structure[s]" and "premises," terms which are associated with real property. This statute is modeled roughly after Model Penal Code § 221.2 (1962). In that code, in § 221.0, an "occupied structure" is defined as "any structure, vehicle or place adapted for overnight accommodation of persons." The analogous definition of "building" found in Neb. Rev. Stat. § 28-501 (Reissue 1985) pertains, in part, to "places adapted for overnight accommodations of persons or animals." There is no evidence that Nieder's vehicle was a place "adapted for overnight accommodations."

An automobile is an item of personal property. Analyzing the plain language of § 28-521, the conclusion is inescapable that the Nebraska statute was intended to protect real property and not meant to prohibit unauthorized entry into a stationary automobile. We hold that an automobile, by itself, is not a "place" as to which notice against trespass may be given within the meaning of § 28-521(1)(c). While defendant's act of entering Nieder's vehicle may be wrongful, the evidence does not establish the corpus delicti of the crime of second degree criminal trespass.

The judgment of the juvenile court is reversed.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

GEORGE EARL, APPELLANT AND CROSS-APPELLEE, V. PRIORITY KEY SERVICES, INC., AND PRIORITY DATA SYSTEMS, INC., APPELLEES AND CROSS-APPELLANTS.

441 N.W.2d 610

Filed June 23, 1989. No. 87-136.

1. **Equity: Appeal and Error.** On appeal to the Supreme Court, an equity action is tried de novo on the record, requiring the court to reach a conclusion independent of the findings of the trial court, but subject to the rule that where credible evidence is in conflict on material issues of fact, the court will consider the fact that the trial court observed the witnesses and accepted one version of the facts over another.
2. **Corporations: Debtors and Creditors: Liability.** Where a corporation transfers its business to another corporation in exchange for debt relief, the purchasing corporation does not succeed to the liabilities of the selling corporation unless (1) the purchasing corporation expressly or impliedly agreed to assume the selling corporation's liability; (2) the transaction amounts to a consolidation or merger of the purchaser and seller corporations; (3) the purchaser corporation is merely a continuation of the seller corporation; or (4) the transaction has been entered into fraudulently to escape liability for such obligations.
3. _____: _____: _____. Where the purchasing corporation merely continues the selling corporation's business under a new name, the purchasing corporation may be liable for the selling corporation's obligations to creditors.

4. **Fraud.** The elements of fraudulent misrepresentation are: (1) A representation was made; (2) the representation was false; (3) when the representation was made, it was known to be false or was made recklessly without knowledge of its truth and as a positive assertion; (4) the representation was made with the intention that it would be relied upon; (5) there was reliance upon the representation; and (6) damages occurred as a result.

Appeal from the District Court for Douglas County: THEODORE L. CARLSON, Judge. Affirmed in part, and in part reversed and remanded with direction.

Richard S. McMillin, of Marks & Clare, for appellant.

Michael O. Johanns and Lavern R. Holdeman, of Peterson Nelson Johanns Morris & Holdeman, for appellees.

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

OLBERDING, D.J.

George Earl appeals an order of the district court for Douglas County finding Priority Data Systems, Inc. (Priority), was not a successor corporation to Priority Key Services, Inc. (Key). Priority and Key cross-appeal the dismissal of their counterclaims against Earl for rescission of the contract for the sale of American Key Data, Inc. (American), and damages based on misrepresentation. We affirm the dismissal of the counterclaims, but reverse the finding as to Priority's liability and remand for entry of judgment against it.

FACTS

The appellant, Earl, contracted with Paul Pettinger and Marcella Haas to sell his data entry business, American, to a new corporation to be formed and named Priority Key Services, Inc. The trade name of "American Key Data" and the customer list were the primary assets of American.

The following were the essential provisions of the agreement for the sale of assets, consulting agreement, and stock purchase agreement completed on July 20, 1982: (1) Purchase price of $60,000 was to be paid: (a) $20,000 at closing, and (b) $40,000 in 60 installments of $889.78, which included interest at 12 percent; (2) stock of the new corporation, Key, was to be owned: (a) 25 percent by Earl, and (b) 75 percent by MPX

Management Systems (Management), owned primarily by Pettinger and Haas; (3) Key could repurchase Earl's 25 percent stock after 18 months; and (4) Earl was to receive commissions on gross income of Key as follows: (a) 5 percent up to $200,000, (b) 3 percent between $200,000 and $400,000, and (c) 1 1/2 percent over $400,000. Gross income included all jobs for which over 60 percent data entry service was invoiced by Key or Priority, owned by Management. Invoicing was done by Priority.

Key ceased making payments under the consulting agreement in October 1983. Invoicing under the consulting agreement ceased in March 1984. Only 16 of the 60 monthly installment payments on the sales agreement were made. Key exercised its option to purchase Earl's stock in January 1984.

Key attempted to buy Earl's contractual interest for $7,500 or to return the business to him, but Earl refused the offer. Pettinger, one of the controlling stockholders in and an officer of Priority, told Earl that if Key closed its doors, Priority would not turn away former Key customers.

In April 1984, Key decided to cease operations due to a poor financial condition.

Key and Priority sent letters to Key customers telling them that Key and Priority had merged effective May 1, 1984. The letters stated they were in the same building; with the same box number, same employees, and same excellent service; but with a different name.

At the time of the trial, Key was no longer doing any business and owned only minimal assets. Priority was serving all former customers of Key who had requested data entry services.

Earl sued Key for breaching the agreement for the sale of assets and the consulting agreement. He also sued Priority on the theories of equitable assignment, successorship liability, fraudulent conveyance, unjust enrichment, and merger by estoppel. Key and Priority counterclaimed for rescission of the contracts based on fraudulent misrepresentation.

At trial, John Cederberg of Touche Ross testified his audit of Key from July 20, 1982, to March 31, 1985, revealed: (1) Key and Priority always did business as two separate and distinct companies, and (2) Key had a net operating loss for the period

of $118,013, based on total revenues of $114,918 and expenses of $232,931.

After the bench trial, the district court for Douglas County entered judgment against Key on the breach of contract claims. Neither party appeals this finding. The court found Priority was not liable on any of the equitable theories and dismissed Earl's claim against Priority. The court also found insufficient proof of fraudulent misrepresentation by Earl and dismissed the counterclaims.

STANDARD OF REVIEW

On appeal to this court, an equity action is tried de novo on the record, requiring this court to reach a conclusion independent of the findings of the trial court, but subject to the rule that where credible evidence is in conflict on material issues of fact, we will consider the fact that the trial court observed the witnesses and accepted one version of the facts over another. *Selection Research, Inc. v. Murman*, 230 Neb. 786, 433 N.W.2d 526 (1989).

On appeal, Earl advances four theories under which he claims Priority is liable: (1) corporate successor liability, (2) equitable assignment, (3) contractual successor liability, and (4) unjust enrichment. Because we find Priority is liable as a successor corporation, we do not reach the other theories.

CORPORATE SUCCESSOR LIABILITY

In *Jones v. Johnson Machine & Press Co.*, 211 Neb. 724, 320 N.W.2d 481 (1982), this court ruled a corporation which purchases the assets of another corporation does not succeed to the liabilities of the selling corporation unless

> (1) . . . the purchasing corporation expressly or impliedly agreed to assume the selling corporation's liability; (2) . . . the transaction amounts to a consolidation or merger of the purchaser and seller corporations; (3) . . . the purchaser corporation is merely a continuation of the seller corporation; or (4) . . . the transaction is entered into fraudulently to escape liability for such obligations.

Id. at 728, 320 N.W.2d at 483. See, also, *Timmerman v. American Trencher, Inc.*, 220 Neb. 175, 368 N.W.2d 502 (1985).

Although Priority did not purchase the assets of Key for

cash, we find the *Jones* rule applies in this instance as well. The record reveals that at the time it ceased operations, Key's liabilities were in excess of $110,000. Of this amount, almost $70,000 was owed to either Priority or Management in advances made for operation expenses or in unpaid management fees. The remainder was the amount owed to Earl for the original sales contract, the stock redemption note, and attorney fee advances. In effect, this transaction amounted to a cancellation of Priority's advances to Key in return for Key's business. As such, it is a transfer of business for a valuable consideration, which properly falls within the *Jones* rule.

In this particular case, several factors lead us to conclude Priority should be held liable for Key's breach of contract with Earl. First, Priority and Key described the transaction as a merger. On April 17, 1984, Key sent letters to its customers claiming it was merging with Priority.

> We want to take this opportunity to thank you for your past business. It isn't often that we take time to say "thank you" to the people who keep us in business.
>
> In order to keep you abreast of our corporate changes, we'd like to inform you of a name change. *We are merging with PRIORITY Data Systems, Inc.*, effective May 1, 1984. From now on you will receive correspondence under that name.
>
> *We are in the same building with the same box number, same employees and same excellent service — just a different name.*

(Emphasis supplied.)

Haas, president of Priority, sent a memorandum addressed to "All PRIORITY and AKD [Key] Employees," dated April 18, 1984.

> In order to keep you abreast of our corporate changes, we would like to inform you of a name change. *American Key Data and PRIORITY Data Systems, Inc. are merging* effective May 1, 1984.
>
> *The operation of the new merged business will be no different.* You will still have two time cards. One for PRIORITY and one for Key Services. The 592-2020 line will be answered "Key Services".

(Emphasis supplied.) These letters and memoranda were clearly intended to give customers and employees the impression no substantial change had taken place.

Further, as is clearly stated in both the letter and the memorandum, Priority provided the same service, at the same address, to the same customers, using the same employees, and in some respects, such as answering the phone and dealing with employee timecards, using the same name. Following the transaction, Priority continued the business which Key had previously been engaged in, and Key virtually went out of existence.

Also, the structure of the transaction supports a finding that its purpose was to avoid Key's obligation to Earl. Following the transaction, Key was left with virtually no assets with which to pay its remaining creditors, which consisted of its related corporations and Earl.

Lastly, Key and Priority were owned by Management, with Haas and Pettinger controlling both corporations. This fact lends further support to the conclusion that Priority was a mere continuation of Key.

Based on the foregoing, we find Priority merely continued Key's business under a new name. As such, Priority is liable for Key's obligation to Earl. *Armour-Dial, Inc. v. Alkar Engineering Corp.*, 469 F. Supp. 1198 (E.D. Wis. 1979).

COUNTERCLAIMS

The counterclaims of Priority and Key present the issue of whether fraudulent misrepresentations were made by Earl prior to the contracts' being signed.

This court has held that the elements of fraudulent misrepresentation are as follows: (1) A representation was made; (2) the representation was false; (3) when the representation was made, it was known to be false or was made recklessly without knowledge of its truth and as a positive assertion; (4) the representation was made with the intention that it would be relied upon; (5) there was reliance upon the representation; and (6) damages occurred as a result. *Bock v. Bank of Bellevue*, 230 Neb. 908, 434 N.W.2d 310 (1989); *Nielsen v. Adams*, 223 Neb. 262, 388 N.W.2d 840 (1986).

Both Haas and Pettinger were educated business people. Pettinger, a certified public accountant, had previously sold a data entry business. Haas had been in the data processing business for over 5 years. They both knew that Earl's business was declining due to his other outside interests. They got what they expected, a data entry business with gross annual sales in previous years of between $200,000 to $400,000. They, not Earl, were in control of, and responsible for, any lack of sales after the contracts were signed. Having reviewed the record, we find that no material false representations were made.

ORDER ON REMAND

The judgment dismissing Earl's second amended petition as to Priority is reversed, and the matter is remanded to the trial court for entry of judgment against both Key and Priority on the sale of assets contract and consulting agreement. The judgment dismissing the counterclaims of Key and Priority is affirmed.

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

TOMMY E. PLAMBECK, APPELLANT, V. UNION PACIFIC RAILROAD COMPANY, APPELLEE.

441 N.W.2d 614

Filed June 23, 1989. No. 87-579.

1. **Employer and Employee: Negligence: Juries.** An employee's failure to obey safety rules may be considered by the jury in assessing contributory negligence.
2. **Trial: Evidence: Verdicts: Appeal and Error.** In considering whether the evidence in a civil case is sufficient to sustain findings necessary for a verdict, this court will not reweigh the evidence, but considers the verdict in a light most favorable to the successful party and resolves evidential conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
3. **Jury Instructions: Proof: Appeal and Error.** A jury instruction is subject to the harmless error rule, which requires a reversal only if error adversely affects the substantial rights of the complaining party, and the complaining party has the burden of establishing the prejudicial effect.

4. **Employer and Employee: Pleadings: Evidence: Jury Instructions.** In proceedings under the Federal Employers' Liability Act, 45 U.S.C. §§ 51 et seq. (1982), where assumption of risk is not made an issue by the pleadings or the evidence, an assumption of risk instruction should not be given.

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

Edward F. Fogarty, of Fogarty, Lund & Gross, for appellant.

John H. Cotton, of Gaines, Mullen, Pansing, Hogan & Cotton, for appellee.

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

COADY, D.J.

On July 13, 1979, the appellant, Tommy E. Plambeck, suffered a back injury while employed by the appellee, Union Pacific Railroad Company, and while working on its premises. Over the next 7 1/2 years, appellant continued to be employed by appellee, but was absent from work frequently because of his injury. Appellant suffered and received almost all the known methods of treatment for back problems and pain, including chymopapian injection, spinal fusion, and attendance at the Pain Clinic.

In 1986, the appellee decided that it had to reduce the number of its employees, and a buy-out policy was instituted. It first offered to pay employees a certain sum to quit voluntarily, and many did. The appellant did not, and there were not enough volunteers in appellant's department to satisfy the plan. Appellant was separated under the involuntary provisions of the buy-out policy in December.

The appellant filed a negligence action pursuant to the terms of the Federal Employers' Liability Act, 45 U.S.C. §§ 51 et seq. (1982) (FELA). The appellee answered by claiming that the appellant was also negligent. The case was tried to a jury, which decided in favor of the appellant in the sum of $9,100.37. On appeal, we affirm the trial court.

Under the FELA, contributory negligence on the part of the appellant is not a complete bar to recovery and may only be used to diminish the amount of damages. See, 45 U.S.C. § 53;

Auer v. Burlington Northern RR. Co., 229 Neb. 504, 428 N.W.2d 152 (1988). The jury completed a form of special verdict which found that the appellee was negligent, that the appellant was also negligent, that $91,003.66 was a sum of money that would reasonably compensate the appellant for his injuries without any consideration about which party might or might not have been negligent, that 10 percent of the injuries were attributable to the appellee, and that 90 percent were attributable to the appellant.

On the day of the accident, appellant, a photographer in the railroad's public relations and advertising department, was ordered to take pictures of a coal car to document any severe wear or damage. He went to the railroad's shops with James Durand of the mechanical department, who was to determine what should be studied and photographed.

In the shop, the two, along with a shop carman, approached the top of the coal car to be studied by the way and use of a catwalk from which the carman lowered a ladder into a 6- by 9-foot platform inside the car. The side of the car above the platform was approximately 9 feet high. The ladder had "rubber-type feet" and extended above the top of the coal car. Appellant held the ladder while Durand went down. At the bottom, Durand held the ladder for appellant's descent. The carman went back to his regular duties.

Because the accident happened in 1979 and the trial was had in 1987, perhaps what happened in the car and what the two witnessses remember is not clear. Someone moved the ladder from the sidewall to the end of the car. The height of the end wall was the same as the sidewall, and the ladder's end was in the open air.

The appellant testified that he went up a rung or two on the ladder and took one picture, perhaps more. He then climbed higher, to a point where his body above his midthigh extended beyond the top of the car. With about 30 pounds of photo equipment strapped on his body and in hand, he turned around and looked through the camera, "composing the picture." He had done exactly the same thing once before while working in another car. He had seen Durand holding the ladder or had assumed that Durand was holding it. He did not remember

telling or asking Durand to hold it. The ladder slipped.

Durand testified that he remembered very little. He recalls standing on the inside platform with his back to the ladder and looking down the length of the car. The bottom of the ladder slid by him from its position behind him, and appellant fell on the ladder.

In his brief, the appellant discusses five areas of alleged error, contending that the trial court erred (1) in submitting the issue of contributory negligence for the consideration of the jury; (2) in both submitting and refusing to submit certain allegations of negligence and contributory negligence whether requested or not; (3) in refusing to give a requested instruction which is related to the doctrine known as assumption of risk; (4) in not granting a new trial because of surprising evidence; and (5) in not granting a new trial because the verdict was bad and based on passion, prejudice, or mistake. This opinion will discuss the case in that order.

In the first assignment of error, the appellant maintains that there was no evidence of negligent conduct by appellant and that the court should have directed a verdict for him on the issue of liability. Because a researching reader will want to read the cases for himself and a casual reader will desire an opinion rather than the writer's brief, an attempt is made in the next paragraph to distinguish each of appellant's cited cases by stating the facts in a single sentence.

A worker using a machine with a known defect was not contributorily negligent merely because he used it, but a jury could find him to be negligent in regard to the manner and way in which he used the machine. *Birchem v. Burlington Northern R. Co.*, 812 F.2d 1047 (8th Cir. 1987). A brakeman stepping off a moving train in the manner taught and approved by the railroad, when it would be impractical for him to wait for the locomotive to stop, is not contributorily negligent even though the brakeman knew that the presence of taconite pellets on the platform might be dangerous. *Borough v. Duluth, Missabe & Iron Range Ry. Co.*, 762 F.2d 66 (8th Cir. 1985). A worker assisting a work gang to pick up a heavy object is simply doing a job and is not negligent even though it was known that a back injury could occur. *Wilson v. Burlington Northern, Inc.*, 670

F.2d 780 (8th Cir. 1982). It is not negligent for a workman to trust a superior's representations, and it is not negligent to fail to see a track signal if a worker could not get in a position to see it. *Knierim v. Erie Lackawanna Railroad Company*, 424 F.2d 745 (2d Cir. 1970). *Greenstein v. Seaboard Coast Line R. Co.*, 471 So. 2d 1318 (Fla. App. 1985), is an example where a jury verdict was contrary to the manifest weight of the evidence, but the facts therein do not match the facts in this case.

The record indicates that the ultimate allegation of contributory negligence claimed by appellee was that the appellant failed to ensure that the ladder that he climbed and worked upon was stable under the circumstances then and there existing. Neither counsel nor the writer has discovered any cases wherein it is stated that a worker is contributorily negligent if he knowingly climbs an unstabilized ladder. However, the appellant did put into evidence the following Union Pacific Railroad rules and instructions applicable at the time of the accident:

> **M.** Employes must exercise care to prevent injury to themselves or others.
>
> . . . .
>
> **707.** Railroad premises must be kept in a clean, orderly and safe condition.
>
> . . . .
>
> **4001.** Employes must take every precaution to prevent injury to themselves and other persons under conditions not provided for by these rules.
>
> Employes must not rely upon the carefulness of others, but must protect themselves when their own safety is affected.
>
> . . . .
>
> **4008.** When working in groups, employees must have an understanding of all moves to be made.
>
> . . . .
>
> **4016.** In using a ladder not equipped with feet, or one not securely blocked, ladder must be held or otherwise secured.

An employee's failure to obey safety rules may be considered by the jury in assessing contributory negligence. *Auer v.*

Burlington Northern RR. Co., 229 Neb. 504, 428 N.W.2d 152 (1988), citing *Flanigan v. Burlington Northern Inc.*, 632 F.2d 880 (8th Cir. 1980). The burden of proving contributory negligence is on the appellee. In considering whether the evidence in a civil case is sufficient to sustain findings necessary for a verdict, this court will not reweigh the evidence, but considers the verdict in a light most favorable to the successful party and resolves evidential conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. *Auer v. Burlington Northern RR. Co., supra.*

We could not find anything in the evidence that required the jury to consider Durand to be the appellant's supervisor. The jury may have believed that taking the first picture on the first, second, or third rung of the ladder was not very dangerous with or without Durand holding it. Their practical experience may have led them to accept that the climb shifted some of the appellant's weight from the ladder's feet to the side of the coal car, causing a dangerous situation and the need for a stabilized ladder. They may have accepted that appellant went up the ladder while Durand was studying the car, facing away and unaware. We find that there was sufficient evidence for the jury's decision.

The second area of appellant's dissatisfaction with the trial concerns the instructions given and the setting forth of the parties' allegations of both negligence and contributory negligence. In regard to criticism of the instruction about the ultimate allegations of appellant's contributory negligence, the next three paragraphs will explain why any defect is found to be harmless. In addition, it must be pointed out that the instruction is the same as the one requested by appellant's proposed instruction No. 6.

At the end of the trial, during the instruction conference, the court's instruction No. 2 was discussed and modified to suit counsel. The instruction read to the jury stated that the Union Pacific Railroad could be found to be negligent: "1. In failing to hold and steady the ladder . . . 2. In failing to furnish the plaintiff with a reasonably safe place to work; and 3. In failing to furnish the plaintiff with reasonably safe equipment . . . ."

Before discussing that instruction with the trial judge, appellant had filed 28 written requested instructions. Included in the requested instruction No. 5 was a request that the trial judge instruct that the railroad could be found negligent because it failed: "(b) . . . to have available persons . . . to hold and steady the ladder . . . . (c) . . . to provide a reasonably safe workplace by cleaning the coal dust and pebbles which coated the deck . . . . (e) . . . to provide a ladder with a hooked top."

Appellant's complaint is expressed in *Krepcik v. Interstate Transit Lines*, 154 Neb. 671, 48 N.W.2d 839 (1951), wherein we said that where specific charges are pleaded and supported by proof, the instructions should submit those specific charges to the jury, and to fail to do so, whether or not requested to do so, is error. We accept that rule, but point out that it has been held that any jury instruction is subject to the harmless error rule, which requires a reversal only if error adversely affects the substantial rights of the complaining party. Appellant has the burden of establishing the prejudicial effect. *Meyers v. Union Pacific R. Co.*, 738 F.2d 328 (8th Cir. 1984). See, also, *Ring v. Duey*, 162 Neb. 423, 76 N.W.2d 433 (1956).

Neither the transcript nor the bill of exceptions discloses that a pretrial conference was had to discuss and determine ultimate allegations of negligence. The reader, trial lawyers, and judges would benefit by rereading former Chief Justice White's article, *Some Approaches To The Instructional Problem*, 40 Neb. L. Rev. 389 (1961). This writer supposes, without the court so holding, that there is only one ultimate act of railroad negligence raised by the facts in this case. The railroad failed to provide a stable ladder for its employee to use in this particular situation and place.

There are many ways that the ladder might have been stabilized. The carman might have been called to climb into the car and to hold the ladder. The ladder might have been fastened to the side of the car by hooks or other mechanical devices. Durand surely could have held it. Appellant had the right to call the jury's attention to all these things during the trial and in argument. His brief suggests that he did so. The jury found the railroad to be negligent, and appellant has failed to convince us that his ability and opportunity to argue was not sufficient to

overcome the weakness of the court's instruction.

Appellant's third attack upon the trial record is critical of the trial court's refusal to give his requested instruction No. 16: "You may not find contributory negligence on the part of the [appellant], however, simply because he acceded to the request or direction of the responsible representatives of his employer that he work at a dangerous job, or in a dangerous place, or under unsafe conditions."

Whether one classifies such an instruction as one stating the doctrine of assumption of risk or not, we have not found much evidence in the record that appellant was directed or requested by Durand, or any railroad employee, to work at a dangerous job or in a dangerous place. This is not a place similar to a situation where one must work in a dusty shop and risk getting lung disease. See *Koshorek v. Pennsylvania Railroad Company*, 318 F.2d 364 (3d Cir. 1963), cited by appellant. There is no direct evidence that anyone told appellant to get on the ladder. The evidence suggests that the persons involved failed to do the obvious and did not expect to participate in any dangerous act.

The trial court instructed on the definitions of negligence, contributory negligence, and ordinary care in great detail. Under the FELA, where assumption of risk is not made an issue by the pleadings or the evidence, such an instruction should not be given. *Auer v. Burlington Northern RR. Co.*, 229 Neb. 504, 428 N.W.2d 152 (1988). We do not choose to reverse our decision.

In his fourth assignment of error, the appellant contends that he was surprised at trial by the testimony of his own doctor. It is sufficient to say that the doctor testified from his medical notes about appellant's history and that the notes were available to the appellant, even if copies were not, in fact, in counsel's possession. We should add that no request for a continuance was made, and a motion for a new trial on the ground of surprise is properly overruled where a request for that reason was not made at the trial. *Kehm v. Dumpert*, 183 Neb. 568, 162 N.W.2d 520 (1968).

Finally, the appellant argues that the jury ignored the evidence and made a bad decision or reached a verdict based on

passion, prejudice, or mistake. Accepting this decision is hard for the appellant and other workers in American industry. But in comparative negligence cases, and a FELA action in such a case, the issue of the percentage of negligence is for the jury's determination, and its finding thereon is not to be disturbed in absence of a clear showing of passion, prejudice, or unconscionability. *Cruz v. Union Pacific R. Co.*, 707 P.2d 360 (Colo. App. 1985). We find no such evidence.

AFFIRMED.

BRIAN T. BUTORAC, ALSO KNOWN AS BRIAN T. MAGGART, THROUGH HIS MOTHER AND NEXT FRIEND, ROSE M. MAGGART, APPELLANT, V. DIXON COUNTY, NEBRASKA, A POLITICAL SUBDIVISION, APPELLEE.

441 N.W.2d 620

Filed June 23, 1989. No. 87-595.

1. **Judgments: Appeal and Error.** Where a party has sustained the burden and expense of trial and has succeeded in securing a judgment on the facts in issue, he has the right to keep the benefit of that judgment unless there is prejudicial error in the proceedings by which it was secured.
2. **Tort-feasors: Liability: Proximate Cause: Words and Phrases.** An efficient intervening cause is a new and independent act, itself a proximate cause of an injury, which breaks the causal connection between the original wrong and the injury. The doctrine that an intervening act cuts off a tort-feasor's liability comes into play only when the intervening cause is not foreseeable.
3. **Counties: Negligence: Motor Vehicles.** A county has no duty to anticipate or foresee every negligent operation of a motor vehicle.

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

David E. Vohs, of Bikakis, Vohs, Storm & Arneson, for appellant.

Larry E. Welch and Susan E. Fieber, of Gross, Welch, Vinardi, Kauffman & Day, P.C., for appellee.

BOSLAUGH, CAPORALE, and GRANT, JJ., and SPRAGUE and MULLEN, D. JJ.

SPRAGUE, D.J.

This is an action brought under the Political Subdivisions Tort Claims Act. The trial court, at the close of plaintiff's case and again at the conclusion of all the evidence, overruled defendant's motions to dismiss and took the case under advisement for several months. Subsequently, the court entered an order stating that "the motion of the Defendant, Dixon County, to dismiss Plaintiff's case should be and hereby is sustained and judgment is entered in favor of the Defendant, Dixon County . . . ." The record reveals that a full trial was had, and extensive evidence was presented by both parties.

If the order of the trial court is to be construed as acting on the motion to dismiss, then every controversial fact should have been resolved in favor of the plaintiff. If the order is construed as a judgment on the facts, and the wording of the order was a technical error, then the verdict will not be set aside unless it is clearly erroneous.

It is well established that where a party has sustained the burden and expense of trial and has succeeded in securing a judgment on the facts in issue, he has the right to keep the benefit of that judgment unless there is prejudicial error in the proceedings by which it was secured. *Bodzek v. Callahan*, 211 Neb. 600, 319 N.W.2d 721 (1982). The plaintiff has failed to show prejudicial error. Therefore, we choose to give the order the effect of a judgment on the merits.

The intersection where the accident occurred was a blind T intersection. At the time of the accident, the plaintiff, Brian T. Butorac, was on his motorcycle, traveling west on the east-west road. According to Butorac's testimony, he was on his right side of the road (the westbound lane). Jim Maxey was the operator of the automobile which collided with Butorac. Maxey traveled south into the intersection and, as he turned east, crossed over the center of the roadway, into the plaintiff's lane of travel. Both of the parties to the accident were familiar with the intersection, and they had traveled over it repeatedly for a long period of time.

The intersection was regarded as potentially dangerous because it was banked and the view of operators entering it was obstructed by an elevation on the northeast side. There was no

traffic control or warning sign upon entering the intersection from either the east or the north. Testimony that the failure to place a sign at the intersection violated generally accepted civil engineering practices was unrefuted.

If we assume, as plaintiff contends, that the county failed to use due care in maintaining or signing the road, the question of the proximate cause of the accident must still be addressed. The record clearly supports the conclusion of the trial court that the proximate cause of the accident was the negligence of Maxey in operating his vehicle in the wrong lane of travel. His actions constitute an efficient intervening cause.

In *Looney v. Pickering, ante* p. 32, 439 N.W.2d 467 (1989), the court stated that an efficient intervening cause is a new and independent act, itself a proximate cause of an injury, which breaks the causal connection between the original wrong and injury. The doctrine that an intervening act cuts off a tort-feasor's liability comes into play only when the intervening cause is not foreseeable.

The plaintiff contends that because of the physical makeup of the intersection, the negligence of Maxey was foreseeable. We disagree. The evidence shows that Maxey was in the plaintiff's lane of travel some distance prior to the intersection and did not follow the rules of the road. The county had no duty to foresee that Maxey, who was very familiar with the condition of the road, would operate his vehicle in such an unsafe manner.

A county has no duty to anticipate or foresee every negligent operation of a motor vehicle.

The question of whether the action of Maxey was foreseeable by the defendant is a question of fact that was determined by the trial court. The record supports such determination.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DAVID D. DITTER, APPELLANT.

441 N.W.2d 622

Filed June 23, 1989. No. 88-265.

1. **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.

2. **Plea Bargains: Judges.** Though this court strongly discourages judicial participation in the plea bargaining process, we do not hold that such participation renders the plea invalid per se.
3. **Appeal and Error.** A defendant cannot complain of error which he invited the court to commit.
4. **Postconviction: Effectiveness of Counsel: Proof.** When the defendant in a postconviction motion alleges a violation of his constitutional right to effective assistance of counsel as a basis for relief, the standard for determining the propriety of the claim is whether the attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the criminal law in the area. 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.
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 proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

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

Richard E. Gee for appellant.

Robert M. Spire, Attorney General, and Donald E. Hyde for appellee.

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

WHITE, J.

Defendant, David D. Ditter, appeals from an order of the district court for Hall County denying his motion for postconviction relief. The district court determined that the pleadings and the file did not present grounds for postconviction relief and summarily denied the petition without an evidentiary hearing. We affirm.

Ditter was charged with murder in the first degree for killing his wife. The defendant pled guilty to the charge and was

sentenced to life imprisonment. The plea was entered pursuant to a plea bargain by which the defendant received life imprisonment rather than the electric chair, and the State agreed to withdraw its motion for forfeiture of bond in a pending rape case against the defendant.

The defendant's case was before this court on direct appeal in *State v. Ditter*, 209 Neb. 452, 308 N.W.2d 350 (1981). In that appeal, because of jurisdictional defects, the only question before us was excessive sentence. We affirmed in part and dismissed in part, stating that the trial court could not have imposed a sentence lesser than the one imposed.

In his appeal the defendant assigns four errors, which can be consolidated into two. He contends that his guilty plea was not knowingly, intelligently, and voluntarily made and that it was entered due to ineffective assistance of counsel.

" ' "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. . . ." ' " *State v. Gagliano*, 231 Neb. 911, 914, 438 N.W.2d 783, 786 (1989); *State v. Jones*, 231 Neb. 110, 435 N.W.2d 650 (1989).

It is clear from the record that the trial court fully complied with the procedures set out in *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986). However, the defendant contends that the totality of the circumstances demonstrates that his plea was not knowingly, intelligently, and voluntarily made. In support of his contention, the defendant directs our attention to a conference held among the defendant; his former attorney, George H. Moyer, Jr.; and the defendant's parents. This conference was held on the morning set for trial and resulted in the defendant's changing his initial plea of not guilty to guilty. Though the conference lasted somewhere between 2 and 3½ hours, it was only partially recorded. The transcript of the conference was admitted into evidence without objection.

Specifically, the defendant argues that he was coerced into changing his plea during the conference by his parents, his attorney, and the judge. However, our careful review of the record indicates that the defendant's contentions lack merit. For example, during the conference the defendant's parents did

express concern about the possible expense of a trial. Notwithstanding that fact, the defendant's father also repeatedly told the defendant not to let the cost of trial influence his decision. The transcript also demonstrates that Moyer did not coerce the defendant into changing his plea, but patiently and carefully explained the available options.

However, the defendant's allegation regarding coercion by the trial judge we find particularly disturbing. Sometime during the conference, Moyer met with the trial judge, the special prosecutor, and the county attorney to discuss plea negotiations. Though it is not clear from the record, it appears Moyer initiated this meeting. After the meeting, Moyer told the defendant in the conference that

> [t]he Court . . . advised me that if the defendant, David Ditter, were to plead guilty to first degree murder that (a) he would not sentence him to the electric chair but to life imprisonment, and (b) he would not call a panel of three judges to perform the sentencing but he would perform the sentencing himself.
>
> The Judge also indicated, after further discussion with respect particularly to Mitigating Circumstance G, the incapacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law as a result of a mental defect, which might lead the jury to find the defendant in this case, David Ditter, guilty of the lesser included offense of second degree murder, *that if the verdict of the jury was second degree murder, that the sentence would be life imprisonment and not a term of years*.

(Emphasis supplied.) The transcript indicates there was a considerable amount of discussion regarding the length of term the defendant would actually serve under a sentence of life imprisonment for second degree murder and under a sentence of life imprisonment for first degree murder. Later on during the conference, this was said:

> DAVID DITTER: I don't feel I am guilty of first degree murder and I want to have a trial out there.
>
> MR. MOYER: I am going to tell you something else that you should know before you make that decision

> unequivocally. A plea is a recommendation for parole. That is to say, if you plead guilty, that would appear on your record before the Parole Board as a recommendation for parole when you come up for review of your sentence, whereas that recommendation would not appear if you went to trial.
>
> DAVID DITTER: I still don't think I am guilty of first degree murder.
>
> . . . .
>
> MRS. DITTER: With the plea there is no death penalty. In the jury you stand a chance of the death penalty.
>
> GODFREY DITTER: The Judge said if the jury found him guilty there would be no chair, it would be life imprisonment. Is that correct?
>
> MR. MOYER: No. If he goes to trial and the jury finds him guilty of first degree murder, there is still a possibility, although I consider it remote, that the death penalty could be imposed. Do you understand what the Judge said? He said that if he pleads guilty, he, Judge Whitehead, would be the sentencing judge, he will not call in a panel of three strange judges to do the sentencing, and he will give him life. If he goes to trial, as I said, there is still a possibility, although I consider it remote — that is the third time I have said it now — that the death penalty could be imposed.
>
> . . . .
>
> MR. MOYER: . . . [I]f there is a trial and conviction of first degree murder, then [Judge Whitehead's] options are open to him. He is no longer bound by the proposed plea bargain and he could call in a panel of three judges.

The defendant argues that the judge's statements constitute judicial intervention in the plea bargaining process. He bases his argument on the fact that though second degree murder carries a minimum of 10 years' imprisonment, the judge said he would give the defendant the maximum sentence of life imprisonment if he went to trial and was convicted of second degree murder. On the other hand, if he went to trial and was convicted of first degree murder, he faced the possibility of the death penalty. Considering the trial judge's posture, the

defendant claims to have had no choice but to plead guilty to first degree murder. In sum, the defendant asserts that he was effectively forced to plead guilty to first degree murder because a trial would not have resulted in a lesser sentence, and carried the risk of the death penalty.

Though this court strongly discourages judicial participation in the plea bargaining process, we do not hold that such participation renders the plea invalid per se. *State v. Svoboda*, 205 Neb. 175, 287 N.W.2d 41 (1980). See, also, *State v. Byrd*, 63 Ohio St. 2d 288, 407 N.E.2d 1384 (1980); Annot., 10 A.L.R.4th 689 (1981). In *Svoboda*, the defendant made a motion to dismiss his attorney. The trial judge denied the motion and in the process of doing so entered into direct plea negotiations with the defendant. Twice the judge told the defendant that he had never seen a case where there was such overwhelming evidence indicating the defendant's guilt. Considering the weight of the evidence, the judge also stated that he could not believe that the defendant would insist on having a trial. This court reversed and remanded the cause, noting that "a fair reading of the [judge's remarks] indicates that the trial court imparted to Svoboda the impression that the court viewed Svoboda's guilt as proven at this stage of the trial." *State v. Svoboda, supra* at 181, 287 N.W.2d at 44.

However, despite the defendant's assertions to the contrary, we find that *Svoboda* is distinguishable from the case at bar. Unlike the circumstances in *Svoboda*, Moyer, not the defendant, initiated the discussion to obtain the best possible arrangement for the defendant. In response, the trial judge indicated the possible penalties the defendant faced depending on the course of action he chose. The record indicates no comments by the trial judge on the weight of the evidence, nor any comments by the judge indicating that he thought the defendant was guilty. We also find persuasive the fact that, unlike the situation in *Svoboda*, the defendant's attorney communicated with the judge. Thus, the defendant was further shielded from any alleged coercion on the part of the judge by his attorney.

In an analogous situation, the Mississippi Supreme Court said:

> Appellant's attorney initiated the conversations with the judge on the guilty plea in an effort to obtain the lightest sentence possible for his client. There is no indication in the record, and it is assumed, that, but for the attorney's action in approaching the trial judge, there would have been no involvement by him in that matter. The appellant cannot take advantage of a situation or an error which he invited or induced the trial court to commit.

Fermo v. State, 370 So.2d 930, 932-33 (Miss. 1979). This jurisdiction also follows the rule that a defendant cannot complain of error which he invited the court to commit. *State v. Blue*, 223 Neb. 379, 391 N.W.2d 102 (1986); *State v. Bonaparte*, 222 Neb. 469, 384 N.W.2d 304 (1986); *State v. Harper*, 218 Neb. 870, 359 N.W.2d 806 (1984). Therefore, the defendant's first consolidated assignment of error is without merit.

The defendant's second consolidated error is that his guilty plea was entered as a result of ineffective assistance of counsel.

> " ' " '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. Gagliano, 231 Neb. 911, 914-15, 438 N.W.2d 783, 786 (1989); *State v. Jones*, 231 Neb. 110, 435 N.W.2d 650 (1989).

The transcript shows that at the end of the conference the defendant asked Moyer to check out a rumor about a fight in the Platte County jail which the defendant allegedly started. As Moyer was leaving the room, the defendant told him that he wanted to have a trial. Moyer was gone for 5 minutes, during which unrecorded discussions took place between the defendant and his parents. When Moyer returned, the defendant had changed his mind and stated that he wanted to accept the plea bargain. The defendant contends that during the entire conference he wanted a trial; further, that Moyer knew this fact and therefore the defendant's sudden decision in that 5-minute span to accept the plea bargain should have raised suspicions in Moyer's mind that the decision was not voluntary. Essentially, the defendant believes that he was rendered ineffective assistance of counsel because Moyer did not explore in detail the motivations for the defendant's sudden change of mind regarding acceptance of the plea bargain. We disagree.

As noted previously, the record indicates that Moyer competently represented the defendant in this matter. In addition, there is no evidence in the record, other than the defendant's allegedly "sudden" change of mind, indicating that his plea was not voluntary. This court is not prepared to hold that every time a defendant changes his mind regarding a plea bargain, his attorney must go through an extensive examination of the defendant to determine the motivation for the decision. The defendant has failed to show how he was prejudiced in the defense of his case by his attorney. Thus, this consolidated assignment of error also lacks merit.

Accordingly, the defendant having failed to establish the basis for postconviction relief, the decision of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. PATRICK H. HANKINS, APPELLANT.

441 N.W.2d 854

Filed June 23, 1989. No. 88-309.

1. **Juror Qualifications: Death Penalty.** It is permissible to exclude from jury service those whose views on capital punishment are such as to prevent or substantially impair their ability to impartially apply the law to the evidence.
2. **Confessions: Miranda Rights: Right to Counsel.** A custodial statement may not be received in evidence unless the defendant was first advised (1) of the right to remain silent, (2) that anything said can and will be used against the defendant in court, and (3) of the right to consult with a lawyer, retained or court-appointed, and to have a lawyer present during interrogation.
3. **Criminal Law: Words and Phrases.** Custodial interrogation is questioning instigated by law enforcement officers after a person has been taken into custody or otherwise deprived of his or her freedom of action in any significant way.
4. **Miranda Rights.** The mere fact that an investigation has focused on a suspect does not trigger the need for the *Miranda* warnings in a noncustodial setting.
5. **Jurisdiction: Evidence.** Generally, the law of the forum determines the admissibility of evidence.
6. **Confessions: Police Officers and Sheriffs: Due Process.** Coercive police conduct is a necessary predicate to the finding that a confession is not voluntary within the meaning of the due process clause of the 14th amendment.
7. **Confessions: Evidence.** To be admissible in evidence, an accused's statement, admission, or confession must have been freely and voluntarily made, and must not have been the product of or extracted by any direct or implied promise or inducement, no matter how slight.
8. **Confessions: Appeal and Error.** A determination by the trial judge that a confession has been voluntarily made will not be overturned on appeal absent an abuse of discretion.
9. **Homicide: Photographs.** In a homicide case photographs of the victim are admissible, even if gruesome, provided a proper foundation is laid and they are received for purposes of identification, to show the condition of the body or the nature and extent of the wounds, or to establish malice or intent, particularly in conjunction with the examining pathologist's testimony.
10. **Trial: Evidence: Testimony: Witnesses.** Under Neb. Rev. Stat. § 27-510 (Reissue 1985), the trial judge, after determining that the evidence of an informer may be relevant, holds an in camera hearing to determine whether there is a reasonable probability that the informer can give the testimony; if it is determined that the informer would be unable to give the testimony, the judge need not require that the informer's identity be disclosed.
11. **Trial: Evidence: Appeal and Error.** The admission or exclusion of evidence is a matter within the discretion of the trial court, whose ruling will not be disturbed on appeal absent an abuse of discretion.
12. **Evidence: Words and Phrases.** Relevant evidence means evidence having any

tendency to make the existence of any fact that is of consequence to the determination of the action appear more probable or less probable than it would appear without the evidence.

13. **Criminal Law: Trial: Juries: Appeal and Error: Words and Phrases.** Harmless error exists in a jury trial of a criminal case when the court makes an erroneous evidential ruling which, on review of the entire record, did not materially influence the jury in a verdict adverse to the defendant.
14. **Due Process: Evidence.** Due process requires the government to turn over evidence in its possession that is both favorable and material to a defendant's guilt or punishment.
15. _____: _____. In the context of the government's duty to turn over to the defense evidence in the government's possession, evidence is material only if there is a reasonable probability that had the evidence been disclosed, the result of the proceeding would have been different.
16. **Trial: Evidence: Motions for Mistrial.** A mistrial is generally granted upon the occurrence of a fundamental failure preventing a fair trial in the adversarial process.
17. _____: _____: _____. 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 and may result from the improper admission of prejudicial evidence.
18. **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 an abuse of discretion.
19. **Trial: Expert Witnesses.** An expert can be required to disclose on cross-examination the facts or data underlying his or her opinion.
20. _____: _____. An expert may be cross-examined for the purposes of testing and inquiring into the basis for his or her opinion.
21. **Testimony: Trial: Evidence.** Cross-examination is proper as to anything tending to affect the accuracy, veracity, or credibility of a witness, and anything within the knowledge of a witness tending to rebut evidence given on direct examination is admissible as a matter of right on cross-examination.
22. **Testimony: Trial: Appeal and Error.** The scope of cross-examination of a witness rests in the discretion of the trial court, and its ruling will be upheld on appeal unless there is an abuse of discretion.
23. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of the witnesses, determine the plausibility of explanations, or weigh the evidence; such matters are for the finder of fact. The verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
24. **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 as true, the benefit of every inference reasonably drawn from the evidence, and every controverted fact resolved in its favor.

25. **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) the evidence is so doubtful in character and lacking in probative value that a finding of guilt based on such evidence cannot be sustained.
26. **Confessions: Proof: Corroboration: Convictions.** A voluntary confession is insufficient, standing alone, to prove that a crime has been committed, but it is competent evidence of that fact and may, with slight corroborative circumstances, be sufficient to warrant a conviction.
27. **Confessions: Proof: Corroboration.** Where a crime involves physical damage to a person or property, the prosecution must generally show that the injury for which the accused confesses responsibility did in fact occur and that some person was criminally culpable; there need be no link, outside the confession, between the injury and the confessor.
28. **Jury Instructions: Appeal and Error.** There is no prejudicial error in jury instructions which, when read together, correctly state the law, are not misleading, and adequately cover the issues.
29. **Jury Instructions.** The wording of jury instructions is within the trial court's discretion.
30. **Criminal Law: Insanity.** An accused is sane at the time of the offense if he or she then had the capacity to understand the nature of the act committed and was able to distinguish right from wrong with respect to such act.
31. **Criminal Law: Jury Instructions: Insanity: Verdicts.** It is not error for the trial court to refuse to instruct the jury on the consequences of a verdict of not responsible by reason of insanity, as the dispositional effects of a verdict in a criminal case are immaterial to a jury's deliberations.
32. **Criminal Law: Trial: Pleas: Insanity.** In a criminal case the prosecution has the right to open and close argument notwithstanding that the defendant has pled not responsible by reason of insanity.
33. **Criminal Law: Pleas: Insanity: Proof.** Under Neb. Rev. Stat. § 29-2203 (Reissue 1985), insanity at the time of the offense is an affirmative defense to a crime, and the burden is upon the defendant to prove such insanity by a preponderance of the evidence.
34. **Criminal Law: Insanity: Proof: Due Process.** Once the facts constituting a crime are established beyond a reasonable doubt based on all the evidence, including the evidence of defendant's mental state, a State may, by statute, require the defendant to prove as an affirmative defense his or her insanity at the time of the offense. Such procedure does not violate the due process clause of the 14th amendment to the U.S. Constitution.
35. **Motions for New Trial: Appeal and Error.** The granting or refusal of a motion for new trial is left to the discretion of the trial court, and in the absence of an abuse of that discretion, the determination will not be disturbed on appeal.

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

Jeffrey A. Silver 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.

Defendant-appellant, Patrick H. Hankins, pled not guilty or, alternatively, not responsible by reason of insanity, to each of three counts of murder in the first degree in violation of Neb. Rev. Stat. § 28-303(1) (Reissue 1985). Pursuant to verdict, he was adjudged guilty as charged and sentenced to life imprisonment on each conviction, the sentences to be served consecutively. In his appeal to this court, Hankins, in summary, assigns as trial error the (1) giving and refusal to give the venire certain advice; (2) receipt of certain evidence; (3) rejection of certain evidence; (4) denial of access to the psychological records of a State witness; (5) failure to grant a mistrial because of the State's cross-examination; (6) failure to sustain Hankins' motions for a directed verdict or dismissal, and finding the evidence sufficient to support the verdicts; (7) giving of certain instructions; (8) refusal to give a requested instruction; (9) failure to grant Hankins surrebuttal during closing argument; (10) failure to find Neb. Rev. Stat. § 29-2203 (Reissue 1985) unconstitutional; and (11) failure to declare a mistrial or grant a new trial because of the State's withholding of information. We affirm.

I. FACTS

The bodies of the three victims, Barbara Cook, her son Kevin Cook, and her daughter Danae Cook, were found in the daughter's apartment in Omaha on Sunday, October 4, 1987, at about 4 p.m. by Paul Haws, a friend of the family.

Both Hankins and Danae Cook had possessed keys to the apartment, as the two had been living together platonically for about a month and a half prior to the killings. Barbara Cook and Kevin Cook lived in Colorado but were staying with Danae Cook on the weekend of October 3 and 4.

Haws testified that on October 3, Hankins and Barbara Cook had a dispute. Barbara Cook had given Hankins a $20 bill

to buy beer, and Hankins failed to return the change. When he did return the change, he left the apartment "[a] little embarrassed" and in a hurry. Haws spent the night of October 3 and the early morning of the next day watching videotaped movies with Barbara and Dawn Cook, another of Barbara Cook's daughters, and several others at Dawn Cook's apartment. At 1 a.m. on October 4, Barbara Cook gave Haws a ride home and told him she planned to go to Danae Cook's to sleep.

Danae Cook worked at her job as a waitress until 4 a.m. the morning of October 4. After work, she gave a coworker a ride home and then met another coworker for hot chocolate. This latter coworker testified that Danae Cook left for home a little before 5 a.m.

Haws had planned to picnic with the Cook family and other friends on October 4; thus, at 11:30 a.m. that day, he and a friend went to Danae Cook's apartment building, where they met Dawn Cook and others. They knocked at Danae Cook's locked apartment door but were unable to get an answer. Haws noticed that Danae Cook's automobile, a brown Monte Carlo, was missing from the parking lot of the apartment building but that both Barbara Cook's and Hankins' vehicles were there.

At about 4 p.m., after trying unsuccessfully throughout the day to get an answer at Danae Cook's apartment or otherwise locate the Cooks, Haws climbed up to the balcony at the rear of the apartment and entered through the unlocked sliding glass door. He then discovered the three bodies. Each body was covered with a blanket and had a pillow over its head. Barbara Cook's body was on the bed in the bedroom, Danae Cook's body was on the couch in the living room, and Kevin Cook's body was on the living room floor. Danae Cook's purse was turned upside down on the floor of the living room, and her automobile keys were missing. Hankins' clothing had also been removed from the apartment. Neither Haws nor Dawn Cook had seen Hankins all day.

Police investigators discovered a metal bar in the apartment, described as a "chrome plated rod or pipe that has a steel rod inserted and welded into one end of it measur[ing] 31 and a half inches long. Outside diameter is an inch and a quarter, and

inside diameter is one inch." The metal bar weighs about 5 pounds. An investigator for the Omaha Police Division's homicide assault unit testified that blood splatters found in the apartment were consistent with the use of the bar as the murder weapon.

The investigator further testified it appeared that the pillow covering Kevin Cook's head had been used to wipe a bloody object. The only fingerprint found on the bar was identified as Hankins'. A forensic serologist testified that blood detected on the bar was consistent with Kevin Cook's blood group, that Kevin Cook's blood could mask the existence of Danae Cook's blood, which may also have been on the bar, and that, most likely, the blood which was detected came from the last person who came into contact with the bar. The blood on the pillow where it appeared a bloody object had been wiped was also consistent with Kevin Cook's blood group. One blond hair, which "exhibited characteristics which were similar to that of Danae Cook," was found on the small end of the metal bar.

A pathologist examined the bodies at 9:30 p.m. on the day they were found; he testified that the victims had been dead at least 12 hours and possibly longer. He further testified that each victim's injuries were essentially identical and that the death of each was the result of numerous head injuries produced by multiple blows of considerable force from a heavy blunt instrument. Such injuries, he opined, were consistent with being produced by the metal bar described earlier.

On October 9, Danae Cook's automobile was found in New Mexico. Police there pursued the automobile off a highway because the driver had reportedly stolen some gasoline. The automobile was later discovered in a pasture, but the driver was not located. A jacket bearing Hankins' initials was discovered in the vehicle, and Hankins' fingerprints were found both on the vehicle and on an object inside the vehicle.

Hankins was eventually located when he, on October 11, called the Amarillo, Texas, police department from a truckstop, telling them he was wanted for theft. When Officer Glenda Utsey, a patrol officer for the city of Amarillo, arrived at the truckstop, Hankins identified himself. Utsey asked him, "What makes you think you are wanted?" Over Hankins'

objection, the court allowed Utsey to testify that Hankins asked to go outside and, on the way to the patrol vehicle, told the officer, "I killed a lady in Omaha, beat up two others real bad, stole a car, ran to New Mexico. There, I ran from the police, wrecked the car and hitchhiked back to Amarillo." Utsey then patted down Hankins and placed him in the back seat of the patrol vehicle without arresting him. Over the radio, Utsey discovered Hankins was indeed wanted and placed him under arrest but did not advise him of his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Utsey next transported Hankins to police headquarters. Utsey testified that in the police vehicle Hankins made several spontaneous statements:

> He asked me what kind of engine my car had in it, how fast it ran, he told me how fast he drove the Monte Carlo, that it had a big 454 engine in it, and that he hadn't eaten in a couple days, and that he had a big craving for Pepsi, and so he decided that after he hitchhiked to Amarillo, eat him a big meal and drink Pepsi and turn himself in, and that after he had done the crime in Omaha he thought about stealing Danae's mother's Subaru station wagon, a new model station wagon, and he couldn't find the keys, he decided to take the Monte Carlo with the 454, ran faster.

At police headquarters, Utsey advised Hankins of his rights under *Miranda* and ascertained that he understood each of them. As required by Texas law, she specifically advised him of his right to terminate the interview at any time. Hankins then signed a form stating he had been advised of the aforedescribed rights.

Utsey testified that no promises were made to Hankins, and no threats or other coercion was exercised over him. Utsey further stated that Hankins appeared physically and mentally alert, not hungry, thirsty, sleepy, or under the influence of any drugs, and appeared to give his statement voluntarily, knowingly, and intelligently. During the course of the interrogation, Hankins did complain that his legs hurt, but said he was "okay." At times, Hankins appeared nervous, disturbed, and depressed. At no time during the interview did Hankins request the advice of an attorney.

Hankins then gave Utsey a statement, which was later reduced to writing. The written statement, which was received in evidence over Hankins' objection, reads:

> On Sunday, October 4th, 1987, between 6:30 a.m. and 7 a.m., I was at an apartment located approximately at 96th and Q Street in Omaha, NE. The apartment belonged to a friend of mine identified as Danay [sic] Cook, WF, approximately 18 years old. Danay's [sic] mother, Barbara Cook, WF, approximately 38 years old, and her brother Kevin Cook, WM, approximately 17 years old, were visiting Danay [sic] from Denver, Co. I had been sleeping on the floor in the living room. When I woke up that morning on 10-04-87, I was feeling depressed and thinking about a lot of things. I got up, went into the dining room and picked up my winch bar, walked into the bedroom and started beating Danay's [sic] mother Barbara Cook while she was sleeping. After I finished, I went into the living room and started beating Danay [sic] which was asleep on the couch and Kevin which was asleep in the floor. After I finished, I wiped the blood off the winch bar and put it back in the dining room. Then I went and got both females [sic] purses, took all the money out of the purses and Danay's [sic] car keys to her 1974 brown Monte Carlo. I put all of my belongings into the car and started driving on the first interstate I saw. I followed I-29 out of Omaha into Iowa, south thru Missouri, then I went as far as the top of northern part of Arkansas in the Ozark's [sic]. From there I went west on an unknown route....
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> ... Whenever I was going thru New Mexico the police started chasing me. I finally crashed the car several miles off of the highway and left it at the scene so I could get away from the police on foot. From there I went to a rest stop and hitched a ride to Amarillo from a truck driver. After I reached Amarillo about 7:30 a.m. on 10-10-87 the trucker dropped me off at Hwy 60. From there I walked to the Union 76 Truck Stop which was about 11:00 a.m. I sat out there all day and watched tv ordered some food to eat, then decided to call the police and turn myself in because I knew I was probably wanted. I knew I had probably killed

> one of the persons I beat. I just didn't know who.

Omaha Police Officer James Wilson also interviewed Hankins at the Amarillo police station. Prior to doing so, Wilson advised Hankins of his *Miranda* rights and determined that he understood each right. Hankins then indicated that he was willing to make a statement and gave a statement which Wilson tape recorded. While making the recording, Wilson again gave Hankins the *Miranda* warnings and ascertained on the recording that, understanding each right, Hankins was nevertheless willing to continue. Hankins also agreed during the recording that the police had not mistreated or threatened him, that he had been given breakfast, and that no promises had been made to him. Wilson confirmed that Hankins was not promised anything nor threatened or coerced, and testified that Hankins appeared to give his statement knowingly and voluntarily; that he appeared calm and cooperative, physically and mentally aware; and that he did not appear to be hungry, thirsty, sleepy, or under the influence of any drug. While making the statement, Hankins was polite and calm but several times became "emotionally distraught." At no point during the interview did Hankins refuse to answer questions or ask for an attorney.

The trial judge, over Hankins' objection, received the recording in evidence and permitted the State to play it for the jury. The recorded statement is substantially the same as the written statement Hankins had given Utsey. However, in response to Wilson's questions, Hankins revealed further information. Hankins indicated that he had no idea what possessed him, saying, "I think I was just pissed off at myself" and "depressed." Hankins described the "winch bar" he used to hit the victims as

> about two or three feet long, it is chrome plated, it's — the handle has grooves on it to where you put your hands on one end. It is smooth from there down to the other end which is solid steel or solid iron with a kind of pointed jag on the end of it.

Hankins stated that after the killings, he wiped the bar on a pillow and placed pillows over the faces of the three victims. He further stated that because his automobile was "a piece of

crap," he searched for the keys to Barbara Cook's vehicle because he knew it would go furthest. Because he could not find those keys, he took Danae Cook's automobile.

Larry Roberts, commander of the homicide assault unit of the Omaha police, stated that information about the cause of the Cooks' deaths and the identification of the murder weapon were withheld from the news media to ensure that when Hankins was interviewed, the information he revealed would not be the result of press disclosures.

Several psychiatrists testified as to Hankins' mental state at the time of the killings. Called by Hankins, Dr. Donald Swanson, who had examined Hankins 3 months before the killings, diagnosed him as having a schizotypal personality disorder, and stated his condition could deteriorate into schizophrenia. Dr. David Kentsmith, who did not examine Hankins until after the killings, diagnosed him as a schizophrenic, undifferentiated type. According to Kentsmith, that disease requires hospitalization and extensive treatment and involves hallucination and a defective ability to feel emotion and relate to others and the environment. Kentsmith's opinion was that at the time of the crimes, Hankins was legally insane, "he did not know right from wrong, he did not understand the consequences of his act, and he didn't realize . . . that he deserved punishment for them."

The State called two psychiatrists. Dr. John Riedler testified Hankins is paranoid, suspicious, and suffers from a personality disorder, but opined that at the time of the crimes, Hankins was sane and had sufficient mental capacity to understand what he was doing, to comprehend the nature and quality of the acts, to distinguish between right and wrong, and to know his acts were wrong and deserving of punishment. Dr. William Logan diagnosed Hankins as having a borderline personality disorder, and agreed with Riedler that at the time of the crimes, Hankins was sane and had the mental capacity to form intent, to deliberate, to understand the nature of the crimes, to understand he could be punished for them, and to distinguish between right and wrong.

In addition, Dr. Bruce Buehler, a physician board certified in pediatrics and clinical and biochemical genetics and board

eligible in developmental medicine, called by Hankins, testified that Hankins suffered from brain damage as the result of his mother's use of the drug Tridione for epilepsy during her pregnancy, so that Hankins' mental capacity was below average. Logan, however, disagreed and opined that if Hankins had organic brain damage, it was not significant.

Dawn Cook, who was acquainted with Hankins as a friend of the family, never knew him to be violent or to have threatened any of the Cooks. He and Kevin Cook "were like brothers at times." She testified, however, that just before the killings, Hankins' "moods were swinging towards depression, anger" and that her sister "was more nervous and wanted to stay away more from the apartment." According to Dawn Cook, Hankins' relationship with her family deteriorated because of the money incident described by Haws.

The record also establishes that Danae Cook had been dating Russell Stortz. According to Dawn Cook, Stortz abused Danae Cook, had a volatile relationship with the Cook family, and had threatened to kill Dawn, Kevin, and Barbara Cook. Danae Cook told a friend the night before her death that she planned to break up with Stortz, and Stortz and Danae Cook were seen arguing outside her workplace on the morning of October 3. Stortz, however, denied ever threatening the Cook family and considered himself very protective of Danae Cook. When told about the killings, Stortz displayed extreme emotion; in his words, "I broke down. I lost it."

II. ANALYSIS

1. Venire Advice

In connection with the first summarized assignment of error, Hankins contends that the trial judge committed prejudicial error in, over objection, informing those sworn as prospective jurors that although, as jurors, they would have no role in sentencing Hankins if he should be convicted of murder, they should nonetheless be aware that a possible consequence of such a conviction would be the court's imposition of a sentence of death. In addition, Hankins claims that in view of that advice, the trial judge erroneously refused to inform the jury of the dispositional consequence of a verdict of not responsible by

reason of insanity.

a. *Advice as to Sentence*

After advising the jury about the potentiality of a sentence of death, the trial judge asked that any venireperson who, with that knowledge, could not in good conscience "take the oath to decide the case on the law and the facts to the exclusion of any other consideration, please stand now" so that he might visit with such venireperson individually. No venireperson stood.

Hankins' claim that the trial judge's comments were improvident because they produced a more conviction-prone jury than would otherwise be the case has been rejected by both the U.S. Supreme Court and this court. It is entirely permissible to exclude from jury service those whose views on capital punishment are such as to "prevent or substantially impair" their ability to impartially apply the law to the evidence. *Lockhart v. McCree*, 476 U.S. 162, 174, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986); *State v. Bird Head*, 225 Neb. 822, 408 N.W.2d 309 (1987); *State v. Burchett*, 224 Neb. 444, 399 N.W.2d 258 (1986) (quoting *Lockhart v. McCree*). No useful purpose would be served by restating the analyses contained in the foregoing cases. We are constrained, however, to point out that, here, none of the venirepersons responded to the trial judge's comments, and apparently none of them were excluded as a result of the information the venire was given.

b. *Disposition If Not Responsible Because of Insanity*

In a related argument Hankins further contends that if a venire is told of the possibility of a sentence of death, it must also be told of the disposition to be made of a defendant found not responsible by reason of insanity. Without citing authority, Hankins argues that such advice is "a natural extension of death-qualifying a jury." Brief for appellant at 45.

Neb. Rev. Stat. § 29-2006(3) (Reissue 1985) provides that it is good cause to challenge one called for jury service in a capital case if his or her opinions are such as to prevent "finding the accused guilty." *State v. Bird Head, supra*. Accordingly, the venire may be examined to determine whether any juror has conscientious scruples against capital punishment such as to

prevent or substantially impair the performance of his or her duties as a juror. *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984), *cert. denied* 469 U.S. 1028, 105 S. Ct. 447, 83 L. Ed. 2d 372. See, also, *State v. Bird Head, supra.*

In *State v. Rowe*, 210 Neb. 419, 315 N.W.2d 250 (1982), *appeal after remand* 214 Neb. 685, 335 N.W.2d 309 (1983), we impliedly held that a juror is disqualified and may be challenged for cause where his or her verdict will be affected by an awareness that an accused found not guilty by reason of insanity might soon be released. We declared that a juror who cannot subordinate his or her personal views on an issue of law and obey the law in deciding the case must be excused for cause. See, also, *State v. Benzel*, 220 Neb. 466, 370 N.W.2d 501 (1985); *State v. DeJesus*, 216 Neb. 907, 347 N.W.2d 111 (1984); *State v. Reeves, supra*. The defendant, like the prosecution, has the right to put pertinent questions to prospective jurors to ascertain if there is ground for challenge for cause. *Oden v. State*, 166 Neb. 729, 90 N.W.2d 356 (1958).

The true object of challenges to the venire, either peremptory or for cause, is to enable parties to avoid disqualified persons and secure an impartial jury. *State v. Rife*, 215 Neb. 132, 337 N.W.2d 724 (1983), *cert. denied* 464 U.S. 1070, 104 S. Ct. 977, 79 L. Ed. 2d 215 (1984). Consequently, the principal purpose of voir dire examination is to ascertain whether the proposed juror is free from bias or prejudice, and whether he or she is in such attitude of mind with respect to the case in hand that he or she would be a fair and impartial juror. *Oden v. State, supra.*

As the State points out, nothing prevented Hankins from conducting voir dire on the issue of whether prejudice against the defense of insanity, Hankins' possible commitment to a psychiatric hospital, or the possibility that Hankins might soon be released if found not responsible by reason of insanity would "prevent or substantially impair" any juror's ability to impartially apply the law to the facts of the case. As counsel has the right to interrogate prospective jurors so as to elicit desired information before accepting the venire, *Medley v. State*, 156 Neb. 25, 54 N.W.2d 233 (1952), the trial judge did not err in refusing to do so himself.

2. Evidence Received

In connection with the second summarized assignment of error, Hankins contends that the trial judge erred in admitting the inculpatory statement he made and in admitting certain pictorial evidence.

a. *Inculpatory Statements*

Hankins makes four arguments for excluding the inculpatory statements which the trial judge admitted over objection as detailed in part I. First, he argues that Utsey's question, "What makes you think you are wanted?", was custodial interrogation requiring preadvisement of rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and because Utsey did not first give the *Miranda* warnings, his answer was inadmissible and all of Hankins' subsequent statements to the police were "fruits of the poisonous tree."

Hankins correctly asserts that under *Miranda*, a custodial statement may not be received in evidence unless the defendant was first advised (1) of the right to remain silent, (2) that anything said can and will be used against the defendant in court, and (3) of the right to consult with a lawyer, retained or court-appointed, and to have a lawyer present during interrogation. *State v. Barnes*, 230 Neb. 949, 434 N.W.2d 516 (1989); *State v. Gibson*, 228 Neb. 455, 422 N.W.2d 570 (1988).

Hankins' argument, however, overlooks the fact that he was not in custody at the time he answered Utsey's question outside the truckstop. Utsey had not placed Hankins under arrest, and, as she testified, Hankins was free to leave at that time. Custodial interrogation has been characterized by the U.S. Supreme Court in *Miranda v. Arizona, supra* at 444, as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *State v. Gibson, supra*. The *Miranda* warnings are required before interrogation only when there has been a restriction on a person's freedom so as to render such person in custody. *State ex rel. NSBA v. Douglas*, 227 Neb. 1, 416 N.W.2d 515 (1987), *cert. denied* ____ U.S. ____, 109 S. Ct. 31, 102 L. Ed. 2d 10 (1988); *State v.*

Brown, 225 Neb. 418, 405 N.W.2d 600 (1987). The mere fact that an investigation has focused on a suspect does not trigger the need for the *Miranda* warnings in a noncustodial setting. *State v. Brown, supra.*

Secondly, Hankins argues that because Wilson failed to advise him of the rights Texas law specifically requires beyond those required by *Miranda* (for example, the right to terminate the interview at any time, see Tex. Code Crim. Proc. Ann. art. 38.22, § 2 (Vernon 1979)), Hankins' taped confession to Wilson was inadmissible in the Nebraska court.

The same issue was confronted in *People v. Benson*, 88 A.D.2d 229, 454 N.Y.S.2d 155 (1982). There, the defendant similarly argued that because New York officers took his confession in Texas, Texas law governed the rights of which the defendant had to be advised and thus the admissibility of his confession in the New York court. The court noted that, generally, the law of the forum determines the admissibility of evidence. The court held that the law of New York, and not the law of Texas, governed the application of *Miranda* to the defendant's confession and thus its admissibility in the New York court.

> It is well established that "the *Miranda* rule evolved solely as a procedural safeguard to protect the accused's privilege against compulsory self incrimination . . . . " . . . Beyond a strictly procedural approach, however, it is clear that this State's law governs since New York has a paramount interest in the application of its laws to this case . . . . Here, New York police officers obtained a statement for use in a New York proceeding emanating from a violent crime in New York. Application of the exclusionary rule would not serve any useful purpose since Texas authorities were not involved. Indeed, exclusion of the subject statement would serve to undermine the good faith efforts of the New York police in complying with the *Miranda* standards.

(Citations omitted.) 88 A.D.2d at 231, 454 N.Y.S.2d at 157. It is clear that under both Nebraska and federal law, Wilson, a Nebraska police officer, properly advised Hankins of his *Miranda* rights, and Hankins voluntarily waived them.

Thirdly, Hankins argues that his waiver of the *Miranda* rights was not intelligent in that, according to psychiatric expert Logan, Hankins was suffering from a personality disorder and, as such, was more likely to be mentally confused in a period of emotional turmoil. Nevertheless, we note that Logan testified that despite Hankins' personality disorder, at the time of the killings he was capable of understanding the nature and quality of his actions. We further note that no expert testified as to Hankins' mental condition at the time he made his confessions.

The test for determining whether a defendant acted intelligently regarding any *Miranda* right is whether, at the time of the waiver, the defendant possessed the capacity to understand and act in response to the warnings given by an interrogating officer. *State v. Rowe*, 228 Neb. 663, 423 N.W.2d 782 (1988). Hankins appeared to understand the rights read to him and gave his confession coherently. Thus, the trial judge had sufficient evidence to determine that Hankins possessed the mental capacity to understand and act in response to the warnings.

Finally, Hankins appears to argue that his statements at the Amarillo police station were not voluntarily made, again basing his argument on his mental condition at the time of the confessions. This argument was recently considered by the U.S. Supreme Court in *Colorado v. Connelly*, 479 U.S. 157, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986). There, the defendant, similarly claiming that his confession to murder was not voluntary, introduced the testimony of a psychiatrist at a hearing to suppress the confession. This psychiatrist testified that the defendant was suffering from chronic schizophrenia and had been in a psychotic state since the day before his confession. The Court held that coercive police conduct is a necessary predicate to the finding that a confession is not voluntary within the meaning of the due process clause of the 14th amendment. The Court explained:

> Absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law. Respondent correctly notes that as interrogators have turned to more subtle forms of psychological persuasion,

> courts have found the mental condition of the defendant a more significant factor in the "voluntariness" calculus. See *Spano v. New York*, 360 U. S. 315[79 S. Ct. 1202, 3 L. Ed. 2d 1265] (1959). But this fact does not justify a conclusion that a defendant's mental condition, by itself and apart from its relation to official coercion, should ever dispose of the inquiry into constitutional "voluntariness."

479 U.S at 164.

The Court further stated:

> We think the Constitution rightly leaves this sort of inquiry to be resolved by state laws governing the admission of evidence and erects no standard of its own in this area. A statement rendered by one in the condition of the respondent might be proved to be quite unreliable, but this is a matter to be governed by the evidentiary laws of the forum, see, *e. g.*, Fed. Rule Evid. 601, and not by the Due Process Clause of the Fourteenth Amendment. "The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false." *Lisenba v. California,* 314 U. S. 219, 236 [62 S. Ct. 280, 86 L. Ed. 166] (1941).

479 U.S. at 167.

In Nebraska, we have held that to be admissible in evidence, an accused's statement, admission, or confession must have been freely and voluntarily made, and must not have been the product of or extracted by any direct or implied promise or inducement, no matter how slight. *State v. Hayes*, 229 Neb. 53, 424 N.W.2d 624 (1988).

A determination by the trial judge that a confession has been voluntarily made will not be overturned on appeal absent an abuse of discretion. *State v. Clark*, 228 Neb. 599, 423 N.W.2d 471 (1988). The record is devoid of any evidence of coercive police conduct. Both Utsey and Wilson testified that Hankins was not promised anything, threatened, or subjected to any other improper influence. Hankins himself stated on the tape that he received neither threat nor promise. The trial judge did not abuse his discretion in determining that Hankins'

confession was admissible.

b. *Pictorial Evidence*

Before trial, Hankins filed a motion in limine to exclude from evidence certain photographs depicting the victims' bodies, their location, and the location of blood splatters found at the crime scene, as well as certain photographic slides of the victims' injuries. The trial judge overruled both this motion and Hankins' objections during trial, except as to three crime scene photographs. Hankins now argues that the pictorial evidence admitted is unfairly prejudicial and thus should have been excluded pursuant to the provisions of Neb. Rev. Stat. § 27-403 (Reissue 1985).

We have held that in a homicide case photographs of the victim are admissible, even if gruesome, provided a proper foundation is laid and they are received for purposes of identification, to show the condition of the body or the nature and extent of the wounds, or to establish malice or intent, particularly in conjunction with the examining pathologist's testimony. *State v. Parsons*, 226 Neb. 543, 412 N.W.2d 480 (1987); *State v. Lamb*, 213 Neb. 498, 330 N.W.2d 462 (1983). In other words, the gruesome nature of photographs alone will not keep them from the trier of fact, so long as the probative value is not outweighed by the prejudicial effect. *State v. Parsons, supra*.

There is no claim that foundation was lacking for any of the pictorial evidence received. The photographs of the crime scene depicting the position of the bodies and location of various blood splatters corroborated Hankins' confession. The photographic slides of the victims' bodies were used by the pathologist to explain the nature and extent of the wounds and to demonstrate that such wounds could have been produced by the metal bar Hankins confessed using in the killings.

The admission or exclusion of evidence is a matter within the discretion of the trial court, whose ruling will not be disturbed on appeal absent an abuse of discretion. *State v. Sardeson*, 231 Neb. 586, 437 N.W.2d 473 (1989); *State v. Sutton*, 231 Neb. 30, 434 N.W.2d 689 (1989). The trial judge did not abuse his discretion in admitting the pictorial evidence about which

Hankins complains.

3. Evidence Rejected

The third summarized assignment of error complains that the trial judge rejected evidence concerning Danae Cook's alleged drug use and her pregnancy and miscarriage immediately prior to her death.

a. *Alleged Drug Use*

Before trial, the State filed a motion in limine to exclude from evidence certain information from a confidential informer "relating to alleged drug activities on the part of the decedent Danae Cook" on the bases that "[s]uch evidence is highly prejudicial, of low probative value and dubious reliability and would tend to confuse the issues" and that the evidence involves hearsay. The State invoked its privilege not to reveal the identity of the informer. An in camera hearing was held, after which the trial judge overruled the State's motion, but also denied Hankins' request to have the informer's identity disclosed pursuant to Neb. Rev. Stat. § 27-510 (Reissue 1985) by ordering all present at the hearing on the motion not to reveal "what went on at this hearing without an order of the court." Hankins claims that Danae Cook's alleged drug involvement was relevant to show that her death may have been drug related.

Under § 27-510, the trial judge, after determining that the evidence of an informer may be relevant ("necessary to a fair determination of the issue of guilt or innocence"), holds an in camera hearing, such as the one had here, to determine whether "there is a reasonable probability that the informer can give the testimony." The trial judge need not require that the informer's identity be disclosed if it is determined that the informer would be unable to give the testimony. In overruling the State's motion, the trial judge implicitly determined that although the evidence relating to Danae Cook's drug involvement might be relevant, the informer's identity did not have to be disclosed, as she would be unable to give the testimony.

At the hearing, Deputy County Sheriff Daniel McGovern testified that he had talked to a confidential informer concerning Danae Cook's possible involvement with drugs. The

confidential informer had indicated in the first interview that she was present when a Jeffrey Opsatnich told a group of people that Danae Cook was killed because she "owed the dealer a lot of money." However, McGovern testified that the informer said during a second interview that Opsatnich was her only source for this information, that Danae Cook had never told her about drug involvement, and that, in fact, she did not know Danae Cook personally.

Hankins offered McGovern's police report, which recites: "[T]he confidential source was also well acquainted with the deceased and verified that she distributed drugs." However, McGovern explained that "well acquainted" and "verified" were his words and that, in fact, the informer said only that she had seen Danae Cook before, went to school with her, and had no personal knowledge that Danae Cook was involved in drugs. Hankins' attorney himself stated at the hearing that when interviewed, Opsatnich "said he never said anything about drugs or anything of that nature, and that he didn't have any idea what I was talking about . . . ."

On this state of the record, the trial judge did not abuse his discretion in concluding that the informer had no personal knowledge that Danae Cook was involved in drugs and therefore could not supply the testimony at trial, as it would be hearsay. Thus, there was no error in denying Hankins' request to have the informer identified.

b. *Pregnancy and Miscarriage*

During trial, Hankins made an offer of proof that, if permitted, Stortz would testify that 2 days before the killings, Danae Cook told him she had miscarried their baby, and that he was certain he was the father. The State objected to the evidence because of a lack of relevance and unfair prejudice, confusion, and misleading of the jury. The trial judge sustained the State's relevancy objection, and Hankins now claims the ruling as error, asserting the evidence is relevant to show that Stortz had motive to kill Danae Cook.

Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action appear more probable or less

probable than it would appear without the evidence. *In re Interest of Adams*, 230 Neb. 109, 430 N.W.2d 295 (1988); *State v. Wells*, 229 Neb. 89, 425 N.W.2d 338 (1988); Neb. Rev. Stat. § 27-401 (Reissue 1985). Evidence is probative if it tends in any degree to alter the probability of a material fact. *State v. Wells, supra*; *State v. Oliva*, 228 Neb. 185, 422 N.W.2d 53 (1988). If the evidence offered could show that a material fact is slightly more probable than it would appear without the evidence, it is relevant. *Id.* Section 27-401 requires only that the degree of probativeness be something more than nothing. *Id.*

The evidence has little, if any, probative value as to whether Stortz had motive to kill Danae Cook, her mother, and her brother. Moreover, even if the evidence were relevant and thus should have been admitted, its exclusion was harmless beyond a reasonable doubt. Harmless error exists in a jury trial of a criminal case when the court makes an erroneous evidential ruling which, on review of the entire record, did not materially influence the jury in a verdict adverse to the defendant. *State v. Cox*, 231 Neb. 495, 437 N.W.2d 134 (1989). Here, Hankins' confession, combined with the abundance of extrinsic evidence which corroborates it, overwhelmingly establishes Hankins' guilt, as is more fully developed in the analysis which follows in part II, 6.

4. Witness Records

Prior to trial, Hankins served a subpoena duces tecum for the records created when Dawn Cook was hospitalized at her own request for psychological problems approximately 4 months before the killings and about 8 months prior to trial. He wished to determine whether the records reflected on this witness' credibility. The trial judge ordered the records produced for an in camera review. The records reflect that although Dawn Cook denied hallucinating, she reported recent poor memory. The records also reveal a physician's statement that Dawn Cook's "memory for both recent and remote events appeared to show some blocking, however, not to a gross degree at this time." The trial judge concluded the records failed to show an impairment of Dawn Cook's ability to "perceive, remember, and relate events to a degree that could not

reasonably be revealed or tested by cross-examination," and denied Hankins access to the records.

Hankins argues the trial judge's decision denied him the ability to effectively cross-examine a chief prosecution witness. He urges that her testimony that Danae Cook was nervous around Hankins, that his relationship with her had deteriorated, that he had taken some money, and that his moods were swinging toward depression and anger provided evidence that he had a motive for the crimes, and he thus was entitled to cross-examine Dawn Cook about her own mental condition in order to properly impeach her.

A sharply divided U.S. Supreme Court in *Pennsylvania v. Ritchie*, 480 U.S. 39, 53, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987), concluded that the confrontation clause of U.S. Const. amend. VI does not empower a criminal defendant to require "pretrial disclosure of any and all information which might be useful in contradicting unfavorable testimony." We, however, recently ruled that the sixth amendment right to confront witnesses requires that upon a showing of reasonable grounds to believe that the failure to produce privileged impeaching information is likely to impair a criminal defendant's ability to effectively cross-examine the witness claiming the privilege, the witness' testimony must be excluded. *State v. Trammell*, 231 Neb. 137, 435 N.W.2d 197 (1989). While the *Ritchie* Court found no such sixth amendment right, it did hold that due process principles require the government to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment. The U.S. Supreme Court ruled that in this context, evidence is material only if there is a reasonable probability that had the evidence been disclosed, the result of the proceeding would have been different. Both *Ritchie* and *Trammell* provide for an in camera review of the information such as was held in the present case.

Under the circumstances, we cannot agree with the trial judge's determination that the information Hankins sought did not have a substantial bearing on Dawn Cook's credibility. The nature of the information was such that it should have been made available to him for such use as might be appropriate during his cross-examination of Dawn Cook. However, Dawn

Cook's testimony was not, contrary to Hankins' claim, crucial to the prosecution. Hankins' depression and shifts in his moods were established by his own confession, as well as by psychiatric evidence. The fact of his encounter with Barbara Cook over his failure to return the change from a $20 bill was also testified to by Haws. Dawn Cook's testimony was indeed, as the State claims, cumulative. Thus, it cannot be said there is a reasonable probability that had the information been disclosed, the result of the proceeding would have been different.

5. Claim of Mistrial Because of Cross-examination

The fifth summarized assignment of error, complaining of the denial of Hankins' first motion for mistrial, arises from the State's cross-examination of Kentsmith, one of the psychiatrists testifying on Hankins' behalf as detailed in part I above. Hankins complains that the State was permitted, over objection, to inquire whether Kentsmith had been aware that approximately a month prior to the subject killings, Hankins, after being unable to visit a hospitalized friend, damaged a vehicle by hitting it with a "winch bar." Hankins argues the question "served no useful cross-examination purpose" but, rather, was used to "put before the jury the fact that . . . Hankins had previously used the winch bar to strike and cause damage, and therefore he might use the winch bar to strike and cause the deaths of Danae Cook, Kevin Cook and Barbara Cook." Brief for appellant at 43.

We begin the analysis of the issues presented by this summarized assignment of error by recalling that a mistrial is generally granted upon the occurrence of a fundamental failure preventing a fair trial in the adversarial process. *State v. Pierce*, 231 Neb. 966, 439 N.W.2d 435 (1989); *State v. Sardeson*, 231 Neb. 586, 437 N.W.2d 473 (1989). 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 and may result from the improper admission of prejudicial evidence. *State v. Jones, ante* p. 576, 441 N.W.2d 605 (1989); *State v. Pierce, supra.* The decision to grant a motion for mistrial is within the discretion of the trial court and will be upheld on appeal absent

an abuse of discretion. *State v. Sardeson, supra*; *State v. Byrd*, 231 Neb. 231, 435 N.W.2d 898 (1989).

The record establishes that the information at issue was contained in a police report Kentsmith considered. Under Neb. Rev. Stat. § 27-705 (Reissue 1985), an expert can be required to disclose on cross-examination the facts or data underlying his or her opinion. See *Gordman Properties Co. v. Board of Equal.*, 225 Neb. 169, 403 N.W.2d 366 (1987). Thus, an expert may be cross-examined for the purposes of testing and inquiring into the basis for his or her opinion. Such examination is useful to the jury in assessing the probative value of the expert's opinion. As we have previously noted, cross-examination is proper as to anything tending to affect the accuracy, veracity, or credibility of a witness, and anything within the knowledge of a witness tending to rebut evidence given on direct examination is admissible as a matter of right on cross-examination. *State v. Sutton*, 231 Neb. 30, 434 N.W.2d 689 (1989). Moreover, the scope of cross-examination of a witness rests in the discretion of the trial court, and its ruling will be upheld on appeal unless there is an abuse of discretion. *State v. Sutton, supra*. The trial judge did not abuse his discretion either in permitting the cross-examination at issue or in denying a mistrial.

6. Sufficiency of Evidence and Motions for Directed Verdict or to Dismiss

The sixth summarized assignment of error rests on Hankins' motion for a directed verdict made at the close of the State's case and his motion to dismiss the charges against him made at the close of all the evidence, both of which motions the trial judge overruled. Hankins argues that the trial judge should have directed a verdict in his favor or granted his later first motion for new trial, as the evidence was insufficient to support the verdicts in that there was not sufficient evidence to corroborate his confession as required by *State v. Scott*, 200 Neb. 265, 263 N.W.2d 659 (1978).

In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of the witnesses,

determine the plausibility of explanations, or weigh the evidence; such matters are for the finder of fact. The verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Butts, ante* p. 71, 439 N.W.2d 493 (1989); *State v. Lehl,* 231 Neb. 906, 438 N.W.2d 505 (1989).

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 as true, the benefit of every inference reasonably drawn from the evidence, and every controverted fact resolved in its favor. *State v. Pierce,* 231 Neb. 966, 439 N.W.2d 435 (1989). 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) the evidence is so doubtful in character and lacking in probative value that a finding of guilt based on such evidence cannot be sustained. *State v. Pierce, supra*; *State v. Diesing*, 231 Neb. 132, 435 N.W.2d 190 (1989).

A voluntary confession is insufficient, standing alone, to prove that a crime has been committed, but it is competent evidence of that fact and may, with slight corroborative circumstances, be sufficient to warrant a conviction. *State v. Scott, supra*; *State v. Moss*, 182 Neb. 502, 155 N.W.2d 435 (1968); *Sullivan v. State*, 58 Neb. 796, 79 N.W. 721 (1899). Where a crime involves physical damage to a person or property, the prosecution must generally show that the injury for which the accused confesses responsibility did in fact occur and that some person was criminally culpable. There need be no link, outside the confession, between the injury and the confessor. *State v. Scott, supra.*

Evidence certainly exists in this case sufficient for the jury to conclude that each of the three victims was killed and that some person was criminally culpable. Hankins' confession sufficiently linked him to the crimes, and, as noted earlier, a surfeit of evidence extrinsic to the confession exists which corroborates Hankins' guilt. Hankins had access to the apartment, and his was the only fingerprint discovered on the weapon used; he owned the metal bar on which Kevin Cook's blood and Danae Cook's hair were found. In addition,

Hankins' clothing and Danae Cook's automobile were missing from the apartment when the bodies were found. Further, as the State points out, the physical evidence coincided with Hankins' confession as to the time of death, the location and condition of the bodies, and the nature of the murder weapon. Hankins' admission that he woke up "depressed and thinking about a lot of things"; that he "got up, went into the dining room" and picked up his "winch bar, walked into the bedroom and started beating" Barbara Cook while she was sleeping; and that after he finished, he went "into the living room and started beating" Danae Cook and then Kevin Cook establishes the killings were done "purposely and with premeditated malice," as required for the offense of first degree murder under the provisions of § 28-303(1). Thus, sufficient evidence exists to support the jury's verdicts, and there is no basis on which the trial judge could properly sustain Hankins' motions to direct a verdict in his favor or to dismiss the charges.

7. Instructions Given

In this seventh summarized assignment of error, Hankins mounts two separate attacks on a total of 5 of the 32 instructions comprising the trial judge's charge to the jury. The first attack involves three instructions which deal with the alternative findings the jury could make. The second attack involves two instructions which Hankins claims both improperly put the burden of proving his insanity at the time of the offense upon him and improperly defined insanity.

a. *Alternative Findings*

As to the first attack, Hankins takes exception not to the contents of the three instructions in question, but urges they were defective in that "not guilty" was placed last in the order of alternative findings the jury could make.

While not in the form of step instructions, see *State v. Patterson, ante* p. 304, 440 N.W.2d 242 (1989), the instructions in question listed the jury's options in the following order: (1) guilty of first degree murder, (2) guilty of second degree murder, (3) not responsible by reason of insanity, or (4) not guilty.

Hankins' claim, however, is without merit. If jury

instructions, when read together, correctly state the law, are not misleading, and adequately cover the issues, there is no prejudicial error. *State v. Cole*, 231 Neb. 420, 436 N.W.2d 209 (1989); *State v. Kistenmacher*, 231 Neb. 318, 436 N.W.2d 168 (1989); *State v. Donhauser*, 231 Neb. 114, 435 N.W.2d 189 (1989). Furthermore, the wording of jury instructions is within the trial court's discretion. *State v. Donhauser, supra.* Having instructed the jury that Hankins was presumed innocent, the order of the alternative findings is not misleading and of no import in this case, as the instructions read together properly state the law.

b. *Insanity*

This brings us to the remaining two questioned instructions, which define insanity and allocate the burden of proving it upon Hankins. The matter of the burden of proof is related to, and resolved by, the analysis of Hankins' claim that § 29-2203, which allocates the burden as do the instructions at issue, is unconstitutional. Thus, we defer consideration of the correctness of the questioned instructions in this regard until part II, 10, of this opinion, which concerns itself with the constitutionality of the challenged statutory language.

Thus, we reach the matter of defining legal insanity. Hankins recognizes that the instructions define the term in accordance with existing Nebraska law but argues that the law as it exists should be abandoned, as it is "archaic and not reflective of the current state of psychiatry."

Our formulation of the test for legal insanity was conceived in *M'Naghten's Case*, 8 Eng. Rep. 718 (1843), which considered an accused sane at the time of the offense if he or she then had the capacity to understand the nature of the act committed and was able to distinguish right from wrong with respect to such act. *State v. Carr*, 231 Neb. 127, 435 N.W.2d 194 (1989); *State v. Robertson*, 223 Neb. 825, 394 N.W.2d 635 (1986). Hankins urges that the better test is found in the American Law Institute's Model Penal Code § 4.01 (1962). That section of the code provides that one is not responsible for criminal conduct if at the time of such conduct, as a result of mental disease or defect, he or she lacks substantial capacity either to appreciate

the criminality of the conduct or to conform his or her conduct to the requirement of law. As used in the code, the phrase "mental disease or defect" excludes an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

Noting that in *Leland v. Oregon*, 343 U.S. 790, 72 S. Ct. 1002, 96 L. Ed. 1302 (1952), *reh'g denied* 344 U.S. 848, 73 S. Ct. 4, 97 L. Ed. 659, the U.S. Supreme Court held that the states may, without violating the 14th amendment, use the *M'Naghten* rule to determine criminal responsibility, we, in *State v. Jacobs*, 190 Neb. 4, 205 N.W.2d 662 (1973), *cert. denied* 414 U.S. 860, 94 S. Ct. 75, 38 L. Ed. 2d 111, declined a similar invitation to abandon our current definition. We are not persuaded that, contrary to Hankins' claim, the interests of society would be better served by the code's description of the mental conditions which should excuse criminal conduct than by the excuse provided by our present rule. We therefore again decline the invitation to change our well-settled law in this regard.

8. Instruction Refused

The eighth summarized assignment of error deals with the trial judge's refusal to give Hankins' requested instruction concerning his disposition should he be found not responsible by reason of insanity. However, this claim overlooks that the trial judge did instruct the jury not to consider Hankins' punishment or the nature of his treatment in rendering its verdict. Additionally, we held that under § 29-2203 as it existed before its amendment in 1984, it was not error for the trial court to refuse to instruct the jury of the consequences of a verdict of not guilty by reason of insanity, as the dispositional effects of a verdict in a criminal case are immaterial to a jury's deliberations. *State v. Williams*, 217 Neb. 539, 352 N.W.2d 538 (1984); *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984), *cert. denied* 469 U.S. 1028, 105 S. Ct. 447, 83 L. Ed. 2d 372. The same holds true with respect to the consequence of a verdict of not responsible by reason of insanity under the present provisions of § 29-2203.

9. Closing Argument

In connection with the ninth summarized assignment of

error, Hankins argues that because he was assigned the burden of proof on the issue of insanity, the trial judge erroneously denied him surrebuttal in closing argument.

Under the Code of Criminal Procedure, specifically Neb. Rev. Stat. § 29-2016(6) (Reissue 1985), the appropriate procedure for closing arguments in criminal cases is that "when the evidence is concluded, unless the case is submitted without argument, the counsel for the state shall commence, the defendant or his counsel follow, and the counsel for the state conclude the argument to the jury."

Nonetheless, Hankins cites *Rea v. Bishop*, 41 Neb. 202, 59 N.W. 555 (1894), a civil case in which we upheld the trial court's decision to allow the defendant to open and close argument because he had admitted the plaintiff's pleadings that a contract existed between them, and the only issue left was his affirmative defense of insanity at the conception of the contract. *Bishop* is based on the predecessor to Neb. Rev. Stat. § 25-1107 (Reissue 1985), which governs the order of trial in a civil case and differs from § 29-2016(6). Section 25-1107(6) provides in part: "In argument, the party required first to produce his evidence shall have the opening and conclusion." Subsection (3) provides: "The party who would be defeated if no evidence were given on either side must first produce his evidence; the adverse party will then produce his evidence."

There exists other civil case law based on § 25-1107 or its predecessor, which holds that as a general rule, the party with the burden of proof is entitled to open and close argument. *Rath v. Sanitary District No. One*, 156 Neb. 444, 56 N.W.2d 741 (1953); *Zweibel v. Myers*, 69 Neb. 294, 95 N.W. 597 (1903). In other words, the party required first to produce evidence, i.e., the party against whom judgment would be rendered if no evidence were introduced by either party, has the right to open and close argument. *Rea v. Bishop, supra.* Where there are several parties who have the burden of proof, the trial court has discretion to determine which litigant shall open and close. *In re Estate of O'Connor*, 117 Neb. 636, 222 N.W. 57 (1928).

This, however, is a criminal case, and the criminal procedure governs. It must be remembered that the State retained the burden to prove the elements of first degree murder, or of the

lesser offense of second degree murder, beyond a reasonable doubt. Only if the State met its burden of proving every element of the crimes charged did Hankins' burden arise. Thus, the trial judge properly denied surrebuttal.

10. Constitutionality of § 29-2203

In the 10th summarized assignment of error, Hankins asserts that the portion of § 29-2203 which provides that one prosecuted for an offense "may plead that he or she is not responsible by reason of insanity at the time of the offense and in such case the burden shall be upon the defendant to prove the defense of not responsible by reason of insanity by a preponderance of the evidence" violates a variety of federal and state constitutional provisions. His argument, however, is limited to urging that placing the burden of proving insanity at the time of the offense on a criminal defendant deprives such defendant of due process.

So far as the federal Constitution is concerned, the issue has been resolved adversely to Hankins' position. In *Patterson v. New York*, 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977), the U.S. Supreme Court, relying on *Leland v. Oregon*, 343 U.S. 790, 72 S. Ct. 1002, 96 L. Ed. 1302 (1952), *reh'g denied* 344 U.S. 848, 73 S. Ct. 4, 97 L. Ed. 659, held that once the facts constituting a crime are established beyond a reasonable doubt based on all the evidence, including the evidence of the defendant's mental state, a state may, by statute, require the defendant to prove as an affirmative defense his or her insanity at the time of the offense. Such procedure does not violate the due process clause of the 14th amendment. Nor do we find anything in Nebraska's due process clause, Neb. Const. art. I, § 3, which requires a different result.

Thus, the trial judge correctly instructed the jury:

> While the burden of proving each and every material element of the crime charged, by evidence beyond a reasonable doubt, is upon the State and that burden never shifts, insanity is an affirmative defense to a crime and the burden is upon the Defendant to prove insanity by a preponderance of the evidence.

That determination also resolves adversely to Hankins his

claim in part II, 7b, above, that the instructions placing on him the burden of proving his insanity were erroneous.

11. Claimed Withholding of Information

This 11th and final summarized assignment of error arises from the Douglas County attorney's posttrial interview with an Omaha radio station, wherein he stated: "[O]bviously we had some evidence that we held back even from the media and waited and used it in that trial and I think we used it very effectively . . . ." That declaration prompted Hankins to move for a mistrial or, for the second time, a new trial.

Hankins argues that the Douglas County attorney's statement that the prosecution withheld information *even* from the media indicates that information and material contemplated by the order for mutual and reciprocal discovery was withheld from him. Indeed, Hankins' attorney testified at the hearing held on his motion that three documents had been withheld from him: the records concerning Hankins' incarceration before trial relied upon by one of the State's psychiatrists, the charts of various injuries suffered by the three victims, and a fingerprint report indicating that five unidentified fingerprints were found at the crime scene and one on Hankins' automobile. Notwithstanding his interview statement, the Douglas County attorney testified that his office withheld no information from the defense, and the State adduced other evidence that the documents Hankins' attorney said were not supplied to him had in fact been provided to the defense.

The granting or refusal of a motion for new trial, like the granting or refusal of a mistrial, is left to the discretion of the trial court, and in the absence of an abuse of that discretion, the determination will not be disturbed on appeal. *State v. Andersen, ante* p. 187, 440 N.W.2d 203 (1989). There being evidence to support the trial judge's ruling, it cannot be said he abused his discretion in refusing to grant a new trial or declare a mistrial because of the prosecution's claimed failure to disclose material evidence.

III. DECISION

Since the record sustains none of Hankins' summarized

assignments of error, the judgment below is affirmed.

AFFIRMED.

FAHRNBRUCH, J., concurs in the result.

STATE OF NEBRASKA, APPELLEE, V. PATRICK W. DURST, APPELLANT.
441 N.W.2d 627

Filed June 23, 1989. No. 88-563.

1. **Convictions: Appeal and Error.** In determining whether evidence is sufficient to sustain a conviction in a jury trial, this court does not resolve conflicts of evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh evidence presented to the jury. A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support the verdict.
2. **Convictions: Circumstantial Evidence.** One accused of a crime may be convicted on the basis of circumstantial evidence if, taken as a whole, the evidence establishes guilt beyond a reasonable doubt.
3. **Criminal Law: Theft.** Ownership of chattels may, in an indictment for their theft, be laid in the owner, or in the person who at the time of theft was in the actual peaceable possession, although such person may have no other property interest therein than the right of possession as against the thief.

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

Kevin V. Schlender for appellant.

Robert M. Spire, Attorney General, and Fredrick F. Neid for appellee.

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

WHITE, J.

Patrick W. Durst appeals his conviction, following a jury trial, of theft by unlawful taking of property having a value of more than $1,000, a Class III felony. The defendant was sentenced to a term of not less than 4 nor more than 10 years' imprisonment. In this appeal, the appellant contends that the evidence presented at trial was insufficient to identify him as the

individual who stole the vehicle and that the State failed to prove beyond a reasonable doubt that he took property belonging to the person named in the complaint.

On November 18, 1987, Phillip Swartz parked his 1978 Pontiac Firebird Trans Am in the parking lot of the Pioneer Hybrid Seeds plant in York, Nebraska, and went in to work. Swartz left his door unlocked and the keys in the ignition. That afternoon he discovered that his automobile was no longer in the parking lot. He ascertained that no one he knew had borrowed his car, and then reported the vehicle as stolen.

The following day Swartz was notified by the Council Bluffs, Iowa, police department that officers had found his car. Swartz testified that he valued his car at approximately $2,500 on the date that the car was taken.

In his first assignment of error, Durst contends that the evidence identifying him as the individual who stole the Swartz vehicle is insufficient to support the jury's verdict. In determining whether evidence is sufficient to sustain a conviction in a jury trial, this court does not resolve conflicts of evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh evidence presented to the jury. A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support the verdict. *State v. Jacobs*, 226 Neb. 184, 410 N.W.2d 468 (1987). Viewing the evidence in favor of the State, the evidence is sufficient to sustain the conviction of the appellant for theft.

The conviction of the appellant is based solely on circumstantial evidence, as there is no direct testimony from a witness who actually saw the appellant taking the vehicle from the parking lot. All identification was purely circumstantial. However, this court has repeatedly held that a conviction may rest solely on circumstantial evidence. *State v. Trimble*, 220 Neb. 639, 371 N.W.2d 302 (1985). One accused of a crime may be convicted on the basis of circumstantial evidence if, taken as a whole, the evidence establishes guilt beyond a reasonable doubt. *State v. Trimble, supra*; *State v. Piskorski*, 218 Neb. 543, 357 N.W.2d 206 (1984).

Regarding the identification of the appellant, although

identification of the accused is an essential element in establishing guilt beyond a reasonable doubt, this identification can be inferred from all the facts and circumstances that are in evidence. *State v. Kaba*, 217 Neb. 81, 349 N.W.2d 627 (1984). There is an abundance of evidence in this case supporting the verdict of the jury.

Richard Studnicka, the manager for Pioneer Hybrid Seeds, testified that on November 18, 1987, he saw a person walking along the edge of the road near the plant. In court, Studnicka identified this man as resembling Durst.

The State also introduced testimony of Robert Hicks, who was involved in a hit-and-run accident in Council Bluffs on November 18, 1987. Hicks testified that his car was hit by a 1978 or 1979 gold Pontiac Firebird. The license plates on the Firebird matched the plates on the vehicle that allegedly belonged to Swartz. Hicks was also able to identify the appellant as the individual driving the car which struck his car.

Lyle McElderry, a part-time escort driver for funeral homes, also was able to identify the appellant. McElderry testified that he observed the appellant leave a vehicle, fall down, and walk into a funeral home. The vehicle the appellant got out of was identified as the stolen vehicle.

Further, the appellant was transported from the scene in a police vehicle. At that time, the officer attending the appellant heard some "jingling" during the drive. After Durst was removed from the car, the keys to the stolen vehicle were recovered from the backseat. No one had been in the vehicle after the appellant.

This evidence was clearly sufficient to sustain the verdict of the jury, and this assignment of error is clearly without merit.

The appellant next argues that the verdict cannot be sustained because the State failed to prove that Swartz was the owner of the automobile taken on the day in question. This contention is equally without merit. Evidence was presented that Swartz did not have legal title to the vehicle at the time of the theft, but instead the title remained in his parents' name. This fact does not mandate reversal.

Ownership of chattels may, in an indictment for their theft, be laid in the owner, or in the person who at the time of theft was

in the actual peaceable possession, although such person may have no other property interest therein than the right of possession as against the thief. *State v. Nelson*, 182 Neb. 31, 152 N.W.2d 10 (1967). At trial it was clearly shown that Swartz was in peaceable and lawful possession of the automobile without any doubt. It is not necessary to show strict legal ownership of personal property for an information charging theft to be sufficient. All that is required under the law for an information charging theft to be sufficient is that the person be in actual possession. *State v. Mays*, 203 Neb. 487, 279 N.W.2d 146 (1979). The identity of the true legal owner is not required to sustain a conviction.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RANDY R. WILEY, APPELLANT.

441 N.W.2d 629

Filed June 23, 1989. No. 88-689.

1. **Postconviction: Evidence: Witnesses: Appeal and Error.** In an evidentiary hearing for postconviction relief, the trial judge, as the trier of fact, resolves conflicts in evidence and questions of fact, including witness credibility and weight to be given the testimony of a witness. The trial court's findings will be upheld unless the findings are clearly erroneous.
2. **Effectiveness of Counsel: Proof.** To be successful in a claim for ineffective assistance of counsel, 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.
3. _____: _____. The burden to prove ineffectiveness of counsel is upon the person challenging the competency of his or her counsel. The record must affirmatively support a claim of ineffective assistance of counsel.

Appeal from the District Court for Dakota County: ROBERT E. OTTE, Judge. Affirmed.

William L. Binkard for appellant.

Randy R. Wiley, pro se.

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

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

WHITE, J.

This case originated as a conviction for assault in the first degree. The appellant, Randy R. Wiley, was sentenced to 5 to 15 years' imprisonment. In his original trial, Wiley was represented by Richard McCoy; on direct appeal he was represented by John Kinney and Dennis Hurley. On direct appeal, the matter of ineffective assistance of trial counsel was discussed in the appellate brief, but because it was not properly assigned as error according to our court rules, we did not decide the issue. See *State v. Wiley*, 225 Neb. 55, 402 N.W.2d 311 (1987).

The appellant then filed a motion for postconviction relief, with the appellant appearing pro se. He requested, but was denied, representation of counsel at the postconviction relief proceeding. Subsequently, the motion for postconviction relief was overruled, and he filed an appeal with this court, which reversed the trial court and remanded for a new hearing on the issue of ineffective assistance of counsel. See *State v. Wiley*, 228 Neb. 608, 423 N.W.2d 477 (1988). That hearing was held, this time with the assistance of counsel, and the trial court overruled appellant's motion to vacate and set aside the judgment and sentence. This appeal followed.

Wiley contends that the trial court erred in not finding that he was denied effective assistance of counsel for two distinct reasons: first, because Wiley pled guilty to a more serious offense than was originally offered as a plea bargain by the prosecution, and second, because trial counsel had at the time of trial taken a judgment against the appellant which was not satisfied at the time the appellant pled guilty. Each of these assignments of error is without merit, and therefore we deny the appellant's request for postconviction relief.

In an evidentiary hearing for postconviction relief, the trial judge, as the trier of fact, resolves conflicts in evidence and questions of fact, including witness credibility and weight to be

given the testimony of a witness. The trial court's findings will be upheld unless the findings are clearly erroneous. *State v. Williams*, 224 Neb. 114, 396 N.W.2d 114 (1986). The appellant must establish that two criteria have been met before a challenge to the effectiveness of his counsel will be upheld.

> " ' "[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." . . .' "

State v. Ditter, ante p. 600, 606, 441 N.W.2d 622, 626 (1989).

Initially, the appellant contends that his counsel rendered ineffective assistance because Wiley pled guilty to a more serious offense than the plea bargain originally offered by the prosecution. Wiley contends it was his understanding that prior to a January 1986 meeting with his counsel, McCoy, the offer to plead guilty to a Class IV felony was no longer available, and he did not realize that the Class IV offer was open at any time subsequent to that date. The appellant argues that at the initial postconviction hearing the prosecutor stated that the offer of a Class IV felony plea settlement was still available on Friday, March 6, 1986. Because McCoy did not keep him advised that the Class IV felony was still open on March 6, Wiley feels that McCoy did not conscientiously represent the appellant as well as a lawyer with ordinary training and skill in the criminal law in the area and that if the representation he received had been effective, there is a reasonable probability that the result in his case would have been different.

In contrast, the record supports the court's finding that Wiley was not denied effective assistance of counsel because of failure to communicate a new offer of a plea bargain. Instead, in his testimony McCoy specifically recalled that on March 6, 1986, the offer of settlement for a Class IV felony was not open.

In an evidentiary hearing as a bench trial, provided by Neb.

Rev. Stat. §§ 29-3001 et seq. (Reissue 1985) for postconviction relief, the trial judge sitting as the trier of fact resolves conflicts in the evidence and questions of fact. In an appeal involving a proceeding for postconviction relief, the trial court's findings will be upheld unless clearly erroneous. *State v. Williams, supra*. In addition, this court has stated, "The burden to prove such ineffectiveness is upon the person challenging the competency of counsel. The record must affirmatively support a claim of ineffective assistance of counsel . . . ." *State v. Pearson*, 220 Neb. 183, 186, 368 N.W.2d 804, 807 (1985). The appellant has failed to meet this burden.

The trial court evidently believed the testimony of McCoy regarding the lack of a subsequent plea offer. As this finding is supported by the record, it is not clearly erroneous and will not be disturbed by this court on appeal.

In his second assignment of error, Wiley urges this court to adopt a per se rule finding an inherent conflict of interest exists when an attorney has an unsatisfied money judgment against an individual and undertakes to represent that individual in a criminal proceeding. This we decline to do.

Because we refuse to adopt any such per se rule, in order to establish the existence of a conflict of interest, the appellant is required to demonstrate that (1) counsel actively represented conflicting interests, and (2) an actual conflict adversely affected performance by the defendant's lawyer. Additionally, these conflicts of interest must be shown to have resulted in counsel's conduct detrimental to the defense. *State v. Anderson*, 229 Neb. 427, 427 N.W.2d 764 (1988).

The only conceivable conflict that the appellant could be referring to is the allegedly opposing interests of Wiley in receiving the best defense available, and the personal financial interest of his trial counsel in receiving the money owed him by the appellant. In that regard the only effect, if any, that the outstanding debt had upon the defense the appellant received is that his trial counsel would work as hard as possible to have the appellant acquitted of all charges. If the appellant were convicted and therefore unable to be out of jail earning money, the trial counsel would be assured of receiving no money from the appellant. Only by obtaining a favorable verdict for the

defense does the attorney have an opportunity to recoup the financial debt owed him by the appellant. Therefore, we see no evidence of any actual conflict of interest.

The judgment of the district court is affirmed.

AFFIRMED.

HASTINGS, C.J., participating on briefs.

JESSE GOMEZ, APPELLANT, V. KENNEY DEANS, INC., APPELLEE.

441 N.W.2d 632

Filed June 23, 1989. No. 88-741.

1. **Workers' Compensation: Proof.** Under Neb. Rev. Stat. § 48-141 (Reissue 1988), the applicant for modification must prove by a preponderance of the evidence that the increase in his incapacity was due solely to the injury resulting from the original accident.
2. _____: _____. In proving an increase in incapacity, the applicant must prove by a preponderance of the evidence that there now exists a material and substantial change for the worse in the applicant's condition—a change in circumstances that justifies a modification, distinct and different from that for which an adjudication had been previously made.
3. **Workers' Compensation: Appeal and Error.** Findings of fact by the Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong.
4. **Workers' Compensation: Evidence: Appeal and Error.** In testing the sufficiency of the evidence to support the findings of fact made by the Workers' Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Robert M. Brenner, of Robert M. Brenner Law Office, for appellant.

Scott A. Burcham and Jill Gradwohl Schroeder, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellee.

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

PER CURIAM.

This is an appeal from the order of a three-judge panel of the Workers' Compensation Court dismissing the plaintiff's application to amend the court's award of August 28, 1986.

On November 29 and December 8, 1983, plaintiff-appellant, Jesse Gomez, suffered injuries to his back as a result of accidents arising out of and in the course of his employment as a laborer by defendant-appellee, Kenney Deans, Inc. The November 29 accident occurred when plaintiff fell through some joists, and the accident of December 8 occurred as he was installing insulation.

In its award on rehearing filed August 28, 1986, the compensation court found that plaintiff was 50 percent temporarily partially disabled and awarded him compensation benefits, medical expenses, and attorney fees. The August 28, 1986, award also provided that plaintiff was entitled to vocational rehabilitation services and that if his disability increased or decreased the parties could petition the court for relief. Neither party appealed the August 1986 award.

On December 21, 1987, plaintiff filed an amended application, alleging that his incapacity had increased "due solely to the injury of Plaintiff because of lack of further rehabilitation to make plaintiff trainable or rehabilitated." After a single judge of the compensation court dismissed the amended application, plaintiff filed a motion for rehearing before a three-judge panel. On August 2, 1988, the panel entered an order dismissing the amended application.

Plaintiff appeals to this court, contending the panel erred (1) in finding that he failed to prove he suffered an increase in disability and (2) in finding that literacy training education is not a rehabilitative plan under Nebraska law. We affirm.

Plaintiff's amended application was filed pursuant to Neb. Rev. Stat. § 48-141 (Reissue 1988). That section provides that "at any time after six months from the date of the . . . award, an application may be made by either party on the ground of increase or decrease of incapacity due solely to the injury . . . ."

Under § 48-141, the applicant for modification must prove by a preponderance of the evidence that the increase in his incapacity was due solely to the injury resulting from the

original accident. *Wilson Concrete Co. v. Rork,* 216 Neb. 447, 343 N.W.2d 764 (1984). In proving an increase in incapacity, the applicant must prove by a preponderance of the evidence that "there now exists a material and substantial change for the worse in the applicant's condition — a change in circumstances that justifies a modification, distinct and different from that for which an adjudication had been previously made." *Id.* at 449, 343 N.W.2d at 766.

The record shows that plaintiff participated in an extensive vocational rehabilitation evaluation before the 1986 rehearing. It was determined at that time that plaintiff was functionally illiterate and was not a reasonable candidate for competitive employment. Plaintiff successfully completed an independent living skills training program offered by the Nebraska Division of Rehabilitation Services.

The compensation court's determination in August 1986 that plaintiff was 50 percent temporarily partially disabled was based on the following findings:

> Dr. Nashelsky testified that plaintiff's prognosis is poor and that he cannot function as a farm or construction laborer. Dr. Odom testified . . . that plaintiff is disabled from heavy duty and that he is limited to some light duty type of situation. Dr. Ogsbury testified that plaintiff was not capable of heavy work . . . .

The 1986 award further states:

> XI
>
> It should be noted that we have not made a finding that the plaintiff is permanently disabled. Our conclusion is that for now the plaintiff is partially disabled and that his injuries combined with his limited learning and experience to render him partially disabled to the extent of 50 percent. His wages were $7.35 an hour at the time of the accident and it is not likely that he could now secure a position which would pay much more than the minimum wage. If the plaintiff's disability increases or decreases and the parties are unable to agree on the extent of increase or decrease they shall be entitled to again petition the Court for relieve [sic] under the provisions of 48-141 R.R.S. 1943.

XII

> There is a reasonable probability that with appropriate training, rehabilitation or education, the plaintiff may be rehabilitated to the extent that he can signigicantly [sic] increase his earning capacity.

As stated, the 1986 award was not appealed by either party.

At the April 12, 1988, hearing on plaintiff's amended application, the panel considered the depositions of Dr. Gunther Nashelsky and Dr. Barrie L. Lindenbaum. Dr. Nashelsky testified that he had treated plaintiff for back pain on a regular basis between April 1986 and the time of his deposition in March 1988. It was Dr. Nashelsky's opinion that plaintiff was physically "very much the same as he was a couple of years ago." Dr. Nashelsky further testified that over the course of his treatment, plaintiff "didn't seem to change very much for the better or for the worse" and that plaintiff would be unable to function as a farm or construction laborer.

Dr. Lindenbaum, an orthopedic surgeon, examined plaintiff in February 1986 and again in January 1988. He also expressed the opinion that plaintiff's medical condition had not changed.

Plaintiff testified in April 1988 that since August 1986, "[t]he pain has increased a little more since the past."

Findings of fact by the Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong. *Gloria v. Nebraska Public Power Dist.*, 231 Neb. 786, 438 N.W.2d 142 (1989); *Wilson Concrete Co. v. Rork, supra.* In testing the sufficiency of the evidence to support the findings of fact made by the Workers' Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. *Gardner v. Beatrice Foods Co.*, 231 Neb. 464, 436 N.W.2d 542 (1989); *Oham v. Aaron Corp.*, 222 Neb. 28, 382 N.W.2d 12 (1986).

Defendant contends that the 1986 award should not be modified because the two doctors, one for the plaintiff and one for the defendant, agree that there has been no significant change in plaintiff's medical condition. Defendant's contentions are based, in part, on our holding in *Pavel v. Hughes Brothers, Inc.*, 167 Neb. 727, 730, 94 N.W.2d 492, 495

(1959), that § 48-141,

> authorizing a decrease or increase on the ground of incapacity due solely to the injury, limits the basis for the modification to that increase or decrease of incapacity which is due solely and only to that violence to the physical structure of the body which resulted from the accident, and which increase or decrease has occurred since the award was rendered.

See, also, *Chadd v. Western Cas. & Sur. Co.*, 166 Neb. 483, 89 N.W.2d 586 (1958); *Peek v. Ayers Auto Supply*, 160 Neb. 658, 71 N.W.2d 204 (1955); *Ludwickson v. Central States Electric Co.*, 142 Neb. 308, 6 N.W.2d 65 (1942).

The finding of the compensation court that plaintiff failed to prove by a preponderance of the evidence that his incapacity has increased is not clearly wrong. The language of the 1986 award indicates that the panel was aware of plaintiff's physical disability and his limited learning and experience. The evidence before the panel in 1988 was that plaintiff's physical condition remained essentially unchanged and that his literacy had improved somewhat since 1986.

As in *Wilson Concrete Co. v. Rork*, 216 Neb. 447, 343 N.W.2d 764 (1984), it appears that plaintiff is merely dissatisfied with the compensation court's finding in 1986 that he was 50 percent temporarily partially disabled, rather than totally and permanently disabled. No appeal was taken from the 1986 award. Plaintiff's first assignment of error is without merit.

In his second assignment of error, plaintiff contends the compensation court erred in finding that literacy training education is not a rehabilitative plan under Nebraska law. The record shows that in February 1988, plaintiff began taking adult basic education classes at the Nebraska Western College Independent Learning Center. Plaintiff testified that he spent approximately 10 hours per week going to classes and doing homework so he could learn to read and write. Plaintiff asked that the compensation court consider this literacy training as a rehabilitation plan.

The panel declined to consider the literacy training as a plan in itself, but approved of the literacy training "in order that it

may lead to a rehabilitation plan that the plaintiff can submit for approval at a future date."

In 1986, plaintiff was awarded rehabilitation services pursuant to Neb. Rev. Stat. § 48-162.01 (Reissue 1988). Section 48-162.01(3) provides in part:

> When as a result of the injury an employee is unable to perform work for which he or she has previous training or experience, he or she shall be entitled to such vocational rehabilitation services, including retraining and job placement, as may be reasonably necessary to restore him or her to suitable employment.

Byron Barkeloo, a vocational rehabilitation counselor for the Nebraska Division of Rehabilitation Services, testified in 1986 that a vocational assessment of plaintiff was performed by the Career Assessment Center at Nebraska Western College and that he personally performed an additional evaluation of the plaintiff. Barkeloo concluded in 1986 that "the physical limitations Mr. Gomez has presented were of such severity that we did not see him as a reasonable candidate . . . for competitive employment . . . ."

Barkeloo determined after the 1986 evaluations that the only rehabilitation plan available to plaintiff through the Division of Rehabilitation Services was independent living skills training. That program taught plaintiff rudimentary living skills, e.g., cooking, cleaning, vacuuming, etc.

Margaret Hunter, the director of the Independent Learning Center, testified at the April 12, 1988, rehearing that plaintiff's literacy had improved somewhat since February 1988. She estimated that it would take 1 or 2 years to bring plaintiff to a junior high level.

Barkeloo testified in 1988 that he was of the opinion plaintiff did not have the physical capacity to engage in competitive employment and that plaintiff was not a feasible candidate for rehabilitation. Barkeloo further testified that he "would not anticipate that academic achievement, if in fact Mr. Gomez could do that at the junior high level, would significantly improve his employability."

Insofar as the compensation court's order denied further rehabilitation efforts in the way of literacy training, it is

affirmed. We do not hold that literacy training may not be an appropriate rehabilitative effort in some cases, but such training is not appropriate in this case. Rehabilitation has been attempted, and the evidence in this case shows that the further rehabilitation proposed by plaintiff would not restore him to suitable employment. Cf. *Pollock v. Monfort of Colorado*, 221 Neb. 859, 381 N.W.2d 154 (1986). The findings of the compensation court to this effect are not clearly wrong, and plaintiff's second assignment of error is without merit.

The order of the compensation court dismissing plaintiff's application for modification is affirmed.

AFFIRMED.

GRANT, J., dissenting.

I respectfully dissent. I recognize that our cases have held that the increase or decrease in incapacity set out in Neb. Rev. Stat. § 48-141 (Reissue 1988) refers to a change in "physical condition" only and not to "earning power" or some other concept. *Ludwickson v. Central States Electric Co.*, 142 Neb. 308, 6 N.W.2d 65 (1942). See, also, *Pavel v. Hughes Brothers, Inc.*, 167 Neb. 727, 94 N.W.2d 492 (1959); *Wilson Concrete Co. v. Rork*, 216 Neb. 447, 343 N.W.2d 764 (1984).

I think, however, that our earlier holdings should be modified in this case, and similar cases, where the circumstances surrounding plaintiff's condition show that a worker's incapacity has increased, not because of any change in his physical condition alone, but because his unchanged physical condition, coupled with the fact (representing a change from the fact determined at the first award) that he cannot be rehabilitated, has caused an increase in incapacity.

In this case, at the 1986 first hearing, the compensation court found that the plaintiff was 50 percent disabled and that there was a reasonable probability that plaintiff could be rehabilitated. The latter finding has been proven wrong, as shown by the undisputed evidence at the modification hearing. In my judgment, the first finding was also wrong, but that finding, in the absence of an appeal, cannot be reviewed in a modification hearing.

It appears to me that the compensation court's earlier finding of 50 percent disability was tied in with the court's simultaneous

finding that plaintiff could be rehabilitated. I think such a conclusion can be reached from the court's remarks in paragraph XII of the 1986 award.

The evidence showed at the modification hearing that the plaintiff cannot be rehabilitated. I believe the clear change in plaintiff's chance of rehabilitation constitutes a change in the degree of his incapacity. I would reverse.

WHITE, J., joins in this dissent.

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

441 N.W.2d 637

Filed June 23, 1989. No. 88-851.

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 this court to reach a conclusion independent of the findings of the trial court, but, where evidence is in conflict, this court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts rather than another.
2. **Parental Rights: Proof: Appeal and Error.** A judgment terminating parental rights will be affirmed where the State has proved by clear and convincing evidence that the parent has willfully failed to comply with a rehabilitative plan ordered by the juvenile court, and it is in the best interests of the child that parental rights be terminated.

Appeal from the Separate Juvenile Court of Douglas County: COLLEEN R. BUCKLEY, Judge. Affirmed.

Michael McGill and Robert J. Kmiecik, of McGill, Parsonage & Lanphier, P.C., for appellant.

Ronald L. Staskiewicz, Douglas County Attorney, and Elizabeth G. Crnkovich for appellee.

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

HASTINGS, C.J.

The mother appeals from an order of the separate juvenile court of Douglas County which terminated her parental rights to her son. She assigns as error that (1) the court's rehabilitation plan was not reasonable; (2) the State failed to prove by clear and convincing evidence that the mother willfully failed to comply with the rehabilitation plan; and (3) the court failed to find that the State had proved by clear and convincing evidence that termination of parental rights was in the best interests of the minor child, but nevertheless ordered such rights terminated. We affirm.

In an appeal from a judgment terminating parental rights, the Supreme Court tries factual questions de novo on the record, which requires the Supreme Court to reach a conclusion independent of the findings of the trial court, but, where evidence is in conflict, the Supreme Court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts rather than another. *In re Interest of S.C., S.J., and B.C., ante* p. 80, 439 N.W.2d 500 (1989); *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 417 N.W.2d 147 (1987).

A judgment terminating parental rights will be affirmed where the State has proved by clear and convincing evidence that the parent has willfully failed to comply with a rehabilitative plan ordered by the juvenile court, and it is in the best interests of the child that parental rights be terminated. *In re Interest of S.C., S.J., and B.C., supra*; *In re Interest of J.S., A.C., and C.S., supra.*

E.B., the minor child, was born January 16, 1986. On November 18 of that year, E.B. was admitted to the hospital suffering from multiple skull fractures, multiple bruises on the face and neck, and seizures related to the head trauma. The mother gave inconsistent explanations for the injuries, and, as a result, the State filed a petition in the separate juvenile court of Douglas County alleging that E.B. came within the provisions of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988). He was immediately placed in foster care, where he has remained since.

The mother did not show up for a detention hearing set for December 23, 1986. On March 19, 1987, she denied the charges

in the petition, and the matter was set for trial.

At a followup exam on April 1, 1987, E.B.'s head growth was lagging, signifying poor brain growth. His vision was poor, his development was significantly behind, his motor skills were very slow, and his postural reflexes were not good. The outlook was pessimistic, and the prediction was that he would have significant brain function problems, both in cognitive functioning and motor skills.

At the trial on April 7, 1987, the mother admitted the allegation that her child had suffered serious injuries while in her care and control. She claimed at that time that the injuries occurred when E.B. fell off the couch and hit his head on a table while two teenage boys were babysitting him.

The mother was involved with a man named Gary Welchen, who was convicted of causing the injuries suffered by E.B. The mother at one time stated that Welchen had indeed caused the injuries, but at other times she maintained that she caused the injuries. She stated under oath on April 21, 1987, that she inflicted the injuries on E.B. by slapping him so hard that he fell down a flight of stairs.

On May 20, 1987, a dispositional hearing was held, at which time the court ordered that the child continue in foster care; that the mother undergo a psychological evaluation to assess her ability to care for her child; that the mother follow any recommendations stemming from such evaluation; and that the mother participate in a psychiatric evaluation and follow any recommendations contained therein.

At the time of that hearing, E.B.'s vision was reported as "guarded," as he was still hemorrhaging behind his eyes and could lose his vision; his motor development was poor; and, although he was at that time approximately 16 months old, he functioned at a 6- to 8-month level. His head size was very small in relation to his body size, which indicated that his brain was not growing. E.B. was on phenobarbital to control his seizures.

Out of a possible 21 visits with E.B. since the filing of the petition to the time of the hearing, the mother had missed 12. She gave as her reason that sometimes the bus was late. She did visit Welchen in the correctional center once a week, even though she did not visit her child regularly.

Following a psychiatric evaluation, the doctor noted that the appellant seemed not to grasp or comprehend the potential harm and possible prognosis for injuries such as those suffered by E.B.

A review hearing was conducted on March 21, 1988. At that time, although E.B. was over 2 years old, he still was only functioning at a 9- to 11-month age level.

The mother's compliance with her rehabilitation plan had been "minimal at best" in the past 6 months, according to one of the witnesses. She attended only 8 of 23 scheduled visits with her son. She slept through one 3-hour visit because she had been up the previous night watching videos. She did not go to individual counseling as she had been ordered and did not always report her changes of address as she had been instructed. (She moved approximately five times between September of 1987 and February of 1988). She did not satisfactorily participate in E.B.'s treatment program, did not pursue a vocational program, and did not follow any of the recommendations of her psychiatrist.

Another hearing was held on June 21, 1988. E.B. at that time was still functioning at the 9- to 11-month level, although he was nearly 2½ years old. The mother got married on May 9, 1988, but she failed to notify caseworkers of this change in her situation. Her husband was undergoing psychiatric care at Douglas County Hospital.

The State filed its motion for termination of the appellant's parental rights, alleging that E.B. came within the provisions of Neb. Rev. Stat. § 43-292(6) (Reissue 1988); that is, that reasonable efforts under the direction of the court had failed to correct the conditions leading to the determination that the child was within the meaning of § 43-247(3)(a). The petition was heard on September 15, 1988.

At that hearing, the court found that the mother did not complete parenting classes and that she attended but 2 of 11 scheduled counseling sessions. Her excuse for nonattendance was that she "had places to go." She failed to maintain independent housing, having lived in 10 different residences during the 2 years that the court was involved with her. She failed to cooperate in the program designed to instruct her as to

how to care for E.B. and his special needs. She attended only 7 of 19 weekly sessions in which she was to work with a preschool teacher for the handicapped and E.B. At one of those sessions it was discovered that the mother was carrying a gun in her purse.

The mother visited E.B. only 29 times out of a possible 78 visits. This was in spite of the fact that Child Protective Services actually provided her with nearly 200 bus tickets. She stated at one time that she knew how to work with E.B.'s physical handicap, but then admitted that she did not actually think that E.B. was handicapped.

Our examination of the plan for rehabilitation that was worked out and approved by the court reveals that it was entirely reasonable and designed to help the mother help her child. She failed miserably to comply with that plan. She refused to attend parenting classes because she claims this was an unreasonable and immaterial requirement because "[t]here was no evidence that [she] was a bad parent." Brief for appellant at 22. Of course, the evidence demonstrated that she either abused her baby or lied to protect the man who did. She refused to show enough interest in the child to even visit him when the opportunities arose.

From a de novo review of the record, we find the evidence clear and convincing that the appellant willfully failed to comply with a reasonable court-ordered rehabilitation plan and that the evidence also clearly and convincingly proved that it was in the best interests of the child that the mother's parental rights be terminated. This case is hopeless.

The judgment of the juvenile court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLANT, V. BEN M. HALSEY, APPELLANT AND CROSS-APPELLEE.

441 N.W.2d 877

Filed June 23, 1989. No. 88-859.

1. **Criminal Law: States: Final Orders: Time: Appeal and Error.** The right of the State to appeal from a final order in a criminal case is limited by the provisions of Neb. Rev. Stat. § 29-2315.01 (Reissue 1988), which requires that an application for leave to docket an appeal be presented to the trial court within 20 days after the final order has been entered, and to the Supreme Court within 30 days from the date of the final order.
2. **Criminal Law: States: Final Orders: Jurisdiction.** A failure to comply with the statutory requirements which are jurisdictional prevents any review by the State of a final order of the trial court in a criminal case.
3. **Criminal Law: States: Final Orders: Appeal and Error.** The State cannot obtain a review of a trial court's final order in a criminal case by asserting a cross-appeal.
4. **Pretrial Procedure: Time: Speedy Trial.** Any delay caused by the defendant's act or conduct, namely, those pretrial situations or matters described or characterized in Neb. Rev. Stat. § 29-1207(4)(a) (Reissue 1985), is automatically excluded in computing the time when the defendant's trial must commence pursuant to the Nebraska speedy trial act.
5. _____: _____: _____. Any period of delay resulting from a defendant's act or conduct specifically mentioned in reference to the pretrial matters or situations described or characterized in Neb. Rev. Stat. § 29-1207(4)(a) (Reissue 1985) is computed without consideration whether such delay was reasonably necessary.
6. **Trial: Juries: Evidence.** It is within the discretion of the trial court whether the jury should be allowed to rehear a part of the evidence.
7. **Lesser-Included Offenses: Words and Phrases.** To be a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time having committed the lesser.
8. **Indictments and Informations: Lesser-Included Offenses.** Although a defendant cannot be convicted of both a principal offense and a lesser-included offense at the same time, there is no prohibition against charging both in one information.
9. **Motions for Mistrial: Constitutional Law: Double Jeopardy.** So long as the trial court has not abused its discretion in determining that a jury is deadlocked, a declaration of mistrial resulting from a jury's inability to reach a verdict does not bar reprosecution under the double jeopardy clause of the fifth amendment.
10. **Motions for Mistrial: Appeal and Error.** The decision as to whether to grant a motion for a mistrial is within the discretion of the trial court, and a refusal to grant a mistrial will be upheld on appeal in the absence of a showing of an abuse of discretion.
11. **Pretrial Procedure: Evidence.** A motion in limine is a procedural step to prevent prejudicial evidence from reaching the jury. It is not the office of a motion in limine to obtain a final ruling upon the ultimate admissibility of evidence.

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

James L. Birkel, of Egr and Birkel, for appellant.

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

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

BOSLAUGH, J.

Sometime during the early morning hours of July 4, 1987, Ramona S. Vyhlidal was brutally beaten about the head and face and was choked while asleep in her trailer home in Bellwood, Nebraska. That morning, the victim was discovered lying on the floor of the trailer by her then 11-year-old daughter, Wendy. When Wendy asked what had happened, the victim said, "Ben was here," and told Wendy to call an ambulance.

Wendy ran to Lawrence Bazer's trailer home, which was nearby, and told the Bazers to call an ambulance. Bazer then went to the victim's trailer home, where the victim told Bazer, "Ben did this to me."

The defendant, Ben M. Halsey, was arrested and charged with attempted first degree murder and first degree assault. Trial to a jury commenced on April 25, 1988. The case was submitted to the jury at 2:30 p.m. on April 28, 1988. Five verdict forms were given to the jury, which permitted the jury to find the defendant guilty of assault in the first degree, not guilty of assault in the first degree, guilty of attempted murder in the first degree, guilty of attempted murder in the second degree, and not guilty of attempted murder in the first or second degree. The jury was not given a verdict form which would have permitted the jury to find the defendant not guilty of attempted murder in the first degree but guilty of attempted murder in the second degree.

At 3:45 p.m. on April 28, 1988, the jury requested that the jury be allowed to hear the tape recording of the testimony of some of the witnesses. The State objected to this request, and the trial court advised the jury that the tape recording of the evidence could not be played back to the jury. The jury was

instructed to return to the jury room and continue with its deliberations.

At 5:10 p.m. on April 29, 1988, the foreman of the jury reported that the jury was divided 10 to 2 and that he believed further deliberations would not result in any change. The trial court instructed the jury to recess for dinner and then reconvene and reread the instructions.

At a hearing on June 8, 1988, the bailiff testified that on the evening of April 29, 1988, after the jury had returned from dinner, the foreman asked her to tell the trial court that the jury was unanimous on one count. The bailiff gave the message to the trial court, which then stated, "[T]hey needed to complete the other count." The bailiff then gave that message to the foreman of the jury. At the same hearing, the foreman of the jury testified that the jury was unanimous in finding the defendant not guilty of first degree attempted murder. The jury, however, was not unanimous on attempted murder in the second degree or on first degree assault.

At 8:45 p.m. on April 29, 1988, the jury was again called back to the courtroom. At that time, the foreman reported that the jury was divided 9 to 3, and he did not believe there was a reasonable possibility of the jury's reaching a unanimous verdict on any of the "verdicts" that had been submitted to the jury. The trial court then declared a mistrial and discharged the jury.

At the conclusion of the hearing on June 8, 1988, the trial court found that the jury had reached a unanimous verdict of not guilty on the charge of attempted first degree murder but that there had been no jeopardy as to attempted murder in the second degree.

The State filed an amended information amending the first count to charge attempted murder in the second degree. The defendant filed a plea in bar to the amended information, which was sustained as to the first count on July 7, 1988, and the charge of attempted murder in the second degree was dismissed.

The second trial, with a jury waived, commenced on July 27, 1988, and resulted in a finding on September 21, 1988, of guilty of first degree assault. On October 13, 1988, the defendant was

sentenced to imprisonment for 6 to 20 years with credit for 13 months. The defendant has appealed, and the State has attempted to cross-appeal from the dismissal of the attempted murder charges.

The right of the State to appeal from a final order in a criminal case is limited by the provisions of Neb. Rev. Stat. § 29-2315.01 (Reissue 1988), which requires that an application for leave to docket an appeal be presented to the trial court within 20 days after the final order has been entered, and to this court within 30 days from the date of the final order. See, *State v. Taylor*, 179 Neb. 42, 136 N.W.2d 179 (1965); *State v. Satterfield*, 179 Neb. 451, 138 N.W.2d 656 (1965); *State v. Halphrey*, 14 Neb. 578, 16 N.W. 823 (1883). A failure to comply with these requirements which are jurisdictional prevents any review by the State of a final order of the trial court in a criminal case. *State v. Gillett & Gaston*, 199 Neb. 829, 261 N.W.2d 763 (1978). The State cannot obtain a review of a trial court's final order in a criminal case by asserting a cross-appeal. See *State v. Martinez*, 198 Neb. 347, 252 N.W.2d 630 (1977). Since the State failed to comply with § 29-2315.01 in this case, the cross-appeal is dismissed.

The defendant contends that the trial court erred in (1) overruling his motion to dismiss for failure to bring him to trial within 6 months, (2) failing to sustain his plea in bar to the assault charge, (3) refusing to comply with the jury's request to play back the recording of a part of the evidence, (4) declaring a mistrial when the jury failed to agree, and (5) failing to grant a mistrial on the ground the defendant's waiver of a jury trial had been improvident.

With respect to the first assignment of error, the defendant contends that delay resulting from motions of the defendant relating to the attempted murder count should be disregarded in computing the time within which the defendant was brought to trial.

Neb. Rev. Stat. § 29-1207(4)(a) (Reissue 1985) provides:

> The period of delay resulting from other proceedings concerning the defendant, including but not limited to an examination and hearing on competency and the period during which he is incompetent to stand trial; the time

> from filing until final disposition of pretrial motions of the defendant, including motions to suppress evidence, motions to quash the indictment or information, demurrers and pleas in abatement and motions for a change of venue; and the time consumed in the trial of other charges against the defendant

shall be excluded in computing the time for trial.

Under the statute, the time spent in resolving pretrial matters as specified in the statute is automatically excluded. *State v. Lafler*, 225 Neb. 362, 405 N.W.2d 576 (1987). The rule is applicable whether the motions relate to all or only one of the counts. The assignment of error is without merit.

The second assignment of error is based upon a contention that the defendant could not be found guilty of both attempted murder and assault, and, therefore, the acquittal of attempted murder barred the retrial on the assault charge. The contention is based upon a theory that the assault was a lesser-included offense of attempted murder.

In *State v. Lovelace*, 212 Neb. 356, 322 N.W.2d 673 (1982), this court adopted the rule that to be a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time having committed the lesser. Under this rule, first degree assault is not a lesser-included offense of attempted murder, because the two offenses involve different elements.

In *State v. Sardeson*, 231 Neb. 586, 437 N.W.2d 473 (1989), we held that receipt of stolen property is not a lesser-included offense of burglary because proof of the greater offense did not necessarily prove the lesser offense. See, also, *State v. Olsan*, 231 Neb. 214, 436 N.W.2d 128 (1989).

In *State v. Hoffman*, 227 Neb. 131, 416 N.W.2d 231 (1987), we held that the defendant could not be convicted of both drunk driving and motor vehicle homicide where both offenses arose out of the same transaction and drunk driving was the predicate offense for motor vehicle homicide. The *Hoffman* case is not applicable here because the defendant was not convicted of both assault and attempted murder. Without regard to whether the defendant could have been convicted of both counts as originally charged, the fact is that he has only

been convicted of assault.

Even though a defendant cannot be convicted of both a principal offense and a lesser-included offense at the same time, there is no prohibition against charging both in one information. Where both offenses are charged in the same information, an acquittal of the principal offense does not automatically result in an acquittal of the lesser-included offense. Thus, the dismissal of the attempted murder count would not bar a second trial on the assault count on which the jury failed to agree. The second assignment of error is without merit.

The third assignment of error relates to the trial court's refusal to allow the jury to listen to a tape recording of a part of the evidence. The general rule is that such a practice is not to be encouraged, but it is a matter within the discretion of the trial court.

In *Barton v. Shull*, 70 Neb. 324, 97 N.W. 292 (1903), this court stated:

> The practice of stating portions of the evidence to the jury after they have been deliberating, while sanctioned by section 287 of the code, is fraught with some danger to a fair trial, and ought to be indulged in with caution. But the trial judge is in the best position to know when it is required and how his statutory power may best be exercised in particular cases. He should not be hampered unduly. Probably the wisest course is to leave the matter largely to his discretion, reviewing his action only for abuse thereof.

70 Neb. at 330, 97 N.W. at 294.

In *U.S. v. Castillo*, 844 F.2d 1379, 1390 (9th Cir. 1988), quoting from *United States v. Nolan*, 700 F.2d 479 (9th Cir. 1983), *cert. denied* 462 U.S. 1123, 103 S. Ct. 3095, 77 L. Ed. 2d 1354, the court said: " 'A trial court is given great latitude in deciding whether to reread testimony requested by the jury. In general, rereading is disfavored because of the emphasis it places on specific testimony and the delay it causes in the trial.' "

The principal danger involved in allowing the jury to rehear but a part of the evidence is that it may give undue emphasis to

the part which is reheard. From our examination of the record in this case, we conclude that the trial court did not abuse its discretion, and the assignment of error is without merit.

The fourth assignment of error relates to the declaration of a mistrial when the jury failed to agree. This is also a matter which is within the discretion of the trial court. In *State v. Bostwick*, 222 Neb. 631, 644-45, 385 N.W.2d 906, 915 (1986), we held: "So long as a trial court has not abused its discretion in determining that a jury is deadlocked, a declaration of mistrial resulting from a jury's inability to reach a verdict does not bar reprosecution under the double jeopardy clause of the fifth amendment." In determining whether the trial court has abused its discretion, " '[t]he most critical factor is the jury's own statement that it was unable to reach a verdict.' " *State v. Bostwick, supra* at 646, 385 N.W.2d at 916, quoting from *Arnold v. McCarthy*, 566 F.2d 1377 (9th Cir. 1978).

The evidence in this case is that the jury remained divided, almost from the beginning of its deliberations until it was discharged. The foreman advised the trial court that further deliberations would be to no avail, and no member of the jury appeared to dispute his statement. From our examination of the record, we conclude that the trial court did not abuse its discretion, and the assignment of error is without merit.

The last assignment of error relates to the ruling on the defendant's motion for a mistrial, made on September 21, 1988. The defendant argues that his waiver of a jury trial was improvident because he was misled by a ruling of the trial court concerning the testimony of his expert witness, Dr. Korn.

The decision as to whether to grant a motion for a mistrial is within the discretion of the trial court, and a refusal to grant a mistrial will be upheld on appeal in the absence of a showing of an abuse of discretion. *State v. Sardeson*, 231 Neb. 586, 437 N.W.2d 473 (1989).

In addition to the statements made by the victim on the day the assault occurred, the victim testified positively at the trial concerning the defendant as the person who beat and choked her. The defendant offered the testimony of an expert witness, Dr. Korn, a neuropsychologist, in an attempt to establish that the victim's identification of the defendant as her assailant was

the result of confabulation.

Before the second trial began, the State moved in limine to exclude portions of Dr. Korn's testimony. The trial court sustained the motion, and the defendant waived his right to be tried by a jury. There is no question but that the waiver at that point was voluntary and valid.

After the trial had begun and four witnesses had testified, the trial court reversed its ruling on the motion in limine and announced that the testimony which the State wanted to exclude would be admitted. The defendant then called Dr. Korn, and the trial proceeded. On July 28, 1988, the testimony was completed, and both sides had rested. At the request of counsel the matter was continued until September 8, 1988.

Additional evidence was received on September 8, 1988, and both sides again rested. Arguments were scheduled for September 21, 1988.

Before final arguments commenced on September 21, 1988, the defendant moved for a mistrial upon the ground that his waiver of the jury was improvident and had been based upon the ruling on the State's motion in limine made on July 27, 1988. The trial court overruled the motion, and the case was then argued.

It is of some significance that the defendant did not move to withdraw his waiver of a jury trial, or move for a mistrial, when the trial court announced on July 27, 1988, that it had decided to reverse its ruling on the motion in limine.

In *State v. Harper*, 215 Neb. 686, 687-88, 340 N.W.2d 391, 393 (1983), quoting from *State v. Tomrdle*, 214 Neb. 580, 335 N.W.2d 279 (1983), we held:

> "A motion in limine is a procedural step to prevent prejudicial evidence from reaching the jury. [Citation omitted.] . . . '[I]t is not the office of a motion *in limine* to obtain a final ruling upon the ultimate admissibility of evidence . . . but is rather to prevent the proponent of potentially prejudicial matter from displaying it to the jury, making statements about it before the jury, or presenting the matter to a jury in any manner until the trial court has ruled upon its admissibility in the context of the trial itself.' . . . 'It [the motion in limine] serves the useful

purpose of raising and pointing out before trial certain evidentiary rulings the court may be called upon to make during the course of trial. . . . It is not a ruling on evidence and should not, except on a clear showing, be used to reject evidence. It adds a procedural step to the offer of evidence.' . . ."

It further appears that the waiver of the jury was "negotiated" and was based in part upon the State's agreement to dismiss the charge that the defendant was a habitual criminal and upon the agreement of the State that all testimony and exhibits received at the first trial would be admitted at the second trial and additional witnesses could be called or recalled.

From our examination of the record, we conclude that the ruling of the trial court on the motion for a mistrial was not an abuse of discretion and that under the circumstances of this case there was no miscarriage of justice.

There being no error, the judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LARRY CRAIG CARTER, APPELLANT.

441 N.W.2d 640

Filed June 23, 1989. No. 88-960.

1. **Motor Vehicles: Constitutional Law: Search and Seizure: Police Officers and Sheriffs.** A motorist has a reasonable expectation of privacy which is not subject to arbitrary invasions solely at the unfettered discretion of police officers in the field.
2. **Criminal Law: Investigative Stops: Police Officers and Sheriffs: Probable Cause.** The test of whether an investigative stop is justified is whether the police officer has a reasonable suspicion founded upon articulable facts which indicate that criminal activity has occurred or is occurring and that the suspect may be involved.

3. _____: _____: _____: _____. Police officers must have a particularized and objective basis for suspecting the person stopped of criminal activity. The assessment of the totality of circumstances includes all of the objective observations and considerations, as well as the suspicion drawn by a trained and experienced police officer by inference and deduction that the individual stopped is, has been, or is about to be engaged in criminal behavior.

Appeal from the District Court for Hall County: JOSEPH D. MARTIN, Judge. Reversed and remanded with directions to dismiss.

Kristi J. Egger, Deputy Hall County Public Defender, for appellant.

Robert M. Spire, Attorney General, and Terri M. Weeks for appellee.

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

PER CURIAM.

The defendant, Larry Craig Carter, was convicted of operating a motor vehicle while his operator's license was suspended and was fined $50 plus costs and placed on probation for 90 days. Upon appeal to the district court the judgment was affirmed.

The defendant has appealed and contends that the trial court erred in failing to suppress evidence obtained as a result of the investigatory stop made at the time of his arrest.

The record shows that the defendant's license had been suspended as a result of his failure to comply with a citation for speeding issued January 13, 1987.

At about 12:15 a.m. on March 11, 1988, Ronald Ochsner, a sergeant for the Hall County sheriff's office, was on patrol in the Grand Island airport area. Sergeant Ochsner has 21 years of experience in law enforcement. The airport is located in a rural area approximately 4 miles from Grand Island.

Ochsner testified at the suppression hearing that the airport area is one of the major problem areas in the county because of the activities in the area and the number of burglaries that have occurred there. The sheriff's office focuses a lot of attention on the area and, if possible, tries to check the area three times each

night.

While Ochsner was checking the northern part of the airport area where a number of office buildings, storage buildings, and businesses are located, he saw a vehicle leave the Stahla office area. No businesses were open in that part of the airport area at that time, and "there's just no traffic there at all at nights." Any traffic is further to the south where the Pony Express and G.P. Mechanics shops are located, which are open at night. Ochsner said he did not see "where the vehicle came out of" and decided to stop the vehicle "due to the amount of burglaries in the area."

The vehicle pulled out from a side road by the Stahla offices, turned east on the access road, stopped at a stop sign at Airport Avenue, and turned south. Ochsner stopped the vehicle 300 or 400 feet south of where the stop sign was located. When Ochsner got behind the vehicle, he noticed that it had out-of-county license plates.

After the vehicle had been stopped, Ochsner discovered that the defendant was the driver. A records check disclosed that the defendant's license had been suspended and that he had failed to appear on the prior speeding charge.

No burglaries had been reported in the area that night, and the last prior burglary had occurred probably 2 months before.

The test of whether an investigative stop is justified is whether the police officer has a reasonable suspicion founded upon articulable facts which indicate that criminal activity has occurred or is occurring and that the suspect may be involved. *State v. Ebberson*, 209 Neb. 41, 305 N.W.2d 904 (1981).

In *State v. Thomte*, 226 Neb. 659, 663, 413 N.W.2d 916, 919 (1987), we said:

> "Police officers must have a particularized and objective basis for suspecting the person stopped of criminal activity. The assessment of the totality of circumstances includes all of the objective observations and considerations, as well as the suspicion drawn by a trained and experienced police officer by inference and deduction that the individual stopped is or has been or is about to be engaged in criminal behavior. See, *Brown v. Texas*, 443 U.S. 47, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979); *Delaware v. Prouse*, 440 U.S. 648, 99 S. Ct. 1391, 59 L.

Ed. 2d 660 (1979)."

Quoting *State v. Ebberson, supra.*

A motorist has a reasonable expectation of privacy which is not subject to arbitrary invasions solely at the unfettered discretion of police officers in the field. *State v. Crom*, 222 Neb. 273, 383 N.W.2d 461 (1986).

In this case, the defendant's automobile was stopped only because the sheriff's officer wanted to know what the vehicle was doing in the area. There was no particularized and objective basis for suspecting the defendant of criminal activity sufficient to justify an investigatory stop. The motion to suppress should have been sustained, and the judgment must be reversed.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

BOSLAUGH, J., dissenting.

The facts in this case are nearly identical to the facts in *State v. Kavanaugh*, 230 Neb. 889, 434 N.W.2d 36 (1989).

After midnight, the defendant was stopped when he was observed leaving a rural area where a number of businesses were located, all of which were closed, and where a number of burglaries had occurred.

As the New Jersey court said in *State v. Davis*, 104 N.J. 490, 504, 517 A.2d 859, 866-67 (1986), the police would be derelict in their duties if they did not investigate circumstances which to an experienced police officer indicate that " 'something amiss might be taking place or is about to take place.' . . ."

HASTINGS, C.J., joins in this dissent.

ERNEST HULINSKY, DOING BUSINESS AS HULINSKY CONSTRUCTION, APPELLEE, V. JAMES B. PARRIOTT AND VIRGINIA L. PARRIOTT, HUSBAND AND WIFE, APPELLEES, AND THE BANK OF BRULE, NOW KNOWN AS ADAMS BANK & TRUST OF BRULE, APPELLANT.

441 N.W.2d 883

Filed June 30, 1989. No. 87-049.

1. **Equity: Mechanics' Liens: Foreclosure.** An action to foreclose a mechanic's or construction lien is one grounded in equity.
2. **Equity: Appeal and Error.** In an appeal of an equity action, the Supreme Court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the Supreme Court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Construction Contracts: Mechanics' Liens: Mortgages.** The construction lien for materials and labor furnished for a building will begin when the furnishing of labor or materials begins. If that is before the recording of a mortgage or trust deed, such construction lien will be superior, but if it is after the filing of the mortgage or trust deed, the lien of the mortgage or trust deed is superior.
4. **Construction Contracts: Mortgages.** Where a materialman furnishes materials under a construction contract for a building before the mortgage of a bank is filed, the bank is not entitled to parity to the extent that the mortgage money it loaned is used to pay the materialmen or laborers.

Appeal from the District Court for Keith County: JOHN P. MURPHY, Judge. Affirmed.

Neil E. Williams and Rita C. Grimm, of McGinley, Lane, Mueller, O'Donnell & Williams, P.C., for appellant.

Gary J. Krajewski, of McQuillan & Spady, P.C., for appellee Hulinsky.

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

BROWER, D.J.

This action was brought by Ernest Hulinsky, appellee, against James B. and Virginia L. Parriott to foreclose upon a construction lien. The Bank of Brule (Bank), now known as the Adams Bank & Trust of Brule, was joined as a defendant because it has a trust deed and security interest in the Parriotts' real estate involved in the action. The trial court granted

foreclosure and ordered the proceeds generated from the sale to be applied to satisfy the liens of Hulinsky and the Bank, in that order of priority. The Bank appeals from the decision of the trial court, claiming the trial court erred in granting Hulinsky's construction lien priority over the lien of the Bank under its trust deed.

An action to foreclose a mechanic's or construction lien is one grounded in equity. In an appeal of an equity action, the Supreme Court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the Supreme Court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Hughes v. Enterprise Irrigation Dist.*, 226 Neb. 230, 410 N.W.2d 494 (1987).

A review of the record, which contains a stipulation entered into at the commencement of the trial, finds that on July 25, 1983, Hulinsky and the Parriotts entered into a memorandum construction contract, wherein Hulinsky agreed to construct a house on lots owned by the Parriotts in Brule, Nebraska. Hulinsky agreed to furnish all material and labor in consideration of Parriotts paying $53,000.

On September 12, 1983, Hulinsky commenced construction, furnishing materials and labor under the agreement. During the construction period, a number of changes were made in the plans and construction, which the evidence shows were agreed to by both Hulinsky and the Parriotts. These changes included: additional plumbing, the addition of a fireplace, foundation and wall relocations, structural changes to effect different room arrangements, additional windows and doors, electrical system modification, increased heating and air-conditioning, upgrades of the roof covering and cabinets, and a change of floor coverings.

On February 10, 1984, before the construction was completed, the Parriotts requested that Hulinsky stop work. Hulinsky performed no further construction work on the dwelling after the request. On March 22, 1984, Hulinsky filed a mechanic's lien for labor and materials in the amount of

$60,592.78, the net amount he claimed was due for labor and materials after allowing the Parriotts credit for a $30,000 payment that was received by Hulinsky.

The Parriotts had executed a trust deed on September 16, 1983, to the property involved in this action. The trust deed secured a master note in the amount of $53,000 to the Bank and was recorded the same day. The Bank concedes Hulinsky had visibly commenced work on the property before the trust deed was filed. During the construction period, one payment of $30,000 was made to Hulinsky under the construction contract by the Parriotts. Hulinsky knew the funds had come from the Bank. The Bank had charged other advances to the Parriotts during the period of construction, as evidenced by the loan disbursement sheet, but none of these funds were received by Hulinsky.

On November 13, 1986, the date of trial, Hulinsky and the Bank stipulated that the sum due the Bank was $53,094.38, which included interest to that date.

The Parriotts caused a petition in bankruptcy to be filed on July 11, 1985, and on December 27, 1985, they were discharged. The trustee in bankruptcy abandoned the property involved.

The Parriotts did not appear in the action, and the only witness at the trial was the plaintiff.

The trial court found the original contract had been amended to include the items added and claimed by Hulinsky, and awarded him the contract balance of $23,000, together with the added materials furnished in the amount of $11,134.13. The court found there was not sufficient evidence to award the amount claimed for additional labor. It awarded interest at 12 percent on the original contract balance and at 6 percent on the amount due on additional materials furnished up to the date of judgment, and thereafter at the rate of 14 percent on the entire amount.

The trial court found the Bank was entitled to judgment for the amount claimed with interest from date of judgment at $14.5128 per diem.

The Bank, to sustain its priority over the lien of Hulinsky, relies upon the fact that the money paid to Hulinsky came from funds received by the Parriotts from the Bank and that

Hulinsky had knowledge of that fact. The Bank claims that in the interest of justice it should be entitled to priority over the Hulinsky lien, at least to the extent of the $11,134.13 awarded for material furnished under the amendment to the original construction contract. The Bank makes no claim on appeal that the contract was not modified or that additional materials were not furnished. Its assignment of error goes to but one issue, and that is as to the priority of the Bank's lien. This court will not consider errors not properly assigned and discussed. Neb. Ct. R. of Prac. 9D(1) (rev. 1989); *State ex rel. Hilt Truck Line v. Jensen*, 218 Neb. 591, 357 N.W.2d 455 (1984).

Under the Nebraska Construction Lien Act, Neb. Rev. Stat. §§ 52-125 to 52-159 (Reissue 1988), adopted in 1981, a person who furnishes services or materials pursuant to a real estate construction improvement contract has a lien to secure the payment of his contract price. § 52-131. Hulinsky clearly has a lien under the act. The right to such lien is statutory in nature and did not exist in common law or in equity. *Krotter & Sailors v. Pease*, 161 Neb. 774, 74 N.W.2d 538 (1956). A claimant of such a lien must in the first instance bring himself within the statute providing for such procedure to perfect the same. *Ideal Basic Industries, Inc. v. Juniata Farmers Coop. Assn.*, 205 Neb. 611, 289 N.W.2d 192 (1980).

The Bank concedes Hulinsky had a valid lien which attached prior to the recording of its trust deed under the act. It argues that the $30,000 disbursed to Parriotts, and then paid to Hulinsky, should have parity with the $23,000 still due on the original construction contract, and the remainder of the Bank's lien should have priority over any amounts due Hulinsky by reason of the agreed amendments or additions.

This court has not addressed this precise question since the enactment of the Nebraska Construction Lien Act. The right to this type of lien is not new to the laws of this state. With the adoption of 1981 Neb. Laws, L.B. 512, the old mechanic's lien statutes, Neb. Rev. Stat. §§ 52-101 to 52-114, 52-121, and 52-122 (Reissue 1978), were repealed. An examination of these statutes, together with prior acts in sequence, discloses some changes and extensions in some respects, but there has been no change in the designation of persons entitled to a lien under the

act, or the priorities created by the act.

This court has consistently held the attaching date of a mechanic's lien is the date on which materials are first furnished or labor is performed by the person claiming the lien. *Krotter & Sailors v. Pease, supra*; *Gilcrist v. Wright*, 167 Neb. 767, 94 N.W.2d 476 (1959). A supplier of materials to a materialman is not within the class entitled to a lien. *Ideal Basic Industries, Inc. v. Juniata Farmers Coop. Assn., supra*; *Krotter & Sailors v. Pease, supra*.

The statute specifically sets forth the attachment and enforceability of a lien against real estate in favor of a person furnishing services and materials under a real estate improvement contract. § 52-126. The contract price refers not only to the initial contract for services and materials, but also to change orders or extras and altered specifications. The act further provides that if no price is agreed upon by the contracting parties, the contract price means the reasonable value of all services and materials covered. § 52-127(2). Services shall not include financing or activities in connection with financing. § 52-127(9). Where money is furnished to pay for materials, this court has previously ruled that the person who provides those funds cannot be said to have furnished materials. *Barry v. Barry*, 147 Neb. 1067, 26 N.W.2d 1 (1947).

From a review of the trust deed delivered to the Bank by Parriotts, it will be noted that no mention is made as to the purpose of the loan. The evidence reflects that Hulinsky knew the Bank was financing the owner, and, although the testimony is not clear, a review of the Bank's disbursement record reflects that the $30,000 was not disbursed until January 9, 1984, nearly 4 months after Hulinsky had commenced construction.

The general rule adopted by this court is that the materialman and laborer lien has priority over a mortgage recorded subsequent, where it is admitted the purpose of the loan was to provide funds to improve the real estate. *Gabel Lumber Co. v. West*, 95 Neb. 394, 145 N.W. 849 (1914); *Creigh Sons & Co. v. Jones*, 103 Neb. 706, 173 N.W. 687 (1919).

In other jurisdictions, the courts have considered the question of whether the financing party is entitled to parity with the materialman, where the funds are used for purposes of the

construction.

In *Beneficial Finance Co. v. Wegmiller Bender Lbr. Co.*, 402 N.E.2d 41 (Ind. App. 1980), cited by the Bank, the trial court had ruled that the mechanic's lien had priority over all liens subsequently created. On appeal, the finance company asserted that it was entitled to parity with the materialman to the extent that the mortgage money it loaned was used to pay the materialmen and laborers who could have otherwise filed mechanics' liens against the property. The court noted an exception to the general rule announced in a prior case, *Ward v. Yarnelle*, 173 Ind. 535, 91 N.E. 7 (1910), where it ruled that a real estate mortgage executed while a building was under construction was entitled to equal priority with claims of the materialmen and laborers who had, without prior obligations, furnished material and labor after execution of the mortgage and with full knowledge of its purpose and effect.

In *Ward, supra*, the mortgage instrument provided it was executed to enable the owner to pay for the construction completion and to pay outstanding obligations on the improvement.

The court in *Beneficial, supra*, held that Beneficial was not entitled to the extraordinary relief announced in *Ward*. The court in *Beneficial* concluded that notice was the important element.

The ruling in *Beneficial, supra*, supports the general rule that where a materialman furnishes materials for construction before the finance company's mortgage is executed, the finance company is not entitled to priority over the mechanic's lien on the theory that it was entitled to parity to the extent that the mortgage money was used to pay the materialmen and laborers. Nebraska has never adopted the exception noted in *Ward*.

In the court's discussion of the general rule in this jurisdiction, set forth in *Krotter & Sailors v. Pease*, 161 Neb. 774, 74 N.W.2d 538 (1956), citing *Glassco v. El Sereno Country Club, Inc.*, 217 Cal. 90, 17 P.2d 703 (1932) (approving an earlier case, *Godeffroy v. Caldwell*, 2 Cal. 489 (1852)) and *Barry v. Barry, supra*, we stated that where one pays for materials furnished by others, the statute does not extend its protection to those who make the payment.

> It has long been the settled rule of this state that "the mechanic's lien law provides exclusively for the security of materialmen and laborers; and one who advances money as a loan, although it is expressly for the payment of materials and labor devoted to the erection of a building, can have no claim to benefits of the law."

Glassco v. El Sereno Country Club, Inc., supra at 93, 17 P.2d at 704, quoting *Godeffroy v. Caldwell, supra.*

The Bank lien was clearly subject to the construction lien of Hulinsky.

The decision of the trial court is affirmed.

AFFIRMED.

DONALD GIGER ET AL., APPELLANTS, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, ET AL., APPELLEES.

D. JAMES WITHERSPOON ET AL., APPELLANTS, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, ET AL., APPELLEES.

442 N.W.2d 182

Filed June 30, 1989. No. 87-521.

1. **Ordinances: Zoning: Injunction: Equity.** An action to declare a city zoning ordinance void, and to enjoin enforcement under color of that ordinance, is one in equity.
2. **Equity: Appeal and Error.** A case in equity is reviewed de novo on the record, subject to the rule that where credible evidence is in conflict on material issues of fact, we consider and may give weight to the fact the trial court observed the witnesses and accepted one version of the facts over another.
3. **Zoning.** Zoning is a legislative function.
4. _____. Zoning regulations are enacted pursuant to the police power of the state.
5. **Legislature: Municipal Corporations: Zoning.** The Nebraska Legislature has granted the City of Omaha the power to zone property lying within its jurisdiction.
6. **Municipal Corporations: Ordinances: Zoning: Public Health and Welfare.** This jurisdiction has long recognized that zoning ordinances enacted by a city, as a lawful exercise of police power, must be consistent with public health, safety, morals, and the general welfare.
7. **Municipal Corporations: Ordinances: Public Health and Welfare.** This court gives great deference to a city's determination of which laws should be enacted

for the welfare of the people.

8. **Ordinances: Zoning: Presumptions: Proof.** The validity of a zoning ordinance will be presumed in the absence of clear and satisfactory evidence to the contrary.
9. **Municipal Corporations: Ordinances: Zoning.** A city is permitted to condition rezoning ordinances on the adoption of an agreement between the developer and the city, or any other means assuring the developer builds the project as represented.
10. **Zoning.** Conditional or contract rezoning is a legislative function and therefore must be within the proper exercise of the police power.
11. **Municipal Corporations: Ordinances: Zoning: Proof.** To successfully challenge the validity of conditional rezoning, the appellants must prove that the conditions imposed by the city in adopting the rezoning ordinance were unreasonable, discriminatory, or arbitrary, and that the regulation bears no relationship to the purpose or purposes sought to be accomplished by the ordinance.
12. **Municipal Corporations.** A municipal corporation possesses, and can exercise, the following powers, and no others: first, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; and third, those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable.
13. **Zoning.** Zoning is a local concern.
14. **Municipal Corporations: Zoning.** In chapter 14 of the Nebraska Revised Statutes, there is an implied grant of power to the city to enact all necessary zoning regulations, including conditional rezoning, as long as those regulations are within the proper exercise of the police power.
15. **Municipal Corporations: Ordinances: Zoning: Proof.** To successfully challenge the validity of a zoning ordinance, the appellants must prove that the actions of a city in adopting that regulation were unreasonable, discriminatory, or arbitrary, and that the regulation bears no relationship to the purpose or purposes sought to be accomplished by the ordinance.
16. **Zoning.** The uniformity requirement in Neb. Rev. Stat. § 14-402 (Reissue 1987) does not prohibit reasonable classifications within a district.
17. **Municipal Corporations: Ordinances: Zoning: Proof.** To successfully challenge the rezoning ordinance on the grounds it violates the uniformity requirement of Neb. Rev. Stat. § 14-402 (Reissue 1987), the appellants must prove that the actions of the city in adopting the rezoning ordinance were unreasonable, discriminatory, or arbitrary, and that the regulation bears no relationship to the purpose or purposes sought to be accomplished by the ordinance.
18. **Municipal Corporations: Ordinances: Zoning.** The city, in adopting a rezoning ordinance, is not required to accomplish all the objectives of Neb. Rev. Stat. § 14-403 (Reissue 1987).
19. **Zoning.** The mere fact that rezoning will depreciate the value of surrounding property does not establish that the rezoning is illegal.
20. _____. Where the validity of the legislative classification for zoning purposes is fairly debatable, the legislative judgment must be allowed to control.

21. **Municipal Corporations: Ordinances: Zoning: Appeal and Error.** What is the public good as it relates to zoning ordinances affecting the use of property is primarily a matter lying within the discretion and determination of the municipal body to which the power and function of zoning is committed, and unless an abuse of this discretion has been clearly shown, it is not the province of the court to interfere. In passing upon the validity of zoning ordinances, an appellate court should give great weight to the determination of local authorities and local courts especially familiar with local conditions.

22. **Ordinances: Zoning: Appeal and Error.** To determine whether a rezoning ordinance complies with a comprehensive plan pursuant to Neb. Rev. Stat. § 14-403 (Reissue 1987), this court will review the land uses surrounding the rezoned property.

23. **Zoning: Words and Phrases.** Spot zoning is generally defined as the singling out of a small parcel of land for a use or uses classified differently from the surrounding area, primarily for the benefit of the owner of the property so zoned, to the detriment of the area and the other owners therein.

24. **Zoning.** The validity of spot zoning depends upon more than the size of the spot, and spot zoning as such is not necessarily invalid, but its validity depends upon the facts and circumstances appearing in each particular case.

25. **Administrative Law: Waters.** Neb. Rev. Stat. § 31-1017 (Reissue 1988) requires the Nebraska Natural Resources Commission to adopt, at a minimum, flood plain regulations promulgated by the Federal Emergency Management Agency.

26. **Municipal Corporations: Administrative Law: Waters.** The City of Omaha is mandated by state statute to implement local flood regulations which meet the minimum criteria established by the Nebraska Natural Resources Commission.

27. **Justiciable Issues: Appeal and Error.** It is not the function of this court to render advisory opinions.

28. **Injunction: Equity.** An action for injunction sounds in equity.

29. **Injunction: Proof.** A party seeking injunction must establish by a preponderance of the evidence every controverted fact necessary to entitle the claimant to relief.

30. **Waters: Words and Phrases.** The flood plain of a stream is considered a part of the channel of such stream, and no one may obstruct the flow of floodwaters in the natural drainage to the detriment of another.

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

John C. Mitchell, of Mitchell & Demerath, and J. Patrick Green for appellants Giger et al.

Richard E. Croker, of Croker, Huck & McReynolds, P.C., and Larry W. Myers for appellants Witherspoon et al.

Charles K. Bunger, Assistant Omaha City Attorney, and Frank F. Pospishil and Harvey B. Cooper, of Abrahams, Kaslow & Cassman, for appellees.

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

WHITE, J.

This appeal involves two lawsuits relating to a development known as One Pacific Place. The development is being constructed on an 84-acre tract of land formerly owned by Carl Renstrom located in southwest Omaha. The land, hereafter the Renstrom property, is approximately triangular in shape, bordered on the north by Pacific Street, on the east by the Happy Hollow and Sunset Hills residential developments, on the southwest by the Big Papillion Creek, and on the west by 105th Street.

In March 1983, appellee Midlands Development Company (Midlands) entered into a real estate purchase agreement with the Renstrom estate for the purchase of the property. Midlands then applied to the city to have the Renstrom property rezoned to permit the construction of a mixed-use development consisting of retail, office, and residential buildings. As part of the application process, Midlands submitted several development plans. A final plan was developed which indicated the following uses for 48 acres of the tract: 112,000 square feet of retail space, 390,000 square feet of office space, 558,000 square feet of parking space, 300 residential units, a private lake, and a planned unit development (PUD). The plan also called for the construction of a public park on the remaining 36 acres to be deeded by Midlands to the city. In a "new procedure," Midlands and the city entered into four agreements incorporating the plan. The four agreements, collectively known as the development agreement, were submitted to the city for approval. In February 1985, the city passed an ordinance approving the development agreement, incorporating it as part of the ordinance, and passed five separate ordinances rezoning the Renstrom property. Building permits were then issued, including a permit allowing Midlands to fill in the flood plain of the Big Papillion Creek located on

the land and to make modifications to the creek channel.

Construction on the site began approximately in September of 1985. Thereafter, two lawsuits were filed in the district court for Douglas County: *Giger et al. v. City of Omaha et al.*, filed by neighboring property owners, and *Witherspoon et al. v. City of Omaha et al.*, filed by downstream riparian property owners living along the Big Papillion Creek. The two petitions requested an order declaring the city's rezoning ordinance and accompanying building permits void, and an injunction to enjoin Midlands from developing the property in any manner inconsistent with prior zoning ordinances. The suits were ordered consolidated for trial. After a lengthy trial, the trial court denied the plaintiffs' requested relief.

Though the plaintiffs-appellants assign a total of 15 errors, these errors are consolidated into three issues for consideration on appeal. The first two issues relate to appellants' contention that the trial court erred in not finding that the Omaha City Council acted in an arbitrary, capricious, and unreasonable manner in adopting the rezoning ordinance. Specifically, the appellants allege that the city entered into a development agreement with Midlands, adopted a rezoning ordinance which incorporated that agreement, and rezoned the Renstrom property pursuant to that agreement and that the city adopted the rezoning ordinance without giving adequate consideration to the risk of flood created by the project. The last issue involves appellants' claim that the trial court erred in not granting a permanent injunction enjoining Midlands from filling the flood plain on the Renstrom property and altering the channel of the Big Papillion Creek.

An action to declare a city zoning ordinance void, and to enjoin enforcement under color of that ordinance, is one in equity. *Sasich v. City of Omaha*, 216 Neb. 864, 347 N.W.2d 93 (1984); *Bucholz v. City of Omaha*, 174 Neb. 862, 120 N.W.2d 270 (1963). A case in equity is reviewed de novo on the record, subject to the rule that where credible evidence is in conflict on material issues of fact, we consider and may give weight to the fact the trial court observed the witnesses and accepted one version of the facts over another. *Thomas v. Marvin E. Jewell & Co., ante* p. 261, 440 N.W.2d 437 (1989); *Sasich v. City of*

Omaha, supra.

Zoning is a legislative function, *Schaffer v. City of Omaha*, 197 Neb. 328, 248 N.W.2d 764 (1977); *In re Application of Frank*, 183 Neb. 722, 164 N.W.2d 215 (1969); and 1 R. Anderson, American Law of Zoning § 3.14 (3d ed. 1986), and zoning regulations are enacted pursuant to the police power of the state, *Euclid v. Ambler Co.*, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926); *Schaffer v. City of Omaha, supra*; *Davis v. City of Omaha*, 153 Neb. 460, 45 N.W.2d 172 (1950); and 1 R. Anderson, *supra*, § 2.01. The Nebraska Legislature has granted the City of Omaha the power to zone property lying within its jurisdiction. Neb. Rev. Stat. §§ 14-401, 14-402, and 14-403 (Reissue 1987); *Davis v. City of Omaha, supra*. Section 7.09 of the City of Omaha Home Rule Charter provides that the Omaha City Council, by ordinance, may enact, amend, and modify zoning regulations in accordance with the laws of the State of Nebraska. In addition, this jurisdiction has long recognized that zoning ordinances enacted by a city, as a lawful exercise of police power, must be consistent with public health, safety, morals, and the general welfare. Neb. Rev. Stat. §§ 14-102(25) and 14-401 (Reissue 1987); *Schaffer v. City of Omaha, supra*; *Wolf v. City of Omaha*, 177 Neb. 545, 129 N.W.2d 501 (1964); *Bucholz v. City of Omaha, supra*; *City of Omaha v. Cutchall*, 173 Neb. 452, 114 N.W.2d 6 (1962); *Davis v. City of Omaha, supra*; *City of Omaha v. Glissmann*, 151 Neb. 895, 39 N.W.2d 828 (1949), *appeal dismissed* 339 U.S. 960, 70 S. Ct. 1002, 94 L. Ed. 1370 (1950), *reh'g denied* 340 U.S. 847, 71 S. Ct. 15, 95 L. Ed. 621; *Cassel Realty Co. v. City of Omaha*, 144 Neb. 753, 14 N.W.2d 600 (1944).

The first argument raised by the appellants is that the city, by adopting a rezoning ordinance pursuant to an agreement between itself and Midlands, acted in an arbitrary, capricious, and unreasonable manner. In support of this argument, the appellants challenge the validity of the rezoning ordinance on two grounds. They assert, first, that rezoning by agreement is invalid per se and, second, that the rezoning ordinance violates the substantive standards set out in §§ 14-402 and 14-403.

Specifically, the appellants contend that because rezoning by agreement is illegal contract rezoning, it is invalid per se, is an

ultra vires act, and fosters an "appearance of evil." They allege illegal contract rezoning occurred because the city bargained away and sold its police power. The appellants do not cite any Nebraska authority for this proposition and claim that this court has never faced a true contract zoning situation. However, we note that *Bucholz v. City of Omaha, supra*, a case where the city conditioned its granting of a rezoning ordinance on the developer's entering into a protective covenant, has been characterized as an example of contract rezoning. 2 R. Anderson, American Law of Zoning § 9.21 (3d ed. 1986); 1 N. Williams & J. Taylor, American Planning Law, Land Use and the Police Power § 29.03 (rev. 1988). Yet, *Bucholz* has also been labeled as an example of a conditional rezoning. Annot., 70 A.L.R.3d 125, 162 (1976); 2 A. Rathkopf & D. Rathkopf, Rathkopf's the Law of Zoning and Planning § 27.05 (rev. 1989); Note, *The Validity of Conditional Zoning: a Florida Perspective*, 31 U. Fla. L. Rev. 968, 971 n.21 (1979); Comment, *Land Use—Goffinet v. County of Christian: New Flexibility in Illinois Zoning Law*, 8 Loy. U. Chi. L.J. 642, 643 n.15 (1977). This distinction is academic because our scope of review, as explained below, is limited to determining whether the conditions imposed by the city for rezoning are reasonably related to the interest of public health, safety, morals, and the general welfare.

This court realizes that in the development of a project such as One Pacific Place there are negotiations between the developer and the city. We are also aware that a city rezones property based on representations made and plans submitted by the developer. However, once a parcel of land has been rezoned, there is no guarantee the developer will follow through on the plans submitted to the city. Legally, the developer is entitled to use his or her land in any manner permitted by the zoning classification. Of course, the city would not be without a remedy if the land was used in a manner not contemplated in the original plans submitted by the developer. The city could rezone the property to another designation and then institute the appropriate proceedings to prevent the unwanted development. See Neb. Rev. Stat. § 14-415 (Reissue 1987).

However, as *Cummings Enterprises v. Shukert*, 231 Neb.

370, 436 N.W.2d 199 (1989), indicates, this is not always an effective remedy. In *Cummings Enterprises*, the developer's land was rezoned from second suburban district to first commercial. He applied for a building permit for a carwash, a permissible use under that classification, and his request was denied. Subsequently, the city rezoned the developer's property to a classification which excluded carwashes. The developer successfully sued for a writ of mandamus ordering the issuance of the building permit. The city issued the permit, and the developer built the carwash. We held that the city had waived its right to appeal the order, since it voluntarily complied with the order instead of obtaining a supersedeas.

In addition, this court gives great deference to the city's determination of which laws should be enacted for the welfare of the people. *Wolf v. City of Omaha, supra*; *City of Omaha v. Glissmann, supra*. When the city rezones a parcel of property, we presume the validity of that action absent clear and satisfactory evidence to the contrary. *Bucholz v. City of Omaha*, 174 Neb. 862, 120 N.W.2d 270 (1963); *Davis v. City of Omaha*, 153 Neb. 460, 45 N.W.2d 172 (1950). Therefore, when the city considers a request for rezoning based upon a plan or representation by the developer, it is presumed that the city grants the request after making the determination that the plan as represented is in the interest of public health, safety, morals, and the general welfare. We do not think a developer should be allowed to develop property in a manner inconsistent with the plan or representation on which the rezoning was based, despite the fact that the inconsistent use may be permissible under the new zoning classification. By developing the property in a manner not contemplated by the city in granting the rezoning classification, the developer contravenes a decision made by the city pursuant to its police power for the benefit of the community. If the city is limited to only enacting bare zoning ordinances and is not permitted to insist that developers construct buffer zones or make other changes in order to blend the development into the surrounding community, the city will be stripped of the power to act for the benefit of the general welfare. Accordingly, the city should be permitted to condition rezoning ordinances on the adoption of an agreement between

the developer and the city, or any other means assuring the developer builds the project as represented. At the risk of confusion, but for the sake of convenience, we will refer to this zoning arrangement as conditional zoning. As Rathkopf notes:

> The purpose [of conditional rezoning] is to minimize the negative externalities caused by land development which otherwise benefits the community. The developer may agree to restrict development of its property, make certain improvements, dedicate a portion of land to the municipality, or make payments to the government.
>
> Conditional rezoning is valuable as a planning tool because it permits a municipality greater flexibility in balancing developmental demands against fiscal and environmental concerns. It also provides a municipality with flexibility to meet specific rezoning requests while preserving the integrity of adjacent property. For instance, the agreement can mitigate the harshness of commercial or industrial rezoning on neighboring residential property by requiring a buffer on the zone boundaries. Finally, conditional rezoning allows a municipality to maintain greater control over the development process.

2 A. Rathkopf & D. Rathkopf, Rathkopf's the Law of Zoning and Planning § 27.05 at 27-45 to 27-46 (rev. 1989). Thus, this device allows the city flexibility to extract improvements that bare zoning ordinances do not provide, grants a greater means of control over the development to the city, and gives the city a remedy to enforce the developer's plans and representations. Theoretically, if the rezoning ordinance adopts the plan, as in this case, the city could institute legal proceedings if the developer builds a project inconsistent with the plans without resorting to rezoning the property. For the foregoing reasons we hold conditional rezoning to be valid. Our holding today is a reflection of the trend started in this jurisdiction by *Bucholz* and the growing movement in this country permitting conditional rezonings. 2 A. Rathkopf & D. Rathkopf, *supra*.

However, our holding recognizing the validity of conditional rezoning is not without limitation. Conditional rezoning is a legislative function and therefore must be within the proper exercise of the police power. Accordingly, the conditions

imposed by the city for the rezoning must be reasonably related to the interest of public health, safety, morals, and the general welfare. See, e.g., *Treme v. St. Louis County*, 609 S.W.2d 706 (Mo. App. 1980) (where offer made or exaction demanded for rezoning bears no reasonable relationship to activities of developer, action of county or municipality in rezoning property in exchange for such offer or exaction is contracting away of police power, which is forbidden); *State ex. rel. Myhre v. Spokane*, 70 Wash. 2d 207, 422 P.2d 790 (1967) (amendment to zoning ordinance and concomitant agreement should be declared invalid only if it can be shown that there was no valid reason for change, that they are clearly arbitrary and unreasonable and have no substantial relation to public health, safety, morals, and general welfare, or that city is using concomitant agreement for bargaining and sale to highest bidder or solely for the benefit of private speculators). See 2 A. Rathkopf & D. Rathkopf, *supra*. Hence, to successfully challenge the validity of conditional rezoning, the appellants must prove that the conditions imposed by the city in adopting the rezoning ordinance were unreasonable, discriminatory, or arbitrary, and that the regulation bears no relationship to the purpose or purposes sought to be accomplished by the ordinance. This is the same test used for testing the validity of zoning ordinances in this jurisdiction. See, *Wolf v. City of Omaha*, 177 Neb. 545, 129 N.W.2d 501 (1964); *Bucholz v. City of Omaha*, 174 Neb. 862, 120 N.W.2d 270 (1963); *City of Omaha v. Cutchall*, 173 Neb. 452, 114 N.W.2d 6 (1962); *City of Omaha v. Glissmann*, 151 Neb. 895, 39 N.W.2d 828 (1949); *Cassel Realty Co. v. City of Omaha*, 144 Neb. 753, 14 N.W.2d 600 (1944). "The validity of a zoning ordinance will be presumed in the absence of clear and satisfactory evidence to the contrary." *Bucholz v. City of Omaha, supra* at 865-66, 120 N.W.2d at 273, citing *Davis v. City of Omaha*, 153 Neb. 460, 45 N.W.2d 172 (1950).

The appellants argue that by entering into the development agreement the city has curtailed or bargained away its police powers because (1) the agreement prohibits amendment without the consent of the developer; (2) the city is committed to approve a PUD "without any present indication as to what

such PUD's might contain"; (3) the city is obligated to issue building permits "without regard to compliance with other building codes, rules and regulations of the City"; (4) the city is required to spend $64,700 for offsite improvements; (5) the agreement mandates the manner in which the city is to levy special assessments for the payments of these improvements; and (6) "[t]hroughout the Subdivision Agreement [one of the agreements in the development agreement], the City obligates itself to deal in many ways involving its legislative and administrative authority with a non-existent Sanitary and Improvement District to be created in the future." Brief for appellants Witherspoon et al. at 18-19. However, the plain language in the provisions of the development agreement contradict appellants' contentions. The development agreement in pertinent part provides:

> SECTION 2. DEVELOPMENT PLAN.
>
> 2.1 Except as otherwise permitted by this agreement, One Pacific Place shall be developed in accordance with the development plan . . . .
>
> 2.2 Midlands reserves the right to modify the Development Plan in any or all of the following ways, *provided* that such modifications do not violate any provisions of the Omaha Municipal Code, *and* the City agrees that any or all of such modifications shall not constitute a violation of Section 2.1:
>
> 2.2.1 As long as the Site Development Regulations are not violated, Midlands may alter the location, physical shape, and exterior dimensions of any structure shown on the Development Plan, within the boundaries of any platted lot.
>
> 2.2.2 As long as the Site Development Regulations are not violated, Midlands may reduce the number of office buildings shown on the Development Plan from three (3) to two (2).
>
> 2.2.3 As long as the Site Development Regulations are not violated, Midlands may reduce the number of commercial buildings shown in the Retail Center on the Development Plan from four (4) to either three (3) or two (2).

2.2.4 As long as the Site Development Regulations are not violated, Midlands may increase or decrease the number of residential structures shown on the Development Plan, provided that the average density on land used for residential purposes in One Pacific Place is no less than fifteen (15) Dwelling Units per gross acre.

2.2.5 As long as the Site Development Regulations are not violated, with the approval of the Planning Director of the City, Midlands may alter the location and design of any off-street surface parking area shown on any platted lot on the Development Plan, so long as such alteration does not increase or decrease the paved surface (excluding medians, landscaped areas, and other portions of the parking area not designed for vehicular access, circulation, or parking) of such parking area by more than twenty percent (20%) from that shown on such lot on the Development Plan. . . .

2.3 *None of the foregoing provisions shall be construed to imply any waiver of any provision of Chapter 55, Chapter 53, or any other section of the Omaha Municipal Code.*

. . . .

SECTION 9. MISCELLANEOUS PROVISIONS.

. . . .

9.2 All amendments of this agreement shall require approval by the City Council of the City and by Midlands or the successor owners of the real estate . . . . This provision *shall not* abrogate any legal remedies available to the City Council of the City or the Planning Director of the City (as provided in the Omaha Municipal Code) under the Omaha Municipal Code . . . .

(Emphasis supplied.) Simply stated, the agreement expressly provides that Midlands may vary the development only if the city does not find the variation deviates from the development plan *and* the variations do not violate *any* provision of the Omaha Municipal Code. Clearly, under this agreement, the powers of the city are unchanged. We fail to see how the development agreement can be construed as bargaining away the city's police power.

In fact, this agreement is in reality an enhancement of the city's police power. An examination of the development agreement and the evidence at trial establishes that the agreement provides more restrictive ceilings and development regulations than the current underlying zoning regulations. For example, a portion of the development, where the office buildings will be located, has been rezoned to ninth residence district (R-9). Absent the agreement, according to Omaha Mun. Code, ch. 55, art. XV, §§ 55-311 et seq. (1983), under the R-9 classification Midlands is free to erect any number of office buildings with no real limitations on the amount of square footage. Here, the agreement restricts Midlands to a maximum of three office buildings and a total of 390,000 square feet of office space.

In sum, we find that there is not clear and satisfactory evidence to support the appellants' contention that the city has bargained away its police power. The evidence clearly shows that the city's police powers are not abridged in any manner and that the agreement is expressly subject to the remedies available to the city under the Omaha Municipal Code. Further, we find that the agreement actually enhances the city's regulatory control over the development rather than limiting it.

The appellants' second contention is that the city engaged in an ultra vires act because there is no statutory enabling act permitting conditional rezoning. The well-settled rule in this jurisdiction is that

> "a municipal corporation 'possesses, and can exercise, the following powers, and no others: First, those granted in express words; second, *those necessarily or fairly implied in or incident to the powers expressly granted*; third, those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable.' "

(Emphasis supplied.) *Jacobs v. City of Omaha*, 181 Neb. 101, 104, 147 N.W.2d 160, 163 (1966), citing *Christensen v. City of Fremont*, 45 Neb. 160, 63 N.W. 364 (1895). As set forth above, the City of Omaha derives the power to zone from §§ 14-401, 14-402, and 14-403, and § 7.09 of the Omaha Home Rule Charter. Section 7.09 provides that the city may enact, amend,

and modify zoning regulations in accordance with the laws of the State of Nebraska. An examination of chapter 14, article 4, of the Nebraska Revised Statutes reveals that all the statutes contained therein primarily use the term "regulations" for describing the zoning power delegated to the city. The Legislature does not specify what regulations the city may use to zone the city. The only limitation is that the regulations must be for "the purpose of promoting the health, safety, morals or the general welfare of the community . . . ." § 14-401. In addition to having the power to enact zoning regulations, the city also has the power to amend, supplement, change, modify, or repeal those regulations. § 14-405. Further, § 14-403 in part provides:

> Whenever the City council shall determine that the use or contemplated use of any building, structure or land will cause congestion in the streets, increase danger from fire or panic, imperil public safety, cause undue concentration or congregation of people, or impede transportation, the council may include in such regulations requirements for alleviating or preventing such conditions when any change in use or zoning classification is requested by the owner.

It is axiomatic that zoning is a local concern. In light of this, plus the fact that the Legislature has used the general term "regulations" without explicitly delineating what regulations the city is permitted to use, coupled with a grant of power to the city to implement, amend, supplement, change, modify, or repeal those regulations, it is clear that the Legislature has given the city broad powers to regulate land uses within its jurisdiction as long as those regulations are within the police power. Thus, we find in chapter 14 of the Nebraska Revised Statutes an implied grant of power to the city to enact all necessary zoning regulations, including conditional rezoning, as long as those regulations are within the proper exercise of the police power.

The third contention by the appellants is that the city fostered an "appearance of evil" by engaging in conditional rezoning. They allege that conditional rezoning could result in corruption of officials and that if the practice is permitted, officials will concentrate more on what they can extract from the developer than on proper rezoning criteria. This argument lacks merit.

The appellants admit there is no evidence of graft or corruption in the case at bar, and we believe our holding is more than adequate to protect against any alleged abuse of this type. We will not strike down a conditional zoning because it looks evil, but only if its application is evil. Accordingly, appellants' challenge to this conditional rezoning as invalid fails.

The appellants' next challenge is that the rezoning ordinance violates the substantive standards of §§ 14-402 and 14-403. To successfully challenge the validity of a zoning ordinance, the appellants must prove that the actions of the city in adopting that regulation were unreasonable, discriminatory, or arbitrary, and that the regulation bears no relationship to the purpose or purposes sought to be accomplished by the ordinance. *Wolf v. City of Omaha*, 177 Neb. 545, 129 N.W.2d 501 (1964); *Bucholz v. City of Omaha*, 174 Neb. 862, 120 N.W.2d 270 (1963); *City of Omaha v. Cutchall*, 173 Neb. 452, 114 N.W.2d 6 (1962); *City of Omaha v. Glissmann*, 151 Neb. 895, 39 N.W.2d 828 (1949); *Cassel Realty Co. v. City of Omaha*, 144 Neb. 753, 14 N.W.2d 600 (1944). In the absence of clear and satisfactory evidence to the contrary, a zoning ordinance is presumed valid. *Bucholz v. City of Omaha, supra*; *Davis v. City of Omaha*, 153 Neb. 460, 45 N.W.2d 172 (1950). The appellants contend the rezoning ordinance (1) violates the uniformity requirement in § 14-402, (2) will diminish the value of the surrounding homes, (3) violates § 14-403, (4) is not in accordance with a comprehensive plan, and (5) constitutes illegal spot zoning.

Section 14-402 provides in part:

> For any or all such purposes, the city council may divide the municipality into districts of such number, shape, and area as may be deemed best suited to carry out the purposes of sections 14-401 to 14-418. Within such districts it may regulate, restrict, or prohibit the erection, construction, reconstruction, alteration, or use of buildings, structures, or land. *All such regulation shall be uniform for each class or kind of buildings throughout each district, but the regulations in one district may differ from those in other districts.*

(Emphasis supplied.) The appellants assert that the rezoning ordinance violates the uniformity provision in § 14-402 because

the agreement results in concessions for both the city and Midlands which are not allowed to other developers. As an example, appellants state in their brief that " '[n]o other developers in the City' have 'been required to give a park for free to the City in exchange for rezoning.' " Brief for appellants Witherspoon et al. at 14. We note that the uniformity requirement in § 14-402 is derived from § 2 of the Standard State Zoning Enabling Act and that almost every jurisdiction has incorporated this limitation into its state zoning enabling legislation. 1 R. Anderson, American Law of Zoning § 5.25 (3d ed. 1986). In his treatise on zoning, Anderson states that there have been few cases interpreting the uniformity requirement and that attacks on conditional rezoning as being violative of the uniformity requirement have "not been notably successful." 2 R. Anderson, American Law of Zoning § 9.20 at 164 (3d ed. 1986); 1 R. Anderson, *supra*, § 5.25. The jurisdictions that have addressed the uniformity requirement have analyzed the challenged ordinances to see if they are reasonable and not discriminatory. 1 R. Anderson, *supra*, § 5.25. For instance, in *Mont. Co. v. Woodward & Lothrop*, 280 Md. 686, 719-20, 376 A.2d 483, 501 (1977), the court, construing a uniform provision comparable to Nebraska's, said:

> The uniformity provision contained in Art. 66D, § 8-102 was derived from § 2 of the Standard State Zoning Enabling Act, as to which it was said in 1 Anderson, *American Law of Zoning*, § 5.22 (2d ed. 1976), that the purpose of the provision was mainly a political rather than a legal one, *i.e.*, to give notice to property owners that there shall be no improper discriminations. [Citations omitted.] We have also recognized that invidious distinctions and discriminations in applying the uniformity requirement are impermissible. [Citations omitted.] The uniformity requirement does not prohibit classification within a district, so long as it is reasonable and based upon the public policy to be served.

See, *Oshtemo Twp v Central Ad Co*, 125 Mich. App. 538, 336 N.W.2d 823 (1983) (township rural zoning act, providing that zoning ordinance provisions must be uniform for each class of

land, buildings, dwellings, and structures throughout the district, is subject to "reasonableness" exception, allowing reasonable restrictions based upon different conditions within the zone); *Quinton v. Edison Park Development Corp.*, 59 N.J. 571, 285 A.2d 5 (1971) (statute which required that zoning regulations be uniform for each class or kind of buildings or other structures or uses of land throughout each district does not prohibit classifications within a district so long as they are reasonable).

We think allowing reasonable classifications within a district is a good rule, especially in view of the broad delegation of authority given by the Legislature to the city in making zoning regulations, as set forth above. Accordingly, the uniformity requirement in § 14-402 does not prohibit reasonable classifications within a district. To successfully challenge the rezoning ordinance on the grounds it violates the uniformity requirement of § 14-402, the appellants must prove that the actions of the city in adopting the rezoning ordinance were unreasonable, discriminatory, or arbitrary, and that the regulation bears no relationship to the purpose or purposes sought to be accomplished by the ordinance.

Other than pointing to the provisions of the agreement itself, the appellants cite no evidence in support of their claim that the rezoning action violates the uniformity requirement. Implicit in appellants' proposition is the assumption that no other developer will be able to take advantage of conditional rezoning. Today's holding clearly refutes that assumption. The appellants have failed to show by clear and satisfactory evidence, *Bucholz v. City of Omaha*, 174 Neb. 862, 120 N.W.2d 270 (1963), and *Davis v. City of Omaha*, 153 Neb. 460, 45 N.W.2d 172 (1950), that the city acted in an unreasonable, discriminatory, or arbitrary manner, and that the regulation bears no relationship to the purpose sought to be accomplished by the ordinance.

The contentions that the rezoning ordinance will result in devaluating the surrounding homes and violates § 14-403, we analyze together. Section 14-403 provides:

> Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in

> the streets; to secure safety from fire, panic and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to secure safety from flood; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements, and to promote convenience of access. Such regulation shall be made with reasonable consideration, among other things, as to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality. Whenever the city council shall determine that the use or contemplated use of any building, structure or land will cause congestion in the streets, increase the danger from fire or panic, imperil public safety, cause undue concentration or congregation of people, or impede transportation, the council may include in such regulations requirements for alleviating or preventing such conditions when any change in use or zoning classification is requested by the owner.

The city, in adopting a rezoning ordinance, is not required to accomplish all the objectives of § 14-403. *Sasich v. City of Omaha*, 216 Neb. 864, 347 N.W.2d 93 (1984). There was competent conflicting evidence on nearly all of the considerations set out in § 14-403. Both sides presented evidence regarding the impact One Pacific Place would have on traffic in the area. The appellants' expert testified that the development would increase traffic congestion and the potential for accidents along Pacific Street. Citing improvements to Pacific Street, such as widening the street, as called for in the development plan, the appellees' expert stated that the traffic congestion would actually decrease because of the improved levels of service at intersections along the street. Both sides presented evidence relating to the adequacy of the 36-acre park, as provided for by the development agreement. Here the thrust of the appellants' evidence was to exhibit that the city's previous master plans designated the entire Renstrom tract for future use as parkland and to demonstrate a need for

an 84-acre public park in the area of the development. The appellees countered with evidence indicating that the city did not have the financial resources available to fund the acquisition of the Renstrom property for a public park and that the city obtained the 36 acres for a park free from the developer through a process of negotiation. In addition, the park deeded by Midlands to the city is consistent with the current parks and recreation plan, which calls for the accumulation of linear parkland along the Big Papillion Creek. The evidence also demonstrates that there are over 200 acres of smaller parks in the area and that the studies the appellants' expert relied on in finding parkland in the Renstrom area deficient were overstated. As will be set out later in this opinion, there also was conflicting evidence relating to the impact One Pacific Place would have on flooding of downstream riparian owners.

The appellees failed to rebut the appellants' contention that the project would decrease the surrounding land values. However, the mere fact that rezoning will depreciate the value of surrounding property does not establish that the rezoning is illegal. *Bucholz, supra*. At most, the evidence establishes that there is a difference of opinion regarding the impact of the development. "Where the validity of the legislative classification for zoning purposes is fairly debatable, the legislative judgment must be allowed to control." *Bucholz, supra* at 868-69, 120 N.W.2d at 275. Giving credit to the fact the trial court heard and observed the witnesses, we cannot say the court was wrong in accepting the appellees' version of what the impact of the development would be. *Sasich v. City of Omaha, supra*. We also note that these issues relating to the impact of the development raised by the appellants were also raised before the city council in opposition to appellees' request for rezoning.

> " 'What is the public good as it relates to zoning ordinances affecting the use of property is, primarily, a matter lying within the discretion and determination of the municipal body to which the power and function of zoning is committed, and unless an abuse of this discretion has been clearly shown it is not the province of the court to interfere. . . .
>
> " 'In passing upon the validity of zoning ordinances, an

> appellate court should give great weight to the determination of local authorities and local courts especially familiar with local conditions.' . . ."

Wolf v. City of Omaha, 177 Neb. 545, 556, 129 N.W.2d 501, 508 (1964). Accordingly, we find that the appellants' contentions that the rezoning ordinance will result in devaluating the surrounding homes and violates § 14-403 are without merit.

We also address the appellants' last two challenges together: the allegations that the rezoning ordinance is not in accordance with a comprehensive plan and that it constitutes illegal spot zoning. Relying on the first sentence of § 14-403, "Such regulations shall be made in accordance with a comprehensive plan," the appellants assert that the project violates the city's comprehensive plan. According to the appellants, the project violates the city policy as detailed in several city master plans from 1965 up to the latest plan in 1981 by (1) failing to restrict high-density/mixed uses, such as One Pacific Place, to the Dodge Street corridor; (2) utilizing the Renstrom property for development instead of parkland; and (3) locating One Pacific Place, a high-density project, in a low-density area.

This court said in *Sasich v. City of Omaha, supra*, that the terms "comprehensive plan" and city plan or master plan are not synonymous and that to determine whether an ordinance complies with a comprehensive plan is not a mechanical test.

> It is apparent from [*Davis v. City of Omaha*, 153 Neb. 460, 45 N.W.2d 172 (1950),] that the term "comprehensive plan" is used with respect to a metropolitan city in its generic sense and does not refer to any special document. The essence of the term "comprehensive plan" implies that not just the subject property but other similarly situated property is considered in the zoning decision. It requires rationality and some degree of consistent treatment.

Sasich, supra at 870, 347 N.W.2d at 97. In applying this definition, the *Sasich* court examined the future land use plan and the surrounding area of the rezoned property. In essence, that court reviewed the surrounding uses utilizing a spot zoning analysis. "The term 'spot zoning' is used by the courts to describe a zoning amendment which is invalid because it is not

in accordance with a *comprehensive or well-considered plan*." (Emphasis supplied.) 1 R. Anderson, American Law of Zoning § 5.12 at 359 (3d ed. 1986). Concerning spot zoning, this court has stated:

> [S]pot zoning [is] generally defined as the singling out of a small parcel of land for a use or uses classified differently from the surrounding area, primarily for the benefit of the owner of the property so zoned, to the detriment of the area and the other owners therein. . . . "The validity of spot zoning depends upon more than the size of the spot, and spot zoning as such is not necessarily invalid, but its validity depends upon the facts and circumstances appearing in each particular case." Hagman, [Urban Planning & Development Control Law], § 93, p. 169, analyzes spot zoning in the following fashion: "Spot zoning is invalid where some or all of the following factors are present:
>
> "1. a small parcel of land is singled out for special and privileged treatment;
>
> "2. the singling out is not in the public interest but only for the benefit of the landowner;
>
> "3. the action is not in accord with a comprehensive plan.
>
> "The list is not meant to suggest that the three tests are mutually exclusive. If spot zoning is invalid, usually all three elements are present, or, said another way, the three statements may merely be nuances of one another."

Holmgren v. City of Lincoln, 199 Neb. 178, 184-85, 256 N.W.2d 686, 690-91 (1977).

In reviewing the evidence, we note that there is conflicting evidence on the type of land use proposed for One Pacific Place, and on the classification of the land uses surrounding the development. The appellants' evidence was that One Pacific Place is a high-density/mixed-use development, that such high-density uses are designated by the city's master plan and policy to be limited to within one-half mile of Dodge Street, and that One Pacific Street is outside of the 1/2-mile Dodge Street corridor. The appellants provided expert testimony that the prevailing land use within a 1-mile radius is low-density

residential. On the other hand, appellees produced evidence demonstrating that the area surrounding the development was composed of both low- and high-density mixed uses. This included an admission by one of the appellants' experts that there are some seven-story apartment buildings across Pacific Street and west of One Pacific Place which are high-density residential uses and that there are high-density three- to four-story office buildings along the south one-half of Regency Parkway between Pacific Street and West Dodge Street. Other evidence by the appellees showed that Pacific Street west of the development is high-density residential area, that Pacific Street east of the development has commercial uses, and that there are substantial commercial uses at Pacific Street and 87th Street, 105th Street, and Interstate 680.

Where there is a conflict in the evidence, the legislative decision must be allowed to control. *Bucholz v. City of Omaha*, 174 Neb. 862, 120 N.W.2d 270 (1963). Giving credit to the fact that the trial judge observed the witnesses and accepted the appellees' version of the facts, *Sasich v. City of Omaha*, 216 Neb. 864, 347 N.W.2d 93 (1984), we find the appellants have failed to prove by clear and convincing evidence that the rezoning ordinance was illegal spot zoning and therefore violative of the comprehensive plan. Accordingly, appellants' first consolidated assignment of error is without merit.

The appellants' second consolidated assignment of error relates to their contention that the city acted in an arbitrary, capricious, and unreasonable manner by giving inadequate consideration to the risk of flood created by the project. Prior to the commencement of construction on the Renstrom property, 90 percent of the property was within the flood plain of the Big Papillion Creek and 60 percent of that land was in the creek's floodway. The flood plain is the area of land adjoining the Big Papillion Creek which has been or may be covered by flood waters. Neb. Rev. Stat. § 31-1010 (Reissue 1988); Omaha Mun. Code, ch. 55, art. V, § 55-112 (1982). The floodway is the channel of the Big Papillion Creek and adjacent lands that must be reserved in order to discharge the base flood without cumulatively increasing the water surface elevation more than 1 foot. Neb. Rev. Stat. § 31-1008 (Reissue 1988); Omaha Mun.

Code, *supra*, § 55-112. The base flood is the flood having a 1-percent chance of being equaled or exceeded in any given year. Neb. Rev. Stat. § 31-1005 (Reissue 1988); Omaha Mun. Code, *supra*, § 55-112. The base flood is also known as the 100-year flood. The concept of the floodway is used so development may occur in a flood plain and at the same time guarantee the other riparian owners protection from flooding. By definition, the floodway is included within the flood plain. The floodway can be narrower than the flood plain, but only if the floodway is large enough to discharge a 100-year flood without the surface elevation of the water rising more than 1 foot. The remaining area in the flood plain not included in the floodway is called the flood fringe. Ideally, if a floodway is properly constructed, the 100-year flood should be entirely contained in the floodway, leaving the flood fringe dry. Once a floodway has been established, construction is permitted in the flood fringe. The City of Omaha, as a participant in the federal flood insurance program, has adopted the floodway for the Big Papillion Creek as established by the Federal Emergency Management Agency (FEMA) in its 1982 flood insurance study.

To gain more ground for development, Midlands decided to move the existing floodway closer to the Big Papillion Creek. The final plan called for filling of the flood fringe and a portion of the existing floodway. Midlands applied to the city for the appropriate permits, and the city in turn applied to FEMA on behalf of Midlands for a map amendment moving the floodway. On July 15, 1985, FEMA gave conditional approval to Midlands for the channel modifications along the Big Papillion Creek. In September 1985, the appellants submitted information to FEMA challenging the preliminary determinations. After reviewing the information, FEMA rejected the challenges and sent a letter to the city on October 29, indicating that there was no basis for withdrawing the conditional approval. In July 1986, the appellants appealed FEMA's determination, which appeal was ultimately rejected. The map amendment was granted by FEMA, creating a new floodway, and the city issued a development permit in September 1986 to allow construction in the newly designated flood fringe area. On November 14 appellant Giger filed *Giger*

v. FEMA et al. in the U.S. District Court for the District of Nebraska, requesting the court to set aside FEMA's decision.

The primary thrust of appellants' attack is the assertion that the city abused its discretion by adopting the map amendment issued by FEMA and issuing the permits to Midlands for filling the new flood fringe. The U.S. Congress has enacted laws creating a national flood insurance program and has delegated the implementation of the program to FEMA. See, generally, 42 U.S.C. §§ 4001 et seq. (1982); 44 C.F.R. §§ 59.1 et seq. (1987). FEMA, pursuant to this delegation of authority, is responsible for establishing the minimum criteria for flood plain management. 44 C.F.R., *supra*, § 60.1. In addition to using the theoretical concepts of flood plain, floodway, and flood fringe as explained above, FEMA has undertaken water studies of various flood-prone waterways such as the Big Papillion Creek. These studies, known as flood insurance studies, establish such things as water elevations and plot the flood plain, floodway, and flood fringes of the watercourses studied. This data is compiled and distributed in the form of maps, 44 C.F.R., *supra*, §§ 65.1 to 65.11, and can be amended by an appeal process. 44 C.F.R., *supra*, §§ 67.1 to 70.9. To be eligible for federal flood insurance under this program, a community must adopt the standards established by FEMA. 44 C.F.R., *supra*, § 60.1. Section 60.2(h), defining minimum compliance with flood plain management criteria, states: "The community shall adopt and enforce flood plain management regulations based on data provided by [FEMA]. Without prior approval of [FEMA], the community *shall not* adopt and enforce flood plain management regulations based upon modified data reflecting natural or man-made physical changes." (Emphasis supplied.)

The Nebraska Legislature has also enacted statutes regulating flood plain management. See, generally, Neb. Rev. Stat. §§ 31-1001 to 31-1031 (Reissue 1988). One of the express purposes of the flood plain management legislation is to "[e]ncourage local governments with flood-prone areas to qualify for participation in the national flood insurance program." § 31-1001(d). "National flood insurance program shall mean the program authorized by the United States

Congress under the National Flood Insurance Act of 1968, as amended, 42 U.S.C., sections 4001 to 4128." § 31-1014. The statutory scheme encourages implementation of local flood plain management regulation under the direction of the Nebraska Natural Resources Commission (NRC). Specifically, § 31-1031 provides:

> (1) The authorities granted by sections 31-1024 to 31-1031 [provisions for flood plain management by the Department of Water Resources] are intended to be exercised by the department only on an interim basis to prevent irreversible development of flood-prone areas prior to the initiation of an adequate local flood plain management program in accordance with section 31-1019 or sections 31-1020 and 31-1021. Such authorities are not intended to substitute for local flood plain management programs when sufficient flood hazard data and maps are available. The authority of the department over the flood plain of any watercourse or drainway identified in accordance with section 31-1025 or 31-1026 shall terminate immediately upon the effective date of an adequate local program which encompasses the same land area. For purposes of this section, *a local program shall be considered adequate if it entitles the local government to participate in the regular program of the national flood insurance program, or if the commission has reviewed the local program and has certified that it is consistent with the minimum standards adopted in accordance with subdivision (5) of section 31-1017*. . . .
>
> (2) The commission shall be responsible for monitoring the status of all local flood plain management programs . . . . .

(Emphasis supplied.) Section 31-1017, defining the powers and duties of the NRC, states that

> the commission shall be the official state agency for all matters pertaining to flood plain management. In carrying out that function, the commission shall have the power and authority to:
>
> . . . .
>
> (5) Prepare, adopt, and promulgate, by rule or

> regulation, minimum standards for local flood plain management regulation. . . . Such minimum standards shall be designed to protect human life, health, and property, and to preserve the capacity of the flood plain to discharge the waters of the base flood . . . . *If deemed necessary by the commission to adequately accomplish the purposes of sections 31-1001 to 31-1031, such standards may be more restrictive than those contained in the national flood insurance program standards, except that the commission shall not adopt standards which conflict with those of the national flood insurance program in such a way that compliance with both sets of standards is not possible.*

(Emphasis supplied.) The duties of local governments concerning flood plain management are set forth in § 31-1019, which provides in pertinent part:

> When the commission, a federal agency, or any other entity has provided a local government with sufficient data and maps with which to reasonably locate within its zoning jurisdiction any portion of the flood plain for the base flood of any watercourse or drainway, *it shall be the responsibility of such local government to adopt, administer, and enforce flood plain management regulations which meet or exceed the minimum standards adopted by the commission pursuant to subdivision (5) of section 31-1017.*

(Emphasis supplied.) By enacting these statutes, it is clear that the legislative purposes are to encourage local governments with flood-prone areas to implement effective flood plain management regulations and qualify for participation in federal flood insurance programs, and to require local governments to adopt local flood plain management regulations which meet the minimum criteria established by the NRC. Pursuant to § 31-1017, the NRC is required to establish, at a minimum, the standards adopted by FEMA.

In accordance with federal and state statutes, the City of Omaha has adopted local regulations for flood plain development. Omaha Mun. Code, ch. 55, art. V, §§ 55-111 to 55-123 (1982), set forth the city's flood plain regulations.

Section 55-113 states:

> It is the purpose of this article to promote the public health, safety and general welfare and to minimize losses by applying the provisions of this article to . . . (4) Assure that eligibility is maintained for property owners in the community to purchase flood insurance in the National Flood Insurance Program; (5) Comply with the Minimum Standards of the State of Nebraska Flood Plain Regulation Act.

Section 55-112 provides the following definitions:

> *Floodplain*: Those lands which are subject to a one (1) percent or greater chance of flooding in any given year. *The designated floodplain for this article shall be based on the areas of one hundred (100) year flood, or areas of special flood hazards, as shown on the flood hazard boundary map, flood boundary and floodway map or flood insurance rate map issued by the Federal Insurance Administration, Federal Emergency Management Agency*, and shall include Zone A and Zones A-1 through A-30.
>
> . . . .
>
> *Floodway*: The channel of a river [or] other watercourses and the adjacent lands [sic] areas that must be reserved in order to discharge the base flood without cumulatively increasing the water surface elevation more than one (1) foot. *The designated floodway for this article shall be based on those areas delineated on the flood boundary and floodway map issued by the Federal Insurance Administration, Federal Emergency Management Agency.*

(Emphasis supplied.) Thus, as mandated by state statute, the city has implemented local flood regulation and has adopted standards which meet the minimum criteria established by the NRC—the standards promulgated by FEMA. Accordingly, any changes of those standards by FEMA establish a new minimum threshold which the NRC and the city are required by law to meet. When FEMA approved the map amendments establishing a new floodway for the Big Papillion Creek adjacent to the Renstrom property, the city was obligated by

statute and local ordinance to adopt those changes. Further, even if the city did not act under compulsion of law, the city's adoption of FEMA's standards ensured its eligibility within the federal flood insurance program, a decision by the city we find within the proper exercise of the police power. We cannot say that the city acted in an arbitrary, capricious, or unreasonable manner by adopting FEMA's map amendments and issuing the permits to Midlands for construction in the old floodway and flood fringe.

The appellants contend that the scientific information used by FEMA for amending the map and changing the floodway was incorrect. We do not review the evidence in connection with this contention because under the supremacy clause this court has no power of review over a federal agency such as FEMA. Any opinion by this court over the validity of FEMA's action would be merely advisory. It is not the function of this court to render advisory opinions. *State v. Rust*, 223 Neb. 150, 388 N.W.2d 483 (1986), *cert. denied* 481 U.S. 1042, 107 S. Ct. 1987, 95 L. Ed. 2d 826 (1987). The appellants' proper avenue of judicial review, which the evidence indicates one of them has taken advantage of, lies with the federal courts. In addition, because this issue is being reviewed under this court's equity jurisdiction, the appellees urge dismissal of this issue, as the appellants have an adequate remedy at law in the federal courts. While noting that the appellants will only have an adequate remedy at law if the federal district court rules in their favor, we find, instead, that appellants have failed to meet their burden of proof to show by clear and satisfactory evidence that the city council's action in adopting the rezoning ordinance was arbitrary, capricious, or unreasonable. The appellants' second consolidated assignment of error lacks merit.

The last consolidated assignment of error is that the district court erred by not entering an injunction against Midlands preventing Midlands from filling in the flood plain and making modifications to the channel of the Big Papillion Creek.

> An action for injunction sounds in equity. [Citation omitted.] "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."

Federal Land Bank of Omaha v. Swanson, 231 Neb. 868, 870, 438 N.W.2d 765, 767 (1989).

"The flood plain of a stream is considered a part of the channel of such stream, and no one may obstruct the flow of floodwaters in the natural drainage to the detriment of another." *Kluck v. Mentzer*, 217 Neb. 8, 10, 347 N.W.2d 306, 308 (1984), citing *Bahm v. Raikes*, 160 Neb. 503, 70 N.W.2d 507 (1955). Because the appellants contend the scientific information used by FEMA was incorrect, their briefs concentrate on the allegedly improper information used by FEMA. Though this contention is irrelevant, the record does contain some evidence indicating that the project would increase water levels and velocity, causing increased flooding and erosion downstream. However, our review of the record indicates that the appellants have failed to establish by a preponderance of the evidence that the development would cause the flooding problems they allege. The record shows that prior development upstream of the development has interfered with the natural flow of the watercourse, significantly increasing the risk of downstream flooding regardless of the impact One Pacific Place may have.

Further, there was competent conflicting evidence on the impact the development would have on the Big Papillion Creek. The appellees' expert testified that the project would have no impact on downstream flooding and that if there was any impact on the velocities of the water, water velocity would actually decrease. Given the state of the evidence, we cannot say the trial judge was incorrect in ruling for the appellees, nor do we find that the appellants established by a preponderance of the evidence every controverted fact necessary to entitle them to

relief.

Accordingly, the decision of the district court for Douglas County denying appellants' request for relief is hereby affirmed.

AFFIRMED.

PATRICK J. STOLMEIER AND LAURA L. STOLMEIER, APPELLEES, V. JERRY C. BECK ET AL., APPELLANTS.

441 N.W.2d 888

Filed June 30, 1989. No. 87-679.

1. **Verdicts: Appeal and Error.** In determining the sufficiency of evidence to sustain a jury verdict, the evidence must be considered most favorably to the successful party and every controverted fact resolved in favor of that party. The successful party is entitled to the benefit of any inferences reasonably deducible from the evidence.
2. **Contracts: Corporations.** In the absence of a subsequent adoption by the corporation, a contract made by a promoter is not binding on the corporation; however, a contract made by a promoter for a corporation may be adopted by the corporation after it comes into existence.
3. _____: _____. An adoption of a contract may be by express corporate action, or it may be established by implication from the conduct of the corporation.
4. _____: _____. Where the corporation voluntarily accepts the benefits accruing to it from the engagement of its promoters, after full knowledge and having the opportunity to decline the same, it is to be regarded as adopting the contract.
5. **Agency: Proof.** An agency relationship cannot be proven through the acts, declarations, or conduct of the agent.
6. **Contracts: Principal and Agent.** Where a principal accepts the benefits of a contract executed for him by an agent, he is bound by agreements made by the agent to procure such contract. Affirmance of an agent's unauthorized transaction can be inferred from the principal's failure to repudiate it.
7. **Contracts: Ratification: Words and Phrases.** Ratification is the acceptance of a previously unauthorized contract and takes effect from the making of the contract, therefore presupposing the existence of a person on whose behalf the contract might have been made.
8. **Contracts: Ratification.** While ratification presupposes the existence of a person on whose behalf the contract might have been made at the time, an adoption may be made by a person who had no legal existence at the time the contract was made on his behalf.

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

Donald C. Hosford, Jr., of Crossman, Norris & Hosford, for appellants.

Patrick J. Stolmeier, of Law Office of Patrick J. Stolmeier, and Bruce Brodkey for appellees.

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

WHITE, J.

This action originated as a claim by the plaintiffs-appellees against the defendants-appellants for the return of funds invested with the appellants. A number of causes of action were alleged, but ultimately only the theory of breach of contract by the organization defendants was submitted to the jury. The jury returned a verdict of $20,000 against all organization defendants. The appellants contend the Douglas County District Court erred in overruling the motions of the defendants for a directed verdict or dismissal made at the end of plaintiffs' case and at the close of all the evidence, and in overruling their motion for judgment notwithstanding the verdict.

In determining the sufficiency of evidence to sustain a jury verdict, the evidence must be considered most favorably to the successful party and every controverted fact resolved in favor of that party. The successful party is entitled to the benefit of any inferences reasonably deducible from the evidence. A jury's verdict will not be disturbed unless it is clearly wrong. *Zwygart v. State*, 230 Neb. 128, 430 N.W.2d 301 (1988); *Maloney v. Kaminski*, 220 Neb. 55, 368 N.W.2d 447 (1985). In view of this standard of review, the record establishes the following facts.

In January and February 1983, Jerry C. Beck, one of the original defendants in this action and the brother-in-law of Laura L. Stolmeier, telephoned the Stolmeiers at their home in San Antonio, Texas. Beck represented that he had recently begun a business which consisted of investing in real estate. Beck stated that he was associated with a group of people in Omaha, Nebraska, who also participated in this investment enterprise. Beck asserted that he was the "day-to-day" manager

of a number of organizations that invested in dilapidated properties. The organizations would purchase the properties very inexpensively and then renovate them for profit. Beck assured the Stolmeiers that if they agreed to invest, their investment would double every 6 months.

In early 1983 the plaintiffs made their first $2,000 investment by sending a money order payable to Beck. Beck said that this money would be put through the organization into the various properties to assist in their renovation.

From April 1 through July 21, 1984, the plaintiffs invested an additional $18,000 into the organization by writing checks payable to Beck. The checks were deposited into a bank account at First Westside Bank in Omaha. At trial, it was established that checks were drawn on that account subsequent to the deposit of the Stolmeiers' investment. These checks were applied to real estate either owned or controlled by the defendant companies.

At the time of the initial investment, the principals of the companies were involved in the business of renovating real property for resale. From February through June 1983, during which time the majority of the plaintiffs' money was invested, the principals of the defendant companies executed documents creating either partnerships or a corporation for their business venture.

All of the defendants knew that the plaintiffs' money had been invested through Beck, who was admittedly the general manager of the real estate development scheme. In addition, the defendants knew that the money deposited by Beck into the First Westside Bank account was used to finance the operating account of the investment enterprise.

Because the plaintiffs' investment was not being applied to any one property, Patrick J. Stolmeier requested a guaranteed rate of return on the investment, and the parties entered into another agreement to that effect. As they had seen none of their investment returned as promised, on December 27, 1984, the Stolmeiers began demanding that the money they had invested be returned to them. This request was made to all the defendants. The money was not returned, and this suit ensued.

The theory of the plaintiffs is that the defendant Beck

contacted the Stolmeiers and represented himself as the managing partner of the organization defendants. Further, the Stolmeiers allege that in soliciting their investment, Beck was acting as an agent for those defendants. Because the named organization defendants include both a corporation and partnerships, the law applicable to each of these legal entities must be examined.

The organization defendants involved in this appeal are four partnerships and one corporation. The partnerships are R & R Enterprises, doing business as Group V Properties, and 5201 Partnership, both in existence at the time of the Stolmeiers' original investment; Essex Investments; and Beckmorr Properties. The latter two were formed subsequent to the original investment. Group V Management and Development Company is the corporate defendant. This corporation was formed after the Stolmeiers' initial investment was solicited by Beck.

In order to determine the law applicable to the various partnership and corporate defendants, a distinction must be made between the organizations on the basis of when they were formed. Our analysis will begin with the only corporate defendant in this case, Group V Management and Development.

The Stolmeiers predicate the liability of the corporation on the actions of Beck. The plaintiffs allege that Beck was an agent and subsequently an officer of the corporation, and therefore his acts are chargeable to the corporation. Group V Management and Development contends that the corporation cannot be liable for the actions of Beck as an agent, as the corporation was not in existence at the time of the actions of Beck and, therefore, there was no principal in existence for whom Beck could have been an agent. While it is true that no corporation was in existence at the time Beck arranged to have the Stolmeiers invest in the enterprise, by soliciting money on behalf of the corporation to be formed, Beck was acting as a promoter for the corporation. Although promoters of a corporation are not in any legal sense its agents before it comes into existence, a corporation can bind itself to the contracts made by promoters by taking, or failing to take, certain action.

In the absence of a subsequent adoption by the corporation, a contract made by a promoter is not binding on the corporation. *Kridelbaugh v. Aldrehn Theatres Co.*, 195 Iowa 147, 191 N.W. 803 (1923). See, also, 18 C.J.S *Corporations* § 122 (1939). However, a contract made by a promoter for a corporation may be adopted by the corporation after it comes into existence. *M'Arthur v. Times Printing Co.*, 48 Minn. 319, 51 N.W. 216 (1892); *Decker v. Juzwik*, 255 Iowa 358, 121 N.W.2d 652 (1963). This adoption may be by express corporate action, or it may be established by implication from the conduct of the corporation. Particularly pertinent to this action, where the corporation voluntarily accepts the benefits accruing to it from the engagement of its promoters, after full knowledge and having the opportunity to decline the same, it is to be regarded as adopting the contract. *Panich v. Curtis, Owen, Fuller Corporation*, 124 S.W.2d 619 (Mo. App. 1938).

In the present case, Group V Management and Development, through its officers, knew that Beck had obtained money from the Stolmeiers for use by the corporation in its business of renovating older buildings for investment purposes. The Stolmeiers adduced evidence that the money invested by them was placed in an account at First Westside Bank in Omaha and then was used by the corporation in operating its business. Through these actions, the corporation adopted the burdens and benefits of the contract made by Beck on behalf of the corporation, and is now properly held responsible for the breach of the agreement made by Beck on behalf of the corporation.

Of the four partnership defendants remaining, two were formally established after the solicitation by Beck. R & R Enterprises and 5201 Partnership were in existence at the time of the Stolmeiers' initial investment. The legal rules applicable to agency relationships also apply to partnerships. Neb. Rev. Stat. § 67-304(3) (Reissue 1986). Regarding the liability of R & R Enterprises and 5201 Partnership, an examination of agency law must be undertaken.

Defendant Beck represented himself as acting on behalf of an organization investing in real estate. He was requesting money from the Stolmeiers for investment in the various

partnerships. While it is true that an agency relationship cannot be proven through the acts, declarations, or conduct of the agent, *Wolfson Car Leasing Co., Inc. v. Weberg*, 200 Neb. 420, 264 N.W.2d 178 (1978), there was other evidence establishing the existence of an agency relationship, including the testimony of members of the organization. Further, the partnerships received the benefits of the contract entered into by Beck. At trial it was established that the money solicited from the Stolmeiers was used by the organization defendants in the renovation of their properties. Where a principal accepts the benefits of a contract executed for him by an agent, he is bound by agreements made by the agent to procure such contract. *Nye-Schneider-Fowler Grain Co. v. Hopkins*, 99 Neb. 244, 155 N.W. 1097 (1916). Further, affirmance of an agent's unauthorized transaction can be inferred from the principal's failure to repudiate it. *Bank of Valley v. Shunk*, 215 Neb. 25, 337 N.W.2d 118 (1983). In this case, Beck's guarantee to the Stolmeiers that they would receive a return on their investment is binding on the principals, R & R Enterprises and 5201 Partnership, as they knew of the money solicited from the Stolmeiers and utilized the funds in conducting their business. While there was no express ratification of the acts of Beck, when the other members of the partnerships were informed of Stolmeiers' dissatisfaction with the investment, no effort was made to repudiate the fact that Beck had the authority to solicit money on behalf of the partnerships. In fact, assurances were made to Patrick Stolmeier that the organization would see what it could do to return the money he invested. Therefore, both R & R Enterprises and 5201 Partnership are equally obligated to pay for the breach of the contract entered into on their behalf by Beck.

Two defendants in this action remain to be discussed, both of them partnerships not yet in existence at the time of the Stolmeiers' initial investment. An agent cannot represent partnerships or corporations which do not exist. Because these organizations were not in existence at the time of the transactions, it cannot be said that merely because they retained the benefits of the transactions entered into by Beck, they therefore ratified the actions of Beck. Ratification is the

acceptance of a previously unauthorized contract and takes effect from the making of such a contract. A ratification therefore presupposes the existence of a person on whose behalf the contract might have been made at the time. See *Clubb Testing Service, Inc. v. Singletary*, 395 S.W.2d 956 (Tex. Civ. App. 1965).

This fact, however, does not prevent our affirmance of the jury verdict. While a ratification presupposes the existence of a person on whose behalf the contract might have been made at the time, an adoption may be made by a person who had no legal existence at the time the contract was made on his behalf. 2A C.J.S. *Agency* § 64 (1972); *Eagle Motor Lines v. Hood*, 256 Ala. 395, 55 So. 2d 126 (1951); *M'Arthur v. Times Printing Co.*, 48 Minn. 319, 51 N.W. 216 (1892). The facts supporting an inference of an adoption in the case of the remaining partnerships are the same as those delineated in the section discussing the liability of the corporation for Beck's preincorporation actions. Because there is no error in the jury verdict from the district court, the judgment is affirmed.

AFFIRMED.

WILLIAM J. McCLELLAND AND DIXIE L. McCLELLAND, HUSBAND AND WIFE, APPELLEES, V. ZONING BOARD OF APPEALS OF OMAHA, NEBRASKA, ET AL., APPELLANTS.

441 N.W.2d 893

Filed June 30, 1989. No. 87-706.

Zoning: Appeal and Error. A zoning board of appeals is vested with discretion to dispose of matters within its province, but its acts are judicial in nature and are subject to review and reversal when they constitute an abuse of discretion and are arbitrary.

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

Herbert M. Fitle, Omaha City Attorney, and Allen L. Morrow for appellants.

James R. Place and Alan M. Thelen, of Breeling, Welling & Place, for appellees.

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

COADY, D.J.

The zoning board of appeals of Omaha (Board) appeals an order of the Douglas County District Court directing the Board to grant a variance for a structure constructed on property owned by William J. and Dixie L. McClelland. The Board claims the district court erred in substituting its own discretion for the Board's discretion. We affirm.

A zoning board of appeals is vested with discretion to dispose of matters within its province, but its acts are judicial in nature and are subject to review and reversal when they constitute an abuse of discretion and are arbitrary. *Alumni Control Board v. City of Lincoln*, 179 Neb. 194, 137 N.W.2d 800 (1965); *Peterson v. Vasak*, 162 Neb. 498, 76 N.W.2d 420 (1956).

In 1981, the McClellands contracted to have a house built in the Seville subdivision of Omaha, Nebraska. The house was to be custom built, with the contract specifying all entrances were to be at ground level. The contractor abandoned the project before the house was completed and left the five entrances unfinished, none of which conformed to the contract.

In December 1981, a city inspector gave final approval to the McClellands to move into the house, provided they complete the entrances. According to the McClellands, they showed the inspector plans for the deck to be added to the rear of the house. Between 1981 and 1986, the McClellands worked on finishing their house and correcting the mistakes of the contractor.

In 1986, they began construction of a deck on the north side of the house in their backyard. The deck was raised to the level of the entrances in the rear, 4 1/2 feet above the ground, with stairs on both the east and west sides of the deck. While they were working on the roof of the deck, the city planning department informed them a building permit was needed, and ordered them to cease work until they obtained a permit. The permit was denied, and the McClellands were ordered to dismantle the entire deck.

The McClellands appealed to the Board, seeking a variance. The Board held two hearings, and at the close of the second hearing, the Board approved the variance for the deck, but ordered the McClellands to remove the roof and supporting beams and the stairs on the east side of the deck. The Board also ordered the McClellands to landscape their backyard in conformity with one of the landscaping plans they presented.

The McClellands appealed to the Douglas County District Court, pursuant to Neb. Rev. Stat. §§ 14-413 and 14-414 (Reissue 1987). The court reversed the Board's denial and ordered the Board to issue the variance for the stairs and the roof.

The sections of the Omaha Municipal Code applicable to residential districts were admitted into evidence at the district court. Omaha Mun. Code, ch. 55, art. IX, § 55-196 (1959) requires a setback of 25 feet for rear yards. Omaha Mun. Code, ch. 55, art. XXXVIII, § 55-750 (1981) requires a setback for all corner lots (such at the McClellands' property) of 17½ feet (one-half the setback required for front yards, which is 35 feet, Omaha Mun. Code, ch. 55, art. IX, § 55-194 (1959)).

The deck structure measures 17 feet 4 inches by 19 feet 6 inches and is set back approximately 14 feet from the north property line. The stairs are set back roughly 20 feet from the east property line. This structure clearly violates the ordinances of Omaha.

We find the Board's action in granting the variance for the deck, but ordering the roof and east stairs to be removed, was arbitrary. The evidence clearly shows this is one complete structure, all of which violated the setback and building permit requirements. Removal of the stairs and roof will not cure the violations. Once the Board allowed the variance of the setback requirements, it could not arbitrarily determine what portions of the structure the variance applied to.

We find the district court correctly ordered the Board to issue the variance requested by William and Dixie McClelland.

AFFIRMED.

JOYCE MCCULLOUGH, AS MOTHER AND NEXT FRIEND OF JAMIE MCCULLOUGH, A MINOR CHILD, APPELLANT, V. RICHARD BOZARTH AND SHERON BOZARTH, APPELLEES.

442 N.W.2d 201

Filed June 30, 1989. No. 87-954.

1. **Summary Judgment.** Summary judgment is an extreme remedy and should be awarded only when an issue is clear beyond all doubt.
2. _____. A summary judgment is properly granted when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue concerning any material fact or the ultimate inferences deducible from such fact or facts and that the moving party is entitled to judgment as a matter of law.
3. **Summary Judgment: Appeal and Error.** In reviewing an order granting a summary judgment, this court must take the view of the evidence most favorable to the party against whom it operates and give that party the benefit of all favorable inferences which may be drawn from the evidence.
4. **Animals: Strict Liability: Proof.** By statute in Nebraska, a dog's *owner* is strictly liable for injuries inflicted by the dog, without any proof that the owner knew of the dog's dangerous propensities.
5. **Animals: Landlord and Tenant: Liability: Negligence.** As a general rule, a landlord is liable for injuries caused by the attack of a tenant's dog only where the landlord had actual knowledge of the dangerous propensities of the dog and where the landlord, having that knowledge, nevertheless leased the premises to the dog's owner or, by the terms of the lease, had the power to control the harboring of a dog by the tenant and neglected to exercise that power.
6. **Summary Judgment.** Where the moving party on a motion for summary judgment shows that if the evidence were uncontroverted at trial such party would be entitled to judgment as a matter of law, that showing shifts the burden of producing evidence as to a factual issue to the party opposing the motion. Failure of the party against whom the motion has been made to meet that burden will result in summary judgment.

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

Thomas C. Lauritsen and Thomas M. Houston, of Andersen, Berkshire, Lauritsen & Brower, for appellant.

Richard C. Gordon and Susan Andersen Anderson, of Walentine, O'Toole, McQuillan & Gordon, for appellees.

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

HASTINGS, C.J.

Joyce McCullough, mother and next friend of Jamie McCullough, a minor, brought this action against defendants-appellees, Richard and Sheron Bozarth, for injuries suffered by Jamie as the result of a dogbite which he sustained on March 20, 1985. At that time Jamie was approximately 7 years of age. Plaintiff alleged negligence and strict liability on the part of the defendants as owners and landlords of a residential property in failing to require the tenants to remove the dog, a pit bull terrier, after acquiring knowledge of the dog's vicious propensities; in failing to evict the tenants after acquiring such knowledge; and in failing to require the tenants to confine the dog in a secure place.

The district court sustained the defendants' motion for summary judgment and dismissed plaintiff's action. Plaintiff has appealed, alleging as error that there were disputed issues of fact as to (1) whether the dog was purchased as a pet or as a guard dog, (2) whether the tenants' house was used for the benefit of the defendants' adjacent business, (3) whether defendants had actual knowledge that a dangerous condition existed on the premises, (4) whether defendants had knowledge of the vicious propensities of a pit bull dog, (5) whether defendants had control over the pit bull dog and/or the premises, and (6) whether plaintiff had a cause of action against a landlord who failed to remedy a dangerous condition on the premises or who allowed it to continue. We affirm.

Summary judgment is an extreme remedy and should be awarded only when an issue is clear beyond all doubt. *Schroer v. Synowiecki*, 231 Neb. 168, 435 N.W.2d 875 (1989).

A summary judgment is properly granted when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue concerning any material fact or the ultimate inferences deducible from such fact or facts and that the moving party is entitled to judgment as a matter of law. *Hall v. Phillips*, 231 Neb. 269, 436 N.W.2d 139 (1989).

In reviewing an order granting a summary judgment, this court must take the view of the evidence most favorable to the party against whom it operates and give that party the benefit

of all favorable inferences which may be drawn from the evidence. *Pioneer Animal Clinic v. Garry*, 231 Neb. 349, 436 N.W.2d 184 (1989).

The defendants are husband and wife and are the owners of a house at 6612 North 60th Street in Omaha. Their daughter, Lynn Snoza, and her husband, Don, were living in the house and renting it from the defendants. Apparently, there was a written lease for 12 months at a time, but a copy of the lease was not in evidence. The rental was $450 per month.

The defendant Richard Bozarth is a self-employed mechanic, and he worked in a garage beneath another house on the premises, approximately 50 feet from the house leased by the Snozas. Occasionally, although not on a regular basis, the defendant had his business calls forwarded to the Snoza residence. Also occasionally, the defendant's business customers would drop off or pick up their keys at the Snozas', and on rare occasions, customers would pay their bills at the Snozas'. However, neither of the Snozas worked for the defendant's business.

The Snozas obtained a pit bull terrier in early spring 1984. The defendant would see the dog on a near-daily basis when he would visit his daughter in the morning upon coming to work. It was his understanding that Don Snoza bought the dog as a pet for his children.

Deposition testimony disclosed that the Snozas' main concern upon purchasing the dog was whether it would make a suitable house pet, and there was no intention to use it as a watchdog. However, Harry McCullough, who is Jamie's father and was a "best friend" of Don Snoza's, in his deposition stated Snoza had told him that because of the neighborhood, he wanted a dog that could protect his family. There is no indication that the defendants knew of this statement.

On March 20, 1985, Harry McCullough and Jamie were visiting at the Snozas' after Jamie and two of the Snoza children had been flying kites together. Jamie, Lynn Snoza, and the Snoza children went inside the Snoza house to get a drink of water. The dog was penned up in the "mud room," with a retractable child's gate and two folding chairs to keep it in. The purpose of this arrangement, according to the Snozas, was to

keep the dog from coming out in the living room and sleeping on the couch. The dog got loose from the mud room, ran toward Jamie, and bit him on the hand and face.

Richard Bozarth testified by deposition that he had never seen the dog snarl or growl and that before the biting incident, "there was not hint of any kind of a mean or vicious action from that dog." He also testified that on many occasions the dog would come down to his garage. He was not aware of any reputation of pit bull dogs. The only evidence of any nature as to the dangerous propensities of the pit bull terrier breed was an excerpt from a newspaper article published on March 17, 1986, almost 1 year after this incident.

Lynn Snoza stated that although the dog occasionally barked, she had never seen it growl or bother anybody. She also stated that before the biting incident, she was not aware of any vicious propensities of the pit bull breed, nor had she ever discussed pit bulls or her dog in particular with her father before the biting incident. She admitted that she had placed a sign on the back door, which she herself had made, stating, "Beware of Dog; Use Front Door." She also agreed that her father had seen the sign and asked about it, and she told him she was tired of people coming to the back door and opening the door, allowing the dog to get out, so that she would have to go retrieve it.

In Don Snoza's deposition he stated that when he bought the dog, he asked the seller if the dog would be vicious, and he was assured that if he "treat[ed] it with respect," it would be a docile house dog. He did not discuss the pit bull breed per se with the seller, nor did he ever discuss pit bulls with Richard Bozarth. He said that until the biting incident, the dog was a "lap dog," a "[v]ery calm animal" that never growled or barked in a menacing manner.

However, Harry McCullough stated by deposition that Don Snoza had related an incident to him in which the dog had gotten loose and scared a little girl in the neighborhood. However, the record contains no details of that incident, what the dog did, or what the little girl did. McCullough did agree that he had had contact with the dog before, when, as he said, "the dog figured you were there to pet it, because it would just

come up and just light on your leg. It would sit on your foot. You know, this dog wanted to be petted, and until you did that, this dog wasn't going to give up." In answer to a question as to whether he would call the dog a friendly dog, he answered, "If you know the dog and it knew you, yeah."

The record is not entirely clear as to whether and under what circumstances the dog was kept on a chain. Richard Bozarth himself stated that the dog was allowed to run loose, although when it was first being trained to stay in its own yard, it was tethered by a 1/4-inch chain. Don Snoza conceded that when it was outside it was usually chained to a post with a 1/4-inch chain. Harry McCullough testified in his deposition that when the dog was outside on its chain, it would bark and lunge at anyone who knocked on the Snozas' back door.

There was absolutely nothing in the record about the terms of the lease between the defendants and their daughter and son-in-law regarding whether permission was required of the landlord to permit the tenant to harbor a dog, whether there was any right on the part of the landlord to evict the tenants if they did keep a dog, or any other rights or obligations on the part of either party to the lease agreement other than the payment of rent. However, the dog was purchased after the beginning of the original lease period.

Neb. Rev. Stat. § 54-601 (Reissue 1988) provides that "the owner or owners of any dog or dogs shall be liable for any and all damages that may accrue (1) to any person, other than a trespasser, by reason of having been bitten by any such dog or dogs . . . ." The dog's *owner* is thus strictly liable for injuries inflicted by the dog, without any proof that the owner knew of the dog's dangerous propensities. See *Paulsen v. Courtney*, 202 Neb. 791, 277 N.W.2d 233 (1979).

However, this action is not against the dog owner, but against the owners of the leased property, and the statute providing for strict liability does not apply. In *Parr v. Head*, 442 So. 2d 1234 (La. App. 1983), the court considered whether the statutory strict liability of the dog owner could "attach" to the landlord, and concluded that it could not. The court reasoned that while the owner of the dog derives some use or pleasure from the animal and should thus bear the risk of loss created by the

ownership of the dog, the landlord derives no such benefit from the existence of the risk. That court did not rule out the possibility of a negligence action against the landlord, however.

Because this issue has never been considered in Nebraska, it is necessary to examine the decisions of other states.

The New York courts have considered several cases in which the plaintiff sought to have liability placed on the landlord. One of the first of these cases was *Siegel v. 1536-46 St. John's Place Corp.*, 184 Misc. 1053, 57 N.Y.S.2d 473 (1945), in which the plaintiff was bitten by a dog in a common stairway in the main hall of the defendant's apartment building. The court emphasized that the landlord had prior notice of the dog's presence and its trend toward viciousness and possessed the power to expel the dog and its owner. That case is distinguishable, however, because the landlord's liability was premised upon his continuing duty to keep the common ways of the property in a reasonably safe condition. See, also, *Linebaugh By and Through Linebaugh v. Hyndman*, 213 N.J. Super. 117, 516 A.2d 638 (1986), in which the New Jersey court held that where the plaintiff was bitten by a tenant's dog while playing in a common area shared by the tenants of the defendants' house, the landlords could be held liable, and thus the summary judgment in their favor was improper. However, again the defendants were aware of the dog and its vicious propensities and thus, the court held, harm to a third person was foreseeable.

In *Strunk v. Zoltanski*, 62 N.Y.2d 572, 468 N.E.2d 13, 479 N.Y.S.2d 175 (1984), the landlord, who knew of the vicious dog *prior* to entering into the lease agreement, was found to have created the foreseeable risk of harm to another. The court announced the following rule:

> A landlord who, with knowledge that a prospective tenant has a vicious dog which will be kept on the premises, nonetheless leases the premises to such tenant without taking reasonable measures, by pertinent provisions in the lease or otherwise, to protect persons who might be on the premises from being attacked by the dog may be held liable to a person who while thereafter on the premises is bitten by the dog.

Id. at 573-74, 468 N.E.2d at 14, 479 N.Y.S.2d at 176. Again, that case may be distinguished on the facts.

Two recent New York cases reiterated the factors which the New York courts have found necessary to impose liability on the landlord. In *Meyers v. Haskins*, 140 A.D.2d 923, 528 N.Y.S.2d 738 (1988), the court stated in effect that to establish liability, it must be shown that the landlord knew of the dangerous animal's presence and had control of the premises or other capability to remove or confine the animal.

In *Cronin v. Chrosniak,* 145 A.D.2d 905, 536 N.Y.S.2d 287 (1988), another case involving a pit bull, the court stated the rule that "[a] landlord not in possession of the premises is usually not liable for injuries inflicted by an animal owned or harbored by a tenant . . . ." *Id.* at 905-06, 536 N.Y.S.2d at 287, citing *Zwinge v. Love,* 37 A.D.2d 874, 325 N.Y.S.2d 107 (1971), and *Georgianna v. Gizzy,* 126 Misc. 2d 766, 483 N.Y.S.2d 892 (1984). However, the court went on to cite the rule set forth in *Strunk v. Zoltanski, supra*, that if during the term of the leasehold a landlord becomes aware of the fact that his tenant is harboring an animal with vicious propensities, he owes a duty to protect third persons from injury *if he had control of the premises or other capability to remove or confine the animal.*

In *Vigil by and through Vigil v. Payne*, 725 P.2d 1155 (Colo. App. 1986), the Colorado court also followed *Strunk v. Zoltanski, supra*, in allowing recovery for an attack against the 6-year-old plaintiff by two Chow dogs owned by the defendants' lessees. The landlords knew of the dogs' presence and of their vicious propensities before entering into the rental agreement. The court held that this prior knowledge was sufficient to establish a duty of care on their part.

> We therefore adopt the rule that where, as here, a landlord has actual knowledge that a tenant owns an animal whose vicious actions have created a clear potential for injury, the landlord has a duty to take reasonable precautions to protect third persons from the animal. However, we specifically limit that duty of care to those instances in which the landlord has actual knowledge of the vicious actions of the animal before entering into a rental agreement with the animal's owner and nevertheless

> subsequently performs the affirmative act of entering into a rental agreement with the animal's owner.

725 P.2d at 1157.

The Florida courts have on several occasions considered the issue of the landlord's liability in such cases. In *Christie v. Anchorage Yacht Haven, Inc.*, 287 So. 2d 359 (Fla. App. 1973), the plaintiff was thrown from his bicycle when attacked by a large German shepherd, which was kept on the premises owned by the defendant corporation. The cyclist was traveling on a path which persons used regularly and with the owner's implied permission. The court held that the directed verdict in the corporation's favor should not have been granted, as it was possible for the jury to find that the corporation had negligently failed to warn the cyclist of a known dangerous condition on the property. But see, *O'Steen v. Kemmerer*, 344 So. 2d 313 (Fla. App. 1977) (in which the court refused to extend *Christie* to a situation in which the plaintiff was injured on her own property by wild animals kept on the landowner's adjacent property by his employee, absent any interest in or use of the animals by the landowner); *Allen v. Enslow*, 423 So. 2d 616 (Fla. App. 1982) (in which the court refused to extend *Christie* to hold a landlord liable to one injured on the street by a tenant's dog).

In *Anderson v. Walthal*, 468 So. 2d 291 (Fla. App. 1985), the court held that under the particular facts of the case, the defendant did not need to have actual knowledge of the dog to be held liable. However, that case is distinguishable from the instant case on the facts. There, the defendant owned an industrial park, which the plaintiff had entered to inquire about leasing a miniwarehouse for storage. The plaintiff was attacked by a pit bull owned by one of the defendant's tenants. The court found that if the jury concluded that the agent and manager of the business, to whom the defendant delegated authority for the day-to-day operations of the business, had actual knowledge of the dog and its vicious propensities, this knowledge could be imputed to the defendant under agency principles.

Vasques by and through Rocha v. Lopez, 509 So. 2d 1241 (Fla. App. 1987), reversed the granting of a directed verdict for the landlord under facts similar to the instant case, that is,

children of the landlord occupied the premises under a lease from the owners. The plaintiff, a child, was attacked by a pit bull owned by the tenants. The landlord's sister collected rent twice a month and the landlord himself visited the premises at least twice a year. From this, the plaintiff relied on *Ward v. Young*, 504 So. 2d 528 (Fla. App. 1987), *Anderson v. Walthal, supra*, and *Strunk v. Zoltanski*, 96 A.D.2d 1074, 466 N.Y.S.2d 716 (1983), *aff'd* 62 N.Y.2d 572, 468 N.E.2d 13, 479 N.Y.S.2d 175 (1984), in asserting that because the jury could infer *actual* knowledge by the landlord and *control* over the premises, the directed verdict for the landlord was improper.

The *Vasques* court relied in part on *Uccello v. Laudenslayer*, 44 Cal. App. 3d 504, 118 Cal. Rptr. 741 (1975), in which the California court was presented with a question of first impression which it answered in the same way as the New York, Colorado, and Florida courts did: "We hold that a duty of care arises when the landlord has *actual knowledge* of the presence of the dangerous animal and when he has the *right to remove the animal by retaking possession of the premises*." (Emphasis supplied). *Id.* at 507, 118 Cal. Rptr. at 743.

The California court concentrated its analysis on the fact that the landlord had the power to eliminate the dangerous condition and prevent the injury. Where the landlord is made aware of the presence of a dangerous animal on the premises, he has a duty to act: "To permit a landlord in such a situation to sit idly by in the face of the known danger to others must be deemed socially and legally unacceptable." *Id.* at 512, 118 Cal. Rptr. at 746. Such power is manifested by the landlord's right to terminate the tenancy and take possession of the premises unless the tenant gets rid of the dog.

The court also emphasized that the duty of care will not be imposed on the landlord unless it is proved that he knew of the dog and its dangerous propensities. Moreover, this knowledge must take the form of actual knowledge, not mere constructive knowledge. In a footnote, the court explained that actual knowledge may be shown by direct or circumstantial evidence which is not based on speculation or conjecture. "Only where the circumstances are such that the defendant 'must have known' and not 'should have known' will an inference of actual

knowledge be permitted." *Id.* at 514 n.4, 118 Cal. Rptr. at 748 n.4.

Two cases relied on extensively by the plaintiff in her brief can be distinguished by their facts. In *Alaskan Village, Inc. v. Smalley*, 720 P.2d 945 (Alaska 1986), the court found the corporate owner of a trailer park liable when its tenant's pit bulls mauled the plaintiff. However, the court's finding of liability was specifically grounded on the defendant's failure to enforce the park's rules, by which the defendant had undertaken to control vicious dogs in the trailer park by inserting a provision in the lease prohibiting tenants from keeping vicious dogs.

Arrington Funeral Home v. Taylor, 474 S.W.2d 299 (Tex. Civ. App. 1971), while somewhat similar to the present case, is still distinguishable on its facts. The plaintiff sued the operator of a funeral home when she was bitten by a dog owned by the defendant's employee. The court held that the defendant could be held liable for the injuries because the defendant had the right to control the use of the premises. The house in which the employee lived was connected to the funeral home. The house, including all appliances and furniture, was furnished to the employee as part of his salary, and the utilities were paid by the defendant. The employee received his mail through the funeral home's main office, and the phones in the funeral home and the house rang simultaneously so that the employee could answer the phone at the house when he was on duty. Under these circumstances, the court concluded that the relationship between the funeral home and the employee constituted more than a typical landlord-tenant relationship.

> We hold that a corporation is liable to a person injured by a vicious dog on premises owned, controlled and partially used in the furtherance of the business of the corporation, where the corporation has given its permission and consent to its employee to keep and harbor the dog on such premises.

Id. at 302.

In New York, which has recognized a common-law cause of action against the landlord who knows of the dangerous animal's presence and has the right to control the premises, see

Strunk v. Zoltanski, 62 N.Y.2d 572, 468 N.E.2d 13, 479 N.Y.S.2d 175 (1984), an appellate division court affirmed a summary judgment dismissing the complaint against a landlord who had never exercised control over the tenant's dog and was unaware of the animal's presence on the property. *Payne v. Pavese*, 98 A.D.2d 879, 470 N.Y.S.2d 860 (1983).

In *Georgianna v. Gizzy*, 126 Misc. 2d 766, 483 N.Y.S.2d 892 (1984), the court held that summary judgment was proper where the landlords had no actual knowledge of the vicious propensities of the dog. Similarly, in *Rico v. Cleary*, 126 A.D.2d 714, 511 N.Y.S.2d 126 (1987), the court held that since the defendant landlord had no prior knowledge of the dog's vicious propensities, summary judgment in favor of the defendant was proper.

The Washington Court of Appeals did not reach the issue of whether the landlords had the right to retake possession of the premises or remove the animal in *Shafer v. Beyers*, 26 Wash. App. 442, 613 P.2d 554 (1980), in view of its finding that the landlords did not know that the dog had vicious propensities.

In a recent case from Illinois, the court also concluded that dogs are presumed tame and docile, and to sustain a cause of action against the landlord, the plaintiff must affirmatively prove that the landlord knew that the dog in question was otherwise. See *Lucas v. Kriska*, 168 Ill. App. 3d 317, 522 N.E.2d 736 (1988).

In *Szkodzinski v Griffin*, 171 Mich. App. 711, 431 N.W.2d 51 (1988), the 6-year-old plaintiff was bitten when an akita dog owned by the defendant's residential tenant attacked him when he entered the premises to retrieve his ball. The court first noted that the statute providing strict liability for the owner of the dog was inapplicable to the landlord. The court then cited *Strunk v. Zoltanski, supra*, in observing that the defendant landlord could be held liable on a common-law theory, but only if he knew of the dog's vicious nature.

We hold that as a general rule, a landlord is liable for injuries caused by the attack of a tenant's dog only where the landlord had actual knowledge of the dangerous propensities of the dog and where the landlord, having that knowledge, nevertheless leased the premises to the dog's owner or, by the terms of the

lease, had the power to control the harboring of a dog by the tenant and neglected to exercise that power.

In the instant case, the landlord defendants deny that they knew of the dangerous propensities of the particular dog or breed of dog, and the plaintiff has failed to dispute this fact. Where the moving party shows that if the evidence were uncontroverted at trial such party would be entitled to judgment as a matter of law, that showing shifts the burden of producing evidence as to a factual issue to the party opposing the motion. Failure of the party against whom the motion has been made to meet that burden will result in summary judgment. *Reifschneider v. Nebraska Methodist Hosp.*, 222 Neb. 782, 387 N.W.2d 486 (1986).

Additionally, the plaintiff has failed to allege that the defendants had sufficient control over the premises so as to have been able to require the removal of the dog from the premises. Therefore, that issue is not presented for determination.

There is no genuine issue concerning any material fact or the ultimate inferences deducible from such fact or facts, and the defendants were entitled to judgment as a matter of law. The judgment of the district court is affirmed.

AFFIRMED.

FAHRNBRUCH, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. PHILLIP E. BOWEN, APPELLANT.

442 N.W.2d 209

Filed June 30, 1989. No. 88-736.

1. **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 determining a court's ruling as a 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.
2. **Constitutional Law: Search and Seizure: Arrests: Police Officers and Sheriffs.** The 4th amendment to the U.S. Constitution, made applicable to the States by the 14th amendment, prohibits the police from making a warrantless and

nonconsensual entry into a suspect's home in order to make a routine felony arrest.

3. **Search and Seizure: Police Officers and Sheriffs.** A warrantless search of a house may be justified when the police have obtained the consent to search from a party who possessed common authority over, or other sufficient relationship to, the premises sought to be inspected.
4. **Search and Seizure.** The determination of whether a consent to search is voluntarily given is a question of fact, and voluntariness is to be determined from the totality of the circumstances.
5. **Convictions: Appeal and Error.** In reviewing 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.

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

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

Robert M. Spire, Attorney General, and Kenneth W. Payne for appellee.

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

GRANT, J.

Defendant-appellant, Phillip E. Bowen, was convicted by a jury in the district court for Douglas County of murder in the first degree and use of a firearm to commit a felony, in violation of Neb. Rev. Stat. §§ 28-303(2) and 28-1205(1) (Reissue 1985). He was sentenced to life imprisonment on the murder charge and to a consecutive term of 1 to 6 years' imprisonment on the weapons charge.

Defendant timely appealed to this court, alleging the district court erred in overruling his motions to suppress physical evidence and statements and allowing said evidence to be admitted at trial. Defendant further contends that the evidence was insufficient, as a matter of law, to sustain his convictions. We affirm.

The record shows the following. The elderly victim, Mary Jirsak, owned and operated Jirsak's Confectionery, a candy

store located at 1418 South 13th Street in Omaha. Jirsak also resided at this address.

On February 18, 1988, at approximately 9:15 a.m., Jirsak was talking on the telephone with her sister, Rose Kojdecki. During their conversation, Jirsak asked Kojdecki to "hold on" because Jirsak had a customer. A few seconds later, Kojdecki heard Jirsak scream loudly and say, "Get out of here. I don't have any money." Kojdecki hung up the telephone and called 911.

Edward Mobley, who operated the welding shop next door to Jirsak's Confectionery, testified that he went to work shortly after 9 a.m. on February 18. As Mobley was walking north on 13th Street, he heard a scream and something that sounded like a "pop." As Mobley continued walking, he saw two men leave the candy store. Both men appeared fairly young, about 18 to 20 years old. One had "long, blondish, . . . scraggly hair." The other was wearing an orange stocking cap with eyeholes, which covered most of his face. As he walked past the two men, Mobley noticed that the man wearing the stocking cap was carrying a "Luger-type" handgun against his chest. Mobley realized something had happened and went into his shop and called 911. He then went to Jirsak's Confectionery and saw the victim lying on the floor.

Police officers were dispatched to the scene at 9:31 a.m. and discovered Jirsak's body lying in the doorway of the candy store. An ambulance was summoned. There was a large amount of blood under her head, and a shell casing was discovered just inches from the body. It was later determined that Jirsak died from a single gunshot wound to her head.

During the course of their investigation, the officers searched the candy store and discovered a chair that had been knocked over and the contents of Jirsak's purse scattered on the floor. The officers also discovered some dimes, an envelope that was ripped open, and a piece of a dollar bill on the floor behind a counter. Jirsak's telephone was off the hook.

While the officers were conducting their investigation, Mack Riggs, a 17-year-old neighbor, heard about the shooting and went to Jirsak's Confectionery about 11:30 a.m. After he found out how many men were involved in the shooting and that a

.22-caliber weapon had been used, Riggs told Officer Paul Briese that he thought he knew who did it. Riggs then told Briese that 2 weeks prior, defendant had telephoned and asked if Riggs wanted to help defendant rob the candy store. Riggs testified that he had subsequent telephone conversations with defendant and Christopher Bazer 2 days prior to the shooting.

Riggs agreed to show police officers two places where defendant and Bazer might be staying, and then went with the officers in a police cruiser. Based on Riggs' information, the officers first went to defendant's mother's house at 3006 South 17th Street in Omaha, but no one was home. The officers then went to 6708 Pacific Street in Omaha, the home of defendant's sister, Vicki Strunk.

The officers, who did not have an arrest warrant or a search warrant, arrived at Strunk's house at 12:10 p.m. Officers Sklenar and Lenker went to the front door of the house, while Officers Wilson and Ivener went to the back. Sklenar knocked on the front door. Strunk answered and gave permission for the officers to enter the house. When Sklenar asked if defendant was there, Strunk said he was and pointed to the kitchen, where defendant was talking on the telephone. Defendant was placed under arrest.

While Ivener was standing outside the back door of Strunk's house, he saw three or four persons, including one individual who matched Bazer's description, go down to the basement. Ivener then saw all these individuals come back upstairs. At this time, defendant's uncle, Larry Bowen, saw Ivener standing at the back door. Larry Bowen told Ivener that defendant and Bazer were in the house, and Ivener entered the house through the back door. He and another officer went into the basement to search for Bazer, but did not find him. Officers Sklenar, Ivener, Lenker, and Wilson then obtained permission from Strunk to search the house for Bazer. They eventually found Bazer hiding in the rafters of the house.

Officer Briese arrived at the Strunk residence 5 to 7 minutes after Sklenar and entered the house through the back door. Larry Bowen summoned Briese to the basement and directed him to the east wall. Larry Bowen directed Briese's attention to a .22-caliber Luger-type weapon lying on a blue foam mattress

and told Briese that the weapon had been covered up by a yellow blanket.

Briese followed Larry Bowen back upstairs and, at 12:27 p.m., advised Sklenar of the location of the gun. Sklenar testified that while Briese was in the basement, Sklenar had been filling out a permission to search form. The form was executed by Vicki Strunk at 12:25 p.m. and authorized Officers Sklenar, Lenker, Briese, Wilson, and Ivener to search her residence at 6708 Pacific.

Defendant was taken to police headquarters and advised of his *Miranda* rights. He waived his *Miranda* rights and agreed to talk to Officers Wilson and Lenker about the Jirsak homicide. The questioning began at 2:25 p.m. Defendant told the officers that Bazer had come to Strunk's residence several days before the homicide and that Bazer had a .22-caliber automatic nine-shot handgun on that occasion.

Defendant also stated that on the night of February 17, 1988, he and Bazer talked about robbing a bar in North Omaha. Defendant and Bazer stayed at the Strunk residence on the night of February 17. The next morning, Bazer wanted to see an individual named "Tim" to get $1,500 from a drug transaction "ripoff" in which Bazer and Tim had been involved. Defendant and Bazer called defendant's brother-in-law, Dale Demont, to give them a ride.

Demont picked up defendant and Bazer at 9 a.m. at Strunk's home. When defendant, Bazer, and Demont left the house, defendant was wearing a red and orange stocking cap. Defendant told the officers that they first went to defendant's mother's residence so that defendant could borrow some money from his mother. Defendant then said he wanted to "pick a bone" with Riggs, who had turned defendant in a few days before on a burglary charge in Sarpy County. They drove by Riggs' house but did not stop because Riggs' car was not there.

Defendant then said he wanted to get some candy, so Demont dropped defendant and Bazer off at Jirsak's Confectionery. Defendant stated that Bazer then announced his intent to rob the old lady in the candy store and that defendant tried to talk Bazer out of committing the robbery.

Defendant stated that when he and Bazer walked into the

candy store, Jirsak was on the telephone in the back room. Jirsak came to the front of the store, and defendant purchased some licorice and pop. After defendant paid for these items, Jirsak went to the back room to get the pop. Defendant stayed at the front of the store, but Bazer followed Jirsak to the back. Defendant told the officers he saw Bazer pull out a gun and ask Jirsak for money. Defendant stated that he then realized what Bazer was doing and pulled the stocking cap down over his face to avoid being recognized in the store. He saw Bazer empty Jirsak's purse out onto the floor.

Defendant then saw Bazer take some change from the cash register. He stated that when Jirsak screamed and tried to get out the door, Bazer grabbed her from behind. At this point, defendant ran out the door and started to run south on 13th Street. He heard a gunshot report when he was several steps south of the door.

Demont drove Bazer and defendant back to Strunk's house. Defendant informed the officers that inside the car Bazer showed that he had taken approximately $6 in change and $20 in currency.

After making the foregoing statements to Wilson and Lenker, defendant was readvised of his *Miranda* rights and agreed to give a taped statement at police headquarters. The taped statement began at 2:56 p.m. and is substantially similar to defendant's untaped statements to Wilson and Lenker. This tape was admitted into evidence and played for the jury.

Demont testified that defendant telephoned him at 8:30 on the morning of February 18, 1988, and said he needed a ride somewhere. Demont picked up defendant and Bazer at Strunk's house. Defendant was wearing an orange hat. When Demont asked defendant and Bazer where they were going, they told him to "[h]ead down towards 13th Street." While they were in the car, defendant and Bazer informed Demont that they were going to commit a robbery. Defendant showed Demont where to drop them off, and told Demont to park on 15th Street and wait. Demont waited on 15th Street for 10 to 15 minutes, drove around the block, and eventually picked up defendant and Bazer. Bazer sat in the front seat, pulled out a gun, and laid it on the seat. Demont testified that Bazer also pulled out an

envelope of money. Defendant, who was sitting in the middle of the back seat, indicated that he got some change out of the register and showed Bazer and Demont a handful of change. The three men returned to Strunk's house.

Vicki Strunk testified that Bazer woke her up at 11 a.m. on the day in question and told her he had shot Jirsak. When Strunk said she did not believe him, Bazer told her to watch the news. Vicki Strunk's estranged husband, Gary Strunk, also was at the house when Bazer and defendant returned. Gary Strunk testified that Bazer appeared nervous, told him to watch the 12 o'clock news, and then went to the basement.

Vicki Strunk further testified that after she and Gary Strunk watched the noon news, they went downstairs to wake up defendant and Bazer. She told Larry Bowen to tell Bazer to get the gun out of the house and to leave. This discussion took place 1 or 2 minutes before the police arrived.

In his "Motion to Suppress the Defendant's Confession," defendant alleged that his taped statement made to Officers Lenker and Wilson on the afternoon of February 18, 1988, was inadmissible because it was coerced. In his motion to suppress "any and all items" of physical evidence, defendant challenged the warrantless search of the residence at 6708 Pacific Street, alleging that there was no probable cause to search the residence, that the information provided by Larry Bowen was not reliable, and that Vicki Strunk's consent to search was not voluntary. Defendant further alleged in his motion to suppress physical evidence that the warrantless "search, seizure and subsequent arrest of the Defendant lacked probable cause" and was not justified by exigent circumstances.

Defendant first contends the district court erred in failing to suppress his taped statement of February 18, 1988, and all physical evidence, including the murder weapon, seized at 6708 Pacific Street, because this evidence was obtained pursuant to an illegal warrantless search prohibited under the holding of *Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980).

Throughout the trial, defendant maintained that he resided with his sister at 6708 Pacific Street. There is other evidence suggesting, and defendant so informed the investigating

officers on the day of the murder, that he lived with his mother at 3006 South 17th Street. In considering defendant's assignments of error, we assume, without deciding, that defendant resided at 6708 Pacific Street.

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 determining a court's ruling as a 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. Andersen, ante* p. 187, 440 N.W.2d 203 (1989); *State v. Sutton,* 231 Neb. 30, 434 N.W.2d 689 (1989).

Vicki Strunk testified at the suppression hearing that she rented the house at 6708 Pacific Street, that her name alone was on the lease, that she made all the rent payments, and that she normally resided in the house with her three children, her 4-year-old nephew, and her uncle, Larry Bowen, who lived in the basement. Strunk further testified that the police officers came to her door "right after the noon news":

> Q. All right. And as soon as you saw them, you knew what they were there for, didn't you?
>
> A. Well, after [Bazer] told me to watch the news, I kind of figured that's probably what they were there for. . . .
>
> Q. All right. There was a . . . story about this shooting on South 13th Street and a description of the two suspects that were seen leaving the scene, and that matched Chris and Phillip, correct?
>
> A. I guess it did. It probably would.
>
> Q. Right. Plus Chris told you that he did it?
>
> A. Right.

The police officers showed Strunk their badges when she answered the door. They asked her if they could come in, and she said, "Yes." The officers then asked her if defendant and Bazer were there. Strunk then "took them in" and pointed to defendant, who was talking on the telephone in the kitchen. Although Strunk claimed she had not voluntarily signed the permission to search form, she also testified that when she signed the form, she told the officers, "Yes, I'll sign it. I ain't

got nothing to hide."

Larry Bowen testified at the suppression hearing that he was present when the gun was found downstairs. Bowen testified that after he "did find the gun and trip over it," he called to a police officer to come to the basement. The officer came downstairs but did not take possession of the gun.

In *Payton v. New York, supra*, the Court held that the 4th amendment to the U.S. Constitution, made applicable to the States by the 14th amendment, prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest. See, also, *State v. Hert*, 220 Neb. 447, 370 N.W.2d 166 (1985); *State v. Ware*, 219 Neb. 594, 365 N.W.2d 418 (1985). In *State v. Ware, supra* at 597, 365 N.W.2d at 420, we noted that the emphasis of the *Payton* decision was "upon the breach of privacy entailed in entering an individual's home." We concluded in *Ware* that because the police lawfully crossed the defendant's threshold pursuant to a valid search warrant, the concerns of the *Payton* Court had been met, and the warrantless arrest of the defendant was lawful.

We held in *State v. Daniels*, 222 Neb. 850, 388 N.W.2d 446 (1986), that a warrantless search of a house may be justified when the police have obtained the consent to search from a party who possessed common authority over, or other sufficient relationship to, the premises sought to be inspected. See, also, *State v. Billups*, 209 Neb. 737, 311 N.W.2d 512 (1981).

Vicki Strunk clearly had the authority to consent to the search of her residence at 6708 Pacific Street. The issue raised at the suppression hearing was whether her consent was voluntary. The determination of whether a consent to search is voluntarily given is a question of fact, and voluntariness is to be determined from the totality of the circumstances. *State v. Bonczynski*, 227 Neb. 203, 416 N.W.2d 508 (1987). The trial court noted there were conflicts in the evidence, but resolved these conflicts against the defendant. From our review of the record, we find there was evidence to support the trial court's ruling that Strunk's consent to search was voluntarily given.

Vicki Strunk testified that Larry Bowen resided in the

basement of the Strunk home on the date of the search. He had common authority over the basement to consent to a search of the basement for the murder weapon. *State v. Daniels, supra.*

As in *State v. Ware, supra*, since the police lawfully crossed the threshold of the Strunk residence, the concerns of the *Payton* Court were met, and the warrantless arrest of the defendant was lawful.

Defendant further contends the trial court erred in failing to suppress his taped statement because the statement was coerced. The trial judge found that "the statement made to the police officers at headquarters was freely and voluntarily made after the defendant was fully advised of his constitutional rights and made a knowing and intelligent waiver of those rights." Again, the conflicts in the evidence were resolved against the defendant and the record shows there was ample evidence to support the court's ruling.

Defendant's first assignment of error is without merit.

Defendant further contends the evidence is insufficient to support his convictions, claiming that the State "has to show the Defendant was more than just present and acquiesced to the robbery of Mary Jirsak." Brief for appellant at 10-11. We have often held that in reviewing 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. Andersen, ante* p. 187, 440 N.W.2d 203 (1989); *State v. Wickline, ante* p. 329, 440 N.W.2d 249 (1989).

Defendant was charged with first degree murder, in violation of § 28-303, which provides: "A person commits murder in the first degree if he kills another person . . . (2) in the perpetration of or attempt to perpetrate any . . . robbery . . . ." Defendant also was charged with using a firearm to commit a felony, in violation of § 28-1205.

Neb. Rev. Stat. § 28-324 (Reissue 1985) provides: "A person commits robbery if, with the intent to steal, he forcibly and by violence, or by putting in fear, takes from the person of another

any money or personal property of any value whatever." Neb. Rev. Stat. § 28-206 (Reissue 1985) provides: "A person who aids, abets, procures, or causes another to commit any offense may be prosecuted and punished as if he were the principal offender."

Defendant's argument is based on our language in *State v. Morrow*, 220 Neb. 247, 369 N.W.2d 89 (1985), that mere presence, acquiescence, or silence, in the absence of a duty to act, is not enough to constitute one an accomplice and that the knowledge that a crime is being or is about to be committed does not constitute one an accomplice.

The evidence in this case was clearly sufficient to support a jury determination that defendant was at least an aider and abettor in this senseless crime. Mobley testified that he saw a young man, who was wearing an orange stocking cap, leave Jirsak's shop. This man was holding a gun against his chest. Defendant stated he was wearing a red and orange stocking cap on the morning in question. Riggs testified that on two occasions prior to the murder, defendant telephoned and asked whether Riggs would help him rob Jirsak's candy store. Based on Riggs' information, the investigating officers discovered defendant, Bazer, and the murder weapon at 6708 Pacific Street.

Demont testified that defendant directed him to drive to 13th Street and that on the way there, defendant and Bazer said they were going to rob some place. Defendant told Demont to drop him off between 13th and 14th Streets and to wait on 15th Street. After 10 to 15 minutes, defendant and Bazer got back in the car. Demont testified that Bazer laid a gun on the front seat and that defendant indicated he took some change out of the register.

Notwithstanding defendant's trial testimony that he did not know Bazer intended to rob Jirsak when they entered the candy store and that defendant tried to persuade Bazer to leave, the evidence is sufficient to support a finding that defendant's involvement in the robbery and murder of Mary Jirsak was substantially more than a mere presence, acquiescence, or silence.

Taking the view most favorable to the State, the evidence is

sufficient to support defendant's convictions.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. KEVIN L. COPPLE, RESPONDENT.

441 N.W.2d 894

Filed June 30, 1989. No. 88-740.

Original action. Judgment of disbarment.

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

PER CURIAM.

Pursuant to Neb. Ct. R. of Discipline 10(I) (rev. 1989), Counsel for Discipline of the Nebraska State Bar Association moves this court for judgment on the pleadings.

The record shows that on March 10, 1989, Counsel for Discipline of the Nebraska State Bar Association filed formal charges against the respondent, Kevin L. Copple. The respondent was charged with four counts of misconduct. Two counts charge respondent with the following violations of the Code of Professional Responsibility:

DR 1-102 Misconduct.

(A) A lawyer shall not:

1. Violate a Disciplinary Rule.

4. Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

6. Engage in any other conduct that adversely reflects on his fitness to practice law.

DR 6-101 Failing to Act Competently.

(A) A lawyer shall not:

3. Neglect a legal matter entrusted to him.

DR 7-101 Representing a Client Zealously.

(A) A lawyer shall not intentionally.

2. Fail to carry out a contract of employment entered into with a client for professional services, but he may withdraw as permitted under DR 2-110, DR 5-102, and DR 5-105.

3. Prejudice or damage his client during the course of the professional relationship, except as required under DR 7-102(B).

In short, the record shows that the respondent was retained and paid legal fees in advance by two clients, but neglected to perform the work for which he was hired. The last two counts relate to the respondent's failure to file an appropriate written response with the Counsel for Discipline concerning the complaints of these two clients.

On March 28, additional formal charges were filed against the respondent. These charges, contained in three additional counts, stem from the respondent's failure to file an appropriate written response to the Counsel for Discipline regarding complaints made against the respondent by three of his other clients, alleging neglect of legal matters entrusted to him.

The record indicates that respondent received the March 10 formal charges on March 16 and that he received the March 28 additional formal charges on March 29.

Under Neb. Ct. R. of Discipline 10(H) (rev. 1989), the respondent has 20 days from the date of receipt of the additional formal charges to file an answer. The respondent failed to file an answer to either the formal charges or the additional formal charges.

Accordingly, pursuant to disciplinary rule 10(I), which provides that "[i]f no answer be filed within the time limited therefor, or if the answer raises no issues of fact or of law, the matter may be disposed of by the Court on its own motion or on a motion for judgment on the pleadings," the respondent is hereby disbarred from the practice of law in the State of Nebraska.

JUDGMENT OF DISBARMENT.

WHITE, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. SANDY L. GORMAN, APPELLANT.

441 N.W.2d 896

Filed June 30, 1989. No. 88-809.

1. **Jurisdiction: Words and Phrases.** Jurisdiction of the subject matter is the power to hear and determine cases of the general class to which the proceedings in question belong and the power to deal with the general subject involved in the action, and means not simply jurisdiction of the particular case then occupying the attention of the court but jurisdiction of the class of cases to which the particular case belongs.
2. **Jurisdiction: Venue: Words and Phrases.** Jurisdiction is the inherent power or authority to decide a case; venue is the place of trial of an action—the site where the power to adjudicate is to be exercised.
3. **Venue: Waiver: Proof.** In the absence of a defendant's waiver of venue, the State has the burden to prove proper venue beyond a reasonable doubt.
4. **Criminal Law: Venue: Proof.** 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.
5. **Trial: Jury Instructions.** 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.
6. **Criminal Law: Trial: Jury Instructions: Proof.** In a criminal trial, the court in its instructions must delineate for the jury each material element the State is required to prove beyond a reasonable doubt to convict the defendant of the crime charged.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Reversed and remanded for a new trial.

Ralph E. Peppard, of Rold & Peppard, for appellant.

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

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

FAHRNBRUCH, J.

Sandy L. Gorman appeals her Douglas County Court conviction and 1-year jail sentence for abusing her 8-month-old daughter. The conviction and sentence were affirmed on appeal to the Douglas County District Court. We reverse and grant a new trial.

Gorman's five assignments of error can be consolidated to claim the district court erred in failing to (1) find the evidence was insufficient to support the conviction, (2) find that the trial court lacked subject matter jurisdiction, and (3) submit an instruction to the jury setting forth the essential elements of the crime charged.

On December 11, 1987, the defendant took her baby to a hospital for treatment of a high temperature, lung congestion, a probable ear infection, and suspected pneumonia. Omaha's Children's Hospital personnel discovered 3-week-old multiple fractures of the child's ribs and a fracture of her left leg. Gorman was charged in the Douglas County Court and convicted by a jury of child abuse, a violation of Neb. Rev. Stat. § 28-707 (Reissue 1985).

Specifically, the defendant was charged with negligently causing or permitting the baby to be (1) placed in a situation that endangered her life or health; or (2) cruelly confined or cruelly punished; or (3) deprived of necessary food, clothing, shelter, or care. Violation of the statute is a Class I misdemeanor if the acts are committed negligently. A Class I misdemeanor carries a penalty of up to 1 year's imprisonment, up to a $1,000 fine, or both. Neb. Rev. Stat. § 28-106 (Cum. Supp. 1986).

At the trial, there was sufficient evidence from which the jury could find beyond a reasonable doubt that the injuries to the child were not accidental, but the result of inflicted trauma; that the defendant inflicted the trauma causing the injuries; and that the acts occurred in Douglas County, Nebraska, on or about November 20, 1987. Because this case is being remanded for a new trial, no purpose would be served in a detailed recitation of the facts. It is sufficient to note that Gorman's first assignment of error is without merit.

In the second assignment of error, Gorman complains that the trial court did not have subject matter jurisdiction to hear her case and asks this court to dismiss the action for that reason. The defendant refers to Neb. Rev. Stat. § 29-1301 (Reissue 1985). Section 29-1301 is a venue statute that provides in part that all criminal cases shall be tried in the county where the offense was committed.

> " 'Jurisdiction of the subject matter is the power to hear and determine cases of the general class to which the proceedings in question belong; the power to deal with the general subject involved in the action; and means not simply jurisdiction of the particular case then occupying the attention of the court but jurisdiction of the class of cases to which the particular case belongs . . . .' "

In re Interest of Adams, 230 Neb. 109, 114, 430 N.W.2d 295, 299 (1988), quoting *Lewin v. Lewin*, 174 Neb. 596, 119 N.W.2d 96 (1962).

" 'Jurisdiction is the inherent power or authority to decide a case; venue is the place of trial of an action—the site where the power to adjudicate is to be exercised.' " *In re Interest of Adams, supra* at 114, 430 N.W.2d at 298, quoting *State ex rel. Bauersachs v. Williams*, 215 Neb. 757, 340 N.W.2d 431 (1983). See, also, *Blitzkie v. State*, 228 Neb. 409, 422 N.W.2d 773 (1988).

In the case before us, Gorman is actually complaining about venue. She asserts there is no evidence that the child's injuries occurred in Douglas County, Nebraska, and, therefore, venue was improper. In Nebraska, 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. Vejvoda*, 231 Neb. 668, 438 N.W.2d 461 (1989). See, also, *State v. Lindsey*, 193 Neb. 442, 227 N.W.2d 599 (1975).

> "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."

State v. Vejvoda, supra at 674, 438 N.W.2d at 466; *Weinecke v. State*, 34 Neb. 14, 51 N.W. 307 (1892).

The defendant's assignment of error has no merit. There was evidence from which a jury could find beyond a reasonable doubt that the alleged crime occurred in Douglas County, Nebraska.

In her final assignment of error, Gorman complains that the trial court failed to instruct the jury on the material elements of the crime charged. In *State v. Lenz*, 227 Neb. 692, 419 N.W.2d

670 (1988), where the defendant complained that the trial court failed to instruct the jury on all the material elements of the crime charged, we held 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. See, also, *State v. Scott*, 225 Neb. 146, 403 N.W.2d 351 (1987); *State v. Bridger*, 223 Neb. 250, 388 N.W.2d 831 (1986); *State v. Breaker*, 178 Neb. 887, 136 N.W.2d 161 (1965).

In a criminal trial, the court in its instructions must delineate for the jury each material element the State is required to prove beyond a reasonable doubt to convict the defendant of the crime charged. In this case, in instruction No. 2, the trial court set forth an inaccurate summarization of the charge in the complaint. The instruction is also somewhat ambiguous. Instruction No. 3 told the jury that negligence is a material element of the crime charged, and then defined it. The jury was not instructed as to the other material elements of the crime. The court should have instructed the jury that to convict Gorman, the State was required to prove beyond a reasonable doubt each of the following elements of the crime charged: (1) that the defendant, Sandy L. Gorman, negligently caused or permitted her child: (a) to be placed in a situation that endangered the child's life or health; *or* (b) to be cruelly confined or cruelly punished; *or* (c) to be deprived of necessary food, clothing, shelter, or care; and (2) that the act or acts were committed in Douglas County, Nebraska, on or about November 20, 1987.

It should be noted that the State is required to prove only one of the negligent acts listed in § 28-707. The alternate word "or" between each set of acts was omitted in instruction No. 2.

One of Gorman's defenses was that the child was not in Douglas County, Nebraska, at the time the State claims the child's injuries occurred. As previously stated, unless waived, the trial of a criminal case must be held in the county where the crime takes place. A set of instructions omitting venue as a material element is prejudicially erroneous.

We vacate Gorman's sentence, reverse her conviction, and remand this cause to the district court with directions for it to remand the case to the Douglas County Court for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

BRUCE CLAYTON HUFFMAN, APPELLANT, V. MUFFY N. HUFFMAN, APPELLEE.

441 N.W.2d 899

Filed June 30, 1989. No. 88-902.

1. **Courts: Judgments.** A district court has discretionary inherent power to vacate or modify its judgment anytime during the term in which the judgment was rendered.
2. **Divorce: Appeal and Error.** In an appeal involving an action for dissolution of marriage, the Supreme Court's review of a trial court's judgment is de novo on the record to determine whether there has been an abuse of discretion by the trial judge, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, the Supreme Court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Divorce: Jurisdiction: Appeal and Error.** The standard of review in an appeal concerning a jurisdictional issue in an action for dissolution of marriage is the same standard for appellate review of any other judgment in a dissolution action.
4. **Judgments: Appeal and Error.** Regarding a question of law, an appellate court has an obligation to reach a conclusion independent from a trial court's conclusion in a judgment under review.
5. **Domicile: Intent: Words and Phrases.** Domicile is obtained only through a person's physical presence accompanied by the present intention to remain indefinitely at a location or site or by the present intention to make a location or site the person's permanent or fixed home.
6. _____: _____: _____. Residence is the result of or achieved by a person's physical presence and living at a location and does not require an intention to stay permanently in the location.
7. **Divorce: Domicile: Actions: Parties.** If one of the parties to a dissolution action has had a Nebraska domicile for the duration prescribed by Neb. Rev. Stat. § 42-349 (Reissue 1988), a party may commence a dissolution action under Neb. Rev. Stat. § 42-348 (Reissue 1988) in the county where one of the parties lives and is not required to commence the action in the domiciliary county of either party to the dissolution action.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Reversed and remanded with directions.

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

Steven C. Smith, of Van Steenberg, Chaloupka, Mullin, Holyoke, Pahlke, Smith, Snyder & Hofmeister, P.C., for appellee.

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

SHANAHAN, J.

Sometime before he filed an action for dissolution of marriage, Bruce Clayton Huffman lost the lease on ranchland used for his cattle operation in McPherson County, Nebraska. On August 11, 1987, Bruce Huffman commenced an action to dissolve his marriage with Muffy N. Huffman and filed his dissolution petition in the district court for Lincoln County, Nebraska, of which North Platte is the county seat. In his petition, Bruce Huffman alleged that he was "a resident of Lincoln County" and that he had been a Nebraska "resident" for at least 1 year before the dissolution petition was filed. See Neb. Rev. Stat. § 42-349 (Reissue 1988) (dissolution; action; conditions). In the petition, Bruce Huffman designated his address as Tryon, McPherson County, Nebraska. By her "Responsive Pleading and Cross-Petition," Muffy Huffman alleged that she was a resident of Dawes County, Nebraska, that she had been a Nebraska resident for the year preceding commencement of the action by Bruce Huffman, and that Bruce "is a resident of Lincoln County, Nebraska."

Huffmans and their lawyers appeared for trial in the district court for Lincoln County on March 28, 1988. At the conclusion of evidence, the court specifically found that "the Court has jurisdiction over the parties and the subject matter of this action," and entered a decree, reflecting dissolution of Huffmans' marriage and custody of the four Huffman children granted to Muffy Huffman, subject to Bruce Huffman's right to visit the children.

On July 28, 1988, Bruce Huffman filed his application to modify the dissolution decree and requested, among other things, that he be granted custody of the Huffman children. Muffy Huffman did not file any pleading directed to Bruce's application. (We do not imply that any pleading was required from Muffy Huffman; rather, we mention the pleadings at this point only as background for the hearing on Bruce's application.)

On September 21, 1988, only Bruce Huffman testified at the

modification hearing before the same judge who previously rendered judgment in the Huffman case and signed the dissolution decree. The hearing was abbreviated by the court's action reviewed in this appeal. During direct examination of Bruce Huffman concerning the change of circumstances alleged for modification of the decree, a recess was taken when Muffy Huffman became ill. When direct examination of Bruce Huffman was about to resume, the court entered the interrogation:

> THE COURT: Before we go on, the Petition for Dissolution shows your address as HC 85, Box 24 Tryon, Nebraska, which is a McPherson County address. Were you living in McPherson County at the time you filed this petition or in Lincoln County?
>
> MR. HUFFMAN: When I filed back in August or whatever it was I was living here in North Platte, that's why we filed it here.
>
> THE COURT: But it shows on the face of the petition a Tryon address, McPherson County.
>
> MR. HUFFMAN: That's where I was still getting my mail for sure. I was just living — I was staying with my grandparents here for the summer.
>
> THE COURT: Well, were you staying with them on a temporary basis, you mean?
>
> MR. HUFFMAN: Yeah, I was looking for a job.
>
> THE COURT: Where was your drivers' license issued from?
>
> MR. HUFFMAN: Probably still at McPherson.
>
> THE COURT: Were you registered to vote in McPherson County?
>
> MR. HUFFMAN: I'm sure I was.

The court then expressed its concern whether there was any jurisdiction for the dissolution decree. See Neb. Rev. Stat. § 42-348 (Reissue 1988) ("All proceedings [for dissolution of marriage] shall be brought in the district court of the county in which one of the parties resides.").

Direct examination of Bruce Huffman resumed:

> [Bruce Huffman's lawyer:] Where did you live at the time you filed this petition?

A. North Platte.

Q. At what address?

A. 220 James Avenue.

Q. And had you left your home in McPherson County?

A. Yes.

Q. Did you have any intent of returning to that home in McPherson County at that time?

A. No.

Q. And did you become employed here in North Platte and in Lincoln County, Nebraska?

A. For a short period of time with — I was collecting things for the NEBRASKAland Days Committee or something — collecting money or donations, that kind of thing.

Q. And then, did you reside here for several months at that same address in Lincoln County, Nebraska, before you went anywhere else?

A. From June through September.

. . . .

Q. At the time you filed this — this action, did you have any intent of living anywhere else other than in Lincoln County, Nebraska?

A. I didn't know where I was going to go. I was kind of in limbo, but — but I figured North Platte area would afford me, you know, the opportunities — maybe more opportunities than — until I did find something more suited to what I knew how to do.

Q. At the time you moved to North Platte and in Lincoln County, Nebraska, did you intend to remain here?

[Muffy Huffman's lawyer]: Objection, asked and answered.

THE COURT: Go ahead and answer.

A. I — did I intend to remain here? I didn't know for sure so I can't answer that, really.

Q. Well, did you have any immediate plans to move anywhere else?

A. No.

Q. Did you intend to remain here for the indefinite future?

A. Right.

Cross-examination included the following:

> [Muffy Huffman's lawyer:] Mr. Huffman, now, before you left your residence, your home up in McPherson County near Tryon, had you lived there all your life?
>
> [Bruce Huffman:] Yes.
>
> . . . .
>
> Q. Okay. And did you stay there [McPherson County] after she [Muffy Huffman] left?
>
> A. I was back and forth but —
>
> Q. Back and forth between your grandparents' place in North Platte and your home place in McPherson County?
>
> A. It wasn't my home place. I didn't have a home there.
>
> Q. Well, you lived there all your life?
>
> A. But I was asked to leave and I did not have a home there, my home was here [North Platte, Lincoln County].

After the court had noted that "[t]he Court on its own motion raises the question of whether it had jurisdiction to enter a decree of dissolution," the court declined to receive further evidence concerning the merits of Bruce Huffman's modification application, took the jurisdictional question under advisement, and later entered an order which contained:

> The Court finds that this matter is controlled by Small v. Small, 229 Neb. 344 (1988) "In comparing the repealed ch. 25, section 6, statute section 42-301, and the current section 42-348, it is apparent that the change of the word 'may' to 'shall' reinforces this court's prior determination that residency of one party in the county where the petition is filed is jurisdictional. The rule announced in Fletcher (Fletcher v. Fletcher, 182 Neb. 549, 156 N.W.2d 1 (1968)), is still valid. The district court for a county cannot acquire jurisdiction over dissolution proceedings unless one of the parties is a resident of that county at the time the original petition is filed."
>
> This Court has no question that residency was not established by the Petitioner in this case. All of the indicias of residency point to McPherson County as the county of residence. There is no question that the Petitioner was temporarily domiciled within the county, but the question

is not domicile it is residence. There is no showing that the Petitioner intended to reside in Lincoln County. All evidence points to temporary situation in which the Petitioner traveled back and forth between Lincoln and McPherson County, never changed his drivers' license, never changed his voters' registration, never obtained his own place to live in Lincoln County, never obtained permanent employment in Lincoln County, and never formed an intention to live in Lincoln County. In answer to the Courts question "Well, were you staying with them on a temporary basis, you mean?" The Petitioner said "Yeah, I was looking for a job.".

The Court finds that the Petitioner was not a resident of Lincoln County at the time of the filing of the Petition in this case. There is no question that the Respondent was not a resident of Lincoln County at the time of the filing of this case. Therefore, the Court finds that it had no jurisdiction to enter the Decree of Dissolution in this case, that the Decree should be set aside and declared void, and that the case should be and is dismissed.

We have examined the "Rules of Practice For The Thirteenth Judicial District," the judicial district which includes Lincoln County, which court rules were filed with this court on January 10, 1988, and provide: "RULE NO. 1. TERM OF COURT There will be one term of Court in each county, to be set by the Court in December of the preceding year." We assume, therefore, that the judgment and decree dissolving Huffmans' marriage were rendered, entered, and vacated during the same term of court. A district court has discretionary inherent power to vacate or modify its judgment anytime during the term in which the judgment was rendered. *Fredericks v. Western Livestock Auction Co.*, 225 Neb. 211, 403 N.W.2d 377 (1987); *Gutchewsky v. Ready Mixed Concrete Co.*, 219 Neb. 803, 366 N.W.2d 751 (1985).

In his first assignment of error, Bruce Huffman claims that the district court erred in vacating its judgment and dissolution decree and dismissing the application for modification of the decree.

In an appeal involving an action for dissolution of marriage,

the Supreme Court's review of a trial court's judgment is de novo on the record to determine whether there has been an abuse of discretion by the trial judge, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, the Supreme Court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Ensrud v. Ensrud*, 230 Neb. 720, 433 N.W.2d 192 (1988); *Christen v. Christen*, 228 Neb. 268, 422 N.W.2d 92 (1988).

Therefore, the standard of review in an appeal concerning a jurisdictional issue in an action for dissolution of marriage is the same standard for appellate review of any other judgment in a dissolution action. Regarding a question of law, an appellate court has an obligation to reach a conclusion independent from a trial court's conclusion in a judgment under review. *In re Estate of Walker*, 224 Neb. 812, 402 N.W.2d 251 (1987); *Boisen v. Petersen Flying Serv.*, 222 Neb. 239, 383 N.W.2d 29 (1986).

In reference to subject matter jurisdiction under § 42-348 concerning a dissolution action, this court stated in *Small v. Small*, 229 Neb. 344, 347, 427 N.W.2d 42, 44 (1988): "The district court for a county cannot acquire jurisdiction over dissolution proceedings unless one of the parties is a resident of that county at the time the original petition is filed."

The word *residence* appears in Neb. Rev. Stat. § 42-349 (Reissue 1988), which in part provides:

> No action for dissolution of marriage may be brought unless at least one of the parties has had actual residence in this state with a bona fide intention of making this state his permanent home for at least one year prior to the filing of the petition, or unless the marriage was solemnized in this state and either party has resided in this state from the time of marriage to filing the petition.

Construing § 42-349 in *Rector v. Rector*, 224 Neb. 800, 401 N.W.2d 167 (1987), we held that the residence requisite for subject matter jurisdiction, expressed in § 42-349, was a requirement that one of the parties to the dissolution action, who in *Rector* was the petitioner, must have a "bona fide domicile" in Nebraska for 1 year before commencement of a

dissolution action.

Thus, the Huffman appeal presents the question: In § 42-348, does the word *resides* refer to domicile or residence?

"To reside" and its corresponding noun *residence* are chameleon-like expressions, which take their color of meaning from the context in which they are found. Also, *domicile* and *residence* are not necessarily synonyms and are not always used interchangeably.

In *State v. Jones*, 202 Neb. 488, 492, 275 N.W.2d 851, 853 (1979), this court examined and recognized the distinction between *residence* and *domicile* and noted:

> " 'It is universally held that in order to acquire a domicile by choice, these essentials must concur: (1) Residence (bodily presence) in the new locality, and (2) an intention there to remain. In other words, there must be a concurrence of the fact and the intent, the factum and animus. Act and intent must, therefore, concur, and the absence of either of these thwarts the change [in domicile]. . . . ' "

Consequently, domicile is obtained only through a person's physical presence accompanied by the present intention to remain indefinitely at a location or site or by the present intention to make a location or site the person's permanent or fixed home. See, *Greenwood v. Hilderbrand,* 357 Pa. Super. 253, 515 A.2d 963 (1986); *Dane v. Board of Registrars of Voters of Concord*, 374 Mass. 152, 371 N.E.2d 1358 (1978); *Loudenslager Will*, 430 Pa. 33, 240 A.2d 477 (1968).

However, residence is the result of or achieved by a person's physical presence and living at a location and does not require an intention to stay permanently in the location. See, *San Patricio County v. Nueces County Hospital Dist.*, 721 S.W.2d 375 (Tex. App. 1986); *Boswell v. South Carolina Ins. Co.*, 353 Pa. Super. 108, 509 A.2d 358 (1986); *Wolinsky v. Bradford Nat. Bank*, 34 Bankr. 702 (Bankr. D. Vt. 1983); *In re Marriage of Weiss*, 87 Ill. App. 3d 643, 409 N.E.2d 329 (1980); *Smiley v. Davenport*, 139 Ga. App. 753, 229 S.E.2d 489 (1976).

We have noted the domiciliary requirement for filing a petition for dissolution of marriage. See, § 42-349; *Rector v. Rector, supra.* However, in dissolution actions, courts

frequently find one or both parties in the process of moving from one county to another. In today's mobile society, it is understandable that a spouse may leave the domiciliary county and relocate as the result of a broken marriage. We believe that the Legislature intended that § 42-348 must be construed to allow a spouse, who has otherwise satisfied the domicile requirements of § 42-349, to file a dissolution petition in the county where either spouse lives, although such spousal presence may be only temporary, rather than a statutory construction which restricts filing a dissolution action to the domiciliary county. Therefore, we hold that, if one of the parties to a dissolution action has had a Nebraska domicile for the duration prescribed by § 42-349, a party may commence a dissolution action under § 42-348 in the county where one of the parties lives and is not required to commence the action in the domiciliary county of either party to the dissolution action.

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

Newton v. Brown, 222 Neb. 605, 617-18, 386 N.W.2d 424, 432 (1986). See, also, *Bump v. Firemens Ins. Co.*, 221 Neb. 678, 380 N.W.2d 268 (1986).

From our de novo review of the record, contrary to the conclusion reached by the district court, we find that Bruce Huffman's undisputed and unequivocal testimony established that the jurisdictional requirements for filing a dissolution action in the district court for Lincoln County had been fulfilled, and conclude that the judgment and dissolution decree in the Huffman case are valid. As a matter of law concerning jurisdiction, the district court erred in setting aside its previous judgment and decree concerning dissolution of the Huffman marriage. In view of the validity of the district court's previous judgment and dissolution decree, the district court's action unfairly deprived Bruce Huffman of the substantial right in the subsistence of the valid judgment and decree, which dissolved Huffmans' marriage. Setting aside the dissolution

decree also denied Bruce Huffman the opportunity to be heard on his application to modify the dissolution decree concerning custody of the Huffman children. The district court abused its discretion in vacating its previous and valid judgment and dissolution decree.

Consequently, we reverse the judgment of the district court, which set aside the district court's previous judgment and dissolution decree in Huffmans' case, and remand this matter to the district court with direction to reinstate its previous judgment and dissolution decree, which have been vacated. Also, we remand this matter to the district court with direction to reinstate the proceedings pursuant to Bruce Huffman's application for modification of the dissolution decree and further direct the district court to resume the hearing on the merits of the modification application.

Bruce Huffman's second assignment of error relates to the district court's exclusion of Bruce's testimony concerning Muffy Huffman's cohabitation with a man named Bob Gregg and the effect of such relationship on the "emotional health" of the Huffman children. As the result of an objection based on lack of Bruce Huffman's qualification to express the indicated opinion, see Neb. Evid. Rules 701 et seq. (opinion and expert testimony) (Neb. Rev. Stat. §§ 27-701 et seq. (Reissue 1985)), the district court excluded Bruce Huffman's opinion testimony. Although Bruce Huffman asks us to decide whether the district court's exclusionary ruling is correct, we decline to reach the evidential question. The district court did not determine whether the modification application was meritorious and, thus, has not decided whether the dissolution decree should be modified. At this juncture in the Huffman case, because there has been no judicial decision regarding the merits of Bruce Huffman's request for modification of the dissolution decree, the exclusionary ruling by the district court has not adversely or prejudicially affected a substantial right of Bruce Huffman. See Neb. Evid. R. 103(1) (Neb. Rev. Stat. § 27-103(1) (Reissue 1985)). Our evaluation of the district court's ruling on the evidential question presently raised by Bruce Huffman would, therefore, be only an advisory opinion in an action wherein there is, as yet, no final judgment on the merits of Bruce

Huffman's modification application.

REVERSED AND REMANDED WITH DIRECTIONS.

SILLIS JIM OSBORNE, APPELLANT, V. BUCK'S MOVING & STORAGE, INC., APPELLEE.

441 N.W.2d 906

Filed June 30, 1989. No. 88-991.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

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

John R. Hoffert, of Knudsen, Berkheimer, Richardson & Endacott, for appellee.

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

SHANAHAN, J.

On rehearing, the Nebraska Workers' Compensation Court dismissed the petition of Sillis Jim Osborne because Osborne failed to prove that his "injuries . . . were the result of an accident which arose out of and in the course of his employment." Osborne appeals, claiming that the judgment of the Workers' Compensation Court is incorrect.

> "Findings of fact made by the Nebraska Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case. [Citations omitted.] In testing the sufficiency of evidence to support findings of fact made by the Nebraska Workers' Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. [Citations omitted.] Factual determinations by the Workers' Compensation Court will not be set aside on appeal unless such determinations are clearly erroneous.

> Regarding facts determined and findings made after rehearing in the Workers' Compensation Court, § 48-185 precludes the Supreme Court's substitution of its view of the facts for that of the Worker's Compensation Court if the record contains evidence to substantiate the factual conclusions reached by the Workers' Compensation Court. [Citations omitted.] As the trier of fact, the Nebraska Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given testimony."

McLaughlin v. McLaughlin, 230 Neb. 460, 461, 432 N.W.2d 45, 46 (1988). See, also, *Fees v. Rivett Lumber Co.*, 228 Neb. 617, 423 N.W.2d 483 (1988).

Osborne testified that on October 28, 1986, while in Buck's employ, he was moving a stack of plywood in the back of Buck's moving van when the plywood fell on him, knocking his right shoulder against the inside wall of the moving van. At the time, Osborne did not realize that he had been injured in the incident and continued to work for Buck's for the next 3 months without reporting the accident to Buck's. On January 13, 1987, after experiencing severe pain in his shoulder for about a week, Osborne sought medical attention at a hospital in Memphis, Tennessee, and was told he had bursitis. Later in January 1987, Buck's terminated Osborne's employment.

Osborne began working for Davis Moving & Storage in Little Rock, Arkansas, in late February 1987, without mentioning the 1986 accident or subsequent pain in his shoulder. Osborne first notified Buck's of his 1986 accident and injury when he filed his "First Report of Alleged Occupational Injury or Illness" with the Nebraska Workers' Compensation Court on May 1, 1987.

On June 1, 1987, after Osborne had complained of pain in his shoulder, Davis referred Osborne to a Dr. Barg. Thereafter, Osborne consulted Drs. Hinkley, Parks, and Fullenwider regarding the pain in his shoulder. A report from Dr. Hinkley indicates that Osborne was afflicted with a C5-6 radiculopathy, associated with some weakness in his humeral abductors and his wrist dorsiflexors. However, no expert opinion or medical evidence in the record shows a causal connection between

Osborne's alleged accident and injury.

> "Unless the character of an injury is objective, that is, an injury's nature and effect are plainly apparent, an injury is a subjective condition, requiring an opinion by an expert to establish the causal relationship between an incident and the injury as well as any claimed disability consequent to such injury."

Fees v. Rivett Lumber Co., supra at 621, 423 N.W.2d at 486. See, also, *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 408 N.W.2d 280 (1987). "Determination of causation is, ordinarily, a matter for the trier of fact." *Mendoza, supra* at 778, 408 N.W.2d at 285. See, also, *Fees v. Rivett Lumber Co., supra.*

Osborne's injury was a subjective condition. The Workers' Compensation Court found that Osborne failed to present expert testimony to establish a causal connection between the accident and his injuries. Therefore, we must affirm the judgment of the Workers' Compensation Court.

AFFIRMED.

EUGENE H. SHERBECK, APPELLANT, V. CARLOS E. SCHAPER, APPELLEE.

442 N.W.2d 364

Filed July 7, 1989. No. 87-338.

1. **Summary Judgment.** A motion for summary judgment shall be granted if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, this court must take the view of the evidence most favorable to the party against whom the motion is directed and give that party the benefit of all favorable inferences which may be drawn from the evidence. Summary judgment is an extreme remedy to be awarded only when the issue is clear beyond all doubt.
3. **Malpractice: Negligence: Damages: Limitations of Actions.** Any action to recover damages based on alleged professional negligence in rendering or failure to render professional services shall be commenced within 2 years next after the

alleged act or omission in rendering or failure to render professional services providing the basis for such action; provided, if the cause of action is not discovered and could not be reasonably discovered within such 2-year period, then the action may be commenced within 1 year from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier.

4. **Limitations of Actions: Words and Phrases.** Discovery, as applied to statutes of limitations, refers to the fact that one knows of the existence of an injury or damage and not that he or she has a legal right to seek redress in court.
5. **Limitations of Actions: Time.** A cause of action accrues, and the statute of limitations begins to run, when there has been discovery of facts constituting the basis of the cause of action or the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery. It is not necessary that the plaintiff have knowledge of the exact nature or source of the problem, but only knowledge that the problem existed.

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

Kent A. Schroeder, of Ross, Schroeder & Fritzler, for appellant.

D. Steven Leininger, of Luebs, Dowding, Beltzer, Leininger, Smith & Busick, for appellee.

HASTINGS, C.J., CAPORALE, and GRANT, JJ., and BURKHARD and HANNON, D. JJ.

BURKHARD, D.J.

On October 25, 1985, the plaintiff, Eugene H. Sherbeck, filed a legal malpractice action against the defendant, Carlos E. Schaper, in the district court for Custer County, Nebraska. The defendant, at all times material herein, was an attorney engaged in the practice of law in Broken Bow, Nebraska.

The plaintiff, in his amended petition, alleges that the defendant performed legal services for him in connection with an installment sale of corporate stock agreement dated June 14, 1979. The plaintiff states that the defendant deviated from the standard of care applicable to attorneys under similar circumstances and failed to exercise the skill and knowledge ordinarily possessed by attorneys under similar circumstances. The thrust of the plaintiff's claim is found in three of the plaintiff's specifications of malpractice:

b. He failed to use reasonable care to assess and explain

> the legal effect and ramifications of the "Installment Sale of Corporate Stock" contract subsequently dated June 14, 1979, when in the exercise of reasonable care he should have done so.
>
> . . . .
>
> f. He failed to advise the Plaintiff that the buyers could impair or substantially encumber all of the assets of the said corporation without the seller's consent and to his detriment when in the exercise of reasonable care he should have done so.
>
> . . . .
>
> h. He failed to advise the plaintiff that the legal effort [sic] of the "Installment Sale of Corporate Stock" subsequently dated June 14, 1979 was nothing more than an unsecured promissory note payable in installments, when in the exercise of reasonable care he should have done so.

The plaintiff claims he was damaged as a proximate result of the defendant's alleged professional negligence.

The defendant, in his answer, among other things denied that he was negligent in any manner and claimed that plaintiff's cause of action was barred by the applicable statute of limitations. Defendant's motion for summary judgment was heard on January 19, 1987, and was sustained by the district court on March 18, 1987, and plaintiff's amended petition was dismissed. We affirm the judgment of the district court.

The plaintiff was the sole owner of all 414 shares of stock in a corporation known as Sargent Livestock Commission Company, Inc. The principal business of the corporation was the operation of a sale barn in Sargent, Nebraska. The main assets of the corporation were real estate, fixtures, and improvements on the real estate amounting to about 43 acres.

Due to health problems, plaintiff considered selling his business. Lorry Marshall approached the plaintiff about purchasing the business. The plaintiff subsequently hired Marshall as a manager and allowed him time to arrange financing. Marshall found another investor named Gary Johnson. Because of income tax consequences, the plaintiff suggested a contract for sale rather than a straight cash

payment. Marshall and the plaintiff worked out the payment terms of the contract.

In May of 1979, the plaintiff asked the defendant for his help in arranging the sale of the business to Marshall and Johnson. To this end, the defendant drafted an installment sale contract for the sale of the plaintiff's 414 shares of capital stock in Sargent Livestock. Marshall conferred with his attorney, John Sennett, concerning the contract, and the defendant also conferred by phone with Sennett regarding the contract. The defendant then redrew the agreement in accordance with his conversation with Sennett as to the schedule of payments. The final draft of the agreement was prepared by Sennett. Sennett either gave copies of the agreement to Marshall "for him to deliver" or gave Marshall a copy and took a copy to the defendant.

The contract provided that the corporation's stock was to be held in escrow by Farmers State Bank and that after the downpayment of $30,000, payments were to be made monthly (for 9 months each year) for 10 years. The buyers were to have full voting rights in the stock. The contract did not give the plaintiff any kind of lien on the corporation's assets.

Before signing the final draft of the agreement, the plaintiff claims he took it to the defendant to check over. This was 2 days before the contract was signed. The plaintiff states he asked the defendant if he was "protected" by the agreement if the buyers did not make their payments, and the defendant, according to the plaintiff, responded, "It looks okay to me." The defendant, on the other hand, denies that he reviewed with the plaintiff the contract prepared by Sennett. The defendant claims he did not have an office conference or telephone conference with the plaintiff before the plaintiff signed the agreement in its final form. Plaintiff, who had a high school education, read the contract before he signed it, but apparently did not understand it. The plaintiff felt that if there was a problem, his attorney would have told him about it. On June 14, 1979, the plaintiff and the buyers, Marshall and Johnson, signed the final draft of the installment sale agreement.

In July 1984, the plaintiff, having just gone through a divorce in which he was represented by Richard Anderson, an

attorney in Kearney, Nebraska, asked Anderson to look into the possibility of selling plaintiff's interest in the sale barn contract. Payments were made under the terms of the agreement until September 1984, when the buyers did not make the agreed payment. Anderson checked the real estate that the plaintiff was selling under the agreement. It was discovered that the agreement of June 14, 1979, had not been filed and that there were three mortgages on the real estate that had been given by the corporation, Sargent Livestock. The mortgages were on file with the register of deeds in Custer County, Nebraska. These were to Basil O. Marshall and Wanda E. Marshall, recorded October 24, 1983; Security State Bank, recorded April 24, 1984; and Lorry Marshall and Marlene K. Marshall, recorded April 24, 1984. The plaintiff testified that he first became aware of these mortgages between the 15th and 20th of October 1984, in a conversation with Anderson. The plaintiff testified that he was "surprised" when he learned from Anderson of the existence of these mortgages, and specifically stated as follows:

> Q- What did Mr. Anderson tell you?
>
> A- He said, "Did you know of big mortgages against Sargent Livestock Commission Company?" I said, "No."
>
> Q- What was your reaction to that information?
>
> A- How they could do it.
>
> Q- What did you do after they told you that?
>
> A- I said my September payment is past due. And he advised me to go to Gary Washburn.
>
> Q- Did you believe at that point that there was a violation of the contract?
>
> A- I never believed there was a violation until the September payment was defaulted.
>
> Q- Well, you said that this information that Mr. Anderson gave you surprised you, didn't you?
>
> A- Yes.
>
> Q- Why did it surprise you?
>
> A- Because, according to the contract, I didn't know that they could do that.
>
> . . . .
>
> Q- When Mr. Anderson told you about these

mortgages, your understanding of the contract at that time was that they couldn't do that; is that a fair statement?

A- Yes.

Anderson confirms that the meeting between himself and the plaintiff took place on October 19, 1984, at Anderson's office in Kearney. The meeting lasted approximately 2 hours. Anderson had been told by his secretary on October 18, 1984, of the presence of the aforementioned three mortgages on the property. The secretary prepared a memorandum setting forth the three mortgages. Upon learning of the mortgages, Anderson immediately called the plaintiff on October 18. The reason for the immediacy of the situation is described by Anderson as follows:

Q- And did you at that point that you asked your secretary to get a hold of Mr. Sherbeck, perceive some problems with the Installment Sale Contract?

. . . .

A- Yeah, I thought there were some problems with it.

Q- What were they?

A- Well, I wasn't completely sure, but I was concerned about whether some of the subsequent liens might hold a priority to his interest in the contract.

Among the matters discussed at the meeting were the mortgages on the property and plaintiff's lack of priority as against those mortgages. Specifically, Anderson told the plaintiff at the October 19, 1984, meeting the following:

Q- And to the best of your recollection Mr. Anderson, would you tell the Court what you discussed with your client on that date?

Q- The client being Mr. Sherbeck.

A- To be honest with you I don't know the particulars. I'm sure I advised him of the other security interests and his lack of priority as against the real property. I'm sure we discussed various possible alternatives to salvage—strike that—to correct the problem. And I just—I can't tell you what all was said. I know we talked about the prior history of the contract and I know we talked about the potential, again, of selling his interests out.

Q- Specifically, did you discuss with Mr. Sherbeck the information contained in Exhibit No. 7? [Memo regarding mortgages against the property.]

A- I'm sure I did because that was my initial purpose with meeting.

. . . .

Q- During the course of the conversation with Mr. Sherbeck, did you tell him that the liens and the presence of the liens that you have set forth in Exhibit 7, appear to be in conflict with his Installment Sale Contract?

. . . .

A- I believe what I told him was that at least with reference to the real property governed by the Installment Sales Contract, they represented interests recorded prior in time to any interests that he might have had.

Q- And I take it you indicated that you thought he had a problem at least?

A- I did.

Also, Anderson's bill to the plaintiff on October 31, 1984, shows, in part, the following entry for October 19, 1984: "Confer with client re: problems connected with the filing of prior liens. Research all prior liens, etc. . . ."

It is undisputed from these facts that the plaintiff knew on October 19, 1984, that he had a serious problem with the contract and that there were mortgages ahead of his interest in the contract.

Following the meeting with Anderson on October 19, 1984, the plaintiff went to see Gary Washburn, an attorney in Broken Bow, about foreclosing on Marshall and Johnson. Washburn testified that he could not be exactly certain, but that his records indicate this meeting occurred most likely on October 24, 1984. Washburn, after doing some checking, called the plaintiff on or about October 29, 1984, and told the plaintiff "that in my opinion I thought he had some problems with [the contract]." Washburn wrote the plaintiff a letter on November 1, 1984, and said, "As I told you on the phone, I feel that this Installment Sale gives you very little protection and that in fact you stand a good chance of being subsequent to Security State Bank of Broken Bow, in so far as their mortgage is concerned."

Thereafter, substantial litigation occurred between the plaintiff and Security State Bank and others regarding priority of the liens against the installment contract real estate. On December 10, 1984, the Security State Bank filed a foreclosure action in the district court for Custer County, Nebraska, involving the real estate that was owned by Sargent Livestock and which was involved in the June 14, 1979, sale of stock from the plaintiff to Marshall and Johnson. The plaintiff in this action was one of the named defendants in the foreclosure action. Trial on the foreclosure action was held on September 26, 1985. A decree of foreclosure was entered on October 16, 1985, although the "Certificate of Service" stamp on the decree states that "a copy hereof was mailed" to the attorneys of record (including Gary Washburn, plaintiff's attorney) on September 27, 1985. In any event, the foreclosure decree provided in part that "[d]efendant Eugene Sherbeck has no interest in, lien, right or title to the mortgaged premises."

A motion for summary judgment shall be granted "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Neb. Rev. Stat. § 25-1332 (Reissue 1985). In reviewing a summary judgment, this court must take the view of the evidence most favorable to the party against whom the motion is directed and give that party the benefit of all favorable inferences which may be drawn from the evidence. Summary judgment is an extreme remedy to be awarded only when the issue is clear beyond all doubt. *Muller v. Thaut*, 230 Neb. 244, 430 N.W.2d 884 (1988).

The applicable statute of limitations for legal malpractice is Neb. Rev. Stat. § 25-222 (Reissue 1985), which provides in part as follows:

> Any action to recover damages based on alleged professional negligence . . . in rendering or failure to render professional services shall be commenced within two years next after the alleged act or omission in rendering or failure to render professional services providing the basis for such action; *Provided*, if the cause of action is not discovered and could not be reasonably

> discovered within such two-year period, then the action may be commenced within one year from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier . . . .

Assuming, but not deciding, that the 2-year provision in the above statute is not applicable to this case, When did the plaintiff discover the alleged negligent acts of the defendant, or at least discover facts which would reasonably lead to such discovery, so as to bring into play the 1-year provision of the above statute? The answer is October 19, 1984. It was on that date that the plaintiff was advised by Anderson of the three mortgages on the real estate involved in the June 14, 1979, transaction, and this surprised the plaintiff "[b]ecause, according to the contract, I didn't know that they could do that." Anderson was sure that he advised the plaintiff as to plaintiff's "lack of priority as against the real property," and believes he told the plaintiff that the three liens "represented interests recorded prior in time to any interests that he [plaintiff] might have had." Anderson also indicated to the plaintiff that he thought the plaintiff "had a problem at least."

> Discovery, as applied to statutes of limitations, refers to the fact that one knows of the existence of an injury or damage and not that he or she has a legal right to seek redress in court. A cause of action accrues, and the statute of limitations begins to run, when there has been discovery of facts constituting the basis of the cause of action or the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery.

Georgetowne Ltd. Part. v. Geotechnical Servs., 230 Neb. 22, 26, 430 N.W.2d 34, 37 (1988). "It is not necessary that the plaintiff have knowledge of the exact nature or source of the problem, but only knowledge that the problem existed." *Board of Regents v. Lueder Constr. Co.*, 230 Neb. 686, 696, 433 N.W.2d 485, 491 (1988).

The plaintiff, on October 19, 1984, knew of the three mortgages on the real estate and his lack of priority, and we conclude, as a matter of law, that these facts were sufficient to

put the plaintiff on such inquiry which, if pursued, would lead to the discovery of the alleged negligence of the defendant. There is no genuine issue as to any material fact. Plaintiff's suit was not filed until October 25, 1985, which was beyond the 1-year statute of limitations. The judgment of the district court is therefore affirmed.

AFFIRMED.

HIWAY 20 TERMINAL, INC., A NEBRASKA CORPORATION, APPELLEE, V. TRI-COUNTY AGRI-SUPPLY, INC., A NEBRASKA CORPORATION, DEFENDANT AND THIRD-PARTY PLAINTIFF, AND ABILD, INC., DOING BUSINESS AS ATLANTIC STEEL ERECTORS, AN IOWA CORPORATION, THIRD-PARTY DEFENDANT, APPELLANTS.

HIWAY 20 TERMINAL, INC., A NEBRASKA CORPORATION, APPELLEE, V. ABILD, INC., DOING BUSINESS AS ATLANTIC STEEL ERECTORS, AN IOWA CORPORATION, APPELLANT.

443 N.W.2d 872

Filed July 7, 1989. No. 87-681.

1. **Trial: Evidence.** Neb. Rev. Stat. §§ 81-8,276 et seq. (Reissue 1987) were enacted to regulate the occupation of real estate appraisers, not to limit the admissibility of evidence in court.
2. **Negligence: Damages.** The collateral source rule provides that benefits received by the plaintiff from a source wholly independent of and collateral to the wrongdoer will not diminish the damages otherwise recoverable from the wrongdoer.
3. **Tort-feasors: Negligence: Damages.** If one tort-feasor, by active conduct, has created a danger to the plaintiff, and the other has merely failed to discover or to remedy it, the passive tort-feasor may be entitled to indemnification.
4. **Negligence: Liability: Damages.** Indemnity will be allowed where the indemnitee has incurred liability to a third person because of negligent reliance upon the care that the indemnitor should have exercised.

Appeal from the District Court for Brown County: EDWARD E. HANNON, Judge. Affirmed.

Michael T. Brogan, of Brogan & Stafford, P.C., for appellant Tri-County Agri-Supply.

William J. Ross, of Ross, Schroeder & Fritzler, for appellant Abild.

Peter T. Hoffman and Kim M. Robak, of Rembolt Ludtke Parker & Berger, for appellee.

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

WHITE, J.

Appellant Tri-County Agri-Supply, Inc. (Tri-County), as general contractor, entered into a written contract to construct a grain storage building, known as the north building, for the appellee, Hiway 20 Terminal, Inc. (Hiway 20). The appellant Tri-County subcontracted with the appellant Abild, Inc. (Abild), generally providing that Abild would provide the labor for erection of the north building. Materials for the north building were manufactured and furnished by Chief Industries, Inc., not a party to this action.

The north building was completed in November 1982 and filled with approximately 600,000 bushels of grain, shortly thereafter. In January 1983, representatives of the appellee Hiway 20 noticed that the north building was beginning to bulge and sag. During 1983, the building was emptied of grain, and it was discovered that certain turnbuckles were not properly installed, thereby causing damage to the building. The fact of improper installation is not disputed on appeal.

Although various theories of recovery were alleged by Hiway 20, this action was tried and submitted to the jury as a negligence action against the appellant Abild as subcontractor and the appellant Tri-County as general contractor. The appellee alleged that Abild was negligent in failing to adequately assemble the tie rods supporting the walls and roof of the north building. The appellant Tri-County was charged with negligence in failing to inspect the work of the subcontractor Abild.

Both appellants defended, stating that they used due care at all times and were not negligent. Tri-County filed a cross-claim against Abild for indemnity, in the event a judgment was entered against the contractor, on the grounds that Abild's

negligence was active and primary while Tri-County's was merely passive, and, further, by virtue of a written indemnity clause in favor of Tri-County contained within the subcontract agreement.

A jury returned a verdict against both appellants in the amount of $325,653.10. Judgments were entered on the verdicts, and the district court, as a matter of law, entered judgment in favor of Tri-County on its indemnity cross-claim.

Both Abild and Tri-County appeal, alleging various errors. Tri-County contends the district court erred in permitting the appellee's expert witness to testify on the diminution in value of the grain storage facility when the witness was not a licensed appraiser, contrary to Neb. Rev. Stat. § 81-8,286(1) (Reissue 1987). Abild alleges that the district court erred in barring the defendants from cross-examining Chief Industries' witness and in entering judgment for Tri-County on its cross-petition against Abild for $325,653.10. We will address these contentions in order.

Hiway 20 requested damages of $154,293.10 in actual damages, $171,360 in diminution in value, and $116,865.37 in lost profits. The jury awarded $325,653.10—the amount of actual damages plus diminution in value. In determining the diminution in value, Hiway 20 called Harry Ahrenholtz to give his opinion on the amount of diminution in value. Tri-County objected to this testimony at trial on the basis of lack of qualifications, as Ahrenholtz was not a licensed appraiser. The district court overruled the objection and admitted the testimony. It is with this ruling that the appellant Tri-County finds error, basing the objection on § 81-8,286. This assignment of error is without merit.

Section 81-8,286 is a regulatory, not an evidentiary, statute. Section 81-8,286(1) provides, in relevant part, "No person shall testify as an appraiser before any tribunal, court, judge, referee, or judicial committee without being licensed . . . ." This statute is contained under the headings "Real Estate Appraisers," "State Administrative Departments," and "Independent Boards and Commissions." The real estate appraisers act was enacted to regulate the occupation of real estate appraisers, not to limit the admissibility of evidence in

court. Instead, to determine the admissibility of Ahrenholtz's opinion, the statutory scheme governing expert witnesses must be examined.

Neb. Rev. Stat. § 27-601 (Reissue 1985) provides that "[e]very person is competent to be a witness except as otherwise provided in these rules." "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Neb. Rev. Stat. § 27-702 (Reissue 1985). It is this statutory scheme which governs the admissibility of Ahrenholtz' opinion, not the statute governing the licensing of real estate appraisers. We were presented with a similar question in *Lincoln Tel. & Tel. Co. v. County Board of Equalization*, 209 Neb. 465, 308 N.W.2d 515 (1981).

In *Lincoln Tel. & Tel. Co., supra*, we were concerned with the testimony of a witness conducting a critique of the appraisal method of a public utility property. We allowed testimony by one other than a licensed appraiser, stating, "The record establishes that the valuation of public utilities, including telephone companies, calls for specialized knowledge that a person holding a real estate appraiser's license would not necessarily have." *Id.* at 474, 308 N.W.2d at 521. Likewise, as found by the trial judge in his order overruling posttrial motions, "In the court's opinion, very few licensed real estate appraisers would be really qualified to testify as to the value of grain handling facilities." We agree, and hold that the testimony of the appellee's expert witness was properly admitted by the district court.

Next, Abild argues that the district court erred in barring the cross-examination of Chief Industries' witness to establish possible bias and personal interest in the lawsuit. The purpose of introducing this evidence was to inquire into the fact that Chief Industries emptied the grain bin and did not demand immediate payment from Hiway 20. Any inquiry into this area was properly refused.

The collateral source rule is well established in the law of damages and long recognized in this jurisdiction. *Tetherow v.*

Wolfe, 223 Neb. 631, 392 N.W.2d 374 (1986); *Huenink v. Collins*, 181 Neb. 195, 147 N.W.2d 508 (1966). This rule provides that benefits received by the plaintiff from a source wholly independent of and collateral to the wrongdoer will not diminish the damages otherwise recoverable from the wrongdoer. The theory underlying the adoption of this rule by a majority of jurisdictions is to prevent a tort-feasor from escaping liability because of the act of a third party, even if a possibility exists that the plaintiff may be compensated twice.

The evidence that the appellants sought to introduce in this action concerned the cost incurred by the appellee in emptying the grain storage facility when the defect in the building was discovered. Chief Industries is not a party to this action. Chief Industries was merely an independent third party that manufactured the parts used in the construction of the north building. The actual construction was done by Abild. When the building began to bulge and sag, Hiway 20 contacted Chief Industries and requested an opinion as to the cause of the problem. In order to fully examine the building, Chief Industries had to remove the grain from the building. While Hiway 20 and Chief Industries agreed that the appellee was not required to compensate Chief Industries for the removal of grain at that time, Hiway 20 did suffer a loss, as a cost was incurred in emptying the grain storage building. The cost of services supplied by Chief Industries in emptying the building constitutes a compensable damage to the appellee.

The evidence that Chief Industries provided services to Hiway 20 without immediately demanding compensation is inadmissible to establish a decrease in the appellee's damages. The motion in limine requesting that this information be excluded from the evidence was properly sustained under application of the collateral source rule. This assignment of error is therefore without merit.

Finally, we must consider Abild's claim that the indemnification clause contained in the subcontract agreement is void and unenforceable.

Initially, Abild argues that the indemnification clause is invalid due to application of Neb. Rev. Stat. § 25-21,187 (Reissue 1985). That section provides, in relevant part:

> In the event that a public or private contract or agreement, for the . . . work dealing with construction . . . contains a covenant, promise, agreement, or combination thereof, to indemnify or hold harmless another person from that person's own negligence, then such covenant, promise, agreement, or combination thereof is void as against public policy and wholly unenforceable.

The indemnification clause in the subcontract agreement at issue in this case provides as follows:

> The Subcontractor agrees to indemnify and save harmless the Contractor from any and all loss or damage (including, without limiting the generality of the foregoing, legal fees, and disbursements paid or incurred by the Contractor to enforce the provisions of this paragraph), occasioned wholly or in part by any negligent act or omission of the Subcontractor or that of anyone directly or indirectly employed by them or performing the work of this Subcontractor under the direction of the Subcontractor or anyone for whose acts any of them may be liable in carrying out the provisions of the general contract and of this Subcontract regardless of whether or not it is caused in part by a party indemnified hereunder.

As conceded by the appellant Tri-County, the final clause in this agreement, stating that the subcontractor must indemnify the general contractor even if the harm is caused by the negligence of the general contractor, is clearly invalid by application of § 25-21,187. Abild, however, contends that the inclusion of this invalid clause in the agreement renders the whole indemnification provision void and unenforceable. This contention is in error. The portion regarding Abild's potential liability for the negligence of Tri-County can be stricken from the remainder of the indemnification clause, and the language that remains may nonetheless be interpreted to impose liability on Abild. However, even if the clause were completely invalidated, because of the common-law right of indemnification which exists in this state, Abild could be required to indemnify Tri-County for the damage caused by Abild's negligence, even absent an agreement to indemnify.

This court has addressed the issue of indemnification in

situations in which an agreement to indemnify is present and in cases where there is no agreement. As stated by this court in *Duffy Brothers Constr. Co. v. Pistone Builders, Inc.*, 207 Neb. 360, 363, 299 N.W.2d 170, 172 (1980),

> "The obligation to indemnify may grow out of an implied contractual relation or out of a liability imposed by law. Thus, where one is compelled to pay money which in justice another ought to pay, or has agreed to pay, the former may recover from the latter the sums so paid, unless the one making the payment is barred by the wrongful nature of his conduct."

In *Tober v. Hampton*, 178 Neb. 858, 872, 136 N.W.2d 194, 203 (1965), a case involving no contractual right to indemnification, we followed Louisiana law, stating, " '[I]ndemnity is restricted to cases where actual fault is attributed to one party and other party is only technically or constructively at fault, and indemnity is never applicable where both parties are actually in the wrong.' " In *Tober*, we did not define precisely what is meant by the terms "technically or constructively" at fault. Similarly, in *Duffy Brothers Constr. Co., supra* at 363-64, 299 N.W.2d at 172, a case involving workers' compensation benefits and no written provision for indemnity, we stated that

> "[t]he right of *indemnity* rests upon a difference between the primary and the secondary liability of two persons each of whom is made responsible by the law to an injured party. It is a right which enures to a person who, without active fault on his own part, has been compelled, by reason of some legal obligation, to pay damages occasioned by the initial negligence of another, and for which he himself is only secondarily liable."

This court then defined primary versus secondary liability by distinguishing not between degrees of negligence, but between the "difference in the *character* or *kind* of the wrongs which cause the injury." *Duffy, supra* at 364, 299 N.W.2d at 172.

In a case involving a contract right to indemnity, *Farmers Elevator Mut. Ins. Co. v. American Mut. Lia. Ins. Co.*, 185 Neb. 4, 173 N.W.2d 378 (1969), we denied indemnity to an "actively" negligent joint tort-feasor, as opposed to a

"technical, constructive, or passive" joint tort-feasor, barring the claimant from indemnification for his own active negligence. In *Farmers Elevator*, we left open the question of whether a "technical, constructive, or passive" joint tort-feasor is entitled to indemnity from an active and primary joint tort-feasor, as a determination of that issue was unnecessary for disposition of the case. A determination of this issue is, however, required in the resolution of this case.

Although this court has employed different phrasing in cases involving claims for indemnification, the rule of law applicable remains constant. Whether the conduct of the party seeking indemnification, either through an existing contract right or otherwise, amounts to "secondary," "technical," "constructive," "vicarious," or "passive" negligence is merely a question of semantics, and all of the above terms simply indicate that *any* conduct other than that which is characterized as direct and active negligence will not bar the claimant from indemnification, if otherwise entitled. More clearly stated, one whose negligence has consisted of mere passive neglect may have indemnity from an active wrongdoer. If one tort-feasor, by active conduct, has created a danger to the plaintiff, and the other has merely failed to discover or to remedy it, the passive tort-feasor may be entitled to indemnification. Prosser and Keeton on the Law of Torts, *Indemnity* § 51 (5th ed. 1984).

Therefore, in the present case, the district court was correct in granting indemnification to Tri-County. Although it was passively negligent, if we did not allow Tri-County indemnity, a general contractor could never recover from the subcontractor for damages caused by the active negligence of the subcontractor merely because the general contractor failed to adequately inspect the work of the subcontractor. We do not feel this result is mandated. The Abild workers were actively derelict in their duties. The only negligence of Tri-County was failure to discover an installation defect which was directly caused by the actions of Abild. Indemnity will be allowed where the indemnitee has incurred liability to a third person because of negligent reliance upon the care that the indemnitor should have exercised. Because the negligence of Abild was active and the negligence of Tri-County merely passive, Tri-County is

entitled to indemnity for the loss suffered as a result of the negligence of Abild.

The judgments of the district court are therefore affirmed.

AFFIRMED.

CAPORALE, J., concurring.

Because this court is ordinarily obliged to resolve cases on the theory on which they were tried, *First West Side Bank v. Hiddleston*, 225 Neb. 563, 407 N.W.2d 170 (1987), it was appropriate to treat this appeal as one in negligence.

However, the character of an action is determined by the nature of the grievance. *Lincoln Grain v. Coopers & Lybrand*, 216 Neb. 433, 345 N.W.2d 300 (1984). The grievance here is that the subcontractor, Abild, Inc., failed to install the turnbuckles in a workmanlike manner, in violation of the terms of its agreement with the contractor, Tri-County Agri-Supply, Inc. Thus, the case is in reality one for breach of contract, not one for the negligent infliction of damages. *L.J. Vontz Constr. Co. v. State*, 230 Neb. 377, 432 N.W.2d 7 (1988).

Thus, while I agree with the result in this case, I write separately to lament the apparent developing proclivity to forsake all civil jurisprudence save the law of negligence. Had this case been tried as one in contract, as it should have been, not only would our analysis have been less complicated, but the matter would have been far easier to present to the jury.

FAHRNBRUCH, J., joins in this concurrence.

STATE OF NEBRASKA, APPELLEE, V. GARY L. BOWLEY, APPELLANT.

442 N.W.2d 215

Filed July 7, 1989. No. 88-528.

1. **Police Officers and Sheriffs: Investigative Stops: Probable Cause.** In order for an investigatory stop to be lawful and justifiable, the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.
2. _____: _____: _____. The factual basis for an investigatory stop need not arise from the officer's personal observation, but may be supplied by

information acquired from another person. When the factual basis is supplied by another, the information must contain sufficient indicia of reliability.

3. **Eyewitnesses: Presumptions.** A citizen informant who has personally observed the commission of a crime is presumptively reliable.
4. **Police Officers and Sheriffs: Investigative Stops: Eyewitnesses: Probable Cause.** In determining whether an investigatory stop is reasonable, the courts have balanced several factors, including the reliability and credibility of the informant, the description of the vehicle, the officer's observations of traffic violations, and the timelag between the report of criminal activity and the stop.
5. **Investigative Stops: Probable Cause.** A vehicle weaving in its own lane of traffic provides an articulable basis or reasonable suspicion for stopping a vehicle for investigation regarding the driver's condition in operating the weaving vehicle.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, 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., WHITE, and FAHRNBRUCH, JJ., and FUHRMAN and WHITEHEAD, D. JJ.

FUHRMAN, D.J.

Gary L. Bowley, convicted by a jury of operating a motor vehicle while intoxicated, was sentenced to the Douglas County Department of Corrections for a period of 120 days and fined $500. Bowley appeals, claiming that the trial court erred in overruling his motion to suppress the fruits of the stop and subsequent arrest of Bowley on July 20, 1987. We affirm.

On July 20, 1987, Omaha Police Officer David Richardson was in a marked cruiser patrolling his district, the Dodge Street area west of 72d Street. At approximately 10 p.m., in the area of 76th and Dodge Streets, Officer Richardson was flagged down by two people on a motorcycle. The two unidentified cyclists informed Richardson there was a pickup truck behind them, and the driver was trying to run them off the road. During the conversation, a pickup truck drove past, which was identified as the pickup that was trying to run down the cyclists. Richardson began to follow the pickup and observed the pickup weaving in and out of traffic without signaling and traveling at

a faster speed than the normal flow of traffic. Richardson eventually caught up with the pickup and pulled the driver over. Field sobriety tests were administered, and the driver was arrested for operating a motor vehicle while intoxicated. The driver was not cited for any other traffic violations.

On September 30, 1987, Bowley was charged in the Douglas County District Court with operating a motor vehicle while under the influence of alcohol. Bowley filed a motion to suppress the evidence obtained as a result of the detention on July 20, 1987, claiming there was insufficient justification for the stop. Bowley argued the evidence should have been suppressed because the officer did not issue citations for the traffic violations he claimed to have seen, nor were these violations noted in the police report. Bowley also claims the citizen informants (the motorcyclists) were unreliable because they remained unidentified until after Bowley was stopped. This motion was overruled by the trial court.

Initially, it must be noted that in order for an investigatory stop to be lawful and justifiable, the officer must be able to point to specific and articulable facts which, taken together with rational inferences from these facts, reasonably warrant the intrusion. *State v. Ege*, 227 Neb. 824, 420 N.W.2d 305 (1988). In addition, the factual basis for the stop need not arise from the officer's personal observation, but may be supplied by information acquired from another person. When the factual basis is supplied by another, the information must contain sufficient indicia of reliability. A citizen informant who has personally observed the commission of a crime is presumptively reliable. *Id.*

In determining whether an investigatory stop is reasonable, this court has balanced several factors, including the reliability and credibility of the informant, the description of the vehicle, the officer's observations of traffic violations, and the timelag between the report of criminal activity and the stop. *Id.* In this instance, Officer Richardson was flagged down by persons who had observed the erratic driving of Bowley. While the informants were unidentified until after Bowley was stopped, they did remain and identify themselves to police. The informants identified the pickup as it traveled past the area

where Officer Richardson was talking with the cyclists, and Richardson then began to follow the pickup. Officer Richardson observed the pickup weaving in and out of the traffic without signaling. Based upon his own observations, coupled with the information received from the cyclists, Richardson pulled the pickup over to determine the condition of its driver, Bowley. This all occurred within a relatively short timespan.

In *State v. Thomte*, 226 Neb. 659, 413 N.W.2d 916 (1987), we held that a vehicle weaving in its own lane of traffic provides an articulable basis or reasonable suspicion for stopping a vehicle for investigation regarding the driver's condition in operating the weaving vehicle. The observations of Officer Richardson, coupled with the information supplied by the citizen informants, provided Richardson with a reasonable basis for detaining Bowley in order to investigate his driving condition. Because there was a reasonable basis for the investigatory stop, the trial court was correct in overruling the motion to suppress the evidence obtained during the stop.

AFFIRMED.

MARGARET CHAMBERS, APPELLANT, V. DEPARTMENT OF SOCIAL SERVICES, APPELLEE.

442 N.W.2d 369

Filed July 14, 1989. No. 87-507.

1. **Administrative Law: Appeal and Error.** The review in the Supreme Court of the judgment of the district court in an appeal from the State Personnel Board is de novo on the record. We make independent findings of fact without reference to those made by the agency whose action is being reviewed and reach our decision independent of all dispositions that have gone on before.
2. **Employer and Employee: Notice.** If a governmental employer has rules or regulations for conducting its business which the employee is required to observe, it is the employer's duty to make them known to the employee. If the employee has no notice of such rules and regulations, he or she cannot be expected to conform his or her conduct to them.
3. _____: _____. Basic in our jurisprudence is the principle that rules must be

known. That principle is fully applicable where the reasonableness of employer action is challenged.

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

John W. Wynkoop for appellant.

Robert M. Spire, Attorney General, and Charles E. Lowe for appellee.

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

FAHRNBRUCH, J.

Margaret Chambers appeals disciplinary action by her employer, Nebraska Department of Social Services (DSS), which resulted in her being placed on probation for 6 months and receiving a demotion and a 15-percent reduction in salary. We reverse and remand with instructions.

Before the disciplinary action, Chambers was an income maintenance worker III and served in an assistant supervisory capacity. DSS claims that such an employee is required to report changes in the economic status of food stamp recipients as soon as such changes come to the employee's attention, regardless of whether the recipient is a client of the employee. In this case, the alleged recipient was Chambers' functionally illiterate son, Mark. DSS further claims that at the time, the requirement was a well known and published policy and procedure and that Chambers intentionally violated it.

Chambers appealed DSS's disciplinary action to the State Personnel Board. After an evidentiary hearing, that board upheld the sanctions imposed upon the appellant. Chambers then appealed to the Lancaster County District Court. It upheld the personnel board's determination. Thereafter, Chambers timely appealed to this court.

DSS also had charged Chambers with using an agency computer terminal to gain access to her son's file. Since the son's case was not assigned to her, DSS claims that Chambers breached the confidentiality of her son's file and in so doing improperly used the state's computer for her own purpose. In its

brief, DSS takes the position that appellant's use of the computer terminal as a basis for discipline is not an issue in this appeal. DSS states that this alleged violation was not used as a basis for disciplining Chambers.

On appeal to this court, appellant, in summary, complains (1) that the disciplinary action taken against her by DSS was not supported by substantial evidence and was arbitrary and capricious; (2) that the evidence is insufficient to show she violated a known policy of DSS; and (3) that the district court erred in affirming the decision of the State Personnel Board, which had previously affirmed the action of DSS.

The review in the Supreme Court of the judgment of the district court in an appeal from the State Personnel Board is de novo on the record. *Kemper v. State*, 230 Neb. 740, 433 N.W.2d 497 (1988); *Monie v. State Personnel Board*, 229 Neb. 27, 424 N.W.2d 874 (1988). Therefore, we make independent findings of fact without reference to those made by the agency whose action is being reviewed, *Monie v. State Personnel Board, supra*, and *Meier v. State,* 227 Neb. 376, 417 N.W.2d 771 (1988), and reach our decision independent of all dispositions that have gone on before. *Monie v. State Personnel Board, supra*; *Department of Health v. Columbia West Corp.*, 227 Neb. 836, 420 N.W.2d 314 (1988).

On April 23, 1986, Chambers' 18-year-old son, a recipient of food stamps, obtained employment at an Amigo's restaurant. Under DSS rules, he was required to report his new work status to DSS within 10 days because it could affect his eligibility to receive food stamps.

It is undisputed that even though Mark had obtained employment on April 23, 1986, he was still eligible for food stamps during the month of May. If brought to its attention, DSS could make a reduction in Mark's eligibility for the month of June 1986 as late as May 21. At that time, the indicated reduction was from $80 to about $27 per month. The evidence is uncontroverted that Chambers reported to DSS on May 9, 1986, that her son was working at Amigos. There is also evidence that DSS was aware of Mark's employment a day or two after he began work.

DSS claims that it has an unwritten policy that an employee

who learns of a change in eligibility of a food stamp recipient must timely report the change to the agency. Several employees testified that they were aware of the unwritten policy, but their testimony varied as to whether the report had to be made immediately, the next day, or within 24 hours after learning of the eligibility change. Chambers testified she was unaware of the time requirements testified to by other witnesses. None of the witnesses could point to any written memorandum or document that set forth the policy or time requirements. The employee's manual did not contain the policy. None of the witnesses could recall that Chambers was present when a witness was told of the alleged time limitations.

We agree with an Indiana Supreme Court holding that

> [i]f appellants had rules or regulations for conducting their business, and which the servant was required to observe, it was their duty to make them known to him. If the servant had no notice of such rules and regulations, he could not be expected to conform his conduct to them.

Hamilton v. Love, 152 Ind. 641, 644, 53 N.E. 181, 181-82 (1899).

The U.S. Court of Appeals for the District of Columbia in *Carter v. United States*, 407 F.2d 1238 (D.C. Cir. 1968), embraced the holding in *Hamilton v. Love, supra*. The appeals court recognized that "[b]asic in our jurisprudence is the principle that rules must be known. That principle is fully applicable where the reasonableness of employer action is challenged." *Carter, supra* at 1246 n.22. Under *Carter*, an employee's knowledge may rest upon fair implication, even though not made express.

Just because some or most employees are aware of an unwritten rule or policy does not support a conclusion that a particular employee is aware of the alleged rule or policy. Here, it was not proven that Chambers was aware of any time requirement policy in regard to reporting a recipient's change in eligibility to receive food stamps. In reviewing the evidence, we find no fair implication can be drawn that Chambers had actual or constructive notice of the time requirements.

As previously stated, it is uncontroverted that Chambers reported Mark's employment on May 9, 1986. Chambers'

report was filed in sufficient time for DSS to make a reduction in Mark's eligibility for food stamps for the month of June. Under DSS rules, no reduction could have been made for the month of May.

Basically, DSS charged Chambers with failing to make a timely report of her son's employment. Unless a definite time period is established, a requirement that an employee must make a timely report is ambiguous. In the context of this case, absent proof that an employee has notice that "a timely report" means within a specified time, "a timely report" means prior to the time the employer must act upon the report.

Since proof is lacking that Chambers had actual or constructive notice of a specific time requirement and since her report of her son's employment was well within the time that DSS was required to act, we find that there was no basis for finding Chambers violated DSS policy. Therefore, no sanctions should have been imposed upon her.

The judgment of the Lancaster County District Court is reversed and remanded with instructions to reverse the decisions of the State Personnel Board and DSS and to dismiss the charges against Chambers. We further direct the district court to order DSS to reinstate Chambers to the position of income maintenance worker III, to pay her back wages, to strike her probation status, and to remove the finding of an alleged violation of DSS policy as charged from her employee file.

REVERSED AND REMANDED WITH DIRECTIONS.

GILBERT CENTRAL CORP., APPELLANT, V. OVERLAND NATIONAL BANK ET AL., APPELLEES.

442 N.W.2d 372

Filed July 14, 1989. No. 87-649.

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

Thomas A. Wagoner for appellant.

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

BOSLAUGH, WHITE, CAPORALE, and GRANT, JJ., and RIST, D.J.

RIST, D.J.

Plaintiff-appellant, Gilbert Central Corp. (Gilbert Central), brought this action against the defendants, Overland National Bank (Overland) and Western Heights Development Co. (Western Heights), to recover the sum of $61,977.35 for grading and asphalt work done by plaintiff for Western Heights incident to the development of a residential subdivision in Grand Island, Nebraska, known as Western Heights Fourth Subdivision.

Plaintiff in its third amended petition alleges that Overland made a loan commitment to Western Heights for the development of the subdivision in 1981; that plaintiff and Western Heights entered into negotiations for grading and asphalt work in said subdivision and in August 1982 reached agreement in principle for such work; that plaintiff notified defendant Overland by letter of its intention to do the grading and asphalt work, and thereafter, on October 18, 1982, Overland corresponded with plaintiff and advised that it would pay for the same; that plaintiff entered into a contract with Western Heights for the work relying upon Overland's representation for such payment; that the work was completed; and that after Western Heights defaulted in payment, plaintiff made demand upon Overland for the balance due, which demand was refused. Plaintiff seeks to recover such balance from Overland on the basis that the bank is estopped from denying liability for such work by virtue of its loan commitment to Western Heights relied upon by plaintiff and on the basis that Overland would be unjustly enriched. A consent judgment was entered between plaintiff and Western Heights, and this suit continued as to Overland.

Defendant Overland in its answer admits that in 1981 it entered into a general agreement with Western Heights to loan

money for such development; admits that on October 18, 1982, it corresponded with Western Heights concerning the same, but denies plaintiff's characterization thereof; and admits that plaintiff entered into a contract with Western Heights to do the work, but denies all allegations with respect to defendant Overland's alleged liability for the same.

After the matter was at issue between plaintiff and Overland, the bank filed a motion for summary judgment, and on May 7, 1987, the trial court sustained the motion and dismissed plaintiff's petition.

Plaintiff appeals to this court, assigning as error that the district court erred in sustaining Overland's motion for summary judgment (1) in finding that the pleadings did not establish a contract based upon the theory of promissory estoppel existing between plaintiff and Overland, and (2) in finding no issue on the matter of unjust enrichment.

Before dealing with factual issues, there is a preliminary matter of pleading to be considered. Plaintiff alleged in paragraph VI of its third amended petition that

> on or about October 18, 1982, the Defendant, Overland National Bank, corresponded with the Plaintiff advising them that the Defendant, Overland National Bank, would pay the Plaintiff for the grading and asphalt work in the subdivision. A copy is attached hereto, marked Exhibit "B" and by reference made a part hereof.

No exhibit B was attached to the third amended petition. The original petition, however, in paragraph V alleged that "on or about October 18, 1982, the Defendant corresponded with the plaintiff advising them that the Defendant would pay the Plaintiff for the grading and asphalt work in the subdivision. A copy is attached hereto, marked Exhibit 'B' and by reference made a part hereof." An exhibit B was attached to this petition, being a letter dated October 18, 1982, from Overland to Western Heights.

The initial question is whether exhibit B may be considered a part of the third amended petition. The allegations in both the original and third amended petition with respect to this exhibit are essentially identical, and both petitions are a part of the court file reflected in the transcript.

In the case of *Bank of Stockham v. Alter*, 61 Neb. 359, 85 N.W. 300 (1901), the plaintiff's last amended petition made reference to a note and mortgage as exhibits alleged to be attached and by reference made a part of such petition. These exhibits were not so attached, but such exhibits had been attached to an earlier amended petition. The court held at 365-66, 85 N.W. at 302:

> Under the system of filings practiced in the district court... all such pleadings are preserved, together with the other files in the case, attached to and held together as one complete package or set of filings. The note and mortgage ... were attached directly to the first amended petition... They were by reference attached to and made a part of the last amended petition, but not physically displaced from the place in the files in connection with the first amended petition.... [W]e think their filing in the case as an exhibit, and the reference to and designation of them as such exhibits in the [last amended petition], sufficiently identifies and connects them with the pleading and as a part thereof; so that, in the absence of a motion directed to the same, they will be considered and treated, as they appear to have been in the trial of the case, as a part of the [last amended petition].

The transcript in this case contains both the original petition with the exhibit attached and the third amended petition. The evidence in this case shows exhibit B was considered by the parties as the basis for the liability alleged in paragraph VI of the third amended petition, and it is so argued in the briefs. We therefore consider exhibit B as a part of the third amended petition.

We next consider the issue raised by Overland in its brief, namely, that exhibit B is at variance with paragraph VI of the third amended petition, both as to the addressee of the letter and its contents. As previously set forth, paragraph VI pleads that this was correspondence by Overland with plaintiff and that Overland advised plaintiff it would pay for the grading and asphalt work. Exhibit B is a letter dated October 18, 1982, from Overland to Western Heights, and states as follows:

> On September 10, 1981, the Overland National Bank

> issued a commitment to Western Heights Development Co. for the purpose of developing 18 acres, subdivided into 27 residential lots.
>
> A portion of this commitment has been reserved to pay the Gilbert Central Corporation in the amount of $63,170.90, for the grading and asphalt work in this subdivision. These funds will be disbursed to Western Heights Development Co. upon completion of the work to the satisfaction of our customer.
>
> It is mutually understood that the bank shall not be obligated to lend funds under this commitment should there be a substantial adverse change in the present financial condition of Western Heights Development Co.

Defendant Overland argues that when an exhibit attached to a petition is at variance with the pleading itself, the exhibit controls. We agree. In *Reller v. Ankeny*, 160 Neb. 47, 53, 68 N.W.2d 686, 690 (1955), this court held:

> An exhibit made a part of a pleading by direct allegation to that effect is a part thereof . . . . The contents of such an exhibit prevail over any allegation of the pleading that is inconsistent therewith and such an exhibit may be considered by the court without reference to the legal effect thereof as alleged in the pleading.

Accordingly, since paragraph VI is at variance with exhibit B, we find the exhibit is the alleged basis of the liability claimed in such paragraph VI and prevails over any characterization of such exhibit contained in that paragraph. We note further that the evidence reflects exhibit B is the basis for the claimed liability and that the parties so argue in their briefs.

Turning to the evidence received in the hearing for summary judgment, the record reflects the following: Gilbert Central, formerly Missouri Valley Construction Company, a wholly owned subsidiary of Peter Kiewit and Sons, entered into negotiations with Western Heights in August 1982 to do the grading and asphalt work in Western Heights Fourth Subdivision and submitted a cost estimate to Western Heights for such work. Gilbert Central also discussed with Western Heights the matter of financing the work. Western Heights advised it had a loan commitment from Overland whereby it

could borrow the necessary funds, and Gilbert Central requested some written assurance of such arrangement.

On August 23, 1982, Gilbert Central wrote Overland advising in substance that it had agreed to do the work at a cost of $63,170.90 on the understanding that Overland had committed the necessary funds for it and that Gilbert Central had agreed not to receive payment for the work for 1 year from the date the project was completed and accepted by Hall County. In the meantime, Western Heights had contacted Overland with respect to the loan commitment, and Overland, on October 18, 1982, wrote exhibit B to Western Heights as set forth above. Gilbert Central received a copy of this letter from Western Heights.

On October 18, 1982, after having seen exhibit B, Gilbert Central and Western Heights entered into a contract for the grading and asphalt work, which provided in part for the payment by Western Heights of $63,170.90 in full no later than 30 days following completion of the work.

Gilbert Central performed the work, completing it sometime in early or mid-1983. Hall County, by letter dated December 2, 1983, approved the specific work done for the contract price above noted.

In early December 1983, Western Heights requested the loan from Overland to pay the contract and was refused on the basis of the financial deterioration of Western Heights, and Western Heights reported this to Gilbert Central. On December 7, 1983, Gilbert Central and Western Heights entered into a further agreement to pay the contract, which including interest was now $77,471.69, in monthly installments of $7,747.77. Payments were made in December 1983 and January 1984, and thereafter Western Heights defaulted. Gilbert Central made demand upon Overland for the payment and was refused.

The evidence reflects the following data with respect to Western Heights financial status: (1) the net worth of Western Heights was as follows: August 25, 1982, $138,771; September 9, 1983, $88,000; and September 26, 1984, $10,100; (2) Western Heights' equity in the property in the subdivision was as follows: August 25, 1982, $70,000; September 9, 1983, $28,000; and September 26, 1984, $24,000; and (3) Western Heights'

equity in real estate other than in the subdivision was as follows: August 25, 1982, $74,500; September 9, 1983, $62,500; and September 9, 1984, $36,000.

In July 1985, Overland commenced foreclosure proceedings upon the subdivision property, resulting in a foreclosure sale in August 1986, at which time Overland bid on the property, and the sale to Overland was later confirmed.

Plaintiff, Gilbert Central, admitted it had no direct dealings with Overland respecting the loan to Western Heights except the letter, exhibit B; that the only evidence Gilbert Central has with respect to the loan is such letter; and that Gilbert Central was aware of the limitation in paragraph 3 of that letter at the time it made its contract with Western Heights.

No mechanic's lien was ever filed by Gilbert Central against the property involved.

Since the case comes to us upon the sustaining of a motion for summary judgment for defendant Overland, the question is whether the pleadings and evidence show no genuine issue as to any material fact and that the defendant Overland, as the moving party, is entitled to judgment as a matter of law. Neb. Rev. Stat. § 25-1332 (Reissue 1985).

The basic issues in this case are (1) is there a genuine issue of fact as to whether plaintiff had a right to rely upon a commitment from Overland to Western Heights for the loan when it made its contract with Western Heights, and (2) if it did, is there a genuine issue of fact as to whether defendant Overland was entitled to refuse to make the loan.

Plaintiff, in support of its claim that the defendant Overland is liable under the doctrine of promissory estoppel, has directed our attention to the case of *Johnston v. State Bank*, 195 N.W.2d 126 (Iowa 1972), in which the Iowa court held that a bank would be liable to a builder where the bank had written a letter to the builder advising of a loan commitment to the owner of the property involved for a building if built pursuant to submitted plans and specifications and to the bank having a first lien thereon. When the bank refused to make the loan after the building had been built, the trial court said that the builder could compel the bank to make the mortgage loan to the owners on the basis of promissory estoppel and that where the bank

had represented to the builder what it would do for the owner, and the builder had reasonably relied upon such representations and performed in accordance with them, the bank could not thereafter change its position to the builder's detriment. The plaintiff in this case claims that exhibit B is such a commitment and representation and that defendant Overland wrote it intending the plaintiff rely upon it or at least was aware plaintiff would rely upon it.

Overland argues exhibit B was not addressed to the plaintiff but, rather, to Western Heights and, therefore, cannot be considered a representation to plaintiff as to the loan commitment, and given the provisions of the third paragraph of the letter which provided no loan liability in the event of a substantial adverse change in Western Heights' financial condition that plaintiff could not reasonably rely upon Overland's making the loan. Overland also argues that Western Heights' financial condition did substantially deteriorate.

Promissory estoppel may arise from the making of a promise, even without consideration, if it is intended that the promise should be relied upon and in fact was relied upon, and if a refusal to enforce it would result in injustice. The reliance by the promisee should reasonably have been expected by the promisor. 28 Am. Jur. 2d *Estoppel and Waiver* § 48 (1966). *Johnston, supra*, held that where a person with knowledge of the facts conducted himself in a certain manner, he cannot afterward assume a position inconsistent with such conduct to the prejudice of another who had acted in reliance upon such conduct.

This court, in considering the doctrine of promissory estoppel, although in a context different from that in this case, defined promissory estoppel as a promise by one party upon which another party relies to his detriment, and which the promisor should reasonably have foreseen would cause the promisee to so rely. *Farmland Service Coop, Inc. v. Klein*, 196 Neb. 538, 244 N.W.2d 86 (1976). *Klein* also held that promissory estoppel operates not with regard to a past or presently existing state of facts but, rather, to a situation which one party promises to be true in the future and that it may extend to the promisee or to a third party whom the promisor

should reasonably expect to act upon it.

We believe plaintiff properly pleads an issue of promissory estoppel, and a factual issue exists as to whether defendant knew or should have reasonably expected plaintiff to have knowledge of the letter and to have relied upon it in making the contract with Western Heights that cannot be determined in summary judgment.

If we assume plaintiff could rely upon the letter in making its contract with Western Heights, issues remain as to whether plaintiff could reasonably do so given the condition contained in the third paragraph of that letter and whether Overland had a reasonable basis to deny the loan. Finally, it must be determined if such issues could be determined in summary judgment.

We conclude plaintiff was bound to take note of the third paragraph of the letter and in fact did so prior to making the contract with Western Heights, and any reliance upon the letter is subject to that condition. We further conclude that for defendant Overland to prevail in summary judgment, the evidence must reflect no genuine issue as to whether Overland acted reasonably and in good faith in denying the loan.

We reach the conclusion that Overland's refusal to make the loan must be reasonable and in good faith based upon our review of cases dealing with agreements to extend credit and to make loans. While there is a general policy requiring good faith and fair dealing with respect to contracts, Restatement (Second) of Contracts § 205 (1981), there are more specific cases dealing with agreements for credit or loans. In *K.M.C. Co., Inc. v. Irving Trust Co.*, 757 F.2d 752 (6th Cir. 1985), the court held there was an implied obligation of good faith imposed on a lender to give notice to a borrower before refusing an advancement under an agreement to extend credit unless the refusal without notice was made in good faith on the basis that the borrower's financial condition would not support such a loan. While this decision has been criticized and distinguished in some jurisdictions and held not applicable where demand debts were involved, *Flagship Nat. Bank v. Gray Distribution Syst.*, 485 So. 2d 1336 (Fla. App. 1986), or where there was only a line of credit arrangement and not a commitment to make a specific loan, *Shaughnessy v. Mark Twain State Bank*, 715 S.W.2d 944 (Mo. App. 1986), most jurisdictions appear to agree

that if there was an agreement to make a specific loan, then good faith and reasonableness are required when the bank determines the borrower is not financially sound and refuses to make the loan for that reason. *In re Red Cedar Const. Co., Inc.*, 63 Bankr. 228 (Bankr. W.D. Mich. 1986); *Midlantic Nat. Bank v. Commonwealth General*, 386 So. 2d 31 (Fla. App. 1980).

We conclude the language contained in the letter, exhibit B, amounts to a specific loan commitment, albeit conditioned in the third paragraph. The letter is specific as to the amount of the loan, the purpose, the parties involved, and the improvement to be financed. The condition set forth in the letter permitting the refusal of the loan must, therefore, be exercised reasonably and in good faith.

A review of the evidence available to the bank concerning Western Heights' financial condition at the time of the loan refusal in December 1983, as previously outlined, leads us to the conclusion that it would be for the trier of the facts to determine the reasonableness and good faith of Overland's actions in refusing the loan and that the evidence shown does not rise to the level that this issue may be decided in summary judgment.

We deem it appropriate to add a caveat that our consideration of the cases on the issues of reasonableness and good faith in loan denial is limited to the specific facts of this case and is not to be considered as stating any rule beyond what is here required.

What we have held with respect to the issue of equitable estoppel is also applicable in the main to plaintiff's claim respecting unjust enrichment. It is essentially a question of whether benefits inured to the bank as a result of the grading and asphalt work and whether or not the bank was justified in refusing the loan. If it was justified, then whatever benefits resulted were not from inequitable or unconscionable conduct. If it was not justified, then the issue exists. In any event, it is a matter not subject to resolution in summary judgment in this case.

For the reasons above set forth, we reverse the judgment of dismissal of the trial court and remand this cause for trial.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

DONALD L. OHNSTAD, SPECIAL ADMINISTRATOR OF THE ESTATE OF DARIN OHNSTAD, DECEASED, APPELLANT, V. OMAHA PUBLIC SCHOOL DISTRICT NO. 1 OF DOUGLAS COUNTY AND RALSTON PUBLIC SCHOOL DISTRICT OF DOUGLAS COUNTY, APPELLEES.

442 N.W.2d 859

Filed July 14, 1989. No. 87-995.

1. **Political Subdivisions Tort Claims Act: Appeal and Error.** A district court's factual findings in a case brought under the Political Subdivisions Tort Claims Act will not be set aside unless such findings are clearly incorrect.
2. **Trial: Evidence: Witnesses.** In a bench trial of a law action, the court, as the trier of fact, is the sole judge of the credibility of witnesses and the weight to be given their testimony. Among the factors entering into the trial court's resolution of any conflicts of evidence are such items as the respective interests of the parties in the litigation; the demeanor of witnesses, including the parties, while testifying before the court; the apparent fairness exhibited by witnesses; the extent to which testimony of various witnesses is corroborated; and the reasonableness or unreasonableness of testimony from the witnesses.
3. **Judgments: Appeal and Error.** In reviewing a judgment awarded in a bench trial, the Supreme Court does not reweigh evidence but considers the judgment in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.

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

Michael L. Schleich and Amy S. Bones, of Fraser, Stryker, Veach, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellant.

Dean F. Suing, of Katskee & Henatsch, for appellee Ralston Public School District.

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

WHITE, J.

This appeal arises from an action brought under the Nebraska Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 13-901 et seq. (Reissue 1987). The plaintiff's son, Darin Ohnstad, died from injuries sustained in a tragic pole-vaulting accident while participating at the 1983 Metro Conference track meet. Darin, a 17-year-old student at Ralston High School,

suffered severe head injuries when he fell headfirst into a metal pole-planting box, which resulted in his death 6 days later. The plaintiff, Donald L. Ohnstad, as the duly appointed special administrator of his son's estate, filed notices of a tort claim with the defendants, Omaha Public School District No. 1 of Douglas County and Ralston Public School District of Douglas County, which denied liability. The plaintiff then filed suit in the district court for Douglas County, alleging that the defendants were negligent because one of their employees, Ralston High School's head track coach Gary Dubbs, failed to properly supervise and instruct Darin in the pole vault event. Specifically, in his petition the plaintiff contended that the defendants were negligent in (1) failing to have the pole vault event properly staffed with duly qualified and competent instructors and coaches, (2) failing to properly instruct and warn Darin of the risks attendant to the pole vault event, (3) failing to properly instruct Darin in the techniques of pole vaulting, (4) failing to properly supervise Darin when he was pole vaulting, (5) failing to instruct Darin in the proper placing of the pole vault standards, and (6) failing to provide Darin with proper and safe equipment to use while pole vaulting.

Omaha Public School District No. 1 was dismissed from the case after its motion for summary judgment was granted. The case proceeded against the defendant Ralston Public School District. The trial court, sitting without a jury, found for the defendant. In its order the court stated that

> the proximate cause of Darin's injuries was his own action of jumping with a low, late plant and attempting to complete a successful vault after he had made the defective plant with the pole. . . .
>
> . . . .
>
> The Court further finds the defendant's negligence, if any, was not the proximate cause of the accident; that in any event, Darin Ohnstad's negligence was more than slight and defendant's, if any, less than gross by comparison.

The plaintiff's motion for a new trial was overruled, and this appeal resulted.

The plaintiff assigns four errors. Since these errors all present issues of fact and not law, the plaintiff's sole

consolidated assignment of error is whether there was sufficient evidence to support the court's finding.

> "A district court's factual findings in a case brought under the Political Subdivisions Tort Claims Act will not be set aside unless such findings are clearly incorrect. [Citations omitted.]
>
> In a bench trial of a law action, the court, as the 'trier of fact,' is the sole judge of the credibility of witnesses and the weight to be given their testimony. Among the factors entering into the trial court's resolution of any conflicts of evidence are such items as the respective interests of the parties in the litigation; the demeanor of witnesses, including the parties, while testifying before the court; the apparent fairness exhibited by witnesses; the extent to which testimony of various witnesses is corroborated; and the reasonableness or unreasonableness of testimony from the witnesses. [Citations omitted.] 'In reviewing a judgment awarded in a bench trial, the Supreme Court does not reweigh evidence but considers the judgment in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.' "

Zeller v. County of Howard, 227 Neb. 667, 669-70, 419 N.W.2d 654, 656 (1988).

In support of his consolidated assignment of error, the plaintiff contends that there was insufficient evidence to support the trial court's finding that Darin was contributorily negligent. The plaintiff has misinterpreted the trial court's findings. Despite language in the court's opinion indicating that Darin's negligence was more than slight in comparison to the appellee Ralston's, the thrust of the opinion is that Darin's actions, not Ralston's, were the proximate cause of the accident. Whether Darin was contributorily negligent is irrelevant. Our review of the record demonstrates that there was sufficient evidence to support a finding that Darin proximately caused the accident without being contributorily negligent. Therefore, the plaintiff's contention is without merit.

Though the plaintiff raised five allegations of negligence on

the part of the appellees in his petition, the evidence adduced at trial focused on only two allegations. First, that Coach Dubbs was negligent in instructing Darin where to place the standards on the day of the track meet and, second, that Coach Dubbs provided Darin with an improper pole. Specifically, the plaintiff asserted that the standards, the devices used to hold the crossbar, were placed too far forward, causing Darin to fall into the vaulting box rather than the matted pit, and that Darin was overweight for the type of pole he was using that day.

There is sufficient evidence to support the court's findings. The appellees produced three expert witnesses, who testified that the cause of the accident was a low, late pole plant and that the placement of the standards did not contribute to the accident. Further, two expert witnesses were of the opinion that Darin was using the correct pole at the time of the accident.

We cannot say, given the state of the evidence, that the trial court's findings are clearly incorrect. Accordingly, the judgment of the district court for Douglas County is affirmed.

AFFIRMED.

GRANT, J., not participating.

LYNN DIDONATO, APPELLANT, V. BESSIE WILLIAMS, APPELLEE.

442 N.W.2d 378

Filed July 14, 1989. No. 87-1079.

1. **Directed Verdict: Appeal and Error.** In considering denial of a motion for directed verdict made at the close of all the evidence, our review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can only draw but one conclusion from the evidence.
2. **Motor Vehicles: Negligence.** A driver who fails to see another who is favored over him is guilty of negligence as a matter of law.
3. _____: _____. Generally, the failure to see an approaching vehicle is not negligence as a matter of law unless the vehicle is undisputably located in a favored position.
4. **Motor Vehicles: Negligence: Directed Verdict: Trial.** Whether one failed to look or looked and failed to see a vehicle when it was within the limit of danger is a question for the jury, except in those cases where the evidence is so conclusive that the approaching vehicle was within the limit of danger that reasonable

minds could not differ thereon. Before a verdict can be properly directed in such a case the position of the oncoming vehicle must be definitely located in a favored position, that is, that it was within that radius which denotes the limit of danger, otherwise the question becomes one for the jury.

5. **Motor Vehicles: Negligence.** The mere stalling or temporary sputtering of a vehicle does not constitute negligence as a matter of law.

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

Jeffrey A. Silver, of Silver, Wieland & Haas, for appellant.

Robert D. Mullin, Jr., of McGrath, North, Mullin & Kratz, P.C., for appellee.

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

WHITE, J.

This appeal arises from a civil action in the district court for Douglas County for damages for personal injuries suffered by the plaintiff, Lynn Didonato, in a motor vehicle accident. On November 13, 1983, the plaintiff was sitting in the front passenger seat of a car driven by Carl Paniko, traveling eastbound on Maple Street in Omaha, Nebraska. The defendant, Bessie Williams, traveling westbound on Maple Street, attempted a left turn onto the southbound Interstate 680 onramp. The plaintiff suffered injuries when Paniko's car collided with the defendant's vehicle.

The plaintiff sued the defendant, alleging in her petition that Williams was negligent in (1) failing to maintain a proper lookout; (2) failing to have her vehicle under reasonable control; and (3) failing to yield the right-of-way to the vehicle in which the plaintiff was a passenger, in violation of Neb. Rev. Stat. § 39-636 (Reissue 1988).

During the trial and at the close of all the evidence, the plaintiff moved the court for a directed verdict on the issue of liability. The trial court overruled the motions and submitted the case to the jury, which returned a verdict in favor of the defendant. Subsequently, the plaintiff made a motion for a new trial or in the alternative for a judgment notwithstanding the verdict. The district court overruled the plaintiff's motion, and

this appeal followed.

In her sole assignment of error the plaintiff contends that the trial court erred in failing to direct a verdict in her favor.

> It is a well-settled rule in this jurisdiction that "[w]ith regard to the overruling of a motion for a directed verdict made at the close of all the evidence, our review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can only draw but one conclusion from the evidence, where an issue should be decided as a matter of law."

Commerce Sav. Scottsbluff v. F.H. Schafer Elev., 231 Neb. 288, 298, 436 N.W.2d 151, 159 (1989).

A review of the record shows that at the scene of the accident, Maple Street has two eastbound lanes and three westbound lanes, including a turning lane. The westbound turning lane provides access to the southbound Interstate 680 onramp. The defendant, who was traveling westbound, went into the turn lane, activated her left turn signal, and slowed to a stop. After letting some eastbound traffic clear the intersection, she looked to the west for any further oncoming eastbound traffic and saw no vehicles within a block of the intersection. As she began her left turn onto the Interstate 680 onramp, she saw Paniko's car, which was at least one block away, traveling eastbound in the outside lane. During the turn, the defendant's car began "sputtering," and the vehicle was unable to generate enough speed to clear the intersection. The defendant's car cleared the inside lane and was partially on the freeway onramp when Paniko's car ran into it. Prior to the accident, the defendant had not experienced any problems with her vehicle that day.

No testimony from Paniko was offered concerning how the accident happened, and the plaintiff had little recollection of the event. Didonato did not know which lane the Paniko vehicle was traveling in prior to the event, the speed of the Paniko vehicle prior to the accident, and the speed the defendant's vehicle was traveling just prior to the accident. Moreover, the plaintiff did not even see the defendant's car until Paniko screamed a moment before impact.

Relying on *Floridia v. Farlee*, 201 Neb. 39, 266 N.W.2d 204 (1978), the plaintiff contends that the trial court erred in

refusing to direct a verdict in her favor on the issue of liability. Briefly, we held in *Floridia* that the defendant, who was making a left turn at an intersection, was negligent as a matter of law because he failed to see the plaintiff's car, which was in the favored position. *Floridia* is an example of the rule recently stated in *Getzschman v. Yard Co.*, 229 Neb. 231, 235, 426 N.W.2d 499, 502 (1988), that " ' "a driver who fails to see another who is favored over him is guilty of negligence as a matter of law." ' " However, we have also said that this rule does not apply where a driver sees the other car. *Eden v. Spaulding*, 218 Neb. 799, 359 N.W.2d 758 (1984). The plaintiff's reliance on *Floridia v. Farlee, supra*, is misplaced because the undisputed evidence shows that the defendant saw Paniko's car.

" 'Generally, the failure to see an approaching vehicle is not negligence as a matter of law unless the vehicle is undisputably located in a favored position.' " *Mitchell v. Kesting*, 221 Neb. 506, 508, 378 N.W.2d 188, 190 (1985).

> " 'Whether one failed to look or looked and failed to see a vehicle when it was within the limit of danger is a question for the jury, except in those cases where the evidence is so conclusive that the approaching vehicle was within the limit of danger that reasonable minds could not differ thereon. . . . Before a verdict can be properly directed in such a case the position of the oncoming vehicle must be definitely located in a favored position, that is, that it was within that radius which denotes the limit of danger, otherwise the question becomes one for the jury.' "

Getzschman v. Yard Co., supra at 236, 426 N.W.2d at 502. The evidence demonstrates that the Paniko vehicle was no closer than a block from the intersection when the defendant commenced her turn. Whether Paniko's car was in the favored position is an issue on which reasonable minds could differ. Therefore, this issue presented a question of fact to be resolved by the jury. Additionally, the mere stalling or temporary sputtering of a vehicle does not constitute negligence as a matter of law. *Piper v. Hill*, 185 Neb. 568, 177 N.W.2d 509 (1970). The trial court was correct in denying plaintiff's motions for a directed verdict and in submitting the case to the jury.

Accordingly, there being no error committed by the trial court, the jury verdict and judgment entered in favor of the defendant are affirmed.

AFFIRMED.

JAMES RAY MOORE, APPELLANT, V. GARY E. GRAMMER ET AL., APPELLEES.

442 N.W.2d 861

Filed July 14, 1989. No. 87-1088.

1. **Actions: Pleadings: Demurrer.** In testing whether a petition which has been challenged by a demurrer states a cause of action, a court is required to accept as true all the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom; a court does not, however, accept as true the conclusions of the pleader.
2. **Constitutional Law: Prisoners.** Prisoners have only narrowly defined liberty interests, for imprisonment necessarily retracts many of the liberties of the free.
3. **Constitutional Law: Prisoners: Employment Security.** The Constitution does not create a property or liberty interest in prison employment.
4. **Constitutional Law: Statutes.** To create liberty or property interests, state law must use explicitly mandatory language in connection with the establishment of specific substantive predicates limiting the discretion of the decision maker.
5. **Constitutional Law: Statutes: Prisoners: Employment Security: Wages.** Nebraska law does not create a protected liberty or property interest in prison employment or wage rates.

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

James Ray Moore, pro se.

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

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

PER CURIAM.

James Ray Moore, pro se, appeals from an order of the district court for Lancaster County sustaining the appellees'

demurrer and dismissing the appellant's petition.

The appellant, an inmate at the Nebraska State Penitentiary, filed this action on July 21, 1987, seeking relief with regard to his transfer to a different prison work assignment. In his petition, the appellant contended that he was dismissed from his prison job without the required procedural due process guarantees of notice and a hearing. On September 3, the appellees, the warden and assistant warden of the Nebraska State Penitentiary, filed a demurrer on the basis that the appellant possessed no constitutional or statutory right to a particular job assignment or wage while incarcerated in a penal institution. On November 12, the appellees' demurrer was heard by telephonic conference. The district court, on November 13, sustained the demurrer, concluding that neither the Constitution nor state law creates a protected property or liberty interest in prison employment.

In his appeal to this court, the appellant's only assignment of error is that the district court erred in sustaining the appellees' demurrer and dismissing the appellant's petition.

In testing whether a petition which has been challenged by a demurrer states a cause of action, a court is required to accept as true all the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom; a court does not, however, accept as true the conclusions of the pleader. *Reimer v. K N Energy, Inc.*, 223 Neb. 142, 388 N.W.2d 479 (1986). The appellant's petition states that on February 11, 1986, he was dismissed from his position in the property control department at the penitentiary and reassigned to the housing unit utility porters, at a rate of $1.05 per day. The appellant, at the time of his removal, had been assigned to the property control department for more than 5 years and was paid $3.29 per day.

The appellant received no notice as to the basis for his job reassignment, nor was he given a hearing. On February 12, in response to the appellant's inquiry, Larry Wayne, the appellant's housing unit manager, informed the appellant that Deputy Warden Harold W. Clarke had told him that only penitentiary staff would work in the property control department. The appellant then submitted a "step one

grievance" to Warden Gary E. Grammer. On February 27, Warden Grammer responded, saying that "[y]ou were removed from your position in Property Control because you were inappropriately involved in dealing with other offender's property at your work location. Due to this involvement, you have been reassigned to Housing Unit Utility at $1.05 per day, and will remain so assigned." However, the appellant was never formally charged with any prison rule infraction relating to his work in the property control department.

Thereafter, the appellant filed a "step two grievance" with Frank Gunter, the director of the Nebraska Department of Correctional Services, appealing Warden Grammer's decision. On March 12, Gunter responded, stating:

> The Penitentiary administration obtained evidence that you had converted the property of other inmates to your own use and to the use of third party inmates. The fact that a disciplinary report was not prepared charging you with such an offense does not preclude the Penitentiary administration from taking a lesser action such as changing your job assignment and rate of pay.

In addition, the appellant filed a complaint with the office of the Public Counsel. On March 24, Warden Grammer sent a letter to the office of the Public Counsel, stating the following:

> An administrative decision was made to unassign all the inmates working in the Property Control area and not to work inmates in that area anymore.
>
> The decision was arrived at after we learned that some inmates assigned to Property Control were involved in stealing and selling or simply giving away the property of other inmates stored therein.
>
> Currently, only penitentiary staff is authorized to handle inmate property.

Our review of the appellant's petition shows that he was attempting to establish one cause of action: that his dismissal from his prison job and subsequent reassignment to a job with a lower rate of pay violated his right to due process of the law.

"It is well established that prisoners have only narrowly defined liberty interests, for imprisonment necessarily retracts many of the liberties of the free." *Lyon v. Farrier*, 727 F.2d 766,

768 (8th Cir. 1984), *cert. denied* 469 U.S. 839, 105 S. Ct. 140, 83 L. Ed. 2d 79, citing *Hewitt v. Helms*, 459 U.S. 460, 103 S. Ct. 864, 74 L. Ed. 2d 675 (1983). It is also clear that the Constitution does not create a property or liberty interest in prison employment. *Ingram v. Papalia,* 804 F.2d 595 (10th Cir. 1986). The U.S. Court of Appeals for the Eighth Circuit said the following in *Lyon v. Farrier, supra* at 769:

> The inmates also claim that the district court committed error in determining that their due process rights were not violated by the failure of prison officials to reinstate them in their prison jobs with back pay. Inmates have no constitutional entitlement to tenure in prison jobs. *Garza v. Miller*, 688 F.2d 480, 486 (7th Cir.1982), *cert. denied*, ____ U.S. ____, 103 S.Ct 796, 74 L.Ed.2d 1000 (1983); *see Gibson v. McEvers*, 631 F.2d 95, 98 (7th Cir.1980). Whatever liberty or property interests inhere in prison employment are the product of state law. *Peck v. Hoff*, 660 F.2d 371, 373 (8th Cir.1981).

To create such interests, state law must use explicitly mandatory language in connection with the establishment of specific substantive predicates limiting the discretion of the decision maker. *Kentucky Dept. of Corrections v. Thompson,* ____ U.S. ____, 109 S. Ct. 1904, 104 L. Ed. 2d 506 (1989). Although the appellant refers to several statutes in his petition, Nebraska law does not create a protected liberty or property interest in prison employment or wage rates. The appellant's assignment of error is without merit.

Accordingly, the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CLAYTON KERN, APPELLANT.

442 N.W.2d 381

Filed July 14, 1989. No. 88-223.

1. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal, no matter how those issues may be phrased or rephrased.
2. **Constitutional Law: Right to Counsel: Effectiveness of Counsel.** At trial a criminal defendant has a constitutional right not only to counsel but to the effective assistance of counsel.
3. **Constitutional Law: 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; that is, there must be a demonstration of reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.
4. **Postconviction: Proof.** One seeking postconviction relief has the burden of establishing a basis for such relief.
5. **Postconviction.** An evidentiary hearing may properly be denied on a motion for postconviction relief when the records and files in the case affirmatively establish that the defendant is entitled to no relief.
6. **Rules of the Supreme Court: Evidence.** Neb. Ct. R. of Prac. 5H (rev. 1989) directs that the clerk of the district court not send to the Clerk of the Supreme Court contraband, drugs, firearms, or other weapons unless specifically requested to do so by the Supreme Court.

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

Thomas L. Spinar for appellant.

Clayton Kern, pro se.

Robert M. Spire, Attorney General, and Dale A. Comer for appellee.

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

CAPORALE, J.

Defendant, Clayton Kern, appeals from the denial of his motion for postconviction relief brought under the provisions of Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1985). He asserts that the postconviction court erred (1) in finding the trial court properly admitted certain evidence, (2) in finding the trial court

correctly determined the evidence sufficient to support his conviction, and (3) in failing to permit a postdenial amendment to his postconviction motion. We affirm.

The facts underlying Kern's conviction for the first degree murder of his second wife are recited in *State v. Kern*, 224 Neb. 177, 397 N.W.2d 23 (1986), this court's opinion determining Kern's direct appeal, and therefore need not be repeated here in detail. It is sufficient merely to note that Kern, distressed over his second wife's announced plan to divorce him, choked her to death with his bare hands. At trial, the prosecution, over defense objection, adduced testimony to the effect that Kern had once, in a fit of jealousy, choked his then estranged first wife to the point of unconsciousness with his bare hands.

In his direct appeal, Kern challenged the trial court's admission of the evidence concerning Kern's assault on his first wife and the sufficiency of the evidence to support the jury's implicit finding that the murder of his second wife was premeditated. This court resolved both questions against Kern, affirming the judgment of the trial court. *State v. Kern, supra.*

Thus, Kern's first two assignments of error must fail, for a motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal, no matter how those issues may be phrased or rephrased. *State v. Ferrell*, 230 Neb. 958, 434 N.W.2d 331 (1989); *State v. Davis*, 228 Neb. 622, 423 N.W.2d 487 (1988). Kern seeks to evade the application of this rule by now stating that the in-court testimony of his first wife regarding the assault on her was insufficient to prove such really took place, an argument he claims was not made in his direct appeal. However, this present formulation of the contention merely rephrases his earlier arguments and does not avoid application of the foregoing rule. *State v. Luna*, 230 Neb. 966, 434 N.W.2d 526 (1989); *State v. Rubek*, 225 Neb. 477, 406 N.W.2d 130 (1987).

In connection with his third and remaining assignment of error, Kern argues that the district court erred by not permitting him to amend his motion for postconviction relief, after entering its order of denial, so as to allege that he was not informed by his appointed trial counsel, nor by the trial court, of his right to take the stand in his own defense. He urges the

view that this is an error of constitutional magnitude sufficient to warrant the postconviction relief for which he prays, specifically, that his conviction and sentence be vacated and set aside and that he be discharged or, in the alternative, be granted a new trial. Thus, Kern, in effect, sought to add to his motion a claim that trial counsel was ineffective.

There is no question but that at trial a criminal defendant has a constitutional right not only to counsel but to the effective assistance of counsel. *State v. Ellefson*, 231 Neb. 120, 435 N.W.2d 653 (1989); *State v. Reddick*, 230 Neb. 218, 430 N.W.2d 542 (1988). 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; that is, there must be a demonstration of reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *State v. Ditter, ante* p. 600, 441 N.W.2d 622 (1989); *State v. Wiley, ante* p. 642, 441 N.W.2d 629 (1989); *State v. Hawthorne,* 230 Neb. 343, 431 N.W.2d 630 (1988).

Moreover, one seeking postconviction relief has the burden of establishing a basis for such relief. *State v. Ellefson, supra*; *State v. Luna, supra*. An evidentiary hearing may properly be denied on a motion for postconviction relief when the records and files in the case affirmatively establish that the defendant is entitled to no relief. *State v. Luna, supra*; *State v. Reddick, supra*.

Implying no consideration of the matter but assuming for the moment that Kern is able to satisfy the first element of the ineffective assistance of counsel test, it is clear that his assertions do not satisfy the second element. Kern fails to draw this court's attention to anything he might have said on the witness stand which might have undermined confidence in the legal correctness of his conviction. Stated another way, Kern alleges nothing from which we may infer that had he testified, the result of the trial leading to his conviction would have been different. That being so, we cannot say the postconviction court erred by not permitting the requested amendment.

Not being clearly erroneous, the district court's judgment denying an evidential hearing and denying Kern's motion for

postconviction relief must therefore be, and hereby is, affirmed.

We further direct that within 15 days of the release of this opinion, the State, through the Saline County attorney, withdraw from the record in this case the exhibit 4 it offered in evidence, being a knife having a 3 1/2-inch-long blade and a 4 3/4-inch-long handle, and substitute therefor a suitable photograph. In this connection we again call the attention of the bench, bar, clerks of courts, court reporters, and other associated personnel to the longstanding provision of Neb. Ct. R. of Prac. 5H (rev. 1989) that under "no circumstances shall the clerk of the district court send to the Clerk of the Supreme Court contraband, drugs, firearms, or other weapons, unless specifically requested to do so by the Supreme Court." *State v. Byrd*, 231 Neb. 231, 435 N.W.2d 898 (1989).

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. FRANCIS R. BOTTS, APPELLANT.

442 N.W.2d 384

Filed July 14, 1989. No. 88-433.

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 of the jury 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 Dawson County: JOHN P. MURPHY, Judge. Affirmed.

Kurt R. McBride, of Hart & McBride, P.C., for appellant.

Robert M. Spire, Attorney General, and Delores Coe-Barbee for appellee.

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

GRANT, J.

Defendant-appellant, Francis R. Botts, was convicted by a jury in the district court for Dawson County of incest in violation of Neb. Rev. Stat. § 28-703 (Reissue 1985). After a determination that defendant was not a mentally disordered sex offender, defendant was sentenced to 3 to 9 years' imprisonment. He timely appealed to this court, contending the evidence was insufficient to establish beyond a reasonable doubt the elements of the crime charged. We affirm.

The amended information filed March 14, 1988, alleged that defendant did "on or about the month of August, 1986, knowingly engage in sexual penetration with his granddaughter" in violation of § 28-703. That statute provides:

> (1) Any person who shall knowingly . . . engage in sexual penetration with any person who falls within the degrees of consanguinity set forth in section 28-702 . . . commits incest.
>
> . . . .
>
> (3)(a) For purposes of this section, the definitions found in section 28-318 shall be used.
>
> (b) The testimony of a victim shall be entitled to the same weight as the testimony of victims of other crimes under this code.

The degrees of consanguinity set forth in Neb. Rev. Stat. § 28-702 (Reissue 1985) include "grandparents and grandchildren of every degree." Finally, Neb. Rev. Stat. § 28-318(6) (Reissue 1985) provides that "[s]exual penetration shall mean . . . any intrusion, however slight, of any part of the actor's or victim's body or any object manipulated by the actor into the genital or anal openings of the victim's body which can be reasonably construed as being for nonmedical or nonhealth purposes."

The record shows that defendant is the grandfather of the victim, who was 5 years old at the time of trial. On April 24, 1987, the child's mother took her to the doctor for a kindergarten roundup physical examination. The mother testified that when the child was unable to produce a urine sample, the mother "did it for her." The doctor discovered the presence of sperm in the urine sample, said to have been

provided by the child. The doctor discussed the problem with the mother and then performed a "rape kit" on the child. The examination did not show any type of physical damage to the child.

The incident also was investigated by the Dawson County sheriff's office. During the sheriff's investigation, the mother told the deputy sheriff that the urine sample was hers, not the child's. A urine sample subsequently obtained from the child on the same day, after the mother told of her actions, was normal.

The child testified at trial that the incident with defendant occurred at night in defendant's bedroom in his house while her brothers were in the living room and her grandmother was at work. The child was wearing panties and one of defendant's shirts. She testified that while she was on defendant's bed, defendant slipped his hand through her panties, touching her vaginal area with his whole hand. She felt the touching inside her body. She told her mother about the incident, which happened "[a] long time ago."

The child's mother testified that in August 1986 her father, the defendant, was living in Lexington, Dawson County, Nebraska. Defendant had invited three of her children, including the victim, to stay the night at the house in Lexington because one of the children would be starting school. The mother testified that defendant picked the children up at about 3 p.m. on August 26, 1986. The mother was sure of the date because it was "two days before Josh was to start school." The victim did not stay overnight with the defendant on any other occasion during August 1986. The mother also testified that the victim complained to her of sexual abuse about 1 month before the April 24, 1987, kindergarten roundup physical examination.

During the investigation of this incident, defendant voluntarily waived his *Miranda* rights and agreed to speak with Stanley Rasmussen, an investigator for the Nebraska State Patrol. Rasmussen testified that defendant denied having any type of sexual contact with his granddaughter, but later stated that if he had done what he was accused of, he could not remember doing it. The record shows that defendant made similar statements to the Lexington police chief after waiving

his *Miranda* rights. Among these statements were, "If it's true, I just don't remember," and "If I did this, I must be sick."

Defendant testified that he was the grandfather of the victim.

We determine that the evidence, when taken in the view most favorable to the State, is sufficient to support defendant's conviction. We have often held that in reviewing 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 of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Bowen, ante* p. 725, 442 N.W.2d 209 (1989); *State v. Wickline, ante* p. 329, 440 N.W.2d 249 (1989). Although there are conflicts in the evidence, the jury resolved those conflicts against the defendant.

The judgment of the district court is affirmed.

AFFIRMED.

ARDIS M. SHADA, APPELLANT, V. CHARLES G. SHADA, JR., APPELLEE.

442 N.W.2d 386

Filed July 14, 1989. No. 88-678.

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

Jeff C. Miller and Charles M. Bressman, Jr., of Young & White, for appellant.

Jerome J. Ortman for appellee.

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

PER CURIAM.

In this marriage dissolution action, Ardis M. Shada

primarily appeals the division of property and the amount of alimony awarded her after 35 years of marriage. Appellant also complains that the trial court abused its discretion in not awarding her $30,000 for attorney fees, expert fees, and costs incurred in this and the trial court. We affirm the trial court.

As required in cases of this nature, we have reviewed the record de novo to determine whether the trial court abused its discretion in dividing the property of the parties and in awarding alimony. *Strong v. Strong, ante* p. 25, 439 N.W.2d 90 (1989); *Decker v. Decker*, 229 Neb. 347, 426 N.W.2d 533 (1988). The awarding of attorney fees and costs are matters within the trial court's discretion. *Ritchie v. Ritchie*, 226 Neb. 623, 413 N.W.2d 635 (1987). See, also, Neb. Rev. Stat. § 42-367 (Reissue 1988).

We determine that there was no abuse of discretion by the trial court with respect to the issues raised. Accordingly, the decree of the trial court is affirmed. Appellant's request for attorney fees in this court is denied.

AFFIRMED.

NORTHERN NATURAL GAS COMPANY AND ENRON LIQUIDS PIPELINE COMPANY, APPELLANTS, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.

443 N.W.2d 249

Filed July 14, 1989. No. 88-706.

1. **State Equalization Board: Appeal and Error.** Neb. Rev. Stat. § 77-510 (Cum. Supp. 1988) provides that any person, county, or municipality affected by a final decision of the State Board of Equalization and Assessment may prosecute an appeal to the Supreme Court.
2. **Administrative Law: Appeal and Error.** When an appeal from an administrative agency is not taken pursuant to the Administrative Procedure Act because of a special statute, the standard of review in this court is to search only for errors appearing in the record; i.e., whether the decision conforms to law, is supported by competent and relevant evidence, and was not arbitrary, capricious, or unreasonable.
3. **State Equalization Board: Taxation: Valuation.** The State Board of Equalization

and Assessment has a wide latitude of judgment and discretion in equalizing assessment of property.

4. _____: _____: _____. The State Board of Equalization and Assessment acts in a quasi-judicial capacity when equalizing property.
5. **Appeal and Error.** In instances where the Supreme Court is required to review a case for error appearing in the record, questions of law are nonetheless reviewed de novo on the record.
6. **State Equalization Board: Taxation: Valuation: Appeal and Error.** In an application before the State Board of Equalization and Assessment, a taxpayer may employ any factual or legal argument in support of his, her, or its position requesting equalization, subject to the final determination of questions of law on a de novo basis by this court on appeal.
7. _____: _____: _____: _____. When the State Board of Equalization and Assessment arbitrarily undervalues a particular class of property so as to make another class of property disproportionately higher, or achieves the same result because of legislative action, the Supreme Court must correct that constitutional inequity by lowering the complaining taxpayer's valuation to such an extent as to equalize it with other property in the state.
8. **State Equalization Board: Taxation: Federal Acts: Equal Protection.** The State Board of Equalization and Assessment, by not taxing the personal property of certain property in a class, although acting involuntarily and under compulsion of federal law, nevertheless, by complying with that mandate, has denied another taxpayer in that same class the equal protection of the law contrary to the 14th amendment to the Constitution of the United States.
9. **Constitutional Law: Taxation: Valuation.** The right of a taxpayer whose property alone is taxed at 100 percent of its true value is to have his, her, or its assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of statute.
10. _____: _____: _____. Where it is impossible to secure both the standard of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of law.
11. **Taxation: Property: Words and Phrases.** For tax purposes in Nebraska, personal property includes all property other than real property and franchises.
12. **Property: Appurtenances: Intent.** To determine whether an item constitutes a fixture, this court looks at three factors: (1) actual annexation to the realty, or something appurtenant thereto, (2) appropriation to the use or purpose of that part of the realty with which it is connected, and (3) the intention of the party making the annexation to make the article a permanent accession to the freehold.
13. _____: _____: _____. Of the three factors determining whether an item constitutes a fixture, the most important is the intention to make the article a permanent accession to the freehold.
14. _____: _____: _____. The intention of the party making the annexation can be inferred from the nature of the articles affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation has been made.

15. **Property: Appurtenances.** In considering the issue of annexation, an important factor is whether removal of the article will injure the realty or will injure the article itself.
16. _____: _____. If a chattel is a necessary or useful adjunct to the realty, then it may be said generally to have been appropriated to the use or purpose of the realty to which it was affixed.
17. **Constitutional Law: Taxation: Valuation.** Although the taxing authorities may classify different types of property for taxation purposes, nevertheless, the results reached by such different methods and reasonable classifications must be correlated so that the valuations reached shall be uniform and proportionate.

Appeal from the State Board of Equalization and Assessment. Reversed and remanded for further proceedings.

John K. Boyer, Norman H. Wright, and Amy S. Bones, of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellants.

Robert M. Spire, Attorney General, and L. Jay Bartel for appellee.

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

HASTINGS, C.J.

This is an appeal by Northern Natural Gas Company and Enron Liquids Pipeline Company (hereinafter collectively referred to as Enron) from a decision of the Nebraska State Board of Equalization and Assessment (the Board) with respect to a request made by Enron for equalization of centrally assessed property.

Enron appealed directly to this court pursuant to Neb. Rev. Stat. § 77-510 (Cum. Supp. 1988), which provides in part: "From any final decision of the State Board of Equalization and Assessment with respect to the valuation of any real or personal property, any person, county, or municipality affected thereby may prosecute an appeal to the Supreme Court."

Since appeal was not taken pursuant to Neb. Rev. Stat. § 84-918 (Reissue 1987) of the Administrative Procedure Act, this court's standard of review is not de novo on the record. This court has decided that when the Administrative Procedure Act is inapplicable because another method of appeal has been prescribed, the standard of review will be to search only for

errors appearing in the record; i.e., whether the decision conforms to law, is supported by competent and relevant evidence, and was not arbitrary, capricious, or unreasonable. *In re Application A-15738*, 226 Neb. 146, 410 N.W.2d 101 (1987) (direct appeal to the Supreme Court from the Department of Water Resources); *Banner County v. State Bd. of Equal.*, 226 Neb. 236, 411 N.W.2d 35 (1987).

The disputes involved in this appeal arose in part as a result of three cases which were decided by the U.S. District Court for the District of Nebraska: *Trailer Train Co. et al. v. Leuenberger*, No. CV87-L-29 (D. Neb. Dec. 11, 1987), *aff'd* No. 88-1118 (8th Cir. Dec. 19, 1988), *cert. denied, Boehm v. Trailer Train Co. et al.*, ____ U.S. ____, 109 S. Ct. 2065, 104 L. Ed. 2d 630 (1989); *Burlington Northern RR. Co. et al. v. Leuenberger*, No. CV87-L-565 (D. Neb. Dec. 10, 1987); and *Oklahoma Gas & Electric Co. et al. v. Leuenberger*, No. CV88-L-52 (D. Neb. Jan. 26, 1988).

The plaintiffs in *Trailer Train* were car companies that furnish railcars to railroads. Their only relationship to Nebraska stems from the fact that their railcars are located or operated in Nebraska by the railroads. The federal district court held that the assessment of the plaintiffs' personal property and the imposition, levy, or collection of any personal property taxes against the plaintiffs pursuant to Neb. Rev. Stat. §§ 77-624 et seq. (Reissue 1986) violates § 306(1)(d) of the Railroad Revitalization and Regulatory Reform Act of 1976 (the 4-R Act), and permanently enjoined the imposition, levy, and collection of any personal property taxes from the plaintiffs. On appeal, the U.S. Court of Appeals for the Eighth Circuit affirmed, ruling that the levy and collection of Nebraska's ad valorem tax on car company property violated the 4-R Act.

The plaintiffs in *Burlington Northern RR. Co.* were several of the railroads that do business in Nebraska. The federal district court preliminarily enjoined and restrained the collection of ad valorem property tax payments for tax year 1987 on that portion of plaintiffs' operating property that consists of personal property. The court issued the preliminary injunction after finding reasonable cause to believe that the

personal property tax levied on the plaintiffs results in discriminatory treatment of common carriers by railroad, in violation of § 306(1)(d) of the 4-R Act.

The plaintiffs in *Oklahoma Gas & Electric Co.* were carlines doing business in Nebraska. The federal district court enjoined distribution of the Nebraska carline tax for the 1987 tax year, finding reasonable cause to believe that the tax violates § 306 of the 4-R Act.

The result in each case was reached through application of the 4-R Act, a federal statute. To prevent the unreasonable burdening of interstate commerce that results from discriminatory state and local taxation of rail carrier property, Congress enacted the 4-R Act, Pub. L. No. 94-210, 90 Stat. 54, § 306 (codified at 49 U.S.C. § 26c (1976); recodified at 49 U.S.C. § 11503 (1982) in accordance with the revised Interstate Commerce Act of 1978).

At issue in *Trailer Train* was whether Nebraska's personal property taxation system, which provides for extensive exemptions from personal property tax under Neb. Rev. Stat. § 77-202 (Supp. 1987), violates § 306(1)(d) of the 4-R Act, which prohibits the imposition of any tax which results in discriminatory treatment of a common carrier by railroad. The federal district court found that the Nebraska system of taxation did violate the federal statute. According to the court,

> Under the Nebraska scheme, the majority of the personal property in the state is statutorily exempted from taxation, while a minority of personal property, including all the property that belongs to Trailer Train in the state, is subject to an ad valorem tax on its actual value. . . . [T]he Nebraska system favors a majority of the property of possible taxpayers by exempting that property from taxation but denies the property of rail car lines the same favorable treatment.

Trailer Train, supra, slip op. at 6. The court further found that the actual result of Nebraska's taxation scheme is an unfair and discriminatory tax burden on the railroads.

In light of the federal district court's rulings in the three cases discussed above, Enron submitted a request with the Board asking that its unit values be equalized with the railroads and

car companies doing business in Nebraska, i.e., that the portion of the unit value that is comprised of personal property be disregarded in determining the amount of property tax it owes to the state. In conjunction with this request, Enron also sought a determination that its pipelines constitute personal property.

Enron is a public service entity within the meaning of Neb. Rev. Stat. § 77-801 (Reissue 1986). Northern Natural Gas, a division of Enron Corporation, owns, maintains, and operates a gas pipeline system in Nebraska. Enron Liquids, a subsidiary of Enron Corporation, owns, maintains, and operates a liquid hydrocarbon pipeline in Nebraska. Enron's property is centrally assessed by the state for property tax purposes through the Tax Commissioner rather than county assessors, pursuant to Neb. Rev. Stat. § 77-802 (Cum. Supp. 1988).

To establish the value of a centrally assessed taxpayer, the Department of Revenue uses a methodology known as "unit value." Rather than valuing individual items of property owned by such a taxpayer, the department values the property of the taxpayer as a total unit. Dennis Donner, the central assessment manager of the Department of Revenue, explained the unit value method at the Board's August 2, 1988, hearing:

> These values are derived by use of the unit value concept, which is a valuation of the company as a going concern, as opposed to just a simple summary of the assets of the company. The Department uses the traditional three approaches to value, that being the market[,] income and cost approach in developing these values, and then it correlates the results into an indication of value for the company. This value is then allocated to the state of Nebraska, based on varying factors, depending on which particular industry we're referring to.

Once the department has calculated the unit value of the centrally assessed taxpayer and determined what portion of that value should be taxed by Nebraska, the Tax Commissioner apportions the total taxable value to all taxing subdivisions in which property of the taxpayer is located and certifies to the county assessors the value so determined. § 77-802.

During the August 2, 1988, hearing, the Board dismissed Enron's request for equalization with the railroads and car

companies doing business in Nebraska. Additionally, the Board decided to equalize Enron's property, and all other centrally assessed property, through application of a statewide "aggregate level of assessment" determined by the Department of Revenue to be 88.7 percent of actual value. The department first calculated the average ratio of assessed value to actual value for all classes of tangible property: residential (improved and unimproved), commercial and industrial (improved and unimproved), agricultural (improved and unimproved), personal, and centrally assessed. Then the department aggregated the average ratios to arrive at the 88.7 percent figure.

At the Board's August 2, 1988, hearing, Enron objected to being equalized with the statewide "aggregate level of assessment" of 88.7 percent of value. In dismissing the matter, the Board stated in its order:

> [T]he uncontraverted [sic] evidence shows that all property valued by the state, including the property of Enron, is at 100 percent of value; that said property is equalized to the same level of value as all property valued by the state that being the aggregate level of value for all tangible property in this state; and, that the State Board has properly fulfilled its duty to equalize all the tangible property in the state.

Enron argues before this court that its property should be assessed at 73.7 percent of actual value, the aggregate level at which unimproved agricultural land is being valued in this state.

Since the perfection of this appeal, on December 19, 1988, an opinion was filed in the U.S. Court of Appeals for the Eighth Circuit which affirmed the decision of the U.S. District Court in *Trailer Train Co. et al. v. Leuenberger*, No. CV87-L-29 (D. Neb. Dec. 11, 1988). That court said in part:

> In [*Burlington Northern R. Co. v. Bair*, 584 F. Supp. 1229 (S.D. Iowa 1984)] the other centrally assessed taxpayers were still subject to the personal property tax as are the taxpayers here who are not in agriculturally related businesses. The railroad in that case received the same "preferential tax treatment" that Trailer Train is accorded here. This is because the other taxpayers are not protected

> by § 306(1)(d). When three-fourths of the commercial and industrial personal property in the state is not taxed because personal property used in agriculturally-related business is exempt, railroads are discriminated against if their personal property is taxed. The appropriate remedy, as awarded by the trial court, is to enjoin the collection of the discriminating tax, even though other taxpayers do not receive the same benefits.

Trailer Train Co. et al. v. Leuenberger, No. 88-1118, slip. op. at 7 (8th Cir. Dec. 19, 1988). Following argument of the case in this court, the Supreme Court of the United States issued an order on May 15, 1989, denying the petition for certiorari filed by the Tax Commissioner of Nebraska. Therefore, the Board's argument throughout its brief that the judgment of the U.S. District Court is not binding in this instance is no longer valid.

Enron assigns as error: (1) The Board erred in dismissing its request for equalization; (2) the Board erred in failing to find Enron's pipelines to be personal property and to equalize that portion of its correlated unit value with railroads and car companies doing business in Nebraska; (3) the Board erred in adopting and applying a "blended" or "aggregate" equalization ratio, composed of an average of the levels at which all various types of property are valued; and (4) the Board erred in failing to equalize Enron's property with unimproved agricultural land.

Basically, Enron made two requests of the Board. First, it contended that its property should be equalized with the property of the railroads and car companies operating in Nebraska, which were also assessed on a unitary basis. In other words, the final judgment of the federal court enjoined the State of Nebraska from assessing the personal property of railroads and car companies, and Enron insists that it not be taxed on that portion of its unit value that represents personal property. In that connection, it further argues that its pipelines are personal property and should not be assessed. Secondly, Enron did not want the Board to equalize its other property with the aggregate level of assessment for all property in the state, including centrally assessed property such as Enron's which is assessed at 100 percent of actual value.

The Board argues that it lacks authority and jurisdiction to consider and act on the issues raised by Enron in the first instance, and therefore this court acquired no jurisdiction to consider the issues on appeal. In other words, the issues raise questions of law, including constitutional issues, and the Board insists that it has no authority to consider those issues.

Neb. Rev. Stat. § 77-505 (Cum. Supp. 1988) requires the Board to review the abstracts of assessments of property submitted by the county assessors and to equalize such valuations for tax purposes within the state. More pertinent to this case, § 77-802 requires the Tax Commissioner to determine the total taxable value of a public service entity like Enron for each of the local assessing districts. The action of the Tax Commissioner, of course, is appealable to the Board. This court has stated the Board has a wide latitude of judgment and discretion in equalizing assessment of property. *City of Omaha v. State Board of Equalization & Assessment*, 181 Neb. 734, 150 N.W.2d 888 (1967). The Board acts in a quasi-judicial capacity when equalizing property. *Box Butte County v. State Board of Equalization & Assessment*, 206 Neb. 696, 295 N.W.2d 670 (1980). County boards of equalization are required to make the initial determination as to whether certain locally assessed property is exempt from taxation, which involves a mixed question of fact and law. See, e.g., *Ev. Luth. Soc. v. Buffalo Cty. Bd. of Equal.*, 230 Neb. 135, 430 N.W.2d 502 (1988); *Bethphage Com. Servs. v. County Board*, 221 Neb. 886, 381 N.W.2d 166 (1986).

Implicit in the determination of tax exemption, as pointed out in *Bethphage*, was the application of the facts to § 77-202(1)(c), which provides that exempt from taxation is property "owned by . . . religious, charitable . . . organizations and used exclusively for . . . charitable . . . purposes . . . ." Certainly this involves a mixed question of fact and law and involves the quasi-judicial power of the board of equalization.

In the instant case, there is a difference between Enron being able to *request* equalization with the railroads and car companies and Enron being *entitled* to be equalized with the railroads and car companies. It is common sense that Enron cannot be equalized with those companies unless it makes a

request. It also seems clear that to make such a request, Enron must start with the Board, the only entity with statutory authority to equalize the valuations of centrally assessed taxpayers. As previously stated, our review on an appeal such as this is for error appearing in the record, but we review questions of law de novo on the record.

We therefore hold that in an application before the Board, a taxpayer may employ any factual or legal argument in support of his, her, or its position requesting equalization, subject to the final determination of questions of law on a de novo basis by this court on appeal.

Article VIII, § 1, of the Nebraska Constitution provides in relevant part that except for motor vehicles, "[t]axes shall be levied by valuation uniformly and proportionately upon all tangible property . . . ." It would seem that no question exists that if the Board arbitrarily undervalues a particular class of property so as to make another class of property disproportionately higher, or achieves the same result because of legislative action, this court must correct that constitutional inequity by lowering the complaining taxpayer's valuation to such an extent so as to equalize it with other property in the state. See, *Kearney Convention Center v. Board of Equal.*, 216 Neb. 292, 344 N.W.2d 620 (1984); *Banner County v. State Bd. of Equal.*, 226 Neb. 236, 411 N.W.2d 35 (1987). This being the case, no logical reason exists why the same requirement of valuation reduction should not be imposed when the disproportionality is brought about by a final judgment of the federal court exempting the personal property of the railroads and car companies from the imposition of a state tax.

The state, by not taxing the personal property of railroads and car companies, although acting involuntarily and under compulsion of federal law, nevertheless, by complying with that mandate, has denied Enron equal protection of the law contrary to the 14th amendment to the U.S. Constitution.

In *Sioux City Bridge v. Dakota County*, 260 U.S. 441, 43 S. Ct. 190, 67 L. Ed. 340 (1923), the county taxed the bridge company's property at actual value while other property in the county was assessed at only 55 percent of its value. The bridge company alleged this practice violated the equal protection

clause of the 14th amendment to the U.S. Constitution.

Citing *Sunday Lake Iron Co. v. Wakefield*, 247 U.S. 350, 38 S. Ct. 495, 62 L. Ed. 1154 (1918), the Court stated:

> "The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents. And it must be regarded as settled that intentional systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property."

(Citations omitted.) *Sioux City Bridge, supra*, 260 U.S. at 445. The Court held that the taxing of the bridge company's property at 100 percent of its actual value while other property is taxed at 55 percent of its actual value violates the equal protection clause of the 14th amendment.

The Court also held that

> the right of the taxpayer whose property alone is taxed at 100 per cent of its true value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of statute. The conclusion is based on the principle that where it is impossible to secure both the standard of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of law.

260 U.S. at 446.

As we have previously stated, it makes no difference if the undervaluation of the property of the railroad and car companies comes about because of deliberate action by the Board, legislative enactment, or the final and binding judgment of the federal courts. The conclusion remains the same: The equal protection clause of the 14th amendment mandates that the same result be reached with respect to the personal property of Enron as that in the case of the railroad and car companies.

It therefore becomes necessary to determine whether the pipelines of Enron are personal property and thus exempt from

taxation under the doctrine of *Trailer Train Co., et al. v. Leuenberger*, No. CV87-L-29 (D. Neb. Dec. 11, 1987), *aff'd* No. 88-1118 (8th Cir. Dec. 19, 1988), *cert. denied, Boehm v. Trailer Train Co. et al.*, ____ U.S. ____, 109 S. Ct. 2065, 104 L. Ed. 2d 630 (1989).

Neb. Rev. Stat. § 77-103 (Reissue 1986) provides:

> The terms real property, real estate and lands shall include city and village lots and all other lands, and all buildings, fixtures, improvements, cabin trailers or mobile homes which shall have been permanently attached to the real estate upon which they are situated, mines, minerals, quarries, mineral springs and wells, oil and gas wells, overriding royalty interests and production payments with respect to oil or gas leases, units of beneficial interest in trusts, the corpus of which includes any of the foregoing, and privileges pertaining thereto.

Personal property includes all property other than real property and franchises. Neb. Rev. Stat. § 77-104 (Reissue 1986). The issue therefore is whether pipelines are fixtures, and thus real property, or are personal property.

Section 77-103 does not provide a definition for fixtures. However, this court in *State ex rel. Meyer v. Peters*, 191 Neb. 330, 215 N.W.2d 520 (1974), stated that the common-law rules relating to fixtures are largely codified in § 77-103.

To determine whether an item constitutes a fixture, this court looks at three factors: (1) actual annexation to the realty, or something appurtenant thereto, (2) appropriation to the use or purpose of that part of the realty with which it is connected, and (3) the intention of the party making the annexation to make the article a permanent accession to the freehold. *Bank of Valley v. U.S. Nat. Bank*, 215 Neb. 912, 341 N.W.2d 592 (1983); *T-V Transmission v. County Bd. of Equal.*, 215 Neb. 363, 338 N.W.2d 752 (1983).

The third factor, the intention to make the article a permanent accession to the freehold, is generally regarded as the most important factor when determining whether an article is a fixture. The other two factors, annexation and appropriation to the use of the realty, have value primarily as evidence of such intention. See generally *Bank of Valley v. U.S.*

Nat. Bank, supra. The intention of the party making the annexation can be inferred from the nature of the articles affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation has been made. *Bank of Valley v. U.S. Nat. Bank, supra*; *Pick v. Fordyce Co-op Credit Assn.*, 225 Neb. 714, 408 N.W.2d 248 (1987); *Fuel Exploration, Inc. v. Novotny*, 221 Neb. 17, 374 N.W.2d 838 (1985).

In this case, the pipelines are buried in the ground. In *Sulphur Springs Val. Elec. Coop. v. City of Tombstone*, 1 Ariz. App. 268, 401 P.2d 753 (1965), *aff'd* 99 Ariz. 110, 407 P.2d 76, the Arizona court had to address whether the pipes, poles, and wires that were the chief components of a utility distribution system were fixtures and therefore real property that had to be sold at public auction. To determine whether an article is a fixture, the Arizona courts consider the same three factors this court considers.

The pipes were buried in the ground. The court noted that there was no evidence of an agreement between the city and owners of the fee that the chattels were to become accessions to the realty. The court held that because there was no proof of the adaptability to the use for which the real estate was appropriated and no proof of an intent by the annexor that the attachment of the chattels be permanent, despite annexation to the realty, the utility equipment had not lost its character as personal property.

In considering the issue of annexation when determining whether an article is a fixture, some courts have looked at whether removal of the article will injure the realty or will injure the article itself. Enron quotes at length from one such case.

> In Stem Brothers, Inc. v. Alexandria Township, 6 N.J. Tax 537 (1984), the question was whether certain underground storage tanks were fixtures or personal property. In this case, the court focused upon the injury by removal test, and stated: "These [the five underground storage tanks] could be lifted from the subject property intact just as could be done with the 20,000 gallon above-ground tanks and no damage at all would occur to

the tanks. The only preparatory work that would need to be done before the tanks could be lifted onto a truck would be removal of the soil covering them. The excavation that would result from uncovering one of the 20,000 gallon tanks would be large. Each such tank is ten feet in diameter and 30 feet long so that the excavation would have to be somewhat longer, wider, and deeper than those dimensions. Despite this size, however, such an excavation could not in any reasonable sense be said to constitute 'irreparable' physical damage to the land because the hole could easily be refilled. As a result, the land would be virtually the same in all respects as it had been before. The sole question, then, is whether the excavation would constitute 'serious' physical damage to the land within the meaning of the phrase 'material injury' as used in the Business Personal Property Tax Act . . .

. . . .

"Some of the factors which might have to be considered in determining whether 'serious physical damage' had occurred to unimproved land are: (a) any change in the market value of the land as a result of the condition; (b) the amount of time and the cost required to repair the condition; and (c) the hazard or dislocation caused by the condition.

"I find that no 'serious physical damage' would be caused to plaintiff's land by an excavation to remove the underground storage tanks and to restore plaintiff's unpaved parking yard to its original state. There is no indication that the value of the land would be affected by such an excavation. The entire process of removing a tank and restoring the ground to its original state would require only two days and would create no serious hazard or dislocation. Finally, the cost to excavate and refill the hole would be relatively insignificant.

"I therefore conclude that all nine of plaintiff's fuel oil storage tanks were business personal property for the tax year 1981 and that the tanks should not have been assessed by the taxing district for local property tax purposes. 6 N.J. Tax at 543."

Brief for appellants at 26-27.

Earl Berdine, an Enron employee, testified in his deposition that very little damage generally results to the pipe when it is removed and that the only damage to the land is "a temporary inconvenience while the work is actually going on and then after the work is completed the land is restored, put back into its original use."

The second factor, appropriation to the use or purpose of that part of the realty with which the article is connected, focuses on the relationship between the article and the use which is made of the realty to which the article is attached. If the chattel is a necessary or useful adjunct to the realty, then it may be said to have been appropriated to the use or purpose of the realty to which it was affixed. If the chattel is attached for a use which does not enhance the value of the land, it is generally deemed not to become a part of the land. See 1 G. Thompson, Commentaries on the Modern Law of Real Property § 56 (1980).

The pipeline companies in *Yellowstone Pipe Line Co. v. St. Bd. Equal.*, 138 Mont. 603, 358 P.2d 55 (1960), *cert. denied* 366 U.S. 917, 81 S. Ct. 1095, 6 L. Ed. 2d 241 (1961), were attempting to establish that their pipelines were real estate. The pipelines were imbedded in real estate rights-of-way obtained from the owners of the fee by written conveyance. The State Board of Equalization argued that the pipelines did not improve the real estate, served no purpose on the land, did not enhance the value of the real estate, and could be removed at any time by the company.

Under Montana case law, if property was placed on land to improve it or make it more valuable, it was generally deemed a fixture, but if it was attached for a use which did not enhance the value of the land, it remained a chattel. Considering the established rules regarding fixtures, the *Yellowstone Pipe Line Co.* court stated:

> The line could as easily lie on top of the ground were it not for the maintenance problem brought on by its exposed position and the difficulty of crossing natural and man-made obstructions. Does the pipe line improve the land and make it more valuable? To the contrary the land

> makes the pipe line more valuable since it removes it from danger of damage were it exposed. To what purpose is the pipe line put? It is used for the transportation of petroleum products and, in our opinion, such use bears no relationship whatever to the use of the realty. There can exist here no presumption that respondents intended the pipe to become part of the realty because the evidence is conclusive that they had no such intention.

Id. at 630-31, 358 P.2d at 69. The court concluded that the pipeline is not a fixture.

As Enron points out in this case, it has the right to remove its pipeline and does so on occasion. According to Enron, and we agree, the pipeline is not adapted to the use to which the ground in which it is embedded is applied. Most of the ground is agricultural land, and while the pipe is in place, a farmer or rancher may continue to conduct his normal operations. The pipeline does not improve the land nor make it more valuable. The ground is only a foundation upon which the pipes can rest. Use of the pipeline bears no relationship to the use of the realty, the pipeline being buried in order in part to minimize maintenance.

Finally, was the intention of Enron to make the article a permanent accession to the freehold?

In a number of cases, the courts have considered the fact that the annexor had an easement as establishing an intent that the article remain personal property. In *Southwestern Public Service Co. v. Chaves County*, 85 N.M. 313, 512 P.2d 73 (1973), the court had to decide whether certain equipment located on easements, including poles and transmission lines, was real estate. The court noted that if Southwestern intended the equipment installed on unowned land to become part of the realty, Southwestern would, under general law, be parting with title to the equipment. The court concluded that there was no evidence, of either a subjective or objective nature, indicating Southwestern had any such intention. To the same effect, see, *Sulphur Springs Val. Elec. Coop. v. City of Tombstone*, 1 Ariz. App. 268, 401 P.2d 753 (1965); *Liberty Lk. Sewer v. Liberty Lk. Utils.*, 37 Wash. App. 809, 683 P.2d 1117 (1984); *In re Mobilife Corp.*, 167 So. 2d 336 (Fla. 1964).

The evidence here was that Enron's normal method of operation is to obtain easements for purposes of laying its pipelines. Its pipeline is generally located on rights-of-way rather than land Enron owns in fee. Enron never intended, as we view the record, to part with the title to its pipelines by conducting its operation in this manner. Furthermore, the evidence discloses that Enron retains possession of the pipes for purposes of repair, replacement, and recycling if necessary.

The Board cites only one case in which the court held that the gas pipeline of a gas transmission company was not personal property but, rather, was real property for tax purposes. *Transco. Corp. v. Prince William Co.*, 210 Va. 550, 172 S.E.2d 757 (1970). That court agreed that the chief test to be considered in determining whether the chattel has been converted into a fixture is the intention of the party making the annexation. We agree, but conclude that in the instant case, the intention of Enron was not to convert its annexations into fixtures. Consequently, we find the pipelines to be personal property.

Finally, because the unitary value of Enron may include some real property, it is necessary that we determine whether that portion of its valuation should be based on an aggregate or blended ratio, or on the average ratio of unimproved agricultural land.

In *Kearney Convention Center v. Board of Equal.*, 216 Neb. 292, 344 N.W.2d 620 (1984), we held that the uniformity clause of the Nebraska Constitution required that the complaining taxpayer's land had to be valued at 44 percent, the lowest ratio of assessed valuation to actual valuation. We had concluded that although the taxing authorities may classify different types of property for taxation purposes, nevertheless, the results reached by such different methods and reasonable classifications must be correlated so that the valuations reached shall be uniform and proportionate. The record in this case does not support such a favorable finding for the Board.

Although article VIII, § 1, of the Nebraska Constitution was amended in 1984 in an attempt to permit the valuation of agricultural land by a different method, this court concluded that the result must be correlated with the value of all other land. At the risk of being redundant, we state that such a result

has not been reached in this case.

The Board has asked us to reconsider our decision in *Banner County v. State Board of Equal.*, 226 Neb. 236, 411 N.W.2d 35 (1987). There is nothing to reconsider. Neb. Const. art. VIII, § 1, providing that "[t]axes shall be levied by valuation *uniformly and proportionately*" (emphasis supplied), to say nothing of the 14th amendment to the U.S. Constitution, which directs that no state shall "deny to any person within its jurisdiction the equal protection of the laws," both remain viable and in full force and effect. *Banner County* could be written in no other way.

The order of the State Board of Equalization and Assessment is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

TRAILBLAZER PIPELINE COMPANY, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.
NATURAL GAS PIPELINE COMPANY OF AMERICA, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.

442 N.W.2d 386

Filed July 14, 1989. Nos. 88-707, 88-708.

State Equalization Board: Taxation: Valuation: Appeal and Error. As to a centrally assessed public service entity taxpayer under the provisions of Neb. Rev. Stat. §§ 77-802 et seq. (Reissue 1986 & Cum. Supp. 1988), where the State Board of Equalization and Assessment made a final decision with respect to the valuation of the property of such taxpayer and the record contains the information disclosing the basis for such decision and assessment and alleged error, the taxpayer being affected by such decision is entitled to prosecute an appeal to this court under the authority of Neb. Rev. Stat. § 77-510 (Cum. Supp. 1988).

Appeal from the State Board of Equalization and Assessment. Reversed and remanded for further proceedings.

William R. Johnson, of Kennedy, Holland, DeLacy & Svoboda, and Bruce J. McWhirter, of Ross & Hardies, for appellants.

Robert M. Spire, Attorney General, and L. Jay Bartel for appellee.

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

HASTINGS, C.J.

These two cases, although briefed separately, were consolidated for argument. Trailblazer Pipeline Company (Trailblazer) and Natural Gas Pipeline Company of America (NGPL) are both public service entities within the meaning of Neb. Rev. Stat. § 77-801 (Reissue 1986). They have each appealed from the order of the State Board of Equalization and Assessment (the Board) to equalize all centrally assessed property valued by the state through application of a statewide "aggregate level of assessment" determined by the Department of Revenue (the Department) to be 88.7 percent of actual value.

The assignments of error generally are that the Board incorrectly assessed their property at a higher level of valuation than other properties and, further, that the Board failed to equalize that portion of their correlated system value with the personal property of railroads and carline companies; i.e., none of the personal property of the railroads and carline companies was assessed, therefore neither should the personal property of these appellants be taxed. The last assignment of error relates to questions of state constitutional uniformity and proportionality and federal constitutional questions of equal protection.

With one exception relating to standing as to NGPL to be later noted, the issues in these appeals are identical to the issues in and are controlled by our opinion in *Northern Natural Gas Co. v. State Bd. of Equal., ante* p. 806, 443 N.W.2d 249 (1989).

Regarding the standing issue, Neb. Rev. Stat. § 77-510 (Cum. Supp. 1988) provides in part: "From any final decision of the State Board of Equalization and Assessment with respect to the valuation of any real or personal property, any person, county, or municipality affected thereby may prosecute an appeal to the Supreme Court."

The Board contends that NGPL, having failed to appear

before the Board at its August 2, 1988, hearing or to otherwise request action of the Board, lacks standing to bring an appeal.

In *Northern Natural Gas Co., supra*, attorneys for Enron Liquids Pipeline Company and Northern Natural Gas Company appeared before the August 2, 1988, meeting of the Board and participated fully in the hearings, examining and cross-examining witnesses, offering various exhibits and testimony, and addressing the Board in summation, generally objecting to the recommendation made by the Department to equalize centrally assessed property at 88.7 percent and to the failure of the Board to equalize public service entities with railroads and carline companies.

The 1988 public service entity values on a system basis and on a Nebraska portion basis for Enron, Trailblazer, and NGPL all were made a part of the record.

Attorney William R. Johnson appeared at the hearing, representing Trailblazer, and in the course of his participation cross-examined Dennis Donner, an employee of the Department, regarding the assessment of railroad and carline companies as the result of federal litigation referred to in *Northern Natural Gas Co., supra*. Also found in the record is an affidavit in reference to Trailblazer of William V. Collins, an employee of NGPL, concerning the activities of both Trailblazer and NGPL as to the nature of pipelines of both companies being personal property.

The August 12, 1988, "Notice of Public Service Company Valuation for Assessment Year 1988," which refers to the enclosure of an appraisal for Trailblazer and NGPL adjusted to an aggregate assessment sales ratio of 88.7 percent, and *inviting a protest to be filed* within 30 days, was mailed to a Mr. McKenna at 701 East 22nd Street, P.O. Box 1207, Lombard, IL 60148, and received separately on behalf of Trailblazer and NGPL. Found in the record is a "Notice of Appeal and Request for Transcript" filed by NGPL with the Board within 30 days of the Board's final decision.

A Nebraska property franchise report including a schedule of property and valuations was filed with the Department on behalf of Trailblazer. Included within Nebraska schedule VII of that report is the account title: "Trailblazer Pipeline Company

is a General Partnership among NGPL-Trailblazer, Inc., Columbia Gulf Transmission Company and Enron Trailblazer Pipeline Company. Subsidiaries of Natural Gas Pipeline Company of America, The Columbia Gas System, Inc. and Enron Corp., Inc., respectively."

Also part of the record includes "FERC Form No. 2: Annual Report of Major Natural Gas Companies." The identification sheet of that report, page 1, gives the Lombard, Illinois, address previously mentioned, and names as the contact person James T. Ashworth, vice president, accounting and control, Natural Gas Pipeline Company of America, operator.

On page 102 of the foregoing report is a schedule called Control Over Respondent. The respondent is named as Trailblazer Pipeline Company, with the accompanying statement that "[a]t December 31, 1987, Trailblazer was a partnership equally owned by NGPL-Trailblazer Inc., a wholly owned subsidiary of Natural Gas Pipeline Company of America (Natural), a wholly owned subsidiary of United Energy Resources, Inc. . . . ."

Trailblazer and the Department entered into a stipulation which recites that Trailblazer is a public service entity; that 96 percent of Trailblazer's system value consists of pipelines; and that the total value system-wide of Trailblazer's real and tangible personal property is $155,000,000, and the amount of that value apportioned to the State of Nebraska is $112,604,400.

A notice of the meeting of the Board set for 2 p.m., August 2, 1988, inviting all interested persons to appear, was published in newspapers in Lincoln, Grand Island, Norfolk, North Platte, and Scottsbluff.

The parties have not pointed out to the court, nor have we been able to find in the record, a property franchise report filed on behalf of NGPL, or anything in the way of a written or oral protest filed with the board by NGPL other than as its position as a partner of Trailblazer. There is nothing by way of a final order of the Board setting forth the valuations assigned to property belonging to NGPL, or for Enron or Trailblazer for that matter, other than the letter of August 12 previously mentioned, which simply states that NGPL's property will be

equalized by evaluating *all* property of centrally assessed taxpayers at 88.7 percent, the aggregated value of all property in the state, including that of centrally assessed taxpayers whose property is valued at 100 percent.

It is on the basis of this record that the Board claims that NGPL has no standing to bring this appeal. In spite of the provision of § 77-510, previously cited, which grants the right of appeal to the Supreme Court to any person who is affected by a decision of the Board, the Board cites two cases which it contends support its position: *Laflin v. State Board of Equalization and Assessment*, 156 Neb. 427, 56 N.W.2d 469 (1953), and *DeCamp v. State Board of Equalization and Assessment*, 203 Neb. 366, 278 N.W.2d 619 (1979).

In *Laflin*, a landowner in Johnson County appealed from the action of the Board in refusing to properly equalize the assessment of farmlands in the various counties of the state for the tax year 1952. Nineteen counties had been notified to appear before a meeting of the Board to show cause why the assessments of land and improvements in such counties should not be raised. Although no notice of an intended increase or decrease of assessment had been served upon Johnson County, an appearance was made on the county's behalf at the Board's hearing by the county attorney and one county commissioner. In addition, Laflin appeared with legal counsel and protested the valuations and assessments made in Johnson County as being excessive and proportionately higher than those on like property in other counties, arguing that this had the effect of requiring him to pay a disproportionate share of the state property tax. The Board disposed of the contentions of the representatives of the county and of Laflin by stating that it " 'decided to take no action towards reducing the assessed value of farm lands and improvements in Johnson County.' " *Laflin, supra* at 430, 56 N.W.2d at 472-73.

In *Laflin*, the Attorney General argued before this court that the Board could take no action toward reducing the assessed value of farmlands and improvements in Johnson County, since no notice had been given. The Attorney General then contended that Laflin's remedy was not a direct appeal to this court but, rather, was to mandamus the Board to give the

required notice if a prima facie case could be made. This court disagreed, saying:

> It was evidently the intention of the Legislature to afford relief to any person, county, or municipality by a direct appeal from a final order of the Board which denied relief to one who had made a showing requiring the affirmative action of the Board. We think appellant pursued the remedy which the Legislature authorized when statutory authority was granted to permit a direct appeal to this court. There being evidence in the record before the Board conclusively indicating that Johnson County land and improvements were valued higher than those of similar kind and class in other counties, the final order of the Board declining to take action with respect thereto constitutes a final disposition of the matter which so affects the appellant that a right to appeal accrued as provided by section 77-510, R.R.S. 1943.

Laflin, supra at 430-31, 56 N.W.2d at 473.

Subsequent to *Laflin*, this court has focused on the language "one who had made a showing requiring the affirmative action of the Board" when addressing the right to appeal pursuant to § 77-510.

At issue in *DeCamp v. State Board of Equalization and Assessment, supra*, was the right to appeal pursuant to § 77-510. DeCamp appealed from a final order of the Board *regarding equalization among counties* of the valuation of real and personal property for the tax year 1978. The Board issued an order for various counties to show cause why the valuations of real property, railroad terminal property, and improvements on leased land reported on their 1978 abstracts of assessment should not be increased or decreased for purposes of intercounty equalization. On August 7, 1978, the Board entered an order raising or lowering the valuations in certain counties and leaving the remaining counties unchanged. DeCamp appealed pursuant to § 77-510.

Appellant did not personally appear at the Board hearings. He alleged by affidavit in this court that he was a property owner of taxable real and personal property in several Nebraska counties and that his appearance before the Board

was in the form of a letter. This court found that an appearance before the Board for the purpose of making "a showing requiring the affirmative action of the Board" could be accomplished through a letter.

The court noted that "[i]t is the rule of Laflin that there is a right of appeal from such issues as were properly brought before the State Board." *DeCamp v. State Board of Equalization and Assessment*, 203 Neb. 366, 369, 278 N.W.2d 619, 622 (1979). Therefore, the court had to determine whether or not appellant's letter did properly raise issues entitling him to relief in this court. The court found that it did not for two reasons. First, the letter was dated after the hearings were completed and therefore was too late. Second, appellant's letter "fell far short of a 'showing requiring the affirmative action of the Board.' " *Id.* at 370, 278 N.W.2d at 622. The letter referred only to the valuation of personal property and made no mention of issues raised on appeal relating to intercounty equalization of real property. The court found that even as to personal property, the letter was not one of a "person affected" by the Board's action. The letter did not reveal to the Board, as did the testimony in *Laflin*, that the appellant was the owner of property, either real or personal, nor was it written in a tone mandating an inference that the appellant desired to be considered in that light. It is required that the party seeking relief be an aggrieved property owner. The court refused to allow proof of this critical matter on appeal.

The record of the Board's August 2, 1988, hearing reveals that the reference to NGPL was made by Thomas J. Dame, the supervisor of the state and local tax department of Midcon Corporation, who stated: "Midcon Corp. is the holding company of Natural Gas Pipeline Company of America, which is the partner in the Trailblazer Pipeline Company, and Natural Gas Pipeline Company is the operator." The attorney for Trailblazer never stated that his arguments were to also apply to a request from NGPL for the same relief requested by Trailblazer, nor does it appear that NGPL submitted a written request for relief with the Board.

NGPL argues, however, that it does have standing to bring an appeal. According to NGPL, since it was valued and

assessed at the Board hearing, "under the express words of § 77-510, NGPL falls within the category of 'any person . . . affected' by the State Board's decision, and it therefore has standing to bring this appeal." Reply brief for appellant NGPL at 1.

Analyzing *Laflin v. State Board of Equalization and Assessment*, 156 Neb. 427, 56 N.W.2d 469 (1953), NGPL argues that when the court said, "It was evidently the intention of the Legislature to afford relief to any person, county, or municipality by a direct appeal from a final order of the Board which denied relief to one who had made a showing requiring the affirmative action of the Board," *id.* at 430, 56 N.W.2d at 473, the court was not determining whether Laflin was a "person affected." According to NGPL, the court was instead discussing whether Laflin's proper remedy was a direct appeal under § 77-510 or a mandamus action to require the Board to give notice of intent to reduce the assessed value of the class of land in question in Johnson County. Furthermore, according to NGPL's brief, "the Court was concerned in Laflin with whether the record before the State Board contained a basis for setting aside the Board's action, not with whether the particular taxpayer bringing the appeal is the one who personally created the record." Reply brief for appellant NGPL at 2.

NGPL contends that the question presented in its appeal is whether a taxpayer who did not appear personally or in writing before the Board, but who the Board's record shows to be an affected property owner, has standing to appeal an action of the Board and to rely on matters inserted into the record by others.

NGPL argues that nothing in the language of § 77-510 requires an affected person to protest or appear before the Board before appealing. According to NGPL, nothing in the statutory scheme governing the Board indicates any legislative intent that a protest or appearance be a prerequisite to appeal such as is the case in the statutory scheme for appeals from county boards of equalization.

As property of a public service entity, NGPL's property is valued and apportioned by the Tax Commissioner rather than by county assessors. Neb. Rev. Stat. § 77-802 (Cum. Supp. 1988). The Board examines the valuations of property which is

valued by the state and equalizes those valuations. Neb. Rev. Stat. § 77-505 (Cum. Supp. 1988). There is no provision for notice to be given to centrally assessed taxpayers that the Board intends to increase or decrease the valuation of their property. Nor is there any statutory provision for a public service entity to protest its valuation.

According to NGPL, it and other public service entities were not informed prior to the Board's meeting either of the determined level of their equalization or of the new methodology that would be employed to determine the equalization rate for centrally assessed taxpayers. NGPL argues in its brief:

> The clear language of the statute cannot be twisted to force all taxpayers to be required to appear and file an objection on the very first day of the announcement of a revolutionary methodology of equalization. Consequently, even if there were no other reason, NGPL's position is clearly distinguishable from Laflin and DeCamp because of the lack of due notice. It would fly in the face of due process required by both the Federal and Nebraska Constitutions to require that NGPL, as well as all other taxpayers, appear at the State Board hearing to object to an unknown equalization level that was determined by a previously unannounced methodology.

Reply brief for appellant NGPL at 6.

Acknowledging that there must be some record upon which this court can decide an appeal, NGPL argues that such a showing has been made on the record. Additionally, NGPL urges this court to find that a centrally assessed taxpayer which has filed the forms required under § 77-801 has by doing so made the affirmative showing required.

We agree with the position expressed by NGPL. Data were submitted which disclosed the 100 percent valuation of all of the property of NGPL. The Board gave NGPL no notice of what it intended to do with these figures, including the employment of an entirely new and different method of equalization. It was not like either *Laflin v. State Board of Equalization and Assessment,* 156 Neb. 427, 56 N.W.2d 469 (1953), or *DeCamp v. State Board of Equalization and Assessment,* 203 Neb. 366,

278 N.W.2d 619 (1979), in which determinations had been made by county boards of equalization, whose actions were being contested before the Board. When the Board sent out notices to both Trailblazer and NGPL that their properties were to be equalized on the basis of an 88.7 percent aggregate valuation and when it became apparent that these two companies were not to be given the "break" which was given to railroad and carline companies, the Board quite obviously recognized that substantial rights of these two companies had been challenged.

The two taxpayers were partners. There was evidence that they operated in similar manners. What affected one, affected the other. The letters of notice advised the two taxpayers that they could appeal the final decision of the Board by filing a protest within 30 days, and were sent to a common official at a common address. Such protests were filed by Trailblazer and NGPL within the prescribed time, and appeals to this court were timely filed.

We conclude that as to a centrally assessed public service entity taxpayer under the provisions of Neb. Rev. Stat. §§ 77-802 et seq. (Reissue 1986 & Cum. Supp. 1988), where, as here, the Board made a final decision with respect to the valuation of the property of such taxpayer (NGPL) and the record contains the information disclosing the basis for such decision and assessment and alleged error, the taxpayer being affected by such decision was entitled to prosecute an appeal to this court under the authority of § 77-510.

Having determined that both Trailblazer and NGPL have standing to prosecute this appeal, their rights are determined by the opinion of this court in *Northern Natural Gas Co. v. State Bd. of Equal., ante* p. 806, 443 N.W.2d 249 (1989). Accordingly, the order of the Board is reversed and the causes are remanded for further proceedings not inconsistent with this opinion and the opinion in *Northern Natural Gas Co., supra*.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. DONALD B. CHILDRESS, APPELLANT.

442 N.W.2d 392

Filed July 14, 1989. No. 88-768.

1. **Records: Appeal and Error.** It is incumbent on the party appealing to present a record which supports the errors assigned; absent such a record, the decision of the lower court is to be affirmed.
2. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be set aside absent an abuse of discretion on the part of the sentencing court.

Appeal from the District Court for Lancaster County: EARL WITTHOFF, Judge. Affirmed.

Peter K. Blakeslee for appellant.

Norman Langemach, Jr., Lincoln City Prosecutor, for appellee.

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

CAPORALE, J.

Donald B. Childress pled guilty in the county court to a charge of third offense driving while under the influence of alcohol, a violation of Neb. Rev. Stat. § 39-669.07 (Reissue 1988). He was so adjudged and thereafter sentenced to serve 6 months in jail less credit to be given for time he had spent in an inpatient alcoholism treatment program, to pay a fine of $500, and to a suspension of his driving privileges for a period of 15 years. Childress then appealed to the district court, which affirmed the judgment of the county court but, because the county judge had failed to carry out his promise to give Childress credit for the 30 days he had spent in treatment, remanded the cause with instructions that such credit be given. Although Childress points to no statutory or other authority for such credit, the State has raised no issue concerning that aspect of the matter, and we therefore do not concern ourselves with that question at this time. In his appeal to this court, Childress claims that the district court erred in failing to find the county court erred by (1) suggesting that he would be considered for probation if he finished treatment for

alcoholism, (2) failing to consider his alcohol treatment discharge summary before imposing sentence, and (3) imposing an excessive sentence. Childress further claims this court has erred by overruling his motion to remand this cause to the county court for resentencing in light of the loss of the presentence report considered by the county court. The record failing to sustain any of his assignments of error, we affirm.

Childress initially entered a not guilty plea. After he acquired counsel, a pretrial conference was held. His then defense counsel claims that at the conference the county judge said that because Childress had not previously undergone treatment for alcoholism nor been on probation in the past, the judge would give strong consideration to probation should Childress complete inpatient treatment for alcoholism. Childress subsequently withdrew his earlier plea and on January 28, 1988, entered a plea of guilty.

At the sentencing hearing held on May 13, 1988, the county judge observed he was misinformed at the time of the pretrial conference; that in fact Childress had seven prior convictions for driving under the influence of alcohol, had been sentenced to the penitentiary for at least one of the convictions, had been on probation before, and had had prior opportunities for treatment. The county judge then imposed the sentence described.

At some unknown time, the original presentence report was lost, and Childress moved that we remand his cause to the district court with directions to order the county court to prepare a new presentence report. We denied that motion and instead ordered the Lancaster County chief probation officer, Larry Heckert, to reproduce the presentence report for review purposes. The new attorney Childress acquired after his county court conviction then filed, per stipulation, an affidavit stating in relevant part:

> That on or about February 1, 1989, I spoke personally with Larry Heckert regarding his preparation of a presentence report on [Childress]. Your affiant was told by Mr. Heckert that it was impossible to reproduce the presentence report on [Childress] originally submitted to the Lancaster County Court, for the reason that a

> different probation officer had prepared the original report, that Mr. Heckert was unaware of the exact contents of the original report, and that the report prepared by Mr. Heckert would include information regarding [Childress] which was not available at the time the original report was submitted to the Lancaster County Court, including information relating to [Childress'] progress in alcohol treatment.

The presentence report prepared by Heckert reveals that Childress underwent inpatient treatment from April 4 to May 4, 1988.

With respect to his first assignment of error, Childress claims that his plea was coerced because of the county judge's claimed pretrial conference statement that he would give strong consideration to probation if Childress were to undergo alcohol addiction treatment. However, no record of the pretrial conference has been presented to us, and, consequently, the issue this assignment of error attempts to raise is not before us. It is incumbent on the party appealing to present a record which supports the errors assigned; absent such a record, the decision of the lower court is to be affirmed. *GFH Financial Serv. Corp. v. Kirk*, 231 Neb. 557, 437 N.W.2d 453 (1989); *State v. Slezak*, 230 Neb. 197, 430 N.W.2d 533 (1988); *State v. Isikoff*, 223 Neb. 679, 392 N.W.2d 783 (1986).

In connection with the next assignment of error, Childress contends that because the original presentence report contained no summary concerning the inpatient alcoholism treatment he underwent immediately before sentencing, the county judge did not take Childress' progress into account before imposing sentence, and thereby abused his discretion. The discharge summary, signed by a student on behalf of a counselor at the treatment center Childress attended, and which is found in the present presentence report, includes the opinion that Childress made "good and steady progress while in treatment," and states that he maintained sobriety, developed the skills and insight needed to "work his recovery program," was able to admit the seriousness of his drinking, and developed an understanding of how his drinking affected his life.

Although he ultimately neglected to do so, in the course of

imposing sentence the county judge said, "I'll give him credit for it as soon as I figure out the days that he was actually in treatment as far as his in-patient." Thus, the record establishes that the county judge was fully aware at the time of sentencing that Childress had attended an alcoholism treatment program.

Moreover, Childress attaches far more importance to the treatment center's discharge summary than the record warrants. The relative inconsequentiality of the summary is perhaps best illustrated by noting that the excerpt in the presentence report concerning Childress' 40-day period of treatment in early 1982 at the same treatment center also contains the opinion that Childress had made progress and that he "was able to get in touch with his powerlessness and unmanageability over drinking and drugs." Yet, Childress remained addicted to alcohol and continued to drive while drunk.

In actuality, Childress' concern that the county judge did not have the benefit of the treatment center's most recent discharge summary merges into the third assignment of error, which claims the sentence imposed is excessive.

The rule which controls this assignment of error is the oft-repeated one that a sentence imposed within statutory limits will not be set aside absent an abuse of discretion on the part of the sentencing court. *State v. Sorbello, ante* p. 486, 440 N.W.2d 696 (1989). In arguing that his conduct does not warrant imposition of the maximum sentence, Childress again urges that during the pendency of this action, "he has taken substantial steps to rehabilitate himself," including undergoing treatment for his alcoholism and abstaining from drinking. However laudable such after-the-fact efforts may be, they do not alter the reality that after repeated drunk driving convictions, Childress once more put other users of the road at risk by driving while drunk. Not even the treatment center's discharge summary on which Childress places so much emphasis suggests that he has attained any insight into how his behavior affects other users of the state's streets and highways. There was no abuse of discretion in the sentence imposed.

This brings us to Childress' claim that this court erred by not ordering the cause remanded so that the county court might

consider new information the replacement report contains. In doing so, he calls our attention to *State v. Slezak, supra*, which remanded the cause for the preparation of a proper bill of exceptions in accordance with the appellant's timely request, and *Norfolk Packing Co. v. American Ins. Co.*, 116 Neb. 118, 216 N.W. 309 (1927), which affirmed the granting of a new trial because the bill of exceptions was destroyed without fault of the party seeking the new trial.

However, a presentence report is not a bill of exceptions. It is clear from the record of proceedings at the sentencing hearing that the county judge imposed the sentence he did because of Childress' past record. That past record is contained in the reproduced presentence report. The only difference Childress declares to exist between the presentence report considered by the county court and the reproduction before us is that the reproduction contains information which was not available at the time the original was prepared: specifically, the 1988 discharge summary. However, as the foregoing analyses demonstrate, Childress' confidence that the subject discharge summary would have changed the result is not borne out by the record.

The judgment of the district court is affirmed.

AFFIRMED.

ROBERT DALE BEHRENDS, APPELLEE AND CROSS-APPELLANT, V. REBECCA JO BEHRENDS, APPELLANT AND CROSS-APPELLEE.

442 N.W.2d 395

Filed July 14, 1989. No. 88-927.

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

William J. Panec for appellant.

Carole McMahon-Boies, of Pepperl & McMahon-Boies Law Offices, P.C., for appellee.

Joseph F. Chilen, guardian ad litem.

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

PER CURIAM.

This is an appeal in proceedings for dissolution of a marriage. The trial court dissolved the marriage, awarded custody of the minor children to the petitioner, divided the property, and awarded a cash property settlement and alimony to the respondent. The respondent has appealed, and the petitioner has cross-appealed.

From our de novo review of the record, we conclude that the trial court did not abuse its discretion in regard to any of the assignments of error made by the parties.

There being no error, the judgment is affirmed. All costs are taxed to the petitioner. No further allowance of attorney fees is made.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DEROISE J. WASHINGTON, APPELLANT.

442 N.W.2d 395

Filed July 14, 1989. No. 88-1015.

1. **Battery: Police Officers and Sheriffs.** Neb. Rev. Stat. § 28-931 (Reissue 1985) is primarily intended to discourage a person from intentionally, knowingly, or recklessly committing a battery on a peace officer while that officer is engaged in performing his or her official duties.
2. **Battery: Words and Phrases.** A battery may be defined as any intentional, unlawful physical violence or contact inflicted on a human being without his consent.
3. **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 the 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.

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

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

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

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

FAHRNBRUCH, J.

Claiming the evidence was insufficient to convict him, DeRoise J. Washington appeals a Douglas County District Court jury verdict finding him guilty of assaulting a police officer in the third degree, a Class IV felony which carries a maximum of 5 years' imprisonment and a $10,000 fine. The defendant was sentenced to an indeterminate term of 1 to 2 years in prison. We affirm.

Washington was convicted of violating Neb. Rev. Stat. § 28-931 (Reissue 1985). It provides that a person commits the offense of assault of an officer in the third degree if he or she intentionally, knowingly, or recklessly causes bodily injury to a peace officer while such officer is engaged in the performance of his or her official duties. A police officer is a peace officer.

Section 28-931 is primarily intended to discourage a person from intentionally, knowingly, or recklessly committing a battery on a peace officer while that officer is engaged in performing his or her official duties. A battery may be defined as any intentional, unlawful physical violence or contact inflicted on a human being without his consent. See *State v. Auman, ante* p. 341, 440 N.W.2d 254 (1989), which interpreted similar language in Neb. Rev. Stat. § 28-932 (Reissue 1985).

Washington claims there was insufficient evidence to convict him. 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 the 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. Auman, supra*; *State v. Lehl*, 231 Neb. 906, 438 N.W.2d 505 (1989).

Taking the view most favorable to the State, the record reflects that between 9 and 9:30 p.m. on April 30, 1988, Omaha Police Officer David Richardson and his partner, Brian Janucik, while patrolling in a marked police cruiser in the vicinity of 24th and Pratt Streets in Omaha, observed a Chevrolet Caprice being driven erratically.

The officers described the car as being operated "negligent[ly]," "reckless[ly]," at a fast rate of speed, and in an "uncontrolled turn." After making these observations, the cruiser's red lights were activated, and the officers followed the Caprice. Several blocks from where the officers first observed the Caprice, it slid to a halt and struck a curb in what was described as an "uncontrolled stop." The defendant, Washington, was later identified as the driver of the Caprice.

The officers pulled alongside the defendant's vehicle. Officer Richardson, who was in his police uniform, approached the driver's side of the Caprice. As Richardson approached, the engine of the Caprice was being "revved." There was evidence from which a jury could conclude that there was sufficient artificial light for the defendant to identify and know that Richardson was a police officer. The defendant began moving the gear selector, which was located on the steering column. Richardson reached into the car and held the defendant back with his right hand. As the officer reached into the car with his left hand to place the gearshift into "park" position, Washington placed the vehicle into reverse, and it moved backward very quickly. The officer's arm became pinned inside the defendant's vehicle. Washington shifted gears and began traveling forward with Richardson running alongside as the defendant drove in a zigzag manner. The defendant made a "very sudden jerk to the right." That freed the officer and threw him to the pavement, where he landed on the left side of his head. Richardson's body went into an uncontrolled tumble.

Officer Janucik pulled up to Richardson, who reentered the cruiser. While being pursued by the cruiser, Washington's vehicle slid from one side of the road to the other until it left the

road, struck a tree stump, and stopped. Richardson went to the passenger side of the Caprice, heard the engine revving again, and saw Washington "doing the shifter." Richardson opened the door, pulled Washington from the car, handcuffed him, and placed him under arrest. Both Washington and Richardson were taken to St. Joseph Hospital in Omaha. At the hospital, Washington was distraught, was profane, was placed in restraints, had a cut near his right eye, and appeared to be intoxicated from alcohol. The defendant, however, was lucid and responded appropriately to questions from his mother.

From Richardson's testimony, medical evidence, and photographs of the officer after he was injured, a jury could find beyond a reasonable doubt that the officer received multiple abrasions and contusions as a proximate result of being thrown to the pavement because of Washington's driving. A defense claim that the officer was injured when he fell from a stationary vehicle obviously did not impress the jury. The evidence is uncontroverted that Richardson was engaged in the performance of his official police duties when he was injured by Washington's overt conduct.

From the manner in which Washington operated his vehicle, and from the evidence as to how the police officer was injured, a jury could find, beyond a reasonable doubt, that Washington intentionally, knowingly, and recklessly caused bodily injury to Police Officer Richardson. In operating the Caprice in the manner in which he did, Washington disregarded a substantial and unjustifiable risk that Officer Richardson would be injured. This constituted recklessness on the part of the defendant. See Neb. Rev. Stat. § 28-109(19) (Reissue 1985).

Washington's intention, knowledge, and recklessness are corroborated by the answer the defendant gave to his mother at the hospital when she asked him if he ran over one of the police officers. Washington responded, "Cops don't mean nothing to me. I tried to back over that one to kill him." The question and the defendant's answer were overheard by a police officer who was investigating the evening's events.

The evidence is overwhelming that Washington committed the crime with which he was charged, and his conviction and sentence should be affirmed.

AFFIRMED.

ARLENE ROESLER, APPELLANT, V. FARMLAND FOODS AND AETNA CASUALTY & SURETY COMPANY, APPELLEES.

442 N.W.2d 398

Filed July 14, 1989. No. 88-1082.

1. **Workers' Compensation.** As the trier of fact, the Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given testimony.
2. **Workers' Compensation: Appeal and Error.** Factual findings by the Workers' Compensation Court have the same effect as a verdict in a civil case and will not be set aside unless clearly wrong.
3. **Workers' Compensation: Evidence.** In testing the sufficiency of the evidence to support the findings of fact made by the Workers' Compensation Court, the evidence must be considered in the light most favorable to the successful party.
4. **Workers' Compensation: Attorney Fees: Time.** Whether a reasonable controversy exists for the purpose of determining whether an attorney fee or delay penalty should be awarded under the provisions of Neb. Rev. Stat. § 48-125 (Reissue 1988) is a question of fact.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Thomas F. Dowd, of Thomas F. Dowd & Associates, for appellant.

Richard R. Endacott, of Knudsen, Berkheimer, Richardson & Endacott, for appellees.

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

CAPORALE, J.

In this workers' compensation case, the plaintiff-appellant employee, Arlene Roesler, claims her award against the defendant-appellee employer, Farmland Foods, and its insurance carrier, defendant-appellee Aetna Casualty & Surety Company, is inadequate. She more specifically assigns as error the compensation court's failure to award (1) more temporary total disability benefits, (2) greater permanent partial disability benefits, and (3) a waiting penalty and attorney fees. Each of the assignments of error being without merit, we affirm.

Resolution of the issues presented by the assignments of error is controlled by the oft-repeated rules that as the trier of fact, the Workers' Compensation Court is the sole judge of the

credibility of witnesses and the weight to be given testimony; that factual findings by the Workers' Compensation Court have the same effect as a verdict in a civil case and will not be set aside unless clearly wrong; and that in testing the sufficiency of the evidence to support the findings of fact made by the compensation court, the evidence must be considered in the light most favorable to the successful party. *Osborne v. Buck's Moving & Storage, ante* p. 752, 441 N.W.2d 906 (1989); *Harpham v. General Cas. Co., ante* p. 568, 441 N.W.2d 600 (1989); *Quinn v. Archbishop Bergan Mercy Hosp., ante* p. 92, 439 N.W.2d 507 (1989); *Gloria v. Nebraska Public Power Dist.*, 231 Neb. 786, 438 N.W.2d 142 (1989).

That being so, no useful purpose would be served by burdening the jurisprudence of this state with a detailed recitation of the evidence. Suffice it to say that there is evidence from which the compensation court could find, as it did, that Roesler's total disability ceased on August 24, 1987, when she entered the part-time employ of the Western, Nebraska, school district as a librarian and special education aid, a position which requires Roesler to shelve books, type, and file. Indeed, the record demonstrates that she has not remained inactive since she departed Farmland Foods the day following that of her stipulated injury, about which more is said later. She was, at the time of her departure from Farmland Foods, employed as the Western, Nebraska, part-time village clerk, as well as the part-time bookkeeper for her husband's bulk fuel business. She continued to work at those positions throughout the period for which she was awarded temporary total disability benefits, May 8, 1987, to and including August 23, 1987.

In arguing that she is entitled to more temporary total disability benefits, Roesler points to the fact that on July 25, 1988, just less than a month prior to the rehearing date, her treating orthopedist noted that her "[c]ervical radiculopathy [seems] to be increasing" and questioned whether she would "benefit from an MRI and possibly even surgical intervention for her spine." The orthopedist at that time recommended a recheck by a Dr. David Smith. Although Roesler stated at rehearing that Dr. Smith had conducted tests, the record does not contain any such evaluation. Notwithstanding these

speculations, it remains clear that Roesler's treating physician himself, on September 18, 1987, expressed the view that Roesler suffered a 15-percent "whole body permanent physical impairment and loss of physical function as a result of her cervical spine disease." Thus, the record contains ample evidence to support the compensation court's finding with respect to when Roesler's period of total disability ceased.

In connection with the second assignment of error, Roesler argues that she suffered more than the "35 per cent permanent loss of earning power" awarded her in addition to benefits for disabilities of each of her hands. The parties stipulated that Roesler suffered a "bilateral carpal tunnel syndrome and aggravation of degenerative cervical disease" as the result of an accident arising out of and in the course of her employment on May 7, 1987. Again, it is sufficient to note that the record supports the finding of the compensation court in this regard. The record establishes that Roesler, who was 49 years old at the time of the hearing below, has had 2 years of college courses and has 4 years of teaching experience. There is medical testimony that although it is necessary for her to move and stretch periodically and to support her arms when extended for periods of time, she is not medically precluded from gainful employment. A vocational rehabilitation counselor testified that Roesler has "transferable skills," particularly in areas such as accounting and child care endeavors. It is this counselor's opinion that Roesler's loss of earning power is between 25 and 35 percent.

Finally, in the third assignment of error, Roesler urges the view that the compensation court erred in denying her both a waiting penalty and attorney fees. As is well known, where there is no reasonable controversy regarding an employee's entitlement to workers' compensation, Neb. Rev. Stat. § 48-125 (Reissue 1988) authorizes award to the employee of an attorney fee and a 50-percent payment for waiting time on delinquent payments. As is also well known, whether a reasonable controversy exists is a question of fact. *Harpham v. General Cas. Co., ante* p. 568, 441 N.W.2d 600 (1989). The foregoing recitation of Roesler's claims and of the evidence relating thereto adequately demonstrates that the

compensation court's express finding of a reasonable controversy cannot be said to be clearly wrong.

AFFIRMED.

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

442 N.W.2d 864

Filed July 14, 1989. No. 89-144.

Original action. Judgment of disbarment.

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

PER CURIAM.

The respondent, Paul J. Gerdes, was suspended from the practice of law by order of this court in *State ex rel. NSBA v. Gerdes,* 231 Neb. 626, 437 N.W.2d 169 (1989). On April 27, 1989, the respondent received a "Notice of Notification Requirements by Disciplined Attorney." The notice stated that pursuant to Neb. Ct. R. of Discipline 16 (rev. 1989), the respondent was required to notify his clients and opposing counsel that he was suspended from the practice of law. The notice also said that rule 16(6) "provides that failure to comply with this rule is contempt of court."

On June 1, the clerk of the court notified the court in writing that the respondent failed to comply with rule 16. Rule 16(6). The respondent was then ordered to show cause on or before June 28 why he should not be held in contempt of court and disbarred from the practice of law for noncompliance with rule 16. Respondent failed to respond to the order.

Therefore it is the order of this court that the respondent, Paul J. Gerdes, be, and hereby is, disbarred from the practice of law in the State of Nebraska, effective immediately.

JUDGMENT OF DISBARMENT.

WHITE, J., not participating.

DISTINCTIVE PRINTING AND PACKAGING COMPANY, APPELLANT, V. VERLYN R. COX ET AL., APPELLEES.

443 N.W.2d 566

Filed July 21, 1989. No. 87-654.

1. **Constitutional Law: Equal Protection.** Neb. Const. art. III, § 18, concerns itself with disparate treatment in much the same manner as does the language of U.S. Const. amend. XIV, which prohibits a state from making or enforcing any law which denies any person within its jurisdiction "the equal protection of the laws."
2. **Constitutional Law: Legislature: Statutes.** Although the power of classification rests with the Legislature of this state, a statute which makes an artificial and baseless classification violates Neb. Const. art. III, § 18.
3. _____: _____: _____. The Legislature is permitted to classify persons as long as, absent implication of a fundamental right or suspect classification, the categorization has a rational basis.
4. **Constitutional Law: Equal Protection: Statutes: Proof.** One attacking a statute as violative of equal protection under Neb. Const. art. III, § 18, has the burden of proving there is no rational basis for the classification.
5. **Constitutional Law: Legislature: Statutes: Presumptions.** In every constitutional challenge there attaches the presumption that all acts of the Legislature are constitutional, with all reasonable doubts resolved in favor of constitutionality.
6. **Legislature: Statutes.** When the Legislature seeks to inaugurate reforms in the area of economics or social welfare, it need not choose between attacking every aspect of the problem or not attacking the problem at all, as long as the action has a rational basis and is free from invidious discrimination.
7. **Constitutional Law: Torts.** Neb. Rev. Stat. § 43-801 (Reissue 1988) is related both to the legitimate governmental purpose of compensating property damage victims and at least in part compensating personal injury victims, and to the legitimate governmental purpose of deterring juvenile delinquency.
8. **Constitutional Law: Equal Protection: Liability.** Neb. Rev. Stat. § 43-801 (Reissue 1988) does not violate either the prohibition against special legislation contained in Neb. Const. art. III, § 18, or the equal protection clause of U.S. Const. amend. XIV on the ground that the liability of parents of children who intentionally inflict personal injury is limited and the liability of parents whose children intentionally inflict property damage is not.
9. **Constitutional Law: Statutes: Liability.** Whether vicarious liability can be imposed depends on whether the statute imposing such liability represents a proper exercise of the police power of the state.
10. **Constitutional Law: Statutes.** Statutes which are reasonably designed to protect the public safety, health, morals, and general welfare do not violate the Constitution where the statute operates uniformly on all within a class which is reasonable.
11. **Constitutional Law: Due Process: Liability.** Neb. Rev. Stat. § 43-801 (Reissue 1988) violates neither the due process clause contained in Neb. Const. art. I, § 3,

nor that contained in U.S. Const. amend. XIV on the ground that it imposes vicarious liability.

12. **Statutes: Liability: Damages: Penalties and Forfeitures.** A statute which imposes liability for actual damages and additional liability for the same act exacts a penalty.
13. _____: _____: _____: _____. A statute which imposes liability only for actual damages exacts no penalty.
14. **Criminal Law: Words and Phrases.** A fine is a certain payment of money imposed as punishment for an offense; it is a pecuniary punishment imposed by a lawful tribunal upon a person convicted of crime or misdemeanor.
15. **Constitutional Law: Damages: Penalties and Forfeitures.** Punitive, vindictive, or exemplary damages contravene Neb. Const. art. VII, § 5, and thus are not allowed.
16. **Damages: Penalties and Forfeitures.** Punitive damages are given to the plaintiff over and above the full compensation for the injuries, for the purpose of punishing the defendant, of teaching the defendant not to again engage in the injurious conduct, and of deterring others from following the defendant's example.
17. **Legislature: Statutes: Public Policy.** The wisdom, justice, policy, or expediency of a statute is for the Legislature alone.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Reversed and remanded for further proceedings.

Richard E. O'Toole and Mark A. Weber, of Walentine, O'Toole, McQuillan & Gordon, for appellant.

P. Shawn McCann, of Sodoro, Daly & Sodoro, for appellees Cox.

Gordon M. Ryan, of Ryan & Seidler, for appellee Hernandez.

Eugene P. Welch, of Gross, Welch, Vinardi, Kauffman & Day, P.C., for appellees McCormick.

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

PER CURIAM.

Plaintiff-appellant, Distinctive Printing and Packaging Company, seeks to recover $178,495.94 in damages from defendants-appellees, Verlyn R. Cox; his wife, Martha L. Cox; and Susana Hernandez, under the provisions of the parental liability statute, Neb. Rev. Stat. § 43-801 (Reissue 1988),

asserting the defendants' respective resident minor sons willfully and intentionally set fire to plaintiff's property. So far as is relevant to this appeal, the defendants demurred on the ground that plaintiff's petition failed to state a cause of action because the statute is unconstitutional on state and federal equal protection and due process grounds. The district court sustained the demurrers and thereafter dismissed plaintiff's petition. In its appeal to this court, plaintiff asserts that the district court's dismissal of its action on the ground that the foregoing statute is unconstitutional in its entirety is erroneous. Pursuant to this court's order, the parties have also explored whether the statute suffers constitutional infirmity by imposing excessive fines for the failure to control one's errant children, or otherwise exacts penalties or punitive damages. Determining that the statute, whether wise or unwise, is constitutional, we reverse the district court's order of dismissal and remand the cause for further proceedings.

EQUAL PROTECTION

The statute reads as follows:

> The parents shall be jointly and severally liable for the willful and intentional infliction of personal injury to any person or destruction of real and personal property occasioned by their minor or unemancipated children residing with them, or placed by them under the care of other persons; *Provided*, that in the event of personal injuries willfully and intentionally inflicted by such child or children, damages shall be recoverable only to the extent of hospital and medical expenses incurred but not to exceed the sum of one thousand dollars for each occurrence.

§ 43-801.

Defendants first contend that limiting the liability of parents whose children inflict intentional personal injury but not limiting the liability of parents whose children inflict intentional property damage denies the latter class of parents equal protection of the law. Neb. Const. art. III, § 18, prohibits the Nebraska Legislature from, among other things, passing any law which grants "any special or exclusive" privilege or

immunity, and further provides that, except for certain matters relating to loans and installment sales, "where a general law can be made applicable, no special law shall be enacted." Thus, article III, § 18, concerns itself with disparate treatment in much the same manner as does the language of U.S. Const. amend. XIV, which prohibits a state from making or enforcing any law which denies any person within its jurisdiction "the equal protection of the laws." See, *Drennen v. Drennen*, 229 Neb. 204, 426 N.W.2d 252 (1988); *Porter v. Jensen*, 223 Neb. 438, 390 N.W.2d 511 (1986).

Although the power of classification rests with the Legislature of this state, a statute which makes an artificial and baseless classification violates article III, § 18. *Snyder v. IBP, inc.*, 229 Neb. 224, 426 N.W.2d 261 (1988). The Legislature is permitted to classify persons as long as, absent implication of a fundamental right or suspect classification, the legislative categorization has a rational basis. *Willis v. City of Lincoln, ante* p. 533, 441 N.W.2d 846 (1989); *School Dist. No. 46 v. City of Bellevue,* 224 Neb. 543, 400 N.W.2d 229 (1987). The defendants do not suggest that the statute involves a fundamental right or suspect classification. Thus, the task is one of determining whether a rational basis exists for the classification at issue. See, *Payless Drug Stores v. Brown*, 80 Or. App. 255, 722 P.2d 31 (1986), *rev. denied* 302 Or. 159, 727 P.2d 129; *Bryan v. Kitamura*, 529 F. Supp. 394 (D. Haw. 1982); *Hayward v. Ramick*, 248 Ga. 841, 285 S.E.2d 697 (1982); *Piscataway Tp. Bd. of Ed. v. Caffiero*, 86 N.J. 308, 431 A.2d 799 (1981), *appeal dismissed* 454 U.S. 1025, 102 S. Ct. 560, 70 L. Ed. 2d 470. The defendants, being the parties attacking the statute as violative of equal protection under article III, § 18, and the 14th amendment, have the burden of proving there is no rational basis for treating the parents of children causing personal injury differently from the parents of children causing property damage. *Otto v. Hahn*, 209 Neb. 114, 306 N.W.2d 587 (1981).

In analyzing the questions presented by this appeal, we must bear in mind that in every constitutional challenge there attaches the presumption that all acts of the Legislature are constitutional with all reasonable doubts resolved in favor of

constitutionality. *Landon v. Pettijohn*, 231 Neb. 837, 438 N.W.2d 757 (1989); *Otto v. Hahn, supra.*

We begin by noting that other courts considering the matter have generally concluded that parental liability statutes such as § 43-801 are rationally related to the legitimate governmental purposes of compensating victims and deterring juvenile delinquency. See, *Bryan v. Kitamura, supra*; *Alber v. Nolle*, 98 N.M. 100, 645 P.2d 456 (1982); *Hayward v. Ramick, supra*; *Piscataway Tp. Bd. of Ed. v. Caffiero, supra*; *Buie v. Longspaugh*, 598 S.W.2d 673 (Tex. Civ. App. 1980); *Vanthournout v. Burge*, 69 Ill. App. 3d 193, 387 N.E.2d 341 (1979); *Watson v. Gradzik*, 34 Conn. Supp. 7, 373 A.2d 191 (1977); *Rudnay v. Corbett*, 53 Ohio App. 2d 311, 374 N.E.2d 171 (1977); *Matter of Sorrell*, 20 Md. App. 179, 315 A.2d 110 (1974); *Mahaney v. Hunter Enterprises, Inc.*, 426 P.2d 442 (Wyo. 1967); *Kelly v. Williams*, 346 S.W.2d 434 (Tex. Civ. App. 1961).

In treating defendants' equal protection concern, we are reminded that a class need not be all-inclusive. " 'Legislation is to a large extent an evolutionary process, and legislatures often work by piecemeal. Not infrequently they approach a new subject of legislation in a timid and halting spirit, and it often takes years and many sessions to frame legislation covering a whole subject.' " *Bridgeford v. U-Haul Co.*, 195 Neb. 308, 318, 238 N.W.2d 443, 450 (1976). When the Legislature seeks to inaugurate reforms in the area of economics or social welfare, it need not choose between attacking every aspect of the problem or not attacking the problem at all, as long as the action has a rational basis and is free from invidious discrimination. *Otto v. Hahn, supra.*

In very few cases from other states is there a complaint that parental liability statutes violate equal protection by creating discriminatory classifications. One such case is *Piscataway Tp. Bd. of Ed. v. Caffiero, supra*, in which it was claimed that a statute which imposed vicarious liability on the parents or guardians of pupils damaging school property treated such persons having public school children differently from those having nonpublic school children, and thus offended equal protection notions. However, the *Caffiero* court found a

rational relation between the statute and the legitimate government objective of maintaining discipline.

> The fact that the Legislature did not at the same time address the problem of deterring delinquent behavior by nonpublic school children or the problem of compensating school districts for all acts of vandalism does not deprive the statute of its rational basis. A state may undertake resolution of problems one step at a time, addressing itself to the part of the problem that seems most acute.

Id. at 324, 431 A.2d at 807.

Similarly, in *Bryan v. Kitamura, supra*, it was argued that the Hawaii parental liability statute denied equal protection because it failed to impose liability on persons other than natural parents who are as responsible for a child's conduct as are natural parents. That court held, however, that the distinction drawn between natural parents and others responsible for the child's behavior is rationally related to the legitimate governmental ends of compensating victims and deterring juvenile delinquency, and said, "It is within the discretion of the legislature to address only part of a problem or to select only one phase of a field for regulation." 529 F. Supp. at 402. See, also, *Vanthournout v. Burge, supra* (wherein the court rejected the argument that the Illinois parental liability act created an unreasonable classification by imposing liability on parents and guardians of minor children but not on schools, police, and others also responsible for a child's conduct).

However, no case has been found which considers the precise question before us: Does a rational basis exist for limiting parental liability where children intentionally cause personal injury but not limiting such liability where children intentionally cause property damage?

We do not agree with plaintiff's suggestion that *Otto v. Hahn*, 209 Neb. 114, 306 N.W.2d 587 (1981), and *Romero v. Hodgson*, 319 F. Supp. 1201 (N.D. Cal. 1970), *aff'd* 403 U.S. 901, 91 S. Ct. 2215, 29 L. Ed. 2d 678 (1971), to which *Otto* refers, stand for the proposition that necessary political compromise in and of itself provides a rational basis for legislative classification. None of the U.S. Supreme Court cases

cited in *Romero* so hold. Indeed, the very purpose of equal protection concepts is to shield hapless citizens from the enactment and enforcement of laws based on political accommodations which, with no reasonable basis, would treat one group differently from another similarly situated group. While it is true that the *Romero* court wrote of necessary political compromises, the fact of the matter is that the then prevailing economic realities provided a rational basis for excluding agricultural labor from unemployment compensation benefits, just as in *Otto* economic considerations provided a rational basis for denying workers' compensation benefits to farm laborers. However, as plaintiff points out, in determining whether a rational basis exists for a legislative classification, courts look to see if any state of facts can be conceived to reasonably justify the disparate treatment which results. *Farm Bureau Life Ins. Co. v. Luebbe*, 218 Neb. 694, 358 N.W.2d 754 (1984).

The debate during the Nebraska Legislature's Judiciary Committee's consideration of the bill which expanded the purview of the earlier parental liability statute so as to include intentionally inflicted personal injury reveals that one of the concerns was the fact that, unlike the situation in property damages, personal injury, if not limited, could expose a parent to liability for subjective pain and suffering. The object of the bill, according to the introducer, was simply to compensate one sustaining personal injury for the actual bills attendant to the injury. Judiciary Committee Hearing, L.B. 49, 80th Leg. (Jan. 28, 1969). The floor debate, again, suggests concern that, on average, unlimited liability would present a greater potential for high damages in instances of personal injury than in instances of objectively measured property damage. Floor Debate, L.B. 49, Judiciary Committee, 80th Leg. (Feb. 26, 1969).

That certain limitations on recovery and differentiation among types of tort-feasors are permissible is demonstrated by *Prendergast v. Nelson,* 199 Neb. 97, 256 N.W.2d 657 (1977). The legislation involved therein, the Nebraska Hospital-Medical Liability Act, Neb. Rev. Stat. §§ 44-2801 et seq. (Cum. Supp. 1976), then limited the damages recoverable

by victims of medical malpractice failing to remove themselves from the ambit of the act to $500,000. In rejecting the claim that such limitation violated state and federal equal protection requirements, this court determined that the Legislature could reasonably distinguish health care providers from other tort-feasors on the basis that the growth in medical malpractice actions was producing exorbitant medical care costs.

Some courts have held that where parental liability statutes limit liability, the statutory purpose must be only to deter juvenile delinquency, not to compensate victims. See, *First Bank Southeast v. Bentkowski*, 138 Wis. 2d 283, 405 N.W.2d 764 (1987); *Stang v. Waller*, 415 So. 2d 123 (Fla. App. 1982); *Standard v. Shine*, 278 S.C. 337, 295 S.E.2d 786 (1982); *Insurance Co. v. Faulkner*, 259 N.C. 317, 130 S.E.2d 645 (1963). However, the legislative history establishes that § 43-801 is related both to the legitimate governmental purposes of compensating, in whole or in part, victims who suffer damage at the hands of juvenile delinquents, and to the legitimate governmental purpose of deterring juvenile delinquency through encouraging parents to control their children. Further, the differences between the elements of damages for personal injury and those for injury to property provide a rational economic basis upon which to limit the liability of parents whose children intentionally injure persons but not limit the liability of parents whose children intentionally injure property. In addition, the Legislature could reasonably have concluded that minor children intentionally injure property more frequently than they intentionally injure persons, and thus desired to place greater deterrence on the infliction of property damage. Accordingly, the defendants have failed to meet their burden of proving that no rational basis exists for the classification made by the Legislature. We therefore hold that § 43-801 does not violate either the prohibition against special legislation contained in Neb. Const. art. III, § 18, or the equal protection clause of U.S. Const. amend. XIV on the ground that the liability of parents of children who intentionally inflict personal injury is limited and the liability of parents whose children intentionally inflict property damage is not.

DUE PROCESS

The next question is whether § 43-801 runs afoul of either the guarantee contained in Neb. Const. art. I, § 3, that no person shall be deprived of property "without due process of law," or the like guarantee embodied in U.S. Const. amend. XIV.

So far as we have been able to determine, only in *Corley v. Lewless*, 227 Ga. 745, 182 S.E.2d 766 (1971), has a parental liability statute been declared invalid on due process grounds. The Georgia statute provided unlimited parental liability for the willful and wanton acts of their minor children resulting in the death, injury, or damage to the person or property of another. The court found that unlike other statutes which provided penalties to curb juvenile delinquency, the Georgia statute, because it imposed unlimited liability, sought instead to provide compensation in full for property damage or personal injury. Relying on earlier decisions that faultless liability deprived one of due process, the *Corley* court held the statute unconstitutional, as it imposed liability without personal fault solely on the basis of the parent-child relationship. Notwithstanding that rationale, the Georgia Supreme Court, in *Haywood v. Ramick*, 248 Ga. 841, 285 S.E.2d 697 (1982), upheld a subsequently enacted similar statute which limited parental liability to $500. The *Ramick* court did not undertake to explain how limiting liability overcame the due process infirmity it had earlier found to exist in vicarious liability, but did observe that *Corley* stood alone in holding parental liability statutes unconstitutional.

We have upheld the imposition of vicarious liability against a due process challenge in *Bridgeford v. U-Haul Co.*, 195 Neb. 308, 238 N.W.2d 443 (1976). There, we determined that whether vicarious liability could be imposed depended on whether the statute represented a proper exercise of the police power of the state.

> Statutes which are reasonably designed to protect the public safety, health, morals, and general welfare do not violate the Constitution where the statute operates uniformly on all within a class which is reasonable. . . .
>
> . . . .
>
> The imposition of strict liability, in the exercise of the

> police power of a state, does not of itself contravene the due process clauses of the federal [and] state Constitutions. . . . Legislation imposing liability without fault is frequently sustained as a proper exercise of the police power. . . . The extent to which the Legislature may exercise the police power, an attribute of state sovereignty, is primarily a matter of legislative judgment, but the purpose of the regulatory matter must be ligitimate [sic] and the means employed to effect it must be reasonable. . . . Nebraska has, both by legislation and court decision, approved the principles of strict liability and vicarious liability in its workmen's compensation statutes, judicial application of the family purpose doctrine, and defective products cases.

(Citations omitted.) *Id.* at 312-14, 238 N.W.2d at 447-48. We then held that Neb. Rev. Stat. § 39-6,193 (Reissue 1974), a statute imposing unlimited vicarious liability on owners-lessors of trucks for the damages negligently caused by the lessees and operators of the trucks, was a reasonable means to the legitimate state ends of increasing highway safety, compensating victims, and encouraging adequate insurance coverage, and, thus, the statute did not deprive truck owners-lessors of their property without due process of law.

In like fashion, imposing total or partial liability on parents whose children intentionally inflict personal injury or damage to property is, as we said in considering defendants' equal protection concerns, a reasonable means to the legitimate state ends of controlling juvenile delinquency and compensating, in whole or in part, the victims of such delinquency. Accordingly, § 43-801 violates neither the due process clause contained in Neb. Const. art. I, § 3, nor that contained in U.S. Const. amend. XIV on the ground that it imposes vicarious liability.

We also note that at least two other jurisdictions have specifically held that the imposition of vicarious liability on parents for the acts of their children does not deprive the parents of due process. *Piscataway Tp. Bd. of Ed. v. Caffiero*, 86 N.J. 308, 431 A.2d 799 (1981), *appeal dismissed* 454 U.S. 1025, 102 S. Ct. 560, 70 L. Ed. 2d 470; *Bryan v. Kitamura*, 529 F. Supp. 394 (D. Haw. 1982).

NEITHER FINE NOR PENALTY

This brings us to the additional concerns we directed the parties to address. U.S. Const. amend. VIII and Neb. Const. art. I, § 9, prohibit the imposition of excessive fines. Neb. Const. art. VII, § 5, further provides that, with certain exceptions not relevant to the present inquiry, all fines and penalties shall be appropriated exclusively to the common schools of the political subdivisions in which they accrue. Obviously, the foregoing constitutional provisions can have application to § 43-801 only if the statute in question imposes a fine or penalty upon the defendants.

This court observed in *Abel v. Conover*, 170 Neb. 926, 929-30, 104 N.W.2d 684, 688 (1960), that in Nebraska "the measure of recovery in all civil cases is compensation for the injury sustained. . . . A statute which imposes liability for actual damages and additional liability for the same act provides a penalty." Implicit in this holding is the notion that a statute which imposes liability only for actual damages exacts no penalty. Liability under the statute being limited to actual damages or less, it is clear that § 43-801 imposes no penalty upon parents. See *DeCamp v. City of Lincoln*, 202 Neb. 727, 277 N.W.2d 83 (1979), which holds that court costs collected by a city violations bureau for parking violations for the apparent purpose of defraying the expenses of operating the bureau are neither fines nor penalties. Compare, however, *School District of McCook v. City of McCook*, 163 Neb. 817, 81 N.W.2d 224 (1957), which holds that sums paid to purge oneself from the charge of violating the overparking provisions of an ordinance constituted penalties. A fine is " '[a] certain payment of money imposed as punishment for an offense.' 'The term "fine" has a distinct meaning; it is a pecuniary punishment imposed by a lawful tribunal upon a person convicted of crime or misdemeanor.' " *Sinner v. State*, 128 Neb. 759, 762, 260 N.W. 275, 276 (1935). Section 43-801 imposes no fine for at least two reasons: pecuniary impositions measured by actual damages sustained are compensatory in nature and not properly characterized as punishment, although certainly such impositions may be experienced as punishing by those upon whom they are levied. See *Trop v. Dulles*, 356 U.S. 86, 96, 78 S.

Ct. 590, 2 L. Ed. 2d 630 (1958) ("The Court has recognized that any statute decreeing some adversity as a consequence of certain conduct may have both a penal and a nonpenal effect. The controlling nature of such statutes normally depends on the evident purpose of the legislature"). See, also, *School District of the City of Omaha v. Adams*, 147 Neb. 1060, 26 N.W.2d 24 (1947), which concludes that statutes granting a private action against a wrongdoer are not penal. Section 43-801 addresses the civil liability of parents for the intentional torts of certain of their children; it does not undertake to make parents criminally culpable for the harm done. Thus, the statute imposes neither fine nor penalty.

NOT PUNITIVE DAMAGES

Although we are aware the U.S. Supreme Court recently held, in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 57 U.S.L.W. 4985 (U.S. June 26, 1989) (No. 88-556), that the eighth amendment prohibition against excessive fines does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded and thus does not prohibit punitive damages per se, the fact remains that punitive, vindictive, or exemplary damages contravene Neb. Const. art. VII, § 5, and thus are not allowed in this jurisdiction. *Miller v. Kingsley*, 194 Neb. 123, 230 N.W.2d 472 (1975); *Abel v. Conover, supra*. Thus, although § 43-801 imposes neither a penalty nor fine, it may yet run afoul of Nebraska law.

Punitive damages "are given to the plaintiff over and above the full compensation for the injuries, for the purpose of punishing the defendant, of teaching the defendant not to do it again, and of deterring others from following the defendant's example." Prosser and Keeton on the Law of Torts, *Introduction* § 2 at 9 (5th ed. 1984).

Although in *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 108 S. Ct. 1645, 100 L. Ed. 2d 62 (1988), the U.S. Supreme Court did not reach the question of whether the size of the $1.6 million punitive damages award for an insurer's bad-faith refusal to pay a claim itself violated the due process,

contract, and excessive fines clauses of the federal Constitution, the Court held that a Mississippi statute imposing a 15-percent penalty upon an unsuccessful appellant from a money judgment was reasonably tailored to achieve the state's legitimate objectives of discouraging frivolous appeals, compensating appellees for the intangible costs of litigation, and conserving judicial resources, and thus did not violate the equal protection clause notwithstanding that unsuccessful appellants from nonmonetary judgments were not subject to the penalty. In their joint *Crenshaw* concurrence, Justices O'Connor and Scalia observe: "Punitive damages are not measured against actual injury, so there is no objective standard that limits their amount." 108 S. Ct. at 1655. According to those justices, it is the "grant of wholly standardless discretion to determine the severity of punishment [inherent in the notion of punitive damages which] appears inconsistent with due process." 108 S. Ct. at 1656. The damages for which parents may be held accountable under § 43-801 are "measured against," in fact are limited by, the "actual injury" caused by their errant children. Thus, § 43-801 may not fairly be characterized as imposing punitive damages.

PREROGATIVE OF LEGISLATURE

While some may question the wisdom of imposing generally uninsurable liability upon the parents of errant children rather than leaving the risk of insurable loss upon those who experience property damage or personal injury at the hands of such children, the fact remains that in a representative democracy such as exists in this state, the wisdom, justice, policy, or expediency of a statute is for the Legislature alone. *Arant v. G. H., Inc.*, 229 Neb. 729, 428 N.W.2d 631 (1988); *Else v. Else*, 219 Neb. 878, 367 N.W.2d 701 (1985); *Williams v. County of Buffalo*, 181 Neb. 233, 147 N.W.2d 776 (1967).

The judgment of the district court, being erroneous, is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

GRANT, J., dissenting.

I dissent. I feel that Neb. Rev. Stat. § 43-801 (Reissue 1988) is

unconstitutional and that its predecessor statute, § 43-801 (Reissue 1952), was unconstitutional, because both constitute special legislation denying equal protection of the law in violation of article III, § 18, of the Nebraska Constitution and the 14th amendment, § 1, to the U.S. Constitution and because the current statute violates the due process clause set out in article I, § 3, of the Nebraska Constitution and in the 14th amendment, § 1, to the U.S. Constitution.

In my judgment, a rational basis for differentiating parents of children who cause property damage from parents of children who cause personal injury damage does not exist. It does not seem rational to me that the State of Nebraska is perfectly willing to drive a family into bankruptcy (most families could not stand a $178,000 judgment such as sought in this case) if a minor child willfully damages property, but chooses to limit possible frightful damages caused by the same willful child by way of personal injury. Can it make sense to value a burned-up warehouse more highly in the overall scheme of things than the eyesight of a child lost through the malicious actions of another child? That such parental statutes do result in bankruptcy filings is shown in many cases. In bankruptcy cases, it appears that the owners of judgments against parents often seek to inflict additional punishment by contending the judgments are not dischargeable because they represent intentional torts. See, *In re Whitacre*, 93 Bankr. 584 (Bankr. N.D. Ohio 1988); *In re Eggers*, 51 Bankr. 452 (Bankr. E.D. Tenn. 1985); *In re Horne*, 46 Bankr. 814 (Bankr. N.D. Ga. 1985); *In re Cornell,* 42 Bankr. 860 (Bankr. E.D. Wash. 1984); *In re Austin,* 36 Bankr. 306 (Bankr. M.D. Tenn. 1984). Appellees herein may take some comfort in the fact that it appears that debts resulting from vicarious liability for intentional or negligent acts of children appear generally to be dischargeable in bankruptcy.

In reaching the foregoing conclusion, I do not contest the obviously correct holding in *Abel v. Conover*, 170 Neb. 926, 104 N.W.2d 684 (1960), also in the majority opinion. What I disagree with is the majority's concept that § 43-801 (Reissue 1988) imposes no penalty on parents since it "imposes liability only for actual damages." Whether they are actual or not, if the

damages are imposed on parents *only* because of the acts of their children, the imposition operates as a penalty on the parents for the actions of another, their child.

I do not believe a rational basis exists for such a differentiation, and I believe § 43-801 is unconstitutional as constituting proscribed special legislation under the Nebraska Constitution and in not affording equal protection under the U.S. Constitution.

I also believe that § 43-801 violates the due process clauses of the Nebraska and U.S. Constitutions, because the statute imposes unlimited vicarious liability, without fault, on certain parents. I do not believe § 43-801 can be considered by this court in the way that courts of other states have considered parental liability statutes in their states, because our statute differs materially from other statutes. In Maryland, New Mexico, Texas, Illinois, Connecticut, Ohio, Georgia, and Wyoming, there are statutory limits to the amount for which the parent may be liable. Those limits range from $300 to $15,000, but the mere fact there is a limit differentiates those states from Nebraska, where the property damage liability is unlimited. In New Jersey, a parent is liable if the parent "fails or neglects to exercise reasonable supervision and control" of the conduct of a minor child—a negligence basis. N.J. Stat. Ann. § 2A:53A-15 (West 1987).

I do not believe the court's analysis of the case of *Bridgeford v. U-Haul Co.*, 195 Neb. 308, 238 N.W.2d 443 (1976), and Neb. Rev. Stat. § 39-6,193 (Reissue 1974) is helpful in this case. Both the case and the statute concern business relationships not present in this case.

If the Nebraska statute imposed liability for a parent's actions, not for the mere status as parents, or had a reasonable limit on the amounts which a parent might have to pay for damages intentionally caused by his or her child (as most of the states provide), I would not make this contention. Such a statute might reflect the valid considerations this state has in encouraging parents to teach their children respect for the law and the property of others. I think it an entirely different situation when the statute operates to take all the assets of a family (up to $178,000 in this case) for the derelictions of one

member of the family, without providing any process where parents can adequately defend such a taking, in a situation where the parents probably cannot obtain protective insurance and thus possibly protect the interest of the family unit in surviving.

I also believe that provisions of the U.S. and Nebraska Constitutions forbidding excessive fines also require the court to determine that § 43-801 is unconstitutional. I note the consideration expressly given in many states to the fact that limited recovery of amounts from parents should be in the nature of penalties to enforce compliance with the law rather than in the nature of compensation to the injured parties. The majority opinion states that § 43-801 is related "to the legitimate state ends of controlling juvenile delinquency . . . ." As soon as that approach is adopted, it is clear the state is imposing a penalty on persons in a certain status, i.e., being parents of children who intentionally damage property, in order to control the behavior of such parents. As stated in *Trop v. Dulles*, 356 U.S. 86, 96, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958), "If the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc.—it has been considered penal."

Such a penalty is in the nature of a fine. The eighth amendment to the U.S. Constitution, and article I, § 9, of the Nebraska Constitution expressly provide that excessive fines may not be imposed. The "fine" sought to be levied on appellees in this case is $178,000. In my judgment, that amount constitutes an excessive, unconstitutional fine and is, therefore, invalid.

I recognize that in *Ingraham v. Wright*, 430 U.S. 651, 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1977), the U.S. Supreme Court held that the "cruel and unusual punishments" clause of the eighth amendment applies only to criminal cases. I not only agree completely with the four-judge dissent in the *Ingraham* case, but I point out that in the case before this court, we are dealing with the "excessive fines" clause of the eighth amendment—a different clause. Even if that conclusion is not correct, I see nothing to prevent the application of the "excessive fines" clause of article I, § 9, of the Nebraska Constitution in the case

before us. See *Colonial Pipeline Co. v. Brown*, 258 Ga. 115, 365 S.E.2d 827 (1988).

I would affirm.

MOZELLA WILLIAMS, PERSONAL REPRESENTATIVE OF THE ESTATE OF VERGIL WILLIAMS, DECEASED, APPELLANT, V. GOULD, INC., ET AL., APPELLEES, SIDNEY LERNER, M.D., APPELLEE AND CROSS-APPELLANT.

TYREE BIGGS, SR., APPELLANT, V. GOULD, INC., ET AL., APPELLEES, SIDNEY LERNER, M.D., APPELLEE AND CROSS-APPELLANT.

ULYSSES ABBOTT, APPELLANT, V. GOULD, INC., ET AL., APPELLEES, SIDNEY LERNER, M.D., APPELLEE AND CROSS-APPELLANT.

443 N.W.2d 577

Filed July 21, 1989. Nos. 87-703, 87-704, 87-705.

1. **Judgments: Jurisdiction: Appeal and Error.** When determination of a jurisdictional question involves factual findings, a trial court's decision on the question of jurisdiction will be upheld unless the factual findings concerning jurisdiction are clearly erroneous.
2. _____: _____: _____. When a jurisdictional question does not involve a factual dispute, determination of the jurisdictional issue is a matter of law, which requires an appellate court to reach a conclusion independent from the trial court's conclusion on the jurisdictional issue.
3. **Pleadings: Proof.** Confronted with a special appearance, a plaintiff has the burden to establish facts which demonstrate the court's personal jurisdiction over the defendant.
4. **Pleadings: Proof: Affidavits.** A special appearance, which is preliminary and collateral to determining the merits of an action, is a pleading within the purview of Neb. Rev. Stat. § 25-1244 (Reissue 1985). Consequently, in a hearing on a special appearance, an affidavit may be used to prove or disprove the factual basis for a court's assertion or exercise of personal jurisdiction over a defendant.
5. **Due Process: Jurisdiction: States.** Before a court can exercise personal jurisdiction over a nonresident defendant, the court must, first, determine whether a statutory standard of the long-arm statute is satisfied, and, if the long-arm statute has been satisfied, second, whether minimum contacts exist between the defendant and the forum state for personal jurisdiction over the defendant without offending due process.

6. **Jurisdiction: Actions.** Pursuant to Neb. Rev. Stat. § 25-536(1)(b)(Reissue 1985) of Nebraska's long-arm statute, a court may exercise personal jurisdiction over a person who acts directly or by an agent concerning a cause of action arising from the person's contracting to supply services or things in Nebraska.
7. **Due Process: Jurisdiction: States.** Due process for personal jurisdiction over a nonresident defendant requires the defendant's minimum contacts with the forum state so that maintenance of the suit does not offend traditional notions of fairness and reasonableness.
8. _____: _____: _____. To determine whether a court has personal jurisdiction over a nonresident defendant, the court must examine the quality and nature of the nonresident's activities and ascertain that the nonresident has sufficient minimum contacts with the forum state to satisfy the requisite due process for assertion or exercise of personal jurisdiction.
9. _____: _____: _____. Fairness and reasonableness, essential to due process in personal jurisdiction over a nonresident defendant, require that the defendant's contact with the forum state must be of a quality and nature that the defendant should reasonably anticipate being haled into court in the forum state.
10. **Due Process: Jurisdiction.** The minimum contacts standard supplies a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where the conduct will or will not render them liable to suit.
11. **Jurisdiction: States.** A defendant's purposeful act, directed to the forum state, not merely the unilateral activity of another who claims a relationship to the defendant, connects the defendant to the forum state.
12. _____: _____. In determining whether a defendant's conduct pursuant to a contract has purposefully established minimum contacts with the forum state, a court considers prior negotiations between the parties, contemplated consequences of the contract, terms of the contract, and the course of dealing between the parties.
13. _____: _____. If a defendant's minimum contacts with a forum state are sufficient for personal jurisdiction, a court may consider other factors bearing on reasonableness and fairness in requiring a nonresident to defend a suit in the forum state, such as the defendant's burden in the litigation commenced in the forum state, the forum state's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and efficient relief, the judicial system's interest in efficient resolution of controversies, and the shared interest of the states in furthering fundamental substantive social policies.
14. _____: _____. So long as a nonresident actor's efforts are purposefully directed toward residents of another state, absence of physical contacts with the forum state does not defeat personal jurisdiction over the nonresident defendant in the forum state.
15. **Pleadings: Jurisdiction: Pretrial Procedure.** Any party to an action in which a special appearance has been filed is entitled to discovery authorized by the Nebraska Discovery Rules to ascertain facts relevant to the court's jurisdiction over the person of the defendant.
16. **Motions for Continuance: Affidavits: Good Cause.** Under Neb. Rev. Stat.

§ 25-1148 (Reissue 1985), an application for continuance must be in writing and supported by an affidavit which contains factual allegations demonstrating good cause or sufficient reason necessitating postponement of proceedings.

Appeal from the District Court for Douglas County: PAUL J. HICKMAN, Judge. Reversed and remanded for further proceedings.

Martin A. Cannon, of Matthews & Cannon, P.C., and Eugene Mattioni, of Mattioni, Mattioni & Mattioni, Ltd., for appellants.

William M. Lamson, Jr., and Patricia A. Zieg, of Kennedy, Holland, DeLacy & Svoboda, for appellee Lerner.

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

SHANAHAN, J.

The appellants, Tyree Biggs, Sr., Ulysses Abbott, and Mozella Williams, who is the surviving spouse and personal representative of the estate of Vergil Williams, filed their separate actions in the district court for Douglas County, Nebraska, against Gould, Inc., Robert J. Fitzgibbons, Sr., M.D., and Sidney Lerner, M.D., concerning bodily injuries caused by exposure to lead, cadmium, and arsenic at Gould's smelter in Omaha.

The Petitions.

In substantially identical petitions, appellants alleged the relationship of the parties and the basis for appellants' actions. Gould, which operated its smelter in Omaha, was not a Nebraska corporation, but had its principal place of business in Minnesota. Gould employed Lerner, an Ohio citizen, as a medical consultant "for the ostensible purpose of examining workers at the Gould plant in Omaha, and informing them of and protecting them from the hazards" of contact with or exposure to toxic substances encountered in Gould's smelter operations. Lerner's employment also included "overseeing plant and corporate policy in regard to biological and industrial monitoring and the health and maintenance of workers exposed to toxins at the lead smelting and refining plant of Gould, Inc." Gould also employed Fitzgibbons, a Nebraska citizen, as a

medical consultant and health care provider for Gould's Omaha employees. According to the appellants, Lerner and Fitzgibbons "failed to conduct their activities with the acceptable standards of medical care," with the result that the physicians' "careless, wanton and reckless acts and omissions" caused permanent bodily injury to Biggs and Abbott and resulted in Vergil Williams' death. Each appellant requested damages from the defendants.

Long-Arm Statute.

Pursuant to the Nebraska "long-arm statute," Neb. Rev. Stat. § 25-536 (Reissue 1985), appellants served summons on Lerner. See, Neb. Rev. Stat. § 25-505.01 (Reissue 1985) (service of summons); Neb. Rev. Stat. § 25-540 (Reissue 1985) (service of summons outside Nebraska). Section 25-536 provides:

> A court may exercise personal jurisdiction over a person:
>
> (1) Who acts directly or by an agent, as to a cause of action arising from the person:
>
> (a) Transacting any business in this state;
>
> (b) Contracting to supply services or things in this state;
>
> (c) Causing tortious injury by an act or omission in this state;
>
> (d) Causing tortious injury in this state by an act or omission outside this state if the person regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state;
>
> (e) Having an interest in, using, or possessing real property in this state; or
>
> (f) Contracting to insure any person, property, or risk located within this state at the time of contracting; or
>
> (2) Who has any other contact with or maintains any other relation to this state to afford a basis for the exercise of personal jurisdiction consistent with the Constitution of the United States.

Special Appearance.

Lerner filed a special appearance in the actions, objecting to personal jurisdiction by a Nebraska court "for the reason that the Court is without jurisdiction of this Defendant in that this

Defendant has had insufficient minimum contact with the State of Nebraska sufficient to satisfy the due process requirements of the United States Constitution and Nebraska Constitution."

Hearing on Special Appearance.

At the hearing on Lerner's special appearance, the parties offered affidavits concerning the question of personal jurisdiction over Lerner.

On May 21, 1975, Lerner, an expert on the medical aspects of occupational lead exposure and a resident of Cincinnati, Ohio, wrote to J.E. Gillan, Gould's corporate safety director, in Rolling Meadows, Illinois. In that letter, Lerner expressed his willingness to become Gould's corporate "Medical Lead Consultant," and stated his views about the prospective position:

> In my view, the Corporate Medical Lead Consultant should serve in an advisory and functional rather than administrative capacity. He should be identified as an independent medical consultant rather than company employee. He should report to a single individual in the corporate headquarters, but at the same time be directly available to a reasonable number of others within the organization.
>
> Services could be provided in a number of areas based on the identified needs. These may include one or more of the following:
>
> 1. Development of corporate policy and medical guidelines for company physicians responsible for the health maintenance of lead workers.
>
> 2. Assist company physicians in the medical management and evaluation of employees with increased absorption of lead with and without clinical effects.
>
> 3. Help assure precision and accuracy of laboratory analysis for lead and other biological tests.
>
> 4. Consult with an employee's personal physician and his representatives (only with Gould approval) with regard to health effects of lead.
>
> 5. Participate in the implementation of the industrial hygiene and safety aspects of the health program for lead.
>
> 6. Keep abreast of medical and medico-legal

developments relating to lead and report these to the company with interpretations and recommendations.

7. Periodically monitor and evaluate existing programs and assist in assuring compliance with company policies and governmental regulations relating to the health maintenance of lead workers.

8. Indoctrinate workers regarding health effects of lead and respective roles of management and labor in the safe handling of lead.

. . . .

At present I could travel a couple of days a month and devote about 4-5 hours per week to Gould in my office. There is some flexibility in these times. I would suggest an annual retainer of $12,000 for work in Cincinnati and $400/day plus expenses for consulting out of Cincinnati. . . .

With the travel schedule as outlined it may take over two years to visit all seventeen plants since I expect other trips for Gould would become necessary in the interim. The nature and level of activity for years after the first or second could best be defined following our mutual experience.

. . . .

. . . I would be happy to answer any further questions and do look forward to the development of a productive and pleasant association.

Gould operated 17 plants throughout the United States, including its smelting and refining plant in Omaha, where Gould refined and separated lead-based scrap and other heavy metals. In September 1975, Gould retained Lerner as its "Medical Lead Consultant" for the services indicated in Lerner's letter of May 21. Gould's "Safety Bulletin," issued by Gillan on September 12, 1975, notified Gould's safety personnel that Lerner was Gould's "Medical Lead Consultant," who would provide professional services in the eight areas mentioned in Lerner's letter to Gillan. Additionally, the safety bulletin stated:

Gould has contracted for approximately twenty hours per month consultant service through telephone and mail

> contact with Dr. Lerner at his Cincinnati office. In addition, the Doctor can be scheduled to visit individual plants, laboratories or divisional offices. . . . It is our expectation that visits can ultimately be arranged to all locations having serious medical lead problems or the potential for developing such problems.
>
> Our objective is to encourage direct contact with Dr. Lerner, especially as regards plant physicians involved in the treatment or evaluation of company employees. However, to assure effective administration of this service, we request that all initial contacts be made through Corporate Safety.

According to Fitzgibbons, who is a "licensed physician residing and practicing in Omaha, Douglas County, Nebraska," since 1963 he has provided "medical care and treatment to employees of Gould" and, in connection with those services, "Gould, Inc. advised me to confer with . . . Dr. Sidney Lerner . . . ." Fitzgibbons stated that "I would confer from time to time with Dr. Sidney Lerner through telephonic communication" and that "[g]enerally, telephonic communication with Dr. Lerner would be initiated by me, however, Dr. Lerner would return my calls in the event he was not in during those calls which I initiated."

Vergil Williams entered employment at Gould's Omaha smelter in 1964; Biggs in 1971; and Abbott in 1976. Each remained in Gould's employment, which exposed them to lead, cadmium, and arsenic, until Gould closed its Omaha smelter in 1982.

Nothing showed that Lerner was ever physically present in Nebraska concerning his activities as Gould's "Medical Lead Consultant" pursuant to the Lerner-Gould contract entered in 1975.

Excluded Affidavits and Dismissal.

At the special appearance hearing, Lerner's lawyer offered the affidavits of Lerner, Gillan, and a Joseph Beemster.

According to Lerner's affidavit, he is an Ohio resident with a specialty in "Occupational Medicine," has no property in Nebraska, is not licensed to practice medicine in Nebraska, has never practiced medicine in Nebraska or treated any Nebraska

patient, and "never tried to solicit or otherwise develop any business in Nebraska [nor] advertised my services in Nebraska." Lerner stated that "[n]o formal contract was ever signed between myself and Gould," that he monthly "billed for my retainer," but his "fee didn't depend upon my furnishing services in Omaha," and that he "never visited [or was] asked to visit the Gould plant in Omaha, Nebraska." However, Lerner recalled his 1980 examination of medical records pertaining to a Benare James, an employee and workers' compensation claimant at Gould's Omaha smelter, although the James records were forwarded by an industrial hygienist in Minnesota. Lerner never had any direct contact with James. However, between 1980 and 1983 Lerner wrote to various people concerning James, including Gould's claim adjuster, and a representative of CNA, the insurance company which provided workers' compensation coverage for Gould. Among the appendages to Lerner's affidavit was a copy of a memorandum containing Lerner's notes in a telephone conversation with Fitzgibbons. The notes refer to three Gould employees, Neil Armstrong, Wm. Harris, and Marvin Love, and contain the descriptive terminology "cramping, aching," "lead poisoning," "chest x-ray," and "intestinal pneuminitis."

Gillan was Gould's "director of corporate safety" from 1974 until his retirement in 1984, and, in his affidavit, asserted that "[n]o formal contract was ever executed between Gould and Dr. Lerner" and "Dr. Lerner's relationship with Gould is best described as a 'Texas handshake deal.' " Gillan's affidavit also contained: "Although plant managers and local plant physicians were free to consult with Dr. Lerner regarding the health and medical treatment of an employee, Dr. Lerner had no authority, without prior approval from Gould, to examine or treat individual employees."

The Beemster affidavit contained statements that Beemster was a former "Director of Health and Safety" for Gould and that he did not "recall ever having any conversation with Dr. Lerner regarding any matters pertaining specifically to the Omaha plant."

When the court asked whether there was an objection to the three affidavits (Lerner, Gillan, and Beemster), Eugene

Mattioni, one of appellants' lawyers, commented:

> I think, Your Honor, except that we may have a caveat to the proceeding today that it may be, because it is a very important issue, that the depositions of these three gentlemen should be taken . . . that possibly it should be reserved that these persons be subject to deposition to review with them the jurisdictional question that is at issue.

Precluding a continuance for the depositions suggested or proposed by Mattioni, the court remarked: "Well, actually, Mr. Mattioni, our procedure is that when we're here for a hearing, we are here for the hearing and are supposed to have our evidence available."

At that point Mattioni objected to the affidavits offered by Lerner and addressed the court: "We would move that we would want the deposition testimony of Dr. Lerner, Mr. Beemster and Mr. Gillan." Later, the court sustained the appellants' objection and excluded the three affidavits offered by Lerner because the court concluded that an affidavit, in reference to disposition of a special appearance, was not permitted under Neb. Rev. Stat. § 25-1244 (Reissue 1985), which provides: "An affidavit may be used to verify a pleading, to prove the service of a summons, notice or other process, in an action, to obtain a provisional remedy, an examination of a witness, a stay of proceedings, or upon a motion, and in any other case permitted by law." The court then found that "there have been insufficient minimum contacts by Defendant Lerner with the State of Nebraska to warrant this Court in assuming jurisdiction over Defendant Lerner," sustained Lerner's special appearance, and dismissed appellants' action against Lerner.

Assignments of Error.

In their appeal, appellants claim that the court erred in sustaining Lerner's special appearance and dismissing their actions and further contend that the court should have allowed appellants a continuance to obtain the depositions of Lerner, Gillan, and Beemster concerning the jurisdictional question.

Lerner cross-appeals and claims that the court erred in refusing to admit the affidavits of Lerner, Gillan, and Beemster.

STANDARD OF REVIEW

When determination of a jurisdictional question involves factual findings, a trial court's decision on the question of jurisdiction will be upheld unless the factual findings concerning jurisdiction are clearly incorrect. Cf. *Alliance Nat. Bank v. State Surety Co.*, 223 Neb. 403, 390 N.W.2d 487 (1986) (bench trial; law action). When a jurisdictional question does not involve a factual dispute, determination of the jurisdictional issue is a matter of law, which requires an appellate court to reach a conclusion independent from the trial court's conclusion on the jurisdictional issue. See, *Huffman v. Huffman, ante* p. 742, 441 N.W.2d 899 (1989) (jurisdictional issue; proceedings for dissolution of marriage); *Lutheran Medical Center v. City of Omaha*, 229 Neb. 802, 429 N.W.2d 347 (1988); *Boisen v. Petersen Flying Serv.*, 222 Neb. 239, 383 N.W.2d 29 (1986). See, also, *Cubbage v. Merchent*, 744 F.2d 665 (9th Cir. 1984). Confronted with a special appearance, a plaintiff has the burden to establish facts which demonstrate the court's personal jurisdiction over the defendant. *Droukas v. Divers Training Academy, Inc.*, 375 Mass. 149, 376 N.E.2d 548 (1978); *Phelps v. Kingston*, 130 N.H. 166, 536 A.2d 740 (1987).

AFFIDAVITS RELATIVE TO A SPECIAL APPEARANCE

This court has held that a *motion*, as the term is used in § 25-1244, relates to "preliminary, collateral and interlocutory matters." *Banks v. Metropolitan Life Ins. Co.*, 142 Neb. 823, 834, 8 N.W.2d 185, 191 (1943). Cf. *State v. Howard*, 184 Neb. 461, 168 N.W.2d 370 (1969) (affidavit may be used to show unavailability of a witness and permit use of the absent witness' prior testimony).

Before any other pleading or motion, a defendant may file a special appearance for the sole purpose of objecting to a court's assertion or exercise of personal jurisdiction over the defendant. *West Town Homeowners Assn. v. Schneider*, 221 Neb. 674, 380 N.W.2d 265 (1986); *Swick v. Coslor*, 194 Neb. 781, 235 N.W.2d 639 (1975). A special appearance may be based on the absence of a defendant's amenability to process issued by

a Nebraska court. See, *West Town Homeowners Assn., supra*; *Wendt v. Yant Construction Co.*, 125 Neb. 277, 249 N.W. 599 (1925). See, also, Neb. Rev. Stat. § 25-516.01(2) (Reissue 1985):

> Prior to filing any other pleading or motion, a special appearance may be made for the purpose of objecting to the jurisdiction of the court over the person of the defendant. The defendant's assertion of a claim for affirmative relief by way of counterclaim, cross-claim, or third-party claim waives any objection that the court erred in overruling the special appearance. The defendant's participation in proceedings on any issue other than jurisdiction over the person waives any objection that the court erred in overruling the special appearance except the objection that the defendant is not amenable to process issued by a court of this state.

A special appearance is analogous to a plea in abatement. *West Town Homeowners Assn., supra*; *Insurance Co. of North America v. Kunin*, 175 Neb. 260, 121 N.W.2d 372 (1963). A plea in abatement does not go to the merits of an action, but, by presentation of facts extrinsic to the merits of an action, demonstrates irregularities or circumstances which preclude further prosecution of the action or require suspension of the proceedings. See, *State v. Ludwig*, 143 Neb. 278, 9 N.W.2d 292 (1943); *White v. Pottawatomie County*, 199 Okla. 103, 184 P.2d 446 (1947); *United States v. Brodson*, 234 F.2d 97 (7th Cir. 1956).

An affidavit may be used to prove or disprove proper service when a special appearance is based on a defect in the service of process. *Erdman v. National Indemnity Co.*, 180 Neb. 133, 141 N.W.2d 753 (1966); *State v. Tautges, Rerat & Welch*, 146 Neb. 439, 20 N.W.2d 232 (1945); *Johnson v. Carpenter*, 77 Neb. 49, 108 N.W. 161 (1906).

We hold that a special appearance, which is preliminary and collateral to determining the merits of an action, is a pleading within the purview of § 25-1244. Consequently, in a hearing on a special appearance, an affidavit may be used to prove or disprove the factual basis for a court's assertion or exercise of personal jurisdiction over a defendant. Therefore, the district court erred in excluding the affidavits offered by Lerner to

support his special appearance. In sum and substance, the excluded affidavits emphasize that Lerner was never physically present in Nebraska and that Lerner "never tried to solicit or otherwise develop any business in Nebraska [nor] advertised [his] services in Nebraska," but definitely underscore the fact that Lerner and Gould contracted for Lerner's professional services as a specialist in occupational medicine pertinent to Gould and its employees.

Therefore, in disposing of the present appeals, inasmuch as the excluded affidavits contained appropriate information on the jurisdictional issue, we consider the affidavits excluded by the district court.

JURISDICTION THROUGH LONG-ARM STATUTE

Before a court can exercise personal jurisdiction over a nonresident defendant, the court must, first, determine whether a statutory standard of the long-arm statute is satisfied, and, if the long-arm statute has been satisfied, second, whether minimum contacts exist between the defendant and the forum state for personal jurisdiction over the defendant without offending due process. *Sherburne Cty. Social Serv. v. Kennedy*, 426 N.W.2d 866 (Minn. 1988); *Austad Co. v. Pennie & Edmonds*, 823 F.2d 223 (8th Cir. 1987); *Phelps v. Kingston*, 130 N.H. 166, 536 A.2d 740 (1987); *Raffaele v. Compagnie Generale Maritime*, 707 F.2d 395 (9th Cir. 1983).

LERNER'S CONTRACT WITH GOULD

Although there was no formal agreement signed by Lerner and Gould, there is no dispute that a contract existed between Lerner and Gould, which called for Lerner's compensated services as a physician and consultant on occupational medicine relative to Gould's smelter operations, wherever those activities were conducted in Gould's business network. As far as Nebraska was concerned, the Lerner-Gould contractual relationship existed from 1975 until Gould closed its Omaha smelter in 1982, although the James workers' compensation claim indicates Lerner's medical involvement with a Nebraska resident as late as 1983. Obviously predicated on Lerner's expertise in occupational medicine, one of Lerner's contractual obligations was: "Assist company physicians in the medical

management and evaluation of [Gould's] employees with increased absorption of lead with and without clinical effects." Gould encouraged its "plant" physicians, involved in the treatment or evaluation of company employees, to draw on Lerner's special knowledge about toxins encountered in Gould's smelter operations. In discharging his obligation to render professional services pursuant to the Gould contract, Lerner actually discussed medical questions over the telephone with Fitzgibbons, Gould's "company" physician in Omaha. In the industrial context of the Lerner-Gould contract, the conclusion is inescapable that Fitzgibbons incorporated Lerner's expertise and advice into Fitzgibbons' "medical care and treatment to employees of Gould, Inc.," in Omaha. For his medical consultations and advisory services for Gould's "company" physicians, Lerner received an annual retainer and a daily fee.

Nebraska's long-arm statute, § 25-536, provides: "A court may exercise personal jurisdiction over a person: (1) Who acts directly or by an agent, as to a cause of action arising from the person: . . . (b) Contracting to supply services or things in this state. . . ."

In *Lupton Assoc. v. Northeast*, 105 A.D.2d 3, 482 N.Y.S.2d 647 (1984), a Massachusetts corporation contracted with a New York corporation that the latter would " 'use its best efforts to promote, develop and extend the sale of [defendant's] products' " in the northeastern United States in exchange for a commission on the net sale price of all goods sold. *Id.* at 4, 482 N.Y.S.2d at 649. The New York long-arm statute provided for personal jurisdiction by acts of nondomiciliaries, when a cause of action arose from the enumerated acts in the statute, viz, "transacts any business within the state or contracts anywhere to supply goods or services in the state." *Id.* at 5, 482 N.Y.S.2d at 649. The court concluded:

> New York courts may now exercise jurisdiction over a nondomiciliary who contracts outside this State [New York] to supply goods or services in New York even if the goods are never shipped or the services are never supplied in New York, so long as the cause of action, as here, arose out of that contract. . . .

Id. at 6, 482 N.Y.S.2d at 650. See, also, *Drake America Corp. v.*

Speakman Co., 144 A.D.2d 529, 534 N.Y.S.2d 679 (1988).

South Carolina's long-arm statute was involved in *Kimbrel v. Neiman-Marcus*, 665 F.2d 480 (4th Cir. 1981), when Kimbrel, a South Carolina resident, commenced an action in South Carolina against Neiman-Marcus, a Texas corporation, concerning a contract with Neiman-Marcus for paintings owned by Kimbrel. The South Carolina long-arm statute, in pertinent part, provided that a court in South Carolina may exercise personal jurisdiction over a defendant who acts directly or by an agent as to a cause of action arising from the person's " 'entry into a contract to be performed in whole or part by either party in this state.' " 665 F.2d at 481. In *Kimbrel*, the court concluded that the South Carolina long-arm statute afforded personal jurisdiction over the nonresident defendant.

See, also, *Powder Horn Nursery, Inc. v. Soil & Plant Lab., Inc.*, 20 Ariz. App. 517, 514 P.2d 270 (1973) (service of process upheld under Arizona's long-arm statute, which provided a corporate defendant " 'which has caused an event to occur in this state out of which the claim which is the subject of the complaint arose,' " *id.* at 519, 514 P.2d at 272; a California laboratory sent its horticultural recommendations and advice to the Arizona plaintiff, which used the information to its damage in raising nursery stock in Arizona); *Wolpert v. N. Shore University Hosp.*, 231 N.J. Super. 378, 555 A.2d 729 (1989) (a New Jersey court had personal jurisdiction over a New York physician who issued a report and intended that the report would be the basis for action in New Jersey).

Under the contract between Lerner and Gould, Lerner assumed the obligation to consult with and advise Gould's "company" physicians, who included Fitzgibbons in Omaha. The contract also obligated Lerner to "[p]articipate in the implementation of the industrial hygiene and safety aspects of the health program for lead" at Gould's plants, which included the Omaha smelter operations. If Lerner's special knowledge was his stock in trade, Lerner contracted to market his product in Nebraska when he agreed to supply, and actually did supply, medical information to a Nebraska physician for the health care of Gould's Omaha employees. Although Lerner did not contract to deliver a tangible product in Nebraska,

nevertheless, Lerner's expertise and professional advice, supplied to a Nebraska physician for the care and treatment of Gould's Omaha employees in fulfillment of the Lerner-Gould contract, constituted Lerner's "[c]ontracting to supply services or things" in Nebraska. § 25-536(1)(b). Therefore, we conclude that the Nebraska long-arm statute, § 25-536(1)(b) and (2), applies on account of Lerner's conduct and activity under his contract with Gould; hence, the first requisite for a court's assertion or exercise of personal jurisdiction over a nonresident defendant has been satisfied. See, *Sherburne Cty. Social Serv. v. Kennedy*, 426 N.W.2d 866 (Minn. 1988); *Austad Co. v. Pennie & Edmonds*, 823 F.2d 223 (8th Cir. 1987); *Phelps v. Kingston*, 130 N.H. 166, 536 A.2d 740 (1987); *Raffaele v. Compagnie Generale Maritime*, 707 F.2d 395 (9th Cir. 1983).

MINIMUM CONTACTS

Because Lerner's conduct comes within the purview of the long-arm statute, § 25-536, we must now consider whether a Nebraska court's assertion or exercise of jurisdiction over Lerner is consistent with due process.

In *McGowan Grain v. Sanburg*, 225 Neb. 129, 403 N.W.2d 340 (1987), we acknowledged that due process for personal jurisdiction over a nonresident defendant requires the defendant's minimum contacts with the State of Nebraska so that "maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *Internat. Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945). To determine whether a court has personal jurisdiction over a nonresident defendant, the court must examine the quality and nature of the nonresident's activities and ascertain that the nonresident has sufficient minimum contacts with the forum state to satisfy the requisite due process for assertion or exercise of personal jurisdiction. *Internat. Shoe Co. v. Washington, supra.*

Fairness and reasonableness, essential to due process in personal jurisdiction over a nonresident defendant, require that the defendant's contact with the forum state must be of a quality and nature that the defendant "should reasonably anticipate being haled into court" in the forum state.

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980). The minimum contacts standard, expressed in *Internat. Shoe Co. v. Washington, supra*, supplies "a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where the conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp. v. Woodson, supra* at 297.

A defendant's purposeful act, directed to the forum state, not merely the unilateral activity of another who claims a relationship to the defendant, connects the defendant to the forum state. *Hanson v. Denckla*, 357 U.S. 235, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958).

In *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985), the Court considered the due process minimum contacts issue in relation to a nonresident defendant's contractual obligations to Burger King, a Florida corporation with its principal place of business in Miami. Rudzewicz and his partner, MacShara, both Michigan residents, jointly applied to Burger King's district office in Michigan for a Burger King franchise. Negotiations for a franchise lasted 4 months, during which Rudzewicz and MacShara communicated directly with officials at Burger King's Miami headquarters. Burger King eventually granted a 20-year franchise to Rudzewicz and MacShara. MacShara, who was to manage the franchised operation, attended management classes in Miami, that is, attended "[m]andatory training seminars . . . at Burger King University in Miami . . . ." 471 U.S. at 465 n.2. Rudzewicz, who supplied the necessary capital for the franchised operation, never physically entered Florida.

After Rudzewicz and MacShara failed to maintain payments prescribed by the franchise agreement, Burger King terminated the franchise. Rudzewicz and MacShara, however, continued to operate as a Burger King franchisee. Burger King sued both partners individually in a U.S. district court in Florida. Rudzewicz claimed that the court in Florida did not have personal jurisdiction over him.

On the jurisdictional question, the Supreme Court concluded that Rudzewicz' contract and dealings with Burger

King supplied a constitutionally permissible basis for personal jurisdiction over Rudzewicz. Recognizing prior cases dealing with contractual obligations, the Court noted that "parties who 'reach out beyond one state and create continuing relationships and obligations with citizens of another state' are subject to regulation and sanctions in the other State for the consequences of their activities." *Burger King Corp. v. Rudzewicz, supra* at 473 (quoting *Travelers Health Assn. v. Virginia*, 339 U.S. 643, 70 S. Ct. 927, 94 L. Ed. 1154 (1950)). Rejecting the contention that an individual's contract with a party within a forum state may, in and of itself, provide the necessary contacts for personal jurisdiction in the forum state, the Court listed four factors to determine whether a defendant's contract supplies the contacts necessary for personal jurisdiction in the forum state: "It is these factors—prior negotiations and future contemplated consequences, along with the terms of the contract and the parties' actual course of dealing—that must be evaluated in determining whether the defendant purposefully established minimum contacts within the forum." *Burger King Corp. v. Rudzewicz, supra* at 479.

Concluding that Rudzewicz "deliberately 'reach[ed] out beyond' Michigan," 471 U.S. at 479, to negotiate the franchise agreement with Burger King, a Florida corporation, the Court held that Rudzewicz' establishment of a substantial and continuing relationship with Burger King's Miami headquarters supplied a sufficient basis for a court's constitutional exercise of personal jurisdiction over Rudzewicz in Florida.

According to the *Burger King* analysis, whether a Nebraska court has personal jurisdiction over a nonresident defendant depends on whether the defendant's contacts with Nebraska are the result of unilateral acts performed by someone other than the defendant, or whether the defendant himself acted in a manner which creates substantial connections with Nebraska, resulting in the defendant's "purposeful availment" of the benefits and protections of Nebraska law. *Burger King Corp. v. Rudzewicz, supra*; *McGowan Grain v. Sanburg*, 225 Neb. 129, 403 N.W.2d 340 (1987). After the extent and nature of the nonresident defendant's contacts are analyzed, the court may apply other facts bearing on reasonableness and fairness in

requiring the nonresident to defend a suit in Nebraska, such as the defendant's burden in the Nebraska litigation, Nebraska's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and efficient relief, the judicial system's interest in the efficient resolution of controversies, and the shared interest of the states in furthering fundamental substantive social policies. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980).

Lerner's lack of physical presence in Nebraska is not controlling on the question whether Lerner has sufficient contacts with Nebraska to subject him to suit in Nebraska.

> Although territorial presence frequently will enhance a potential defendant's affiliation with a State and reinforce the reasonable foreseeability of suit there, it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted. So long as a commercial actor's efforts are 'purposefully directed' toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there.

Burger King Corp. v. Rudzewicz, supra at 476.

Despite lack of physical presence in the state where a contract is to be performed, a nonresident defendant, who purposefully directs activities toward a forum state's residents, through such contract, may be constitutionally subjected to suit in the state where the contract is to be performed. See, *Biltmoor Moving & Storage Co. v. Shell Oil Co.*, 606 F.2d 202 (7th Cir. 1979) (Illinois long-arm statute; personal jurisdiction in Illinois over a Texas moving consultant, which contracted to relocation of an Illinois corporation, when the consulting services were provided mostly by mail and telephone calls to Illinois); *Waterval v. District Court, etc.*, 620 P.2d 5 (Colo. 1980) (Colorado long-arm statute; personal jurisdiction over a Virginia defendant who, without physical presence in

Colorado, offered investment advice to a Colorado resident, who sustained damage by reliance on the advice given); *Good Hope Industries, Inc. v. Ryder Scott Co.*, 378 Mass. 1, 389 N.E.2d 76 (1979) (Massachusetts court had personal jurisdiction over a Texas petroleum engineering firm, which agreed to provide and did provide a Massachusetts corporation with an appraisal of natural gas reserves in Texas); *Shepler v. Korkut*, 33 Mich. App. 411, 190 N.W.2d 281 (1971) (Michigan court had personal jurisdiction over Louisiana boat designer which sent its faulty design into Michigan, where the plaintiff constructed a defective boat on the basis of the faulty design); *Computac, Inc. v. Dixie News Co.*, 124 N.H. 350, 469 A.2d 1345 (1983) (New Hampshire court had personal jurisdiction over North Carolina news agency which contracted with New Hampshire firm for data processing services and sent raw data to New Hampshire over the telephone for processing); *Furda v. Superior Court (Serological Biopsy)*, 161 Cal. App. 3d 418, 207 Cal. Rptr. 646 (1984) (California court had personal jurisdiction over a Michigan resident who developed and marketed a secret biochemical biopsy process by providing services to California physicians). See, also, *McGee v. International Life Ins. Co.*, 355 U.S. 220, 78 S. Ct. 199, 2 L. Ed. 2d 223 (1957) (California court had personal jurisdiction over Texas insurance company which provided insurance to California resident, although the company had no office or agent in California).

Courts considering whether personal jurisdiction exists over nonresident physicians have recognized that the unilateral activities of a patient cannot supply the minimum contacts essential for due process. See, *Wright v. Yackley*, 459 F.2d 287 (9th Cir. 1972) (Idaho court did not have jurisdiction over a South Dakota physician who prescribed medication for a South Dakota resident, who later moved to Idaho, although the physician forwarded the prescription to Idaho); *Etra v. Matta*, 61 N.Y.2d 455, 463 N.E.2d 3, 474 N.Y.S.2d 687 (1984) (New York court did not have personal jurisdiction over a Massachusetts physician who treated a New York patient in Massachusetts, when the Massachusetts physician did not solicit New York patients); *State ex rel. Sperandio v. Clymer*,

581 S.W.2d 377 (Mo. 1979) (Missouri court did not have jurisdiction over a Utah physician on account of consultative advice given from Utah regarding a Missouri patient's condition, where a Missouri physician solicited the medical advice and the Utah physician received no fee). The common thread of the foregoing decisions is the unilateral activity of the plaintiff, not the purposeful activity of the defendant, which connected the nonresident defendant with the forum state. See *Hanson v. Denckla*, 357 U.S. 235, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958).

However, when a health care provider, such as a physician or hospital, purposefully directs activities toward a resident of the forum state, the provider is subject to the personal jurisdiction of courts in the state where the health care recipient resides. See, *Cubbage v. Merchent*, 744 F.2d 665 (9th Cir. 1984) (action in California where the court had personal jurisdiction over an Arizona hospital and Arizona physicians who actively solicited California patients); *Phelps v. Kingston*, 130 N.H. 166, 536 A.2d 740 (1987) (New Hampshire court had personal jurisdiction over Maine dentist who treated a New Hampshire patient in Maine, where the dentist solicited New Hampshire patients); *S. R. v. City of Fairmont*, 167 W. Va. 880, 280 S.E.2d 712 (1981) (West Virginia court had personal jurisdiction over Pennsylvania medical corporation that solicited West Virginia patients). Common to each of the foregoing cases is a defendant's purposeful act, namely, soliciting patients from the forum state, which subjected the defendant to suit in the forum state, that is, provided the defendant with foreseeability of being haled into court in the forum state. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985).

Appellants' claims against Lerner relate to Lerner's contractual relationship with Gould, which obligated Lerner to assist in the formulation of Gould policy relative to "industrial hygiene and safety aspects" of Gould's overall health program for lead contamination, as well as "[a]ssist company physicians in the medical management and evaluation of employees" suffering from lead absorption or other toxic conditions attributable to employment at Gould's Omaha smelter. Lerner

also described his role as including indoctrination of "workers regarding health effects of lead." In return for performance of these obligations, Lerner initially received in excess of $12,000 per year. The undisputed evidence reveals that Lerner actually carried out certain contractual obligations to Gould, including his consulting with Fitzgibbons "from time to time" on specific health problems of employees in Gould's Omaha plant. The Lerner-Gould contract provided the impetus for Lerner's professional information imparted to a Nebraska physician, who used the information in his care and treatment of Gould's Nebraska employees and their medical attention necessitated by employment at Gould's Omaha smelter plant. Thus, through the medium of a contract with a multistate corporation, Lerner voluntarily thrust his medical expertise into states known to be sites for Gould's operations.

Lerner claims that his involvement with the medical health of Gould's Omaha workers was not the result of "solicitation" by Lerner. We disagree. Although Lerner did not negotiate his contract with Gould in Nebraska, in their contract Lerner and Gould contemplated Lerner's conduct which culminated in Lerner's contact with Nebraska, contacts which had a substantial impact on Nebraska residents. While there is no evidence that Lerner solicited the business of individual Gould employees or actively advertised his services in Nebraska, the evidence is unambiguous regarding the existence and content of Lerner's contract with Gould. Lerner held himself out as an expert on occupational medicine and, through the contract, invited Gould and its "company" physicians to take advantage of his expertise. In such a situation, any demarcation between Lerner's invitation to Gould and direct solicitation of Gould employees becomes indiscernible and legally nonexistent. Lerner's ties with Nebraska are not the result of unilateral acts by appellants or some third party, but, rather, are the direct result of Lerner's activities and conduct attributable to a contractual relationship immediately affecting the health of Nebraska residents.

When Lerner entered the contract with Gould and carried out his contractual duties, Lerner "purposefully directed" his activities toward the State of Nebraska, and "purposefully

avail[ed]" himself of the privilege of conducting activities within Nebraska by accepting a contract under which he was paid for services rendered to Gould and Gould employees in Nebraska. See *Burger King Corp. v. Rudzewicz, supra.*

Further, Lerner has not shown any "other considerations," discussed in *Burger King Corp. v. Rudzewicz, supra*, which weigh against a Nebraska court's exercise of personal jurisdiction over Lerner. Nebraska has an interest in providing a forum for Nebraska employees injured by out-of-state actors who have purposefully directed their activities toward the state. In addition, the appellants' interest in obtaining convenient and effective relief, as well as the interstate judicial system's interest in the efficient resolution of disputes, is better served by a resolution of issues in Nebraska rather than multiple resolutions pertaining to several individual defendants in different forums. We also note that Lerner made no showing that he, as a defendant in a Nebraska court, is burdened more than he might be as a defendant in an Ohio court. See *Burger King Corp. v. Rudzewicz, supra.*

Therefore, we hold that Lerner has sufficient contacts with the State of Nebraska to constitutionally warrant a Nebraska court's assertion or exercise of personal jurisdiction over him.

A SPECIAL APPEARANCE AND DISCOVERY

When a defendant has appeared specially and objected to personal jurisdiction over the defendant, to say that the factual basis for resolution of the jurisdictional question is important amounts to a major understatement. Affidavits, although permissible in connection with a special appearance, may be self-serving or otherwise provide information which is somewhat skewed by the party offering the affidavit in conjunction with a special appearance.

Therefore, any party to an action in which a special appearance has been filed is entitled to discovery authorized by the Nebraska Discovery Rules to ascertain facts relevant to the court's jurisdiction over the person of a defendant. Accord, *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 98 S. Ct. 2380, 57 L. Ed. 2d 253 (1978); *Crane v. Carr*, 814 F.2d 758 (D.C. Cir. 1987); *Surpitski v. Hughes-Keenan Corporation*, 362

F.2d 254 (1st Cir. 1966); *Nehemiah v. Athletics Congress of U.S.A.*, 765 F.2d 42 (3d Cir. 1985); *Amer. Lung Ass'n v. Farmers & Mer. Nat. Bank*, 329 S.E.2d 854 (W. Va. 1985); *Bielefeldt v. St. Louis Fire Door Co.*, 90 Wis. 2d 245, 279 N.W.2d 464 (1979). See, also, *Insurance Corp. v. Compagnie des Bauxites*, 456 U.S. 694, 102 S. Ct. 2099, 72 L. Ed. 2d 492 (1982) (sanctions may be applied against a party who fails to comply with discovery in connection with an issue of personal jurisdiction). See, further, *English v. 21st Phoenix Corp.*, 590 F.2d 723 (8th Cir. 1979).

In the present case, however, appellants orally requested a continuance to obtain depositions pertaining to the issue of personal jurisdiction over Lerner. An application for continuance must be in writing and supported by an affidavit which contains factual allegations demonstrating good cause or sufficient reason necessitating postponement of proceedings. See Neb. Rev. Stat. § 25-1148 (Reissue 1985). See, also, *State v. Carter*, 226 Neb. 636, 413 N.W.2d 901 (1987); *Korte v. Betzer*, 193 Neb. 15, 225 N.W.2d 30 (1975); *Stastny v. Tachovsky*, 178 Neb. 109, 132 N.W.2d 317 (1964). Because appellants' request for a continuance was oral and, therefore, failed to comply with § 25-1148, which prescribes a written application for a continuance and supporting affidavit, we are precluded from considering whether the district court committed reversible error in denying a continuance, although appellants' requested continuance related to permissible discovery concerning the jurisdictional issue raised by Lerner's special appearance.

CONCLUSION

The district court erred in sustaining Lerner's special appearance and dismissing appellants' actions. Therefore, the judgment of the district court is reversed, and these matters are remanded to the district court for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

FREDRICK M. GETZSCHMAN, A.I.A., APPELLEE, V. MILLER CHEMICAL COMPANY, INC., A NEBRASKA CORPORATION, AND LAWRENCE HOFFMAN, APPELLANTS, CAROL HOFFMAN, APPELLEE.

443 N.W.2d 260

Filed July 21, 1989. No. 87-746.

1. **Contracts: Architects.** If there is an express contract for architectural services, an architect's duties are determined by the contract for the architect's employment.
2. _____: _____. Implicit in every contract for architectural services is the duty of the architect to exercise skill and care which are commensurate with requirements of the profession.
3. **Breach of Contract: Architects.** If an architect fails to exercise reasonable professional care in the discharge of his contractual duties, the architect breaches the contract of employment.
4. **Contracts: Architects.** An architect employed to prepare plans and specifications for a building, with the understanding that construction will be accomplished within certain cost limitations, cannot recover compensation for architectural services when the building cannot be erected except at a cost materially in excess of the amount specified for construction.
5. _____: _____. When an architect has no express contractual obligation to design a structure within a specified budget or to estimate the construction cost of a proposed project, construction at a cost greater than anticipated by or acceptable to the owner is no defense to an architect's action to recover a fee.
6. **Judgments: Time.** Neb. Rev. Stat. § 25-1315.02 (Reissue 1985) authorizes entry of a judgment notwithstanding the verdict if the appropriate motion is filed within 10 days after reception of the verdict to be set aside.
7. **Judgments: Directed Verdict.** A motion for judgment notwithstanding the verdict may be granted when the movant's previous motion for a directed verdict, made at the conclusion of all evidence, should have been sustained.
8. **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.
9. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from the court's refusal to give a requested instruction, the 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.
10. **Trial: Evidence: Appeal and Error.** Admission or exclusion of evidence is a matter for the discretion of the trial court, whose ruling on an evidential question will be upheld unless such ruling constitutes an abuse of discretion.
11. **Rules of Evidence: Expert Witnesses.** The first question to be answered by a court considering admissibility of expert testimony under Neb. Evid. R. 702,

Neb. Rev. Stat. § 27-702 (Reissue 1985), is whether the testimony is likely to assist the trier of fact.

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

William F. Hargens, of McGrath, North, O'Malley & Kratz, P.C., for appellants.

Timothy J. Cuddigan, of Marks & Clare, for appellee Getzschman.

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

SHANAHAN, J.

In the district court for Douglas County, Fredrick M. Getzschman, an architect, filed a breach of contract action against Lawrence (Larry) Hoffman, Carol Hoffman, and Miller Chemical Company, Inc. (Miller), a Hoffman family corporation for which Larry Hoffman was executive vice president and general manager. Getzschman based his action on his written contract to design a family home for Hoffmans and claimed $35,999.97 in damages. The defendants denied liability and counterclaimed against Getzschman. At trial, the court dismissed Getzschman's claim against Carol Hoffman. The jury returned a verdict of $35,999.97 for Getzschman and found against Hoffman and Miller on their counterclaim. Joinder of the defendants and joint or several liability are not issues in this appeal. In view of the nature of the errors assigned, a detailed narrative is necessary.

GENERAL BACKGROUND

Sometime early in 1985, Hoffmans first met with Getzschman to discuss expansion of Hoffmans' existing home, namely, enlargement of one of the Hoffman house's bedrooms and the addition of two bedrooms and a bath. Hoffmans agreed to pay Getzschman $50 per hour to design the proposed expansion. According to Getzschman, Larry Hoffman never mentioned a budget or other limitation of cost for the project, but wanted to add no more than 1,000 square feet to Hoffmans' house. Larry Hoffman told Getzschman about Hoffman's

background in construction, experience which Hoffman used in estimating that the proposed expansion would cost between $75 and $80 per square foot.

Getzschman prepared designs pursuant to Hoffmans' request. Hoffmans then took Getzschman's designs to Donald Bassler, a personal friend of Larry Hoffman and president of Ronco Construction Company, and Bassler estimated the construction cost at a range between $70,000 and $85,000 based on Getzschman's design for the expansion. Due to bad soil conditions at the site of the planned expansion, the addition to Hoffmans' house was abandoned in May 1985, and Hoffmans decided to build a new house on a different lot. At Larry Hoffman's request, Getzschman's bill for the abandoned expansion was sent directly to Miller, which issued its check to pay Getzschman.

In early June 1985, Hoffmans met with Getzschman regarding his designing Hoffmans' new home. According to Getzschman, much of this meeting was spent discussing the terms of Getzschman's employment. Getzschman outlined his services as the architect for Hoffmans' new house and referred to a standard preprinted agreement for architectural services. The printed contract obligated Getzschman to provide "cost estimating services," an appraisal service in which the architect attempts to determine the cost of constructing the home as designed. Getzschman testified that Hoffman said it was unnecessary to provide cost estimating on the new home because Bassler would estimate the construction cost "like he did on the addition project," which had been abandoned. In place of architectural cost estimating, Hoffman requested Getzschman to double his jobsite inspections during construction of the new house. Getzschman testified that Hoffman gave no indication about the amount he wanted to spend for the new house, but Hoffman testified that when he and his wife first visited with Getzschman concerning their new house, Getzschman was informed that Hoffmans did not want to spend more than $250,000 on construction. Getzschman told Hoffmans to clip articles or advertisements from magazines which depicted design features the Hoffmans might want to incorporate into their new home.

THE CONTRACT

Sometime before June 10, 1985, Getzschman mailed a form contract to Larry Hoffman, who, after "scanning" the contract, signed the agreement as executive vice president of Miller, which was designated as the "owner" in the architectural contract submitted by Getzschman. The contract, entitled "Standard Form of Agreement Between Owner and Architect for Housing Services With Cost Estimating Services Provided by Owner," stated that Getzschman's fee would be 10 percent of the construction cost of the house. "Construction cost" was defined in the contract as "the total cost or estimated cost to the Owner of all elements of the Project designed or specified by the Architect." Twenty percent of Getzschman's fee was to be paid on completion of the "design phase" of the project, 55 percent on completion of the "construction documents phase," 5 percent on completion of the "bidding or negotiation phase," and the remaining 20 percent on completion of the "construction phase." Article 2 of the contract was entitled "The Owner's Responsibilities" and specified: "2.6 The Owner, unless otherwise provided in Article 10, shall furnish the services of a cost consultant or cost estimator to provide all construction cost data, Statements of Probable Construction Cost or other cost estimates as the Architect's work progresses." Article 10, entitled "Other Conditions or Services," contained a space for insertion of additional provisions in the contract. In this space on the Getzschman-Hoffman contract, the following was typewritten:

> Concerning Article 1.4 of this agreement [architect's duties during the construction phase of the project], the Architect shall visit the site of the work semi-monthly for the purposes of inspection of progress, as part of the Basic Services of this agreement. If more frequent visits are requested by the Owner, they shall be paid for as "Additional Services" . . . .

Concerning termination of the agreement, article 7 provided in part:

> 7.1 This Agreement may be terminated by either party upon seven days' written notice should the other party fail substantially to perform in accordance with its terms

through no fault of the party initiating the termination.

. . . .

7.3 In the event of termination not the fault of the Architect, the Architect shall be compensated for all services performed to termination date, together with Reimbursable Expenses then due and all Termination Expenses as defined in Paragraph 7.4.

7.4 Termination Expenses include expenses directly attributable to termination for which the Architect is not otherwise compensated, plus an amount computed as a percentage of the total compensation earned to the time of termination, as follows:

.1 20 percent if termination occurs during the Design Phase, or

.2 10 percent if termination occurs during the Construction Documents Phase, or

.3 5 percent if termination occurs during any subsequent phase.

Paragraph 8.4 of the agreement provided in part: "This agreement represents the entire and integrated agreement between the Owner and the Architect and supersedes all prior negotiations, representations or agreements, either written or oral. This Agreement may be amended only by written instrument signed by both Owner and Architect."

Thus, the architectural contract signed by Larry Hoffman did not contain a cost limitation or include a budget restriction on construction.

DESIGN AND CONSTRUCTION

On June 20, 1985, Getzschman met with Hoffmans at the Miller offices, where Hoffmans gave Getzschman various magazine photographs depicting features to be incorporated into Hoffmans' new home, including a curved staircase, notwithstanding Getzschman's warnings that such a staircase "could be very expensive to execute." Larry Hoffman testified that when he asked Getzschman about the cost of the curved staircase, Getzschman replied, "Well, you have to have stairs going from the first floor to the second floor. It shouldn't be at all [expensive]." According to Getzschman, the size of the new

home was also discussed with Hoffmans, who expressed their desire that the house contain living space of approximately 3,500 square feet, although Larry Hoffman testified that the specific size of the home was not discussed before initial plans were drafted.

Getzschman testified that after the June 20 meeting, he and Larry Hoffman went to lunch together, and apparently Hoffman attempted to engage Getzschman in a discussion about an estimate or projection of the cost for the new home. When Hoffman asked Getzschman why he was reluctant to provide a cost projection, Getzschman responded that he did not want to do any projections which were not required by his contract for Hoffmans' new home. Getzschman testified that he then asked Hoffman whether he was still planning to use Bassler to do the cost estimates on the home, and Hoffman replied that "he probably would," but not until completion of the design phase of the project.

On June 25, Getzschman delivered the "Schematic Design" to Larry Hoffman, who testified that when he asked Getzschman about the construction cost of the home, Getzschman said that the total construction cost for the 3,900-square-foot house depicted in the schematic design would be $265,000. Hoffman also testified that Getzschman indicated that the new home could be built for about $65 per square foot. Getzschman testified that Larry Hoffman expressed some concern over the size of the home and was also dissatisfied that Getzschman had not included the curved staircase which Hoffmans had specified. Getzschman, however, testified that he "guessed" that the construction cost for the house in the schematic design would be $312,000.

On June 26, Getzschman sent Miller a bill in the amount of $2,487 for architectural services based on a total construction cost of $312,000. Because Getzschman did not have topographic surveys of Hoffmans' lot for the new house, he was unable to prepare a "site layout plan," to show the relationship between the designed house and the lot. Therefore, Getzschman billed for approximately 40 percent of the fee due on completion of the design phase of the project. On July 2, Miller issued its check to Getzschman for payment of the June

26 bill.

On July 2, Getzschman met with Hoffmans to discuss changes in the schematic design. Getzschman testified that at this meeting the "scope of the project was expanded" by a list of 20 changes requested by Hoffmans, which included an increase in size of the master bedroom, changes in the location of a number of rooms, enlargement of the kitchen, addition of a makeup center in the dressing area, enlargement of the closets, addition of the circular staircase, additions of an enclosed terrace and specially designed "shell showers" in the bathrooms, enlargement of the entry area, custom guttering, and the addition of a fireplace and two rotisserie grills. Getzschman also testified that he asked Larry Hoffman whether a set of plans should be prepared for Bassler's cost estimation, and Hoffman answered that "he would take care of that after he reviewed the next set of plans." Larry Hoffman did not deny requesting most of these changes, but testified that Getzschman told him that despite the additions to the schematic design, the house would still cost only $65 per square foot to construct. Getzschman denied mentioning $65 per square foot as a probable construction cost for the home.

Getzschman incorporated Hoffmans' revisions into the design for the new home and met again with them in the middle of July on Hoffmans' boat on the Missouri River. On account of the revisions, the size of the house increased from 3,900 square feet to 4,800 square feet with an increase in cost from $250,000 to somewhere between $300,000 and $350,000, but, according to Larry Hoffman, Getzschman acknowledged that the house in the revised design could be built within the $65 per square foot "budget."

Regarding his June 26 bill for services, Getzschman testified that he told Larry Hoffman that $312,000 was an "estimate or guess" for construction cost of the house in the first set of schematic designs shown to Hoffmans on June 25 and was the basis for the progress payments due under the contract. In his file memorandum concerning the meeting on Hoffmans' boat, Getzschman indicated that he told Hoffmans that the $312,000 figure would be used to determine the amount of progress payments until bids for the project were received, at which time

he would adjust his total bill to reflect 10 percent of the construction cost. Getzschman's memorandum also contained reference to Getzschman's concern, expressed to Hoffmans, whether any cost estimates would be available before a final draft of the plans. Larry Hoffman stated that "he would take care of that [cost estimates], and had past experience from other projects he had built to judge at this point."

On July 22, 1985, Larry Hoffman authorized Getzschman to draft the final plans for the new home. Getzschman also delivered to Hoffman plans for the basement of the home, which had been delayed because a topographic survey of the lot was unavailable. Getzschman testified that Larry Hoffman wanted to put a basement under the entire house, including the garage, but that Getzschman told Hoffman that the expanded basement would be very costly. According to Getzschman, Hoffmans also requested a number of changes and additions to the final plans, some of which Getzschman agreed to do as additional services under the contract, since the changes had been discussed and dismissed earlier during design of the home. Between July 22 and presentation of the final plans, additions made included a seal on the basement and garage floors, a trench drain in the garage, a hanging rack in the garage, L-shaped shoe racks in the closets, an antenna system, a refrigerator and icemaker in the bar, an enclosed toilet in the main bathroom, and "built-ins"—a television and deep fryer for the kitchen and an ironing center.

On July 29, Getzschman sent Miller a second bill for his services and indicated that the total fee for completion of the design phase of the project was $6,240. Larry Hoffman testified that this figure comforted him, because the billed fee confirmed a total construction cost of $312,000. Getzschman gave Hoffmans credit for previous payments and billed them for services relative to the construction documents phase of the project. Getzschman's total July bill was $6,613, which was paid by a check drawn on Hoffmans' personal account on August 2, 1985.

On July 30, Getzschman and Hoffman met to discuss the possibility of custom-made glass windows for the home, an idea which was later abandoned in view of the excessive cost.

Getzschman testified that he once again asked Larry Hoffman whether Hoffman was going to get a cost estimate from Bassler, and Hoffman responded that he was not sure. Getzschman also testified that he told Hoffman that due to the additions made to the home after the completion of the schematic design, Getzschman "feared that we were far from the scope of the project as I had originally envisioned it." Hoffman, according to Getzschman's file memorandum, responded that "he was sure he could build the house for a figure he wanted, but had not determined from his CPA what that figure was yet, and if the bids came in over what he wanted to spend he would negotiate with the lowest bidder to remove the extras."

Getzschman testified that he stopped by Hoffman's office on August 16, 1985, to clarify Hoffmans' requirements for the electrical system in the home. According to Getzschman, Larry Hoffman expressed his concern over the cost of the home, stating that "he [Hoffman] had probably gone over his limit." Getzschman remarked that Hoffman should have been more concerned about costs in July and that Getzschman might be able to remedy any cost concerns by removing some "extravagant items" from the final plans. According to Getzschman, Hoffman turned down this suggestion and decided to evaluate the cost situation after bids on the project were received. Hoffman denied the occurrence of this meeting with Getzschman.

On September 3, Getzschman delivered the final plans and specifications for the house and submitted his bill for the completion of the construction documents phase of the project. At this meeting, Bassler was also present and looked over Getzschman's plans. Bassler testified that after he looked at the plans for 30 seconds to a minute, he told Hoffman that the house would cost between $650,000 and $750,000. Hoffman believed that Bassler was joking about the cost of the home. Bassler and other contractors were invited to bid on the Hoffman project.

Hoffman testified that shortly before construction bids were opened on Friday, September 27, he had lunch with Getzschman. Both guessed at a low bid on the project; Hoffman guessed $350,000, while Getzschman guessed

$340,000. Getzschman gave a substantially different version of the lunchtime conversation with Hoffman, who said that "he was sure the bids were going to come in for more than $500,000." When bids were opened later that afternoon, the low bid was $698,000. Hoffman testified that he was shocked at the bids and asked Getzschman what "went wrong." Getzschman responded, "Boy, I don't know; it beats me." Getzschman, however, testified that he was not surprised by the amounts of the bids and that Hoffman mentioned that the bids were more than Hoffmans wanted to spend on the house. Hoffman, however, did not reject the bids immediately because he wanted to think about the project over the weekend.

On Monday, September 30, Hoffman rejected the bids and contacted Getzschman, asking him to redesign the home at a cost between $300,000 and $400,000. When Hoffman requested the revisions at no extra cost, Getzschman refused and indicated that the revisions would be done only after Hoffman paid for the architectural services already rendered. Hoffman terminated the contract with Getzschman.

On October 1, Getzschman sent a bill to Miller for the total due on completion of the bidding phase, $33,207.97, which was based on the new construction cost of $698,000, the low bid on September 27. Hoffman did not pay this bill, but, instead, took Getzschman's plans to Orlin Johnson, a draftsman, to revise the plans and lessen the construction cost. Johnson reduced the house's size to 4,200 square feet. Hoffman eventually contracted with Ronco Construction, which built the Hoffman house for $328,000. Hoffman paid Johnson $1,476.91 for his services in revising the plans for the house. After reviewing Johnson's designs, Getzschman expressed his opinion that Johnson merely copied the Getzschman plans and design for the house eventually built by Hoffmans.

On November 4, Getzschman sent Miller a final bill for his services in designing Hoffmans' house—a past due balance of $33,207.97, plus Getzschman's termination expenses of $2,792 under article 7 of the architect's contract.

Getzschman subsequently sued Hoffmans and Miller for the balance due on the contract. In their answer, the defendants alleged that Getzschman was barred from recovery by virtue of

his: (1) "failure to perform conditions precedent under the contract"; (2) "breach of fiduciary duty of good faith, loyalty and full disclosure"; and (3) "negligence and breach of duty of reasonable care." The defendants counterclaimed that Getzschman breached the contract by failing to design a house which could be built for the agreed $65 per square foot, by violating a fiduciary duty of "good faith, loyalty and full disclosure," and by failing to use due care (negligence) during preparation of the design.

EXCLUSION OF TESTIMONY

The defendants called Jerry Gill as an expert witness on architects. When Gill was asked on direct examination about an architect's "customary and standard procedures" in designing a house, the court sustained Getzschman's objection (relevance) and sustained Getzschman's additional objection (relevance) when defendants' counsel subsequently attempted to elicit Gill's testimony regarding the "standard or accepted understanding of an architect's duties as to any steps he follows as he goes through the basic services." The court sustained Getzschman's objections because the case was being tried on a "contract-theory." In an offer of proof, Gill testified that an architect has a duty to advise his client of the cost of all changes requested by the client and that an architect has a duty to design a house which does not substantially exceed the client's budget. In the offer of proof, Gill expressed his opinion, based on an assumption that Hoffmans had given Getzschman a budget of $300,000 to $350,000 for the house, that Getzschman's actions in designing a $698,000 house constituted a breach of an architect's duties of good faith, loyalty, and full disclosure.

INSTRUCTION CONFERENCE

At the instruction conference, Larry Hoffman and Miller tendered instructions on an architect's duty of reasonable care and fiduciary duty. The tendered instruction on an architect's duty of reasonable care proposed that an architect has the duty to perform contractual duties with "skill, ability, judgment and taste reasonably and without neglect." The tendered instruction on fiduciary duty stated that an architect is "duty bound to make a full disclosure of all matters, of which he has

knowledge, which it is desirable or important that his principal learn." The tendered instruction on fiduciary duty also provided that an architect, who knows that construction cost is an important factor to the architect's client, must supply the client with "some idea of the final cost of the project." The court refused the tendered instructions. Hoffman and Miller objected to the court's instruction outlining the parties' contentions because the instruction did not mention the counterclaim based on "breach of duty." The court remarked: "I am going to rule at this time that a breach of duty is not a proper issue in this case. It is a contract case and I am not going to instruct on it. Your objection . . . is overruled." In instruction No. 10, however, the court gave the following:

> It is the law in Nebraska that in contracts for architectural services the following rules are applicable;
>
> An architect is bound to make full disclosures of all matters of which he had or should have knowledge and which it was important that his client should know.
>
> An architect may breach his contract for architectural services by underestimating the construction costs of a proposed structure if he has agreed to stay within a certain dollar budget.
>
> The rule to be applied is that the costs of construction must reasonably approach that stated in the dollar budget unless the owners order changes which increase the cost of construction.

Consequently, the common denominator in the instructions, both requested and given, was breach of an architect's duties to remain within budget for a project and to inform the client about any important matter, such as cost overrun.

The jury returned a verdict in favor of Getzschman for $35,999.97, the full amount claimed as damages, and found against Hoffman and Miller on their counterclaim. Asserting that "the evidence has established, as a matter of law, a defense to [the] breach of contract," Hoffman and Miller filed a motion for judgment notwithstanding the verdict, new trial, or remittitur, which the court overruled. In its judgment, the district court included an allowance of interest at the legal rate. See Neb. Rev. Stat. § 45-102 (Reissue 1988).

ASSIGNMENTS OF ERROR

Hoffman and Miller appeal, contending that the district court erred in (1) refusing to instruct the jury regarding an architect's fiduciary duty and the duty of reasonable care; (2) excluding expert testimony offered to prove that Getzschman breached his fiduciary duty and the duty of reasonable care; (3) overruling the appellants' motion for judgment notwithstanding the verdict, a new trial, or remittitur; and (4) including interest in the judgment entered on the verdict. Hoffman and Miller also maintain that the awarded damages are excessive.

ARCHITECTURAL DUTIES

In *Durand Associates, Inc. v. Guardian Inv. Co.*, 186 Neb. 349, 183 N.W.2d 246 (1971), this court first discussed the nature of an architect's contractual duties to a client. Durand, the architect, agreed to design an apartment building for Guardian Investment, and, after some discussion about cost, a $420,000 figure was inserted as the construction cost estimate in the architectural contract. The lowest bid received on the project was $724,535. When Guardian told Durand that this cost was too high, Durand spoke with some bidders in an attempt to eliminate items and was able to cut the cost of construction to $652,728. However, even the reduced cost figure was too high for Guardian. After Guardian terminated the contract, Durand sued Guardian for breach of contract, and Guardian cross-claimed based on the erroneous construction cost estimate by Durand. At the close of the evidence, the trial court granted directed verdicts in favor of Durand on Guardian's cross-claim and in favor of Guardian on Durand's breach of contract claim.

After noting that the contract obligated Durand to furnish cost estimates when requested to do so, the *Durand* court addressed the architect's contention regarding the contractual language that "[the architect] does not guarantee such estimates."

> Durand's profession required him to keep informed on building costs and in case of any question he could readily ascertain the approximate cost on any project. His

> knowledge in this respect was superior to that of the defendants. Durand held himself out as an expert in his field. He was supposed to be skilled in estimating costs of construction. Those employing him or his firm had a right to expect that he would exercise that skill and judgment. It was his affirmative duty to give the defendants some definite idea of the reasonable cost of the project. It is immaterial whether or not the defendants told him, as they contend, that the cost could not exceed $420,000 above the exclusions. When that figure was included in the contract, he was bound by it. If it was not a realistic estimate, he should have disclosed to the defendants that the plans proposed by him could not possibly be carried out for that figure. He was duty bound to make full disclosure of all matters of which he had or should have had knowledge which it was important that his clients should know.
>
> . . . We . . . hold that an architect or engineer may breach his contract for architectural services by underestimating the construction costs of a proposed structure. The rule to be applied is that the cost of construction must reasonably approach that stated in the estimate unless the owner orders changes which increase the cost of construction. It is ordinarily for a jury to say whether the actual cost is within a reasonable range of the estimated cost unless, as here, the excess is so great that the court can deal with it as a matter of law.

Id. at 354-55, 183 N.W.2d at 250-51. Because Durand breached the architectural contract by markedly underestimating the cost of construction, he was barred from recovering under the contract.

Hoffman and Miller argue that *Durand* controls the present case, and also seek to hold Getzschman liable under common-law tort theories—breaches of a fiduciary duty and the duty of due care.

If there is an express contract for architectural services, an architect's duties are determined by the contract for the architect's employment. *Guirey, Srnka & Arnold, Architects v. City of Phoenix*, 9 Ariz. App. 70, 449 P.2d 306 (1969);

Moundsview Ind. S. D. No. 621 v. Buetow & Assoc., 253 N.W.2d 836 (Minn. 1977); *Kelly v. Northwest Community Hospital*, 66 Ill. App. 3d 679, 384 N.E.2d 102 (1978); *Cobb v. Thomas*, 565 S.W.2d 281 (Tex. App. 1978); *I. O. I Systems, Inc. v. City of Cleveland, Tex.*, 615 S.W.2d 786 (Tex. App. 1980). Implicit in every contract for architectural services is the duty of the architect to exercise skill and care which are commensurate with requirements of the profession. *Rowe v. Moss*, 656 S.W.2d 318 (Mo. App. 1983); *I. O. I Systems, Inc. v. City of Cleveland, Tex., supra*; *Nelson v. Com.*, 235 Va. 228, 368 S.E.2d 239 (1988). If an architect fails to exercise reasonable professional care in the discharge of his contractual duties, the architect breaches the contract of employment. *Durand Associates, Inc. v. Guardian Inv. Co.*, 186 Neb. 349, 183 N.W.2d 246 (1971).

This court has recognized the principle that " 'accompanying every contract is a common-law duty to perform the thing agreed to be done with care, skill, reasonable expediency, and faithfulness, and a negligent failure to observe any of these conditions is a tort as well as a breach of contract.' " *Driekosen v. Black, Sivalls & Bryson*, 158 Neb. 531, 536, 64 N.W.2d 88, 92 (1954). Although an aggrieved party may choose a tort action rather than a contract action to remedy alleged negligence in the performance of a contract, nevertheless, the contract may control the scope of a duty undertaken by the defendant. In the context of a negligence claim based on an architectural contract, tort liability may arise when the architect negligently fails to perform an express or implied contractual duty. While Nebraska law allows a party to base a claim for nonperformance of a contractual duty on either a contract or tort theory, in both cases the contract may determine the duty which has been breached with resultant liability.

Regarding an architect's duty to inform the client concerning the cost of a proposed project, *Durand* governs only those situations when the architect has agreed to design a project with a specified budget, or when the architect is obligated to furnish an estimate of construction costs. "An architect employed to prepare plans and specifications for a building, with the understanding that the construction would be accomplished

within certain cost limitations, cannot recover compensation for [architectural] services when the building cannot be erected except at a cost materially in excess of the amount specified." *Kleinschmidt, Brassette & Associates v. Ayres*, 368 So. 2d 1153, 1155 (La. App. 1979). See, also, *Kurz v. Quincy Post No. 37, American Legion*, 5 Ill. App. 3d 412, 283 N.E.2d 8 (1972); *Guirey, Srnka & Arnold, Architects v. City of Phoenix, supra*; *Baylor University v. Carlander*, 316 S.W.2d 277 (Tex. App. 1958); *Zannoth v. Booth Radio Stations*, 333 Mich. 233, 52 N.W.2d 678 (1952); 6 C.J.S. *Architects* § 32(b) (1975).

However, when an architect has no express contractual obligation to design a structure within a specified budget or to estimate the construction cost of a proposed project, construction at a cost greater than anticipated by or acceptable to the owner is no defense to an architect's action to recover a fee.

> "[W]here the cost of construction is not fixed in the agreement employing an architect, nor estimated by him, but the plans are prepared according to details dictated by the owner, it has been held that the fact that the plans when completed call for a building which will cost more to erect than the owner expected, or is willing, to pay, will not preclude the architect from recovering compensation for his services in making the plans."

Guirey, Srnka & Arnold, Architects v. City of Phoenix, supra at 76, 449 P.2d at 312. "[W]here an architect is employed to prepare plans and specifications for a building and there are no cost limitations agreed upon, such architect can recover compensation for his services irrespective of the costs of construction." *Kleinschmidt, Brassette & Associates v. Ayres, supra* at 1155.

MOTION FOR JUDGMENT N.O.V.

Hoffman and Miller argue that the district court erred in overruling their motion for relief pursuant to Neb. Rev. Stat. § 25-1315.02 (Reissue 1985):

> Whenever a motion for directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action

> to the jury subject to a later determination of the legal questions raised by the motion. Within ten days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict . . . . A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed.

Section 25-1315.02 authorizes entry of a judgment notwithstanding the verdict (n.o.v.) if the appropriate motion is filed within 10 days after reception of the verdict to be set aside. *Dunn v. Hemberger*, 230 Neb. 171, 430 N.W.2d 516 (1988). A motion for judgment n.o.v. may be granted when the movant's previous motion for a directed verdict, made at the conclusion of all evidence, should have been sustained. *Weston v. Gold & Co.*, 167 Neb. 692, 94 N.W.2d 380 (1959).

> Upon a motion for directed verdict, the moving party is deemed to have admitted as true all the material and relevant evidence admitted which is favorable to the opposing party. . . . A trial court should direct a verdict . . . only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom.

In re Estate of Peterson, ante p. 105, 111, 439 N.W.2d 516, 520 (1989).

> "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."

Burns v. Veterans of Foreign Wars, 231 Neb. 844, 850, 438 N.W.2d 485, 489-90 (1989).

Hoffman and Miller moved for a directed verdict at the conclusion of all evidence and sought dismissal of

Getzschman's breach of contract action because "the evidence has established, as a matter of law, a defense to that breach of contract . . . ." Evidence was conflicting on the question whether Hoffmans informed Getzschman that there was a limitation on the cost of construction. Further, Getzschman and Hoffmans excluded the contractual provision concerning the architect's estimate of costs and, thus, made the owner responsible for cost estimating, a situation for which, according to Getzschman, Larry Hoffman had bargained in exchange for Getzschman's more frequent inspections of the construction work. If Hoffmans expressed no budget and the architectural contract placed no obligation on Getzschman for estimating the cost of the project, actual cost of construction in excess of Hoffmans' anticipation does not defeat Getzschman's claim for a fee. The evidence in this case presents a submissible factual question concerning a defense to Getzschman's action for breach of contract. The district court properly overruled the motion by Hoffman and Miller for a directed verdict and, consequently, committed no error in overruling the motion for judgment n.o.v.

INSTRUCTIONS

Hoffman and Miller also contend that the district court erroneously rejected their tendered instructions on the tort claims embodied in their counterclaim.

> 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.

Burns v. Veterans of Foreign Wars, supra at 853, 438 N.W.2d at 491.

> Regarding the element of prejudice, this court looks first to the instructions as given, mindful that jury instructions must be read together, and if taken as a whole they correctly state the law, are not misleading, and adequately cover the issues, there is no prejudicial error upon which a reversal on appeal may be based.

Zeeb v. Delicious Foods, 231 Neb. 358, 361, 436 N.W.2d 190, 193 (1989).

Although the court rejected the tendered instructions regarding the tort counterclaims, an instruction was given pertaining to the breach of contract alleged in the counterclaim, that is, Hoffman and Miller were entitled to recover if the jury found that Getzschman's breach of contract caused damage to the counterclaimants. Furthermore, the court instructed the jury that an architect breaches a contract for services by the architect's "underestimating the construction costs of a proposed structure," when there is an agreed budget for the contracted project, and further instructed that an architect has a duty to design a structure for which the construction cost "reasonably approach[es]" the agreed budget, if any. In substance, the court also instructed the jury that an architect has the duty to fully disclose to the owner those important matters which might remain unknown to the owner in the absence of the architect's disclosure. Hoffman and Miller did not object to the court's instruction regarding an architect's duties and failed to suggest any modification or clarification of the instruction given. In the case before us, the issue is performance or nonperformance of a duty, and not the reason underlying alleged nonperformance. The court's instruction on an architect's contractual duties expressed the elements which, if proved, entitled Hoffman and Miller to recover on their counterclaim for tortious breaches of duty by Getzschman. The essence of the tendered instructions on a tortious breach of a common-law duty was substantially expressed in the instruction given concerning breach of a contractually imposed duty. Multiple instructions, utilizing alternative terminology expressing the same basic concepts of duty and breach of duty, were unnecessary.

By its verdict, the jury expressed that Getzschman had performed all his obligations under the contract, including the duties of full disclosure to the owner and restriction of construction cost to an agreed budget, if such budget existed. Therefore, Hoffman and Miller have failed to demonstrate prejudice by the court's refusal to give the tendered instructions on Getzschman's duties under tort law inasmuch as

Getzschman's contractual duties were identical to his duties at common law pertaining to tort liability under the theories advocated by Hoffman and Miller. Inherent in the verdict is the jury's disbelief of the factual basis asserted by Hoffman and Miller for their contract defenses and their contract counterclaim. There is no reason to believe that the jury would have been more receptive to the same factual contentions alternatively characterized as "tort counterclaims." The district court committed no reversible error in rejecting the instructions tendered by Hoffman and Miller.

EXPERT TESTIMONY

Next, Hoffman and Miller claim that the district court erred by excluding testimony from Gill, an architectural expert, concerning an architect's duties in the course of a contracted project. In the offer of proof, Gill expressed his opinion that an architect has obligations to advise the owner about construction costs and remain within the budget for the project. Also, in Gill's opinion, an architect must inform the owner concerning the probable cost of construction. Gill then expressed his opinion that, assuming the existence of an agreement between Hoffmans and Getzschman concerning a budget of $300,000 to $350,000, Getzschman breached an architect's duty to keep the owner informed of costs and the duties of good faith, loyalty, and full disclosure.

"Admission or exclusion of evidence is a matter for the discretion of the trial court, whose ruling on an evidential question will be upheld unless such ruling constitutes an abuse of discretion." *State v. Olsan*, 231 Neb. 214, 220, 436 N.W.2d 128, 133 (1989).

Although the district court excluded Gill's testimony about an architect's duties in performing a contract to design a structure, the court did instruct the jury that an architect has a duty "to make full disclosures of all matters of which he had or should have knowledge and which it was important that his client should know," that an architect may breach the contract for services by underestimating construction costs if there is an agreed budget, and that the costs of construction must "reasonably approach that stated in the dollar budget unless the

owners order changes which increase the cost of construction." Thus, by correctly instructing the jury regarding an architect's duties involving a budget for a project or the limitation of cost of construction, the court supplied the jury with a statement of law containing and establishing the very facts sought to be proved through Gill's testimony.

Moreover, Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1985), states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

In the light of Rule 702, the question concerning Getzschman's alleged breach of duty based on an agreed budget was properly submitted to the jury without evidence from an expert to assist in determining whether Getzschman "substantially exceeded" any agreed budget. *Durand Associates, Inc. v. Guardian Inv. Co.*, 186 Neb. 349, 183 N.W.2d 246 (1971); *Johannes v. McNeil Real Estate Fund VIII*, 225 Neb. 283, 404 N.W.2d 424 (1987); *State v. Trevino*, 230 Neb. 494, 517, 432 N.W.2d 503, 519 (1988) (" '[E]xpert testimony is admissible only if it will be of assistance to the jury in its deliberations and relates to an area not within the competency of ordinary citizens' "); *In re Interest of D.L.S.*, 230 Neb. 435, 443, 432 N.W.2d 31, 37 (1988) ("Expert evidence is not required to establish matters which are self-evident").

Although expert testimony is, in some circumstances, permitted even in "areas where laymen have competence to determine the facts testified to by the expert," see *Christensen v. City of Tekamah*, 201 Neb. 344, 351, 268 N.W.2d 93, 98 (1978), in each case the first question to be answered by a court considering admissibility of expert testimony under Rule 702 is whether the testimony is likely to assist the trier of fact. *Christensen v. City of Tekamah, supra*; *Priest v. McConnell*, 219 Neb. 328, 363 N.W.2d 173 (1985) (Shanahan, J., concurring); *Patch v. Sebelius*, 349 N.W.2d 637 (N.D. 1984); *Lindberg v. Leatham Bros., Inc.*, 693 P.2d 1234 (Mont. 1985); *Scott v. Sears, Roebuck & Co.*, 789 F.2d 1052 (4th Cir. 1986).

If the jury had believed Larry Hoffman's testimony regarding Getzschman's alleged promises about the cost of constructing the house, the jury was competent to determine whether the $698,000 bid "substantially exceeded" the agreed budget. Gill's testimony was unnecessary to assist the jury in determining whether Getzschman breached an architect's duty concerning the budget for a project and was, therefore, inadmissible. The district court did not abuse its discretion in excluding Gill's testimony.

DAMAGES

Finally, Hoffman and Miller argue that the awarded damages exceed those which are properly recoverable for breach of the contract in issue and that the district court erred in awarding interest. Hoffman and Miller maintain that Getzschman may recover the appropriate percentage of the cost of the house which was eventually built and may not recover a fee based on the cost of the house designed by Getzschman. The contract clearly provides that Getzschman's fee will be 10 percent of the "Construction Cost as defined in Article 3 of this agreement." Article 3.1.1 provides, "The Construction Cost shall be the total cost or estimated cost to the Owner of all elements of the Project designed or specified by the Architect." Furthermore, article 4.3 of the contract controls Getzschman's compensation in the event the project is not completed as planned:

> When compensation is based on a percentage of Construction Cost, and any portions of the Project are deleted or otherwise not constructed, compensation for such portions of the Project shall be payable to the extent services are performed on such portions, in accordance with the schedule set forth in Subparagraph 9.2.2 based on (1) the lowest bona fide bid or negotiated proposal. . . .

The contract clearly provides that Getzschman's fee is not limited to the cost of actual construction merely because Hoffmans took the final plans to another draftsman for revisions resulting in a lower cost of the house eventually constructed. Getzschman is entitled to a fee based on the "lowest bona fide bid" for "all elements of the Project designed" by Getzschman, namely, a bid of $698,000.

In the architectural contract in issue, paragraph 9.4 states:

> Payments due the Architect and unpaid under this Agreement shall bear interest from the date payment is due at the rate entered below, or in the absence thereof, at the legal rate prevailing at the principal place of business of the Architect.
>
> (*Here insert any rate of interest agreed upon.*)
>
> Legal rate in the State of Nebraska.

Under the contract, interest on the amount due the architect is an explicit item of recovery for the architect. The district court did not err in assessing interest at the legal rate prescribed by § 45-102.

Consequently, the judgment of the district court is affirmed.

AFFIRMED.

ULYSSES ABBOTT, APPELLANT, V. GOULD, INC., APPELLEE.
TYREE BIGGS ET AL., APPELLANTS, V. GOULD, INC., APPELLEE.

443 N.W.2d 591

Filed July 21, 1989. Nos. 87-857, 87-874.

1. **Workers' Compensation: Jurisdiction.** The Nebraska Workers' Compensation Court has exclusive jurisdiction in actions arising under the Workers' Compensation Act.
2. **Jurisdiction: Words and Phrases.** Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong.
3. **Judgments.** The language of a judicial opinion must be read in the context of the facts under consideration and its meaning limited by those facts.
4. **Constitutional Law.** The conduct proscribed by U.S. Const. amend. XIII and Neb. Const. art. I, § 2, is the use or threat of physical force or legal coercion to extract labor from an unwilling worker.
5. **Constitutional Law: Workers' Compensation: Due Process.** The exclusive remedy provided by the Workers' Compensation Act satisfies the due process requirements of U.S. Const. amend. XIV and Neb. Const. art. I, § 3, as well as the requirements of Neb. Const. art. I, § 13, that every person shall have a remedy by due course of law for any injury done him or her.

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

Martin A. Cannon, of Matthews & Cannon, P.C., and Eugene Mattioni, of Mattioni, Mattioni & Mattioni, Ltd., for appellants.

Joseph K. Meusey, Thomas F. Hoarty, Jr., and Mary Kay Frank, of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellee.

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

CAPORALE, J.

In these consolidated appeals the plaintiffs-appellants, a number of former employees and personal representatives of certain former employees of defendant-appellee, Gould, Inc., seek to recover damages allegedly caused by the employer's conduct and that of its contract physician, defendant Robert J. Fitzgibbons, Sr., M.D. Gould demurred in part on the ground that the district court lacks subject matter jurisdiction. That court sustained Gould's demurrers and dismissed the actions as against it, which dismissal the plaintiffs assign as error. We affirm.

Pursuant to the district court's novel "Standing Order," the propriety of which does not now concern us, the various plaintiffs filed a "Master Long Form Petition," setting forth common allegations of fact. In addition, each plaintiff filed a "Short Form Petition," setting forth allegations of fact unique to each.

So far as is relevant to these appeals, the petitions allege that at the relevant times, Gould operated a secondary lead smelting and refining plant; that Gould knowingly misrepresented to employees that their work environment was reasonably safe and that the clothing and devices provided them and safety precautions taken would protect them from harm; that, in fact, Gould intentionally subjected its employees to contact with and ingestion of various airborne particles and fumes known to Gould to be injurious to human health; that Gould exacerbated the work hazards by intentionally failing to provide adequate

safeguards at the worksite and by intentionally refusing to disclose the true hazardous character of the work environment; that in an attempt to cover up the effects of the toxic exposures, Gould falsely and intentionally misrepresented that certain drugs and medications would prevent the harmful effects of whatever substances might be present in the work environment; that, as intended by Gould, its employees relied upon the misrepresentations and were thereby caused to ingest, without their informed consent, certain drugs and medications which independently caused them additional injury; and that Gould accomplished the foregoing in conspiracy with its contract physician.

The Nebraska Workers' Compensation Court has exclusive jurisdiction in actions arising under the Workers' Compensation Act. *Peak v. Bosse*, 202 Neb. 1, 272 N.W.2d 750 (1978). See, also, *Haumont v. City of Lincoln*, 229 Neb. 52, 424 N.W.2d 892 (1988); *P.A.M. v. Quad L. Assocs.*, 221 Neb. 642, 380 N.W.2d 243 (1986). Our question becomes, then, whether plaintiffs' petitions state causes of action under the act. If so, exclusive jurisdiction lies in the compensation court, and the district court properly granted Gould's demurrers for want of subject matter jurisdiction, such jurisdiction being the power to hear and determine cases of the general class to which the proceedings in question belong. *State v. Gorman, ante* p. 738, 441 N.W.2d 896 (1989); *In re Interest of Adams,* 230 Neb. 109, 430 N.W.2d 295 (1988).

Neb. Rev. Stat. § 48-101 (Reissue 1988) provides, so far as pertinent to our inquiry, for workers' compensation benefits when an employee suffers personal injury caused by an occupational disease which arises out of and in the course of his or her employment.

> An occupational disease must be a natural incident of a particular occupation and must attach to that occupation a hazard which distinguishes it from the usual run of occupations and which is in excess of that attending employment in general. . . .
>
> . . . .
>
> The requirement of [§ 48-151] is that the cause and conditions of the disease be characteristic of and peculiar

> to the employment and that the disease be other than an ordinary disease of life. The statute does not require that the disease be one which originates exclusively from the employment. The statute means that the conditions of the employment must result in a hazard which distinguishes it in character from employment generally.

Ritter v. Hawkeye-Security Ins. Co., 178 Neb. 792, 794-95, 135 N.W.2d 470, 472 (1965). Plaintiffs argue, in effect, that Gould's acts elevated the hazards to which they were exposed to a point well beyond that "natural[ly] incident" to the occupation of lead smelting and that their injuries thus are not within the comprehension of "occupational disease" as that term is used in the Workers' Compensation Act.

In *Marlow v. Maple Manor Apartments*, 193 Neb. 654, 659, 228 N.W.2d 303, 306 (1975), this court held that the Workers' Compensation Act is

> intended to cover only claims arising out of and in the course of the employment. The operative fact is one of coverage, not of election to file a claim for compensation. If coverage exists, even though for some reason compensation may not be payable, the [Workers'] Compensation Act is exclusive. If the accident does not arise out of and in the course of the employment, there is no coverage, and the parties then are not subject to the act. An adjudication that an injury does not arise out of or in the course of the employee's employment is a conclusive determination only of the fact that the [Workers'] Compensation Court lacks jurisdiction in the matter. This determination does not bar recourse to the tort remedy, if one exists.

More recently, in *P.A.M. v. Quad L. Assocs., supra* at 645, 380 N.W.2d at 246, quoting *Marlow v. Maple Manor Apartments, supra*, and *Johnston v. State*, 219 Neb. 457, 364 N.W.2d 1 (1985), it was observed:

> "The [Workers'] Compensation Act provides the exclusive remedy by the employee against the employer for *any* injury arising out of and in the course of the employment. This is the basis on which the rights of employers and employees are put in balance. The

> employer, by having liability imposed on him without fault, receives in return relief from tort actions. Logically, therefore, where the employer is negligent he should not be relieved of liability where compensation coverage is not provided to the employee.
>
> ". . . .
>
> ". . . The operative fact is one of coverage, not of election to file a claim for compensation. If coverage exists, even though for some reason compensation may not be payable, the [Workers'] Compensation Act is *exclusive*."

(Emphasis in original.)

This court has never before faced the precise question presented in this appeal: whether allegations that an employer intentionally concealed the dangers inherent in the work environment, intentionally inflicted injury resulting in occupational disease, and intentionally concealed the true nature and effect of the disease fall within or without the Workers' Compensation Act. However, the question is not without precedent.

In a case remarkably similar to those now before us, the injured employees alleged that their employer had intentionally concealed from them and from various state and federal agencies the fact of their continuing exposure to toxic chemicals and that they had been injured as a result. The Supreme Court of Ohio held that the risk of intentional tort committed by the employer was not one " ' "in the course of or arising out of [the employee's] employment." . . .' " *Blankenship v. Chemicals*, 69 Ohio St. 2d 608, 613, 433 N.E.2d 572, 576 (1982). The majority of that court reasoned that to hold otherwise would be tantamount to encouraging such conduct, a consequence which could not be reconciled with one of the purposes of the Workers' Compensation Act, namely, the promotion of a safe and injury-free work environment.

The Supreme Court of California reasoned differently in *Johns-Manville, etc. v. Contra Costa, etc.*, 27 Cal. 3d 465, 612 P.2d 948, 165 Cal. Rptr. 858 (1980). That court focused on the balance the Workers' Compensation Act achieves by poising the advantage of an employer's freedom from common-law

liability against the detriment of relatively swift and certain compensation liability, while giving the employee expeditious compensation benefits in return for the surrender of a potentially larger recovery at common law. The *Johns-Manville* court wrote:

> It is not uncommon for an employer to "put his mind" to the existence of a danger to an employee and nevertheless fail to take corrective action. . . . In many of these cases, the employer does not warn the employee of the risk. Such conduct may be characterized as intentional or even deceitful. Yet if an action at law were allowed as a remedy, many cases cognizable under workers' compensation would also be prosecuted outside that system. The focus of the inquiry in a case involving work-related injury would often be not whether the injury arose out of and in the course of employment, but the state of knowledge of the employer and the employee regarding the dangerous condition which caused the injury. Such a result would undermine the underlying premise upon which the workers' compensation system is based. That system balances the advantage to the employer of immunity from liability at law against the detriment of relatively swift and certain compensation payments. Conversely, while the employee receives expeditious compensation, he surrenders his right to a potentially larger recovery in a common law action for the negligence or willful misconduct of his employer. This balance would be significantly disturbed if we were to hold, as plaintiff urges, that any misconduct of an employer which may be characterized as intentional warrants an action at law for damages.

Id. at 474, 612 P.2d at 953-54, 165 Cal. Rptr. at 863. Thus, the majority of the court held that California's compensation act barred an action at law for the initial injury the employee suffered as the result of being exposed to asbestos at his work site. The *Johns-Manville* opinion went on to hold, however, that an action at law is available to the injured employee

> if the employer acts deliberately for the purpose of injuring the employee or if the harm resulting from the

> intentional misconduct consists of aggravation of an initial work-related injury. . . .
>
> In the present case, plaintiff alleges that defendant fraudulently concealed from him, and from doctors retained to treat him, as well as from the state, that he was suffering from a disease caused by ingestion of asbestos, thereby preventing him from receiving treatment for the disease and inducing him to continue to work under hazardous conditions. These allegations are sufficient to state a cause of action for aggravation of the disease, as distinct from the hazards of the employment which caused him to contract the disease.

Id. at 476-77, 612 P.2d at 955, 165 Cal. Rptr. at 865. In a similar vein, the Supreme Court of New Jersey, in *Millison v. E.I. du Pont de Nemours & Co.*, 101 N.J. 161, 501 A.2d 505 (1985), held that claims that the employer knowingly and deliberately exposed its employees to the adverse health effects of asbestos did not state a cause of action outside the workers' compensation law, but that the claim the employer fraudulently concealed its knowledge of already contracted diseases did state such a cause of action.

The foregoing analyses and others like them, however, fail to accord due deference to the fact that "[t]he primary object of compensation acts was to do away with the inadequacies and defects of the common-law remedies, to destroy the common-law defenses, and, in the employments affected, to give compensation, *regardless of the fault of the employer*." (Emphasis supplied.) *Ray v. School District of Lincoln*, 105 Neb. 456, 462, 181 N.W. 140, 142 (1920).

Plaintiffs' reliance upon *Navracel v. Cudahy Packing Co.*, 109 Neb. 506, 191 N.W. 659 (1922), *reh'g denied* 109 Neb. 512, 193 N.W. 768 (1923), for the proposition that this court has since adopted an intentional tort exception to the compensation act is misplaced. It is true that the original *Navracel* opinion states:

> An employer could not, of course, be protected by the provisions of the compensation act where he intentionally inflicts an injury upon an employee. Such an injury could hardly be said to be one which would be incidental to the employment, or one which would arise from the operation

of the employer's business.

Id. at 510, 191 N.W. at 660.

However, the language of a judicial opinion must be read in the context of the facts under consideration and its meaning limited by those facts. *Douglas County v. Vinsonhaler*, 82 Neb. 810, 118 N.W. 1058 (1908). *Navracel* held that an employee who had not formally rejected the coverage of the compensation act could not sue his employer at law for the latter's failure to guard certain machinery in violation of the factory act. It is obvious that read within the limitation of the *Navracel* facts, the obiter dictum upon which plaintiffs place so much emphasis did not adopt a rule of law which carved out an exception to the coverage of the compensation act. Indeed, *Edelman v. Ralph Printing & Lithographing, Inc.*, 189 Neb. 763, 765, 205 N.W.2d 340, 341 (1973), disapproves *Navracel* to the extent "it may imply a necessarily different result under the [Workers'] Compensation Act compulsory upon" an employee who accepts benefits under the act. Plaintiffs have cited us to no case from this jurisdiction which has applied an intentional tort exception to the compensation act, nor has our research disclosed any such case.

To ask us to read the compensation act of this jurisdiction in such a way as to require employers not only to provide workers' compensation benefits but also to defend and respond in damages to employee tort actions is to invite us to subvert the very purpose of the whole workers' compensation scheme. See *Griffin v. George's, Inc.*, 267 Ark. 91, 589 S.W.2d 24 (1979). It is an invitation we decline.

We thus hold that the allegations of the plaintiffs against Gould fall within the ambit of this state's Workers' Compensation Act and that the district court is therefore without subject matter jurisdiction in regard to those allegations.

Remaining to be considered is plaintiffs' contention that to so construe the act is to subject them to involuntary servitude in violation of U.S. Const. amend. XIII and Neb. Const. art. I, § 2, and to deprive them as well of due process by denying them a remedy by due course of law for their injuries, in violation of U.S. Const. amend. XIV and Neb. Const. art. I, §§ 3 and 13.

Plaintiffs' involuntary servitude argument under the federal Constitution is foreclosed by the holding in *U.S. v. Kozminski*, ____ U.S. ____, 108 S. Ct. 2751, 101 L. Ed. 2d 788 (1988), to the effect that the conduct proscribed by the 13th amendment is limited to the use or threat of physical force or legal coercion to extract labor from an unwilling worker. Thus, the deceit, howsoever intentional, alleged here does not constitute involuntary servitude within the meaning of that amendment. We find nothing in Neb. Const. art. I, § 2, which requires different treatment than does the Constitution of our nation.

Plaintiffs' remaining constitutional arguments are resolved by noting that they have a remedy under the Workers' Compensation Act for all personal injuries proved to have been caused by an occupational disease arising out of and in the course of their employment with Gould, including both the initial effects caused by the work environment and any subsequent exacerbations of the same.

AFFIRMED.

WILLIE PODESTA YOUNG, APPELLEE, V. WILLIAM TATE, APPELLANT.

442 N.W.2d 865

Filed July 21, 1989. No. 87-882.

1. **Contracts.** A written contract which is expressed in clear and unambiguous language is not subject to interpretation or construction. The meaning of an unambiguous contract presents questions of law.
2. **Appeal and Error.** On appeal, this court reaches its own independent conclusions on questions of law.
3. **Contracts.** Where, after a contract is made, a party's principal purpose is substantially frustrated without his or her fault by the occurrence of an event, the nonoccurrence of which was a basic assumption on which the contract was made, his or her remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.
4. _____. An imprudent or bad bargain in and of itself is not an excuse for nonperformance of a contract.
5. **Contracts: Substantial Performance: Damages.** The general rule is that in spite of lack of substantial performance, where there has been a part performance

and it has been of substantial benefit to the other party and he or she has accepted and retained the benefits thereof, he or she should not be permitted entirely to avoid the duties assumed by him or her under his or her contract, and, under such circumstances, the party partially performing is entitled to recover the reasonable or fair value of such performance, subject to the reciprocal right of the other party to recoup such damages as he or she has suffered from the failure of the part-performing party to perform fully or substantially his or her contract.

6. **Contracts.** Generally, the rule that a party who fails fully to perform his or her contract cannot recover on the contract for part performance applies only to entire, indivisible contracts, not to severable contracts. There may be a recovery on the contract for a part performance of a divisible contract.

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

John W. Wynkoop for appellant.

Norman F. Bradshaw for appellee.

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

HASTINGS, C.J.

Willie Podesta Young brought an action on a contract for money damages against William Tate. Tate counterclaimed against Young on this same contract. Tate appeals from a judgment in favor of Young on her petition for $25,000 and from a judgment against him on his counterclaim for $25,000 against Young. We affirm in part and in part reverse and remand with directions.

In the latter part of 1984, Young and Tate became interested in and began to discuss investing in a resort development in Illinois to be known as Eagle Creek Resort. They agreed to invest $50,000 for the first stage of development for Eagle Creek Resort, which consisted of putting together a bid to be made to the State of Illinois. Because Young had credit available to her which Tate did not have, the original agreement was for Young to put up the entire $50,000, with Tate agreeing to be responsible for repaying the first $25,000.

As evidence of this agreement, the parties signed a written contract which is set out as follows:

This agreement is between Willie Podesta Young (WPY) and William Tate (WT).

WPY will provide $50,000 for the first stages of development for the Eagle Creek Resort.

WT will assume the liability for the first $25,000. WPY will provide the above mentioned $25,000 on January 2, 1985. The check for $25,000 should be made out to Eagle Creek Resort, LTD.

The next $25,000 will be provided by WPY as needed. A five day notice will be given to WPY before the second draw is needed.

WPY will receive 25% ownership in Eagle Creek Resort, LTD.

/s/ Willie Podesta Young
Willie Podesta Young
/s/ William L. Tate
William Tate

It is agreed that if Eagle Creek Resort shall fail to repay WPY in accord with the terms of the Promissory Note from Eagle Creek Resort to WPY then W.T. shall pay to WPY the sum of $25,000. /s/ WPY /s/ WmT

. . . .

SUBSCRIBED and sworn to before me this 2nd day of January 1985.

/s/ Irene M Mahoney
Notary Public

The provision beneath the signatures, which is initialed by both parties, was added by the attorney advising Young.

Young paid the first $25,000 on January 2, 1985. On or about February 20, 1985, Tom Schuessler, who apparently was the person responsible for the early development stages, requested that Young pay the second $25,000. She refused to do so because she began to have doubts about the project and was unsatisfied with the accounting of money spent to date, which had been given to her. Thereafter, Tate began paying the bills for further development, paying, in all, $32,000. Tate learned in December 1985 that the project had failed and the State of Illinois had awarded the contract to someone else.

Young demanded that Tate pay back her $25,000, since under

the contract he agreed to be liable for the first $25,000. Tate refused to pay. Young sued Tate for the $25,000 she had paid, and Tate counterclaimed for $25,000 of the $32,000 he spent after Young refused to pay the second $25,000.

As noted by this court in *Artex, Inc. v. Omaha Edible Oils, Inc.*, 231 Neb. 281, 436 N.W.2d 146 (1989), a written contract which is expressed in clear and unambiguous language is not subject to interpretation or construction. The meaning of an unambiguous contract presents questions of law. It is axiomatic that on appeal, this court reaches its own independent conclusions on questions of law. See *Fisbeck v. Scherbarth, Inc.*, 229 Neb. 453, 428 N.W.2d 141 (1988).

The contract in this instance is completely unambiguous. Young was to pay $50,000 in two installments, and Tate was to be responsible to her to repay the first $25,000. There was no satisfaction clause in this contract, and therefore there was no requirement that Young must be honestly satisfied with the progress of the project before she completed her part of the performance agreed to in the contract. *Artex, Inc., supra.*

The contract is silent on the issue of Young's right to request an accounting of how the money was spent. It is equally silent regarding Young's ability to refuse to pay the second $25,000 in the event she is not satisfied with how the first $25,000 was spent. Therefore, Young's obligation to pay the second $25,000 was not discharged because she was dissatisfied with the project.

Young also claims that her obligation to pay the second $25,000 was discharged due to a supervening event that rendered performance impractical.

Where, after a contract is made, a party's principal purpose is substantially frustrated without his or her fault by the occurrence of an event, the nonoccurrence of which was a basic assumption on which the contract was made, his or her remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary. *Cleasby v. Leo A. Daly Co.*, 221 Neb. 254, 376 N.W.2d 312 (1985).

Young argues that the purpose of the contract was to successfully bid on development of the resort in Illinois.

According to her, this purpose was substantially frustrated after her meeting with Illinois officials on February 14, 1985, because she "returned from this meeting with serious reservations concerning the viability of the project," "believing that further expenditure of funds would be fruitless." Brief for appellee at 9.

The contract says nothing about any requirement that a *successful* bid be made. It is common sense that the possibility of not being the successful bidder had to be within the contemplation of the parties when the agreement was consummated. Whatever Young was told by the Illinois officials, which is not clear from the record, the purpose of the contract was not at that time substantially frustrated thereby discharging Young from her obligation to pay the second $25,000 when it was requested. As this court said in *Mohrlang v. Draper*, 219 Neb. 630, 635, 365 N.W.2d 443, 447 (1985), "An imprudent or bad bargain in and of itself is not an excuse for nonperformance of a contract."

Nevertheless, Young did pay the first $25,000, thereby substantially benefiting Tate, who was without money to invest at that time, and Tate did agree to be liable for the first $25,000. In *Peters v. Halligan*, 182 Neb. 51, 152 N.W.2d 103 (1967), this court stated:

> The general rule is that in spite of lack of substantial performance, where there has been a part performance and it has been of substantial benefit to the other party and he has accepted and retained the benefits thereof, he should not be permitted entirely to avoid the duties assumed by him under his contract, and, under such circumstances, the party partially performing is entitled to recover the reasonable or fair value of such performance, subject to the reciprocal right of the other party to recoup such damages as he has suffered from the failure of the plaintiff to perform fully or substantially his contract.

Id. at 58-59, 152 N.W.2d at 109. The court later explained that, generally, the rule that a party who fails fully to perform his or her contract cannot recover on the contract for part performance applies only to entire, indivisible contracts, not to severable contracts. There may be a recovery on the contract

for a part performance of a divisible contract. *Peters v. Halligan, supra.*

Given that the $50,000 was to be paid in two installments of $25,000, it can be said that the agreement between the parties was a divisible contract. Following the rule of *Peters v. Halligan, supra*, Young was entitled to the return of her first $25,000 guaranteed by Tate, and to that extent, the judgment of the district court is affirmed. However, by the same token, Tate paid the second $25,000, which was the responsibility of Young, and therefore Tate is entitled to recover from Young on his counterclaim the sum of $25,000.

Accordingly, the judgment of the district court finding against Tate on his counterclaim is reversed, and the cause is remanded with directions to enter judgment in favor of Tate in the amount of $25,000 on his counterclaim.

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

CAPORALE, J., not participating.

MID-AMERICA MAINTENANCE, INC., APPELLEE, V. BILL MORRIS FORD, INC., A NEBRASKA CORPORATION, APPELLANT, FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF SUPERIOR, A FEDERAL ASSOCIATION, ET AL., APPELLEES.

442 N.W.2d 869

Filed July 21, 1989. No. 87-885.

1. **Mechanics' Liens: Foreclosure: Equity.** An action to foreclose a construction lien is one grounded in equity.
2. **Equity: Appeal and Error.** In an appeal of an equity action, the Supreme Court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the Supreme Court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Mechanics' Liens: Contracts.** A construction lien is not valid absent a contract between the parties.

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

John B. McDermott, of McDermott, Depue & Zitterkopf, for appellant.

Carla J. Alexander, of Downing & Alexander, for appellee Mid-America.

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

FAHRNBRUCH, J.

Bill Morris Ford, Inc. (Ford) appeals a decree foreclosing a material and labor lien on its Ford dealership building in a suit brought by Mid-America Maintenance, Inc. (Mid-America). We affirm the Nuckolls County District Court decree.

On appeal, Ford claims that the evidence is insufficient to sustain the foreclosure in favor of Mid-America. Appellant essentially makes two arguments: (1) that the evidence does not support a finding that a contract existed between the parties and (2) that the evidence does not support a finding that the materials set forth in the lien were delivered to the jobsite and incorporated into the work actually done.

An action to foreclose a construction lien is one grounded in equity. *Smith v. Central Inv. Co.*, 218 Neb. 728, 358 N.W.2d 772 (1984); *O'Keefe Elevator v. Second Ave. Properties*, 216 Neb. 170, 343 N.W.2d 54 (1984). In an appeal of an equity action, the Supreme Court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the Supreme Court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Thomas v. Marvin E. Jewell & Co., ante* p. 261, 440 N.W.2d 437 (1989); *Frenzen v. Taylor, ante* p. 41, 439 N.W.2d 473 (1989).

In the spring of 1983, William A. Morris, president of Ford, telephoned Mid-America about repairing leaks in the roof of Ford's building located in Superior, Nebraska. Harvey Knoll, Sr., Mid-America's president, inspected the roof. After a

personal interview with Knoll, Ford engaged Mid-America to repair the roof of appellant's building.

Mid-America's evidence reflects that in conformity with its written proposal, it was engaged to and did apply 95 rolls of 50-pound roofing over the entire existing roof. That was covered with an aluminum fiber coating. The job was completed on October 26, 1983. Total cost of materials, adhesive, plastic roof cement, and tax was $6,626.10. Labor cost was $5,703, making a total of $12,329.10. Testimony of Knoll and his son, Harvey Knoll, Jr., further reflects that there was a discussion about whether the building needed a patch repair or complete covering. Although Morris refused to sign anything, he did orally authorize Mid-America to proceed with a complete roof repair as stated in the written proposal. That proposal was submitted to Morris before Mid-America was engaged to perform the work, according to the senior Knoll.

Ford paid Mid-America $5,500 in installments. It refused to pay any additional sum, claiming that it authorized a patch job only for the sum of $5,500. Mid-America timely filed a construction lien against Ford's building and real estate February 21, 1984. Thereafter, this suit to foreclose the lien was filed.

William Morris died before trial. The key witness for Ford, Morris, in a deposition taken before his death, testified that he "could have" telephoned the senior Knoll and that he recalled that Mid-America did some work for Ford. "I'm positive that I asked him to do something," Morris testified. He said he asked Mid-America to patch Ford's roof. Morris said he never saw a written proposal for the work, but recalled that Knoll had asked him "to sign something, but I don't know if it was this [the proposal] or what it was." Morris said, "I was going to spend $5,500 and that's it." In answer to further questions, Morris said he did not know if the paper submitted to him by Knoll was the proposal or whether there was a dollar amount on it.

Morris admitted he and Knoll reached an agreement, but claimed that it was limited to $5,500 for patchwork. In contrast to the detailed testimony of the senior Knoll concerning the condition of the roof, the work to be done, completion of the work, and a subsequent offer by Morris on the method of

payment, Morris' testimony was vague, incomplete, and indefinite. Morris did not recall when the work was to be completed. He could not explain the discussion he and Knoll had about the condition of the roof. Morris could not recall telling Knoll that he would pay for the entire roof repair as soon as he sold some used vehicles or offering to turn over a truck to Knoll in exchange for the remainder of the amount owed on the roof.

Morris said that he did not know what work was done and what work was not done and that he did not know whether Mid-America, after completing its work, returned to fix various leaks. In its pleadings, Ford alleged that Mid-America could not have used the quantities of materials it claimed. Morris said he did not know what specific items Ford would not have purchased, adding, "I don't know anything about a roof."

The first issue for this court's consideration is whether Mid-America and Ford entered into a contract. A construction lien is not valid absent a contract between the parties. Neb. Rev. Stat. § 52-131 (Reissue 1988). See, also, *Columbus Fed. S. & L. Ass'n v. Swails Constr. Co.*, 215 Neb. 287, 338 N.W.2d 593 (1983).

Implicit in the trial court's order is a finding that the parties entered into a contract. Obviously, Morris and Knoll, Sr., agreed that Mid-America would repair the Ford dealership's roof. We agree with the trial court that there was an express contract.

Ford's first argument, that there is insufficient evidence of a contract, is really a complaint that the trial judge accepted Mid-America's version of the facts rather than Ford's. The trial court, having viewed Mid-America's witnesses, obviously found their testimony credible. We give weight to that finding.

Because Morris testified by deposition, his credibility must be judged through the answers he gave to the questions proposed, along with all of the other facts and circumstances in evidence. This witness could not recall details concerning the negotiations with Knoll, Sr., only that he engaged Mid-America to patch Ford's roof. He claimed the work was to cost $5,500. His testimony was vague on many material points that one would expect a businessman to remember with clarity. In

several areas, his testimony corroborated the testimony of witnesses for Mid-America. His testimony fails to negate relevant evidence adduced by Mid-America.

As did the trial court, based on the credibility of the witnesses, we too find there was sufficient evidence of a contract. Ford's first argument is without merit.

Ford's second argument, that there is insufficient evidence that the items listed on the construction lien were actually used in the roof repair, is also without merit. Neb. Rev. Stat. § 52-134 provides:

> A lien for furnishing materials arises only if:
>
> (a) They are supplied with the intent, shown by the contract of sale, the delivery order, delivery to the site by the claimant or at his or her direction, *or by other evidence,* that they be used in the course of construction of, or incorporated into, the improvement in connection with which the lien arises; and
>
> (b) They are either:
>
> (i) Incorporated in the improvement or consumed as normal wastage in construction operations . . . .

(Emphasis supplied.)

Appellant argues that Mid-America is not entitled to a construction lien because it did not enter into evidence bills of lading, delivery tickets, or other documents to prove intent that the materials were to be used in the course of the roof repair. This argument ignores that provision of the statute that "other evidence" may be used to prove intent by delivery to the site at the direction of the claimant.

Harvey Knoll, Sr., testified that the materials listed on the lien were delivered to the site at his direction and that his employees carried the materials onto the roof. The filed lien was received in evidence. Harvey Knoll, Jr., testified that he was onsite and that all the listed items were used in the roof repair under his supervision. This evidence is sufficient to prove that Mid-America supplied, delivered, and incorporated in Ford's roof the items set forth in the construction lien.

The only evidence offered on this issue by the appellant is Morris' statement that he did not know which of the items listed on the lien were not delivered or used on the roof. This is not

sufficient to overcome Mid-America's evidence.

The trial court's judgment in favor of Mid-America is correct and is affirmed.

AFFIRMED.

JACK E. CONVERSE, APPELLEE, V. JEREMY P. MORSE, BY HIS FATHER AND NEXT FRIEND, QUENTIN MORSE, APPELLANT.

442 N.W.2d 872

Filed July 21, 1989. No. 87-945.

1. **Trial: Witnesses: Testimony: Evidence.** Where a party without reasonable explanation testifies to facts materially different concerning a vital issue, the change clearly being made to meet the exigencies of pending litigation, such evidence is discredited as a matter of law and should be disregarded.
2. **Trial: Witnesses: Testimony: Evidence: Juries.** Where a party's testimony was not changed to meet the exigencies of the case, in that the change is satisfactorily explained, or the changed version at trial is corroborated by other evidence in the record providing an adequate basis for the jury's findings, a question of credibility for the jury is presented.
3. **Motor Vehicles: Negligence: Right-of-Way.** The driver of a motor vehicle has the duty to keep a proper lookout and watch where he is driving even though he is rightfully on the highway and has the right-of-way. He must keep a lookout ahead or in the direction of travel, and he is bound to take notice of the road, to observe the conditions along the way, and to know what is in front of him for a reasonable distance.
4. **Motor Vehicles: Negligence.** Generally, it is negligence as a matter of law if one operates a motor vehicle on a public street or highway and, on account of the manner of operation, is unable to stop such operator's vehicle or turn that vehicle aside without colliding with an object or obstruction on the street or highway within the operator's range of vision.
5. **Trial: Motor Vehicles: Negligence: Juries.** Where an object on a highway in front of one driving thereon at night is so nearly the color of the road that it may be difficult to distinguish it until quite close, or where the lights of oncoming traffic distract the driver or impair the driver's vision and the opportunity for immediate discernment of the object is thereby affected, the driver's negligence, if any, presents a question for the jury.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Affirmed.

John F. Simmons, of Simmons, Raymond, Olsen, Ediger, Selzer & Ballew, P.C., for appellant.

Harry R. Meister, of Meister & Segrist, and James M. Mathis, of Holtorf, Kovarik, Nuttleman, Ellison, Mathis & Javoronok, for appellee.

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

HASTINGS, C.J.

The plaintiff, Jack E. Converse, brought an action in the district court for Scotts Bluff County against the defendant, Jeremy P. Morse, by his father and next friend, Quentin Morse, to recover for personal injuries he sustained when his automobile hit the defendant's stalled car. The jury found for the plaintiff.

The defendant appeals, assigning as error the district court's failure to direct a verdict in his favor, the court's failure to sustain his motion for new trial, the court's failure to find that plaintiff's testimony was discredited as a matter of law, and the court's finding that the testimony of witnesses other than the plaintiff sufficiently sustained plaintiff's burden of proof.

On the evening of November 23, 1985, the defendant left home in his midnight-blue Pontiac Trans Am to visit a friend. The night was dark. The defendant drove south on the county road until he reached the intersection of the county road and the "Experiment Farm Road." He then proceeded to turn right, heading west on the Experiment Farm Road.

About halfway through his turn, the defendant's car stalled. He looked to the west, saw nothing, and then looked to the east. There is a hill which rises to the east of the intersection, and from that direction, the defendant could see an oncoming car. So that the oncoming westbound car would not collide with his stalled car, the defendant coasted his car into the eastbound lane. He parked his car facing west in the southernmost lane of the road, on a bridge. The road slopes downhill from the bridge to the west.

The oncoming westbound vehicle, owned by Rick and Sandra Schwartzkopf, passed the defendant's car safely. Rick Schwartzkopf testified that he sped up to pass the defendant's

car so that he would not be on the bridge at the same time as a car that he saw approaching from the west. Approximately 3 seconds after he passed the defendant's vehicle, Rick Schwartzkopf passed the oncoming car, which was driven by the plaintiff.

The defendant testified that after the Schwartzkopfs passed him, he turned off his headlights to aid him in restarting his car. However, Rick Schwartzkopf testified that the defendant's lights were not on and that it took him a few seconds after he first saw something on the bridge to realize that it was a car. Sandra Schwartzkopf testified that she did not know it was a car until the defendant tapped his brake lights about 2 seconds before they passed him.

While attempting to restart his car, the defendant noticed the headlights of the plaintiff's car, which was heading east toward him. The defendant continued trying to start his car until the oncoming car was 300 to 400 feet from him, at which point he turned on his headlights and braced himself for a collision. The Schwartzkopfs, who witnessed the accident in the rearview mirror and through the back window of their car, testified that the defendant turned his lights on about 2 seconds before the collision. The plaintiff's car hit the defendant's car head on, injuring the plaintiff.

At trial, the plaintiff testified that as he turned onto Experiment Farm Road, from the east he noticed the glow from the Schwartzkopfs' headlights coming over the hill. The plaintiff testified that as he met the Schwartzkopfs' oncoming car, he was blinded by its headlights. A "second or so" after passing the Schwartzkopfs, "another set of headlights appeared out of nowhere right smack in front of" him, and before he could apply the brakes, he hit the defendant's car. He stated that because he was blinded by the Schwartzkopfs' oncoming car, he was unable to see the defendant's car in time to avoid a collision.

However, at the plaintiff's deposition taken approximately 6 months before trial, he stated that he met the Schwartzkopfs' car as he turned onto Experiment Farm Road at the *bottom* of the hill, not *on* the hill. Also at his deposition, the plaintiff testified that the reason he was not able to see the defendant's

car was that he was coming up an incline.

Because the plaintiff changed his testimony between the deposition and trial as to the location of the Schwartzkopf car when he passed it, thereby introducing for the first time at trial the excuse that he had been blinded by the Schwartzkopfs' headlights, the defendant contends that the plaintiff's testimony should have been discredited as a matter of law.

This court first adopted the rule whereby a party's testimony at trial may be disregarded if the testimony is inconsistent with testimony given at an earlier judicial proceeding in *Ellis v. Omaha Cold Storage Co.*, 122 Neb. 567, 240 N.W. 760 (1932). The court has continued to apply the rule since that time and has delineated the factors that must be present before the rule will be applied.

In *Insurance Co. of North America v. Omaha Paper Stock, Inc.*, 189 Neb. 232, 202 N.W.2d 188 (1972), quoting from *Clark v. Smith*, 181 Neb. 461, 149 N.W.2d 425 (1967), the rule was stated thus: " 'Where a party without reasonable explanation testifies to facts materially different concerning a vital issue, the change clearly being made to meet the exigencies of pending litigation, such evidence is discredited as a matter of law and should be disregarded.' " 189 Neb. at 234-35, 202 N.W.2d at 190.

The rule was also given in *Momsen v. Nebraska Methodist Hospital*, 210 Neb. 45, 313 N.W.2d 208 (1981), wherein the defendant was unable to reconcile his deposition testimony with his testimony at trial. The court noted that there is theoretically no difference between the use of deposition testimony and the use of testimony from prior related litigation, and therefore the rule providing for discrediting of a party's changed testimony applies equally in both situations. The court then set forth the factors mandating that the conflicting testimony be disregarded. "The important considerations are that the testimony pertains to a vital point, that it is clearly apparent the party has made the change to meet the exigencies of the pending case, and that there is no rational or sufficient explanation for the change in testimony." *Id.* at 55, 313 N.W.2d at 213.

For examples of other applications of this rule to plaintiffs, see, *Peterson v. Omaha & C. B. Street R. Co.*, 134 Neb. 322,

278 N.W. 561 (1938) (plaintiff changed her testimony at her second trial after a weakness in her case had been pointed out by this court's appellate opinion); *Gohlinghorst v. Ruess*, 146 Neb. 470, 20 N.W.2d 381 (1945) (plaintiff, to benefit her own case, gave a different version of events at trial from what she had previously testified to at deposition); *Rahfeldt v. Swanson*, 155 Neb. 482, 491, 52 N.W.2d 261, 266 (1952) (workers' compensation claimant gave three different accounts of his injury, prompting this court to state, "Conduct of this kind merits neither toleration nor reward"); and *Kokes v. Shafer*, 215 Neb. 470, 473, 339 N.W.2d 292, 294 (1983) (workers' compensation claimant shifted position "to meet the exigencies of the matter then at issue"). For cases applying the rule to witnesses generally, see, *Sacca v. Marshall*, 180 Neb. 855, 146 N.W.2d 375 (1966); *Kluender v. Mattea*, 214 Neb. 327, 334 N.W.2d 416 (1983); and *State v. Robertson*, 223 Neb. 825, 394 N.W.2d 635 (1986).

Other cases stand for the proposition that the conflicting testimony need not be discredited, but merely presents a question of credibility for the jury to determine. The basis for these decisions is that the factors delineated in *Momsen v. Nebraska Methodist Hospital, supra*, are not applicable. As explained in *Momsen*, quoting *Kirchner v. Gast*, 169 Neb. 404, 100 N.W.2d 65 (1959),

> "Those cases where we have held the statements to be judicial admissions have been where it is patent that the witness deliberately changed his testimony to meet the necessities of the case, and where the change has been unexplained, or is unexplainable on any rational basis. We have then held it to be a matter of law, but otherwise it is a question of credibility for the trier of facts."

210 Neb. at 53, 313 N.W.2d at 212-13.

In *Kipf v. Bitner*, 150 Neb. 155, 33 N.W.2d 518 (1948), the plaintiff testified in his pretrial deposition about the respective locations of the defendant's and his cars prior to their collision. At trial, the plaintiff gave differing testimony as to the locations of the cars when the plaintiff first saw the defendant. The defendant contended that the inconsistency precluded plaintiff from any recovery. However, this court held that those cases in

which the changed testimony was discredited were distinguishable on fact and law; while the plaintiffs in those cases changed their testimony to benefit themselves, the court found that the plaintiff in the case before it had no such motive. As the issues presented were for the jury, whose decision was supported by the evidence, the court affirmed the judgment for the plaintiff.

See, also, *Armer v. Omaha & Council Bluffs St. Ry. Co.*, 153 Neb. 352, 44 N.W.2d 640 (1950), wherein the court held that where the witness' description of the accident was not changed to meet the exigencies of the case, it was for the jury to weigh the impeaching effect of the change. The court also noted that, in any event, the plaintiff's version of the events which she gave at trial was corroborated by the other evidence, providing an adequate basis for the jury's finding.

The court in *Dorn v. Sturges*, 157 Neb. 491, 59 N.W.2d 751 (1953), held that the distinction made in *Kipf v. Bitner, supra*, was appropriate to the facts therein; that is, as the prior statement was not made to meet the exigencies of the present case, its effect was a matter for the jury to assess. "Such statements are . . . not conclusive but may be explained, rebutted, or contradicted, and thereafter are to be given such weight as the trier of the facts deems them entitled." 157 Neb. at 504, 59 N.W.2d at 759.

This proposition was repeated in *Kirchner v. Gast, supra*, wherein the plaintiff's deposition testimony and trial testimony differed as to preaccident speed, the length of skid marks, and the use of brakes. The court held that such testimony presented a question of credibility for the jury.

In *Kluender v. Mattea*, 214 Neb. 327, 334 N.W.2d 416 (1983), the witness explained the difference in his testimony regarding the degree of twist in the cross-shaft after certain tests had been performed on it by stating that he had merely been "eyeballing" the shaft and that he had never accurately measured it. The court held that as the witness had offered a rational or sufficient explanation for the change in his testimony, there was no need for the exclusion of his testimony under the rule announced in *Momsen v. Nebraska Methodist Hospital*, 210 Neb. 45, 313 N.W.2d 208 (1981).

In the present case, in spite of defense counsel's insistence that the plaintiff changed his testimony when he realized his earlier version "just wasn't going to cut it," it is not clearly apparent that the plaintiff's testimony was changed because the necessities of his case demanded it, nor is it true that the plaintiff had no rational explanation for the change.

When asked why he had changed his version of where the Schwartzkopfs' car was when he passed it, the plaintiff's explanation was that after the deposition he realized he could not accurately gauge the location where he had met the Schwartzkopfs' car and that he simply made a mistake when he said the Schwartzkopfs' car was at the bottom of the hill. His explanation for not previously mentioning being blinded by the lights was that no one at the deposition had asked him that question, and it had not occurred to him. Although the defendant contends that the plaintiff changed his story so that it would correspond to the Schwartzkopfs' testimony, the plaintiff notified his counsel of the change the day after his deposition, long before the Schwartzkopfs testified at trial.

Furthermore, the plaintiff's testimony at trial was substantiated by the testimony of other witnesses. Rick Schwartzkopf testified that approximately 3 seconds after he passed the defendant's vehicle, he passed the plaintiff's car. He and his wife testified that the defendant turned his lights on about 2 seconds before the collision. The plaintiff testified that a "second or so" after passing the Schwartzkopfs, the defendant's headlights appeared in front of him, and he instantly hit the defendant's car. Thus, the plaintiff's testimony is corroborated by the testimony of the Schwartzkopfs, and even if the plaintiff's testimony were disregarded, sufficient evidence still exists which would justify a conclusion that the plaintiff passed the Schwartzkopfs' car just a few seconds before hitting the defendant and could very well have been blinded by the Schwartzkopfs' headlights.

The defendant next contends that even if he were negligent as a matter of law, the plaintiff's violation of the "range of vision" rule constituted contributory negligence sufficient to bar his recovery.

In *Mantz v. Continental Western Ins. Co.*, 228 Neb. 447, 422

N.W.2d 797 (1988), this court explained a driver's duty:

> The driver of a motor vehicle has the duty to keep a proper lookout and watch where he is driving even though he is rightfully on the highway and has the right-of-way. He must keep a lookout ahead or in the direction of travel, and he is bound to take notice of the road, to observe the conditions along the way, and to know what is in front of him for a reasonable distance.

Id. at 453, 422 N.W.2d at 802, citing *Prime Inc. v. Younglove Constr. Co.*, 227 Neb. 423, 418 N.W.2d 539 (1988), and *Hilferty v. Mickels*, 171 Neb. 246, 106 N.W.2d 40 (1960). Furthermore, the court specified the duty of a driver driving at night:

> Moreover, a driver ordinarily has a duty to drive an automobile on a public street at night in such a manner that he can stop in time to avoid a collision with an object within the area lighted by his headlights, and the driver is negligent if he fails to do so.

228 Neb. at 453, 422 N.W.2d at 802. But the court qualified this rule, stating, "A motorist is not, however, negligent where the object cannot be observed by the exercise of ordinary care in time to avoid a collision." *Id.*

In *Prime Inc. v. Younglove Constr. Co., supra*, the court stated the range of vision rule:

> Generally, it is negligence as a matter of law if one operates a motor vehicle on a public street or highway and, on account of the manner of operation, is unable to stop such operator's vehicle or turn that vehicle aside without colliding with an object or obstruction on the street or highway within the operator's range of vision.

Id. at 430, 418 N.W.2d at 544. The court then stated an exception to the rule, which we find applicable to the present case:

> An exception to or exoneration from the range of vision rule exists when a motorist, otherwise exercising reasonable care, does not see an object or obstruction sufficiently in advance to avoid colliding with that object or obstruction, which is relatively indiscernible on account of its color similar to the street or highway and thereby is rendered indistinguishable from the surface.

Id.

A case similar to the present one is *Monasmith v. Cosden Oil Co.*, 124 Neb. 327, 246 N.W. 623 (1933). In *Monasmith*, the defendant, having tire trouble, stopped his car on the traveled portion of the highway. Although it was dark out, he did not turn on his lights. The plaintiff, who was traveling in the same lane, discovered the defendant's car too late to avoid hitting it.

The court first determined that the defendant was negligent: "Leaving an unlighted vehicle on [a] highway, on [a] dark night, without any warning, constitutes gross negligence, within the comparative negligence statute." *Id.* at 329, 246 N.W. at 624. The court then undertook to decide whether the plaintiff was guilty of contributory negligence more than slight. The court noted that the defendant's car was "dusty and nearly the color of the graveled road" and that there was no evidence that the plaintiff was speeding or that his brakes or headlights were not in working order. *Id.* at 328, 246 N.W. at 624. The court stated the applicable rule:

> Where an object on a highway in front of one driving thereon at night is so nearly the color of the road that it may be difficult to distinguish it until quite close, it cannot be said, as a matter of law, that such person was guilty of more than slight negligence in his failure to see it in time to stop his car or to prevent running against it.

Id. at 330, 246 N.W. at 624. The court held that under the circumstances of the case, the question of contributory negligence was for the jury.

In *Haight v. Nelson*, 157 Neb. 341, 59 N.W.2d 576 (1953), the plaintiff hit the defendant's car, which, due to mechanical failure, was parked on a traveled portion of the highway. The car's color blended with the color of the road surface, and the car had no lights on. The court set forth the range of vision rule, and then in applying the rule, commented on conditions (which are present in our case) which may enter into the determination of negligence.

> "The existence or presence of . . . blinding headlights, or other similar elements which materially impair or wholly destroy visibility are not to be deemed intervening causes but rather as conditions which impose upon the drivers of

> automobiles the duty to assure the safety of the public by the exercise of a degree of care commensurate with such surrounding circumstances." . . .
>
> . . . .
>
> ". . . [W]e have made exceptions to [the range of vision] rule when the nature of the object or its condition, such as color, dirt, et cetera, in relation to the highway or road, affected its immediate visibility or when, because of the lights of oncoming traffic, the driver's attention is distracted or his vision impaired and his opportunity for immediate discernment thereby affected. . . ."

Id. at 344-46, 59 N.W.2d at 579-80, quoting in part from *Buresh v. George*, 149 Neb. 340, 31 N.W.2d 106 (1948).

In *Bartosh v. Schlautman*, 181 Neb. 130, 147 N.W.2d 492 (1966), the court held that where an exception to the range of vision rule applies, the general range of vision rule does not apply, and the determination of negligence becomes a question for the jury. In *Bartosh*, the court held that the exceptions to the rule involving visibility of the object clearly applied to the facts: the highway and the back of the stalled vehicle were a similar color; there were no lights on the stalled vehicle; and two witnesses who also approached the stalled vehicle from behind stated that they could not make out the vehicle until they were extremely close to it, even though they had their headlights on.

In *McClellen v. Dobberstein*, 189 Neb. 669, 204 N.W.2d 559 (1973), the defendants' driver abandoned his garbage truck in the roadway, heading north, when it ran out of gas. No lights or warnings were on the truck. A patrolman investigating the abandoned truck parked his cruiser on the opposite side of the road, heading south, with its headlights on. The northbound plaintiff testified that he did not realize the car with the headlights on was stationary until he was about four blocks from it; that the lights blinded him, and he looked to the right side of the road to avoid looking at the headlights; and that he never saw the parked truck on the right side of the road. The court held that the issues were properly submitted to the jury because the facts brought the case within exceptions to the range of vision rule—specifically, the exception "where the object . . . is of the same color as the roadway, and for that

reason, or for other sufficient reasons, cannot be observed by the exercise of ordinary care in time to avoid a collision." *Id.* at 674, 204 N.W.2d at 563. The defendants argued that because of the plaintiff's conduct when faced with the situation, the exception did not apply, but the court held that the plaintiff's conduct and credibility presented circumstances from which the jury was entitled to form a judgment as to whether the plaintiff was contributorily negligent.

From the record in the present case, the inference can be drawn that at least from the time the plaintiff turned onto the Experiment Farm Road until a second or two before the accident, the defendant's headlights were not on, nor were there any emergency flashers or other means of warning other motorists. The only other witnesses present that evening, the Schwartzkopfs, both testified that they had difficulty seeing the defendant's vehicle. Rick Schwartzkopf testified that it took approximately 3 seconds after he came over the hill (with his halogen headlights on the bright setting) to ascertain that there was a car on the bridge, and his wife testified that it was not until the defendant tapped his brake lights, about 2 seconds before the Schwartzkopfs passed him, that she realized there was a vehicle on the bridge. Rick Schwartzkopf testified that he had trouble seeing the defendant's "black or real dark blue" car because "[i]t was a dark night and dark highway and it was just hard to see." He stated that the color of the defendant's car and the color of the road on which it was parked were "similar, they were both dark." Sandra Schwartzkopf testified that the car, roadway, and sky all appeared black to her. She also stated that "[t]he darkness blended together so if it would've been a white car it would have been much easier to see."

The evidence in the record regarding the difficulty of seeing the defendant's car against the dark road and sky, as well as the evidence that the plaintiff was blinded by the Schwartzkopfs' headlights, was sufficient to bring the case within an exception to the range of vision rule. The defendant's argument that the plaintiff's violation of the range of vision rule barred his recovery as a matter of law is without merit.

It is well settled in this jurisdiction that with regard to the overruling of a motion for directed verdict made at the close of

all the evidence, our review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can only draw but one conclusion from the evidence, where an issue should be decided as a matter of law. *Commerce Sav. Scottsbluff v. F.H. Schafer Elev.*, 231 Neb. 288, 436 N.W.2d 151 (1989).

A motion for new trial is addressed to the discretion of the trial court. In the absence of an abuse of discretion, a trial court's disposition of a motion for new trial will be upheld on appeal. *DeCamp v. Lewis*, 231 Neb. 191, 435 N.W.2d 883 (1989).

The court did not err in failing to direct a verdict in the defendant's favor or in failing to sustain his motion for new trial. The record presented a question of fact for the jury. The judgment is affirmed.

AFFIRMED.

IN RE ESTATE OF JOSEPH F. MASOPUST, DECEASED.
CLARENCE W. RITZ, APPELLANT, V. DARYL LONG, PERSONAL REPRESENTATIVE OF THE ESTATE OF JOSEPH F. MASOPUST, DECEASED, APPELLEE.

443 N.W.2d 274

Filed July 21, 1989. No. 87-1017.

1. **Decedents' Estates: Claims.** The purpose of the nonclaim statute, Neb. Rev. Stat. § 30-2485 (Reissue 1985), is facilitation and expedition of proceedings for distribution of a decedent's estate, including an early appraisal of the respective rights of interested persons and prompt settlement of demands against the estate.
2. **Decedents' Estates: Claims: Time.** The requirements of Neb. Rev. Stat. § 30-2485 (Reissue 1985) are mandatory, and where a claim is not filed within the time provided in the statute it is barred.
3. **Decedents' Estates: Claims: Time: Good Cause.** The only way a creditor can give the county court authority to make an order extending the time in which to file his claim against a decedent's estate is to make such application within the time provided in the statute after the expiration of the time previously allowed for filing claims and then only by showing good cause for doing so.
4. **Decedents' Estates: Executors and Administrators: Claims: Waiver.** A personal

representative cannot waive the defense of nonclaim to the prejudice of his estate, either by agreement with the claimant or by neglecting to plead such defense.

5. **Decedents' Estates: Claims: Limitations of Actions.** The statute of nonclaim as a bar to claims against an estate is more rigorously applied than the general statute of limitations.
6. **Decedents' Estates: Claims: Notice: Time.** There is no distinction as to creditors against an estate based on whether they had personal notice or actual knowledge of the time allowed for the filing of claims.

Appeal from the District Court for Nemaha County: ROBERT T. FINN, Judge. Affirmed.

William C. Nelson and Albert G. Fuller, of Fuller, Chatelain & Nelson, for appellant.

Allen Fankhauser, of Kotouc, Fankhauser & Maschman, for appellee.

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

PER CURIAM.

The claimant, Clarence W. Ritz, has appealed from the order of the district court affirming the judgment of the county court disallowing his claim filed in the proceedings to administer the estate of Joseph F. Masopust, deceased.

On May 15, 1984, Robert Short sold 6,818 shares of stock of Peru Agency, Inc., a bank holding company, to Joseph Masopust. On October 15, 1984, Short assigned the $49,764.79 balance due from Masopust on the May 15 contract to the claimant Ritz. Masopust died on November 1, 1984, and proceedings to administer his estate were commenced on November 13, 1984. A notice to creditors was published on December 7, 14, and 21, 1984. A copy of the notice was not sent to Ritz, and he had no actual notice of the death of Masopust until September 1985.

Although Daryl Long, the personal representative of Masopust, had no knowledge of the assignment from Short to Ritz, Long had knowledge of the contract between Masopust and Short. Long was present, on the day of the funeral, when the decedent's brother Charles paid Short the $2,400 due November 1, 1984. On February 6, 1985, Long wrote a check

on estate funds to Short for $2,114.75 for the payment due February 1, 1985.

The last day for filing claims in the Masopust estate proceedings was February 7, 1985. On April 1, 1986, Ritz wrote to Long, informing him that he claimed $49,764.79 as the balance due from Masopust under the May 15, 1984, contract between Masopust and Short. On April 8, 1986, Long sent Ritz a notice of disallowance of his claim. On May 14, 1986, Ritz filed a petition for allowance of claim in the Masopust estate proceedings. The personal representative filed an answer on June 23, 1986. Both parties then filed motions for summary judgment.

The matter was heard in the county court on the pleadings, depositions, and a stipulation of facts on January 22, 1987. On May 19, 1987, the court found that the claim was barred under Neb. Rev. Stat. § 30-2485 (Reissue 1985) and disallowed the claim. Upon appeal to the district court, the judgment was affirmed. The claimant has now appealed to this court.

The claimant contends that the trial court erred in finding that the claim was barred, because Ritz, a known creditor, had not been given notice of the order concerning the filing of claims in the Masopust estate proceedings; that a failure to allow the claim would result in a windfall or unjust enrichment to the estate; that the defense of limitations had been waived by partial payments; that the estate was estopped from denying the validity of the claim; and that the claimant should prevail under general equitable provisions. As a matter of law, none of these contentions have merit.

In *In re Estate of Feuerhelm*, 215 Neb. 872, 874-75, 341 N.W.2d 342, 344 (1983), we held:

> The purpose of the nonclaim statute, § 30-2485, is facilitation and expedition of proceedings for distribution of a decedent's estate, including an early appraisal of the respective rights of interested persons and prompt settlement of demands against the estate. As a result of the nonclaim statute, the probate court or the personal representative can readily ascertain the nature and extent of the decedent's debts, determine whether any sale of property is necessary to satisfy a decedent's debts, and

project a probable time at which the decedent's estate will be ready for distribution. See, 2A Neb. Rev. Stat. General Comment at 674 (Reissue 1979); *Simpson v. First Nat. Bank & Trust Co. of Lake Worth*, 318 So. 2d 209 (Fla. App. 1975).

In *J. J. Schaefer Livestock Hauling v. Gretna St. Bank*, 229 Neb. 580, 593-94, 428 N.W.2d 185, 193-94 (1988), we held that the requirements of § 30-2485 are mandatory, and where a claim is not filed within the time provided in the statute it is barred. We said:

> Claims against the estate of a decedent which are based on promissory notes executed by the deceased must be presented within the time provided by Neb. Rev. Stat. § 30-2485(a)(1) (Reissue 1985) and in the manner provided in Neb. Rev. Stat. § 30-2486 (Reissue 1985), if notice to creditors has been published. Section 30-2485(a) provides as follows:
>
> "(a) All claims against a decedent's estate which arose before the death of the decedent, including claims of the state and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, if not barred earlier by other statute of limitations, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented as follows:
>
> "(1) within two months after the date of the first publication of notice to creditors if notice is given in compliance with section 30-2483; *Provided*, claims barred by the nonclaim statute at the decedent's domicile before the first publication for claims in this state are also barred in this state. If any creditor has a claim against a decedent's estate which arose before the death of the decedent and which was not presented within the time allowed by this subdivision, including any creditor who did not receive notice, such creditor may apply to the court within sixty days after the expiration date provided in this subdivision for additional time and the court, upon good cause shown, may allow further time not to exceed thirty days;

"(2) within three years after the decedent's death, if notice to creditors has not been published."

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

These cases are in agreement with the earlier decisions of this court. In *Storm v. Cluck*, 168 Neb. 13, 22, 95 N.W.2d 161, 167 (1959), we held:

"The only way a creditor can give the county court authority to make an order extending the time in which to file his claim is to make such application within 3 months after the expiration of the time previously allowed for filing claims and then only by showing good cause for doing so. § 30-605, R. R. S. 1943."

In that case we said at 20-21, 95 N.W.2d at 166-67:

In this case, claims of creditors, as admitted by plaintiffs, were timely required and noticed to be filed on or before April 12, 1954, and judgment barring claims was rendered May 19, 1954. However, plaintiffs, for want of any diligence, never made any timely application for an extension of time to file their claims and never made any attempt to file them in the estate until September 13, 1957, more than 3 years after April 12, 1954, when they were required to file them, and more than 3 years after May 19, 1954, when the judgment was rendered barring all claims. In other words, plaintiffs, by their own fault or neglect and for want of due diligence, failed to comply with either or all of sections 30-604, 30-605, and 30-609, R.R.S. 1943.

In In re Estate of Yetter, 125 Neb. 763, 252 N.W. 202, this court held that: "A claimant against the estate of a deceased person is not entitled to have time extended beyond that duly fixed by the county court so that he might present his claim, where such claimant has been guilty of inexcusable inattention, neglect, or lack of diligence."

As early as Estate of Fitzgerald v. First Nat. Bank of Chariton, 64 Neb. 260, 89 N.W. 813, this court concluded that what is now section 30-609, R.R.S. 1943, was a statute of nonclaim, and held that: "An administrator can not waive the defense of non-claim to the prejudice of his estate, either by agreement with the claimant or by neglecting to plead such defense."

In In re Estate of Golden, 120 Neb. 226, 231 N.W. 833, we reaffirmed that conclusion and, citing authorities, said: "Claims not filed within the time limited by the county court, after due notice, are forever barred. * * * Time and notice given by the county court were in strict compliance with the statutes. The statute of nonclaim as a bar is more rigorously applied than the general statute of limitations. * * * In Nebraska an administrator cannot waive the defense of nonclaim to the prejudice of the estate * * *. There is, however, a statutory provision that permits the filing of a belated claim within three months from expiration of the general time-limit. 'The court may,' says the statute, 'for good cause shown allow further time not exceeding three months.' * * * The sufficiency of the showing by claimants is the controlling question. The jurisdiction of the county judge to permit the filing of a belated claim depends upon good cause shown. In absence of such a showing he has no discretion to grant such permission." In conformity therewith, this court specifically held: "Claims against the estates of deceased persons are forever barred, unless presented within the time allowed by the county court for the filing of claims, or unless permission to file belated claims is granted pursuant to statute for good cause shown.

"The statute of nonclaim is generally more rigorously applied than the general statute of limitations.

"The jurisdiction of the county court to permit the filing of a belated claim against the estate of a deceased person depends upon good cause shown, and in the absence thereof there is no judicial discretion for the granting of such permission."

In *Supp v. Allard*, 162 Neb. 563, 566, 76 N.W.2d 459, 461

(1956), we said:

> Neither the statute nor our holdings thereunder make any distinction as to creditors based on whether or not they are residents or nonresidents of the state, or upon the fact of whether or not they had personal notice or actual knowledge of the time allowed for the filing of claims. We think none was intended.

The judgment of the district court is affirmed.

AFFIRMED.

HASTINGS, C.J., participating on briefs.

STATE FARM FIRE & CASUALTY COMPANY, A CORPORATION, APPELLEE, V. GREGORY E. VICTOR, APPELLEE, RAY E. SMITH, PERSONAL REPRESENTATIVE OF THE ESTATE OF DARRYL SMITH, DECEASED, APPELLANT.

442 N.W.2d 880

Filed July 21, 1989. No. 87-1117.

1. **Summary Judgment: Appeal and Error.** Summary judgment is an extreme remedy and should be awarded only when an issue is clear beyond all doubt. A summary judgment is properly granted when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue concerning any material fact or the ultimate inferences deducible from such fact or facts and that the moving party is entitled to judgment as a matter of law. In reviewing an order granting a summary judgment, this court must take the view of the evidence most favorable to the party against whom it operates and give that party the benefit of all favorable inferences which may be drawn from the evidence.
2. **Insurance: Negligence: Intent.** An injury is expected or intended from the standpoint of the insured if a reason for an insured's act is to inflict bodily injury or if the character of the act is such that an intention to inflict an injury can be inferred as a matter of law.

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

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

James L. Quinlan, of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellee State Farm.

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

FAHRNBRUCH, J.

This appeal challenges a summary judgment ruling that a homeowner's policy issued by State Farm Fire & Casualty Company (State Farm) excludes payment of damages arising from the shooting death of Darryl Smith by the policy's insured.

Smith was shot in the head with a .357 Magnum pistol fired by State Farm's insured, Gregory E. Victor. At the time he was shot, Smith was standing in the doorway of his father's home.

We affirm the trial court's judgment because under State Farm's homeowner's policy, coverage is excluded where, as here, an injury is expected or intended by the insured.

State Farm brought this declaratory action in the Sarpy County District Court to determine if it was liable under its policy. Ray E. Smith, Darryl's father and personal representative of his estate, was designated as a defendant along with Victor.

Summary judgment is an extreme remedy and should be awarded only when an issue is clear beyond all doubt. A summary judgment is properly granted when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue concerning any material fact or the ultimate inferences deducible from such fact or facts and that the moving party is entitled to judgment as a matter of law. In reviewing an order granting a summary judgment, this court must take the view of the evidence most favorable to the party against whom it operates and give that party the benefit of all favorable inferences which may be drawn from the evidence. *Meylan v. Mutual Benefit Life Ins. Co., ante* p. 565, 441 N.W.2d 598 (1989); *Carnes v. Schram, ante* p. 282, 440 N.W.2d 451 (1989).

On February 15, 1986, Victor hosted a birthday party for his neighbor. As the party broke up, around 2 or 2:30 a.m., several female guests complained that money had been taken from

their purses. A number of the remaining guests believed that Darryl Smith had taken the money.

Several men, including Victor, decided to visit the Smith home to ask Darryl Smith about the missing money. Victor took with him a .357 Magnum pistol and a .22-caliber pistol. Both guns were loaded.

Victor went to the front door of the Smith home, taking the .22 pistol with him. Ray Smith answered the door, carrying a loaded shotgun. Victor grabbed the shotgun and, in the ensuing struggle, the elder Smith managed to discharge the shotgun once into the air before abandoning the gun and retreating into his home. Victor threw the shotgun into the yard, walked down the driveway, and fired his .22 until it was empty into a car he believed was Darryl Smith's.

Before Victor reached his own car, he heard a shot, turned back to the house, and saw a person silhouetted in the doorway. Victor, walking rapidly to his car, retrieved his .357 Magnum pistol and shot toward the doorway of the Smith home. This shot struck Darryl Smith in the head. The victim died.

On July 24, 1986, Victor was convicted by a jury of manslaughter and use of a firearm in the commission of a felony. No appeal was taken from those convictions.

On September 18, 1986, Ray Smith, as personal representative of the estate of Darryl Smith, filed a wrongful death action against Victor. The petition alleged Darryl Smith's death was caused by Victor's negligence and assault and battery. Victor referred the suit to State Farm pursuant to his homeowner's insurance policy. The policy, in effect at the time of the shooting, provides: "SECTION II - EXCLUSIONS 1. Coverage L . . . [does] not apply to: a. bodily injury or property damage which is expected or intended by an insured."

State Farm has provided Victor a defense to the wrongful death action under a reservation of rights agreement in which the insurance company reserved the right to deny coverage.

In the declaratory judgment action, State Farm filed a motion for summary judgment. The trial court found that Victor intentionally fired his gun at Darryl Smith, causing Smith's death. Summary judgment was entered in favor of State Farm.

After the filing of this appeal, Ray Smith, as personal representative, and Victor entered into a stipulation agreeing that judgment in the underlying wrongful death action be entered against Victor in the amount of $75,000 on the negligence allegation. The cause of action alleging assault and battery was dismissed. Smith agreed not to attempt collection of the judgment until after resolution of this appeal.

The only issue for this court's consideration is whether the injury leading to Darryl Smith's death was expected or intended by Victor. This issue requires interpretation of the insurance contract provision excluding from coverage "bodily injury or property damage which is expected or intended by an insured." Nearly identical provisions were interpreted in *State Farm Fire & Cas. Co. v. Muth*, 190 Neb. 248, 207 N.W.2d 364 (1973), and in *Jones v. Norval*, 203 Neb. 549, 279 N.W.2d 388 (1979).

In *Muth*, a young boy fired a BB gun from a moving automobile, striking another young boy in an eye and causing the loss of sight in that eye. Muth testified that he pointed the gun at the boy's feet without taking careful aim and that his intention was to scare somebody. This court held that "an injury is either expected or intended if the insured acted with the specific intent to cause harm to a third party." *Muth, supra* at 252, 207 N.W.2d at 366.

The *Muth* rule was discussed and broadened in *Jones, supra*. In that case, Norval was knocked unconscious and his jaw broken when Jones hit him in the face. Jones admitted that he intended to hit Norval, but said he did not intend to cause serious injury.

This court found that the injury was not covered by Jones' homeowner's insurance policy, which excluded " 'bodily injury or property damage which is either expected or intended from the standpoint of the Insured.' " *Jones, supra* at 551, 279 N.W.2d at 390. *Jones* stands for the proposition that "an injury is 'expected or intended' from the standpoint of the insured if a reason for an insured's act is to inflict bodily injury *or if the character of the act is such that an intention to inflict an injury can be inferred as a matter of law.*" (Emphasis supplied.) *Jones, supra* at 554, 279 N.W.2d at 391.

This court reasoned:

> To hold that under such circumstances the testimony of the insured that he did not intend to injure the plaintiff is sufficient to permit the fact finder to find that no harm to the injured party was intended, simply ignores reality. Any reasonable analysis requires the conclusion that from the very nature of the act harm must have been intended.
>
> Although Norval may not have intended the specific injury which resulted, such specific subjective intent is not required to exclude coverage under the policy. The "intent" which is necessary to exclude coverage is not the intent to act nor the intent to cause the specific injury. Instead it is the intent to cause bodily injury to the person acted upon and it makes no difference if the actual injury is more severe or of a different nature than the injury intended.
>
> Where an 18-year-old man intentionally hits another person in the face with his fist, with force enough to knock the person unconscious, an intent to cause bodily injury can be inferred as a matter of law, and the subjective intent of the actor is immaterial. From the very nature of the act, no reasonable man could doubt that harm to the person struck must have been intended.

Jones, supra at 554-55, 279 N.W.2d at 391-92.

Victor admitted under oath that he shot his pistol at the doorway, knowing there was a person standing in the doorway. He knew that the weapon he used, a .357 Magnum pistol, is a powerful weapon capable of causing serious damage. Victor's testimony reflects that at the time he fired the fatal shot, he believed that the person standing in the doorway was Darryl Smith.

From Victor's actions, it can only be concluded that as a matter of law Victor expected or intended to injure Darryl Smith. Victor's liability to Smith's estate is not covered by Victor's homeowner's insurance policy with State Farm.

There being no genuine issue concerning any material fact, the trial court was correct in applying the law and in entering summary judgment in favor of State Farm.

AFFIRMED.

HASTINGS, C.J., participating on briefs.

IN RE ESTATE OF CLARENCE FRANK MARKUS, DECEASED. EDWARD STENGEL, PERSONAL REPRESENTATIVE OF THE ESTATE OF CLARENCE FRANK MARKUS, DECEASED, APPELLEE, V. MICHAEL MARKUS AND ROSEMARIE MARKUS, APPELLANTS.

442 N.W.2d 883

Filed July 21, 1989. No. 88-064.

1. **Appeal and Error.** As to determinations of fact by the trial court, the standard of review is whether the findings are supported by sufficient evidence, and these findings are not to be disturbed unless clearly wrong.
2. **Judgments: Appeal and Error.** In determining the sufficiency of evidence to sustain the trial court's judgment, the evidence must be considered in the light most favorable to the successful party, every controverted fact must be resolved in that party's favor, and the party must have the benefit of every inference that can be reasonably deduced therefrom.

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

Rollin R. Bailey, of Bailey, Polsky, Cada, Todd & Cope, for appellants.

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

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

WHITE, J.

This case originated in the county court for Buffalo County as an action to recover losses sustained by an estate allegedly caused by a breach of duty by the estate's personal representative. The appellants, Michael and Rosemarie Markus, contend that Edward Stengel, the personal representative of the Clarence Frank Markus estate, breached his fiduciary duty by failing to sell real property in an efficient and expeditious manner, thereby causing depletion of the estate assets in the sum of $262,122. The county court held that Stengel did not breach a duty to the estate, and this decision was affirmed by the district court.

There is a very long history of litigation in this case. On November 8, 1982, Clarence Markus died, leaving a will and an estate suffering the burden of many debts. At his death,

Markus owned over 650 acres of land upon which he operated a farm and raised and sold quarter horses. In 1979, the operations began to experience financial difficulty. In 1979, Markus lost $31,000; in 1980, he lost $137,000; in 1981, $150,000; and in 1982, he lost $105,000 up to the time of his death in November. In addition, Markus died owing various debts amounting to nearly $950,000, requiring nearly $90,000 annually in interest payments.

Stengel, the brother-in-law of the deceased and the appellee in this action, was named in the Markus will as personal representative. On November 15, 1982, the Buffalo County Court admitted the Markus will to informal probate, appointing Stengel as personal representative.

On January 17, 1983, Stengel filed an inventory based on information he received from a certified public accountant, who had handled the business books for Markus. It was during his conversation with the accountant that Stengel became aware of the dire financial condition the estate was in at that time. Stengel later testified he knew after meeting with the accountant and viewing the business records of the estate that there was no way the estate could be operated profitably.

On December 21, 1982, the heirs under the Markus will, Michael and Rosemarie Markus, filed a petition for formal probate and objections to the appointment of Stengel as personal representative.

Following proceedings in the county court on January 21, 1983, Stengel was formally appointed personal representative. The heirs appealed this appointment to the district court for Buffalo County. On February 16, the county court held a hearing on the motion of the heirs for the setting of bond for their perfection of an appeal to the district court. Bond was set and, on the same date, the county court appointed Stengel as special administrator.

On May 12, 1983, the district court affirmed the decision of the county court. The heirs appealed this decision to the Nebraska Supreme Court, but voluntarily moved to dismiss their appeal on October 17, 1983.

From November 9, 1983, through November 12, 1984, Stengel, acting as personal representative, listed and sold the

real property of the estate. The heirs object to the timing of these sales, claiming undue delay and damage by the failure of the personal representative to dispose of the real property either through his powers as personal representative or as special administrator. Stengel contends that he was without power to sell the real property during the pendency of the numerous appeals and that even if he did have the power, he relied on the advice of his attorney, who informed him he was without power to sell the real estate. At trial, Stengel's attorney, Jeff Jacobsen, testified that he did tell Stengel that Stengel was without power to sell the real property, and in fact sent a letter to the attorney for the heirs informing him of this belief.

The county court, on February 11, 1987, approved the final accounting of the personal representative over the appellants' objections. This decision was affirmed by the district court. On January 4, 1988, the appellants filed a motion for a new trial on the order of the district court affirming the final administrative hearing of the personal representative, which was overruled on January 14.

In finding that Stengel administered the estate in an efficient and expeditious manner, the county court and the district court, in affirming that decision, were deciding a question of fact. As to determinations of fact by the trial court, the standard of review is whether the findings are supported by sufficient evidence, and these findings are not to be disturbed unless clearly wrong. *In re Estate of Massie*, 218 Neb. 103, 353 N.W.2d 735 (1984); *In re Estate of Marsh*, 216 Neb. 129, 342 N.W.2d 373 (1984). In determining the sufficiency of evidence to sustain the trial court's judgment, the evidence must be considered in the light most favorable to the successful party, every controverted fact must be resolved in that party's favor, and the party must have the benefit of every inference that can be reasonably deduced therefrom. *In re Estate of Schoch*, 209 Neb. 812, 311 N.W.2d 903 (1981).

The county court found that Stengel was not negligent and had exercised due care in the administration of the estate due to his reasonable reliance upon the advice of his attorney. Stengel's attorney assured him that his power as personal administrator was stayed during the appeals process and that because his

powers as a special administrator were limited, Stengel could not sell the real estate until he was formally appointed as personal administrator.

In the journal entry of February 16, 1983, the county court stated, in part:

> Normally in appeals involving the Nebraska Probate Code such as this, a nominal bond would be sufficient. However, Section 24-541.03 of the Nebraska Statutes provides that the appeal herein will be supersedeas and therefore will prohibit the personal representative from acting herein. The estate will be able to minimally function through the appointment of a special administrator. However, because of the limitations on the powers and duties of a special administrator, the estate will be somewhat delayed in its operations.
>
> The estate has over $750,000 in claims now on file with the Court. It is the belief of this Court that such a delay as expected herein may result in a large amount of additional interest which potentially could adversely effect [sic] the claimants herein.

This language clearly indicates that the county court found that Stengel could no longer act as personal representative for the estate, and, instead, any actions taken on behalf of the estate would have to be undertaken by the special administrator.

On February 16, 1983, the court also appointed Stengel special administrator. The letters appointing him provide:

> NOW, THEREFORE, these Letters are issued as evidence of such appointment and qualification and authority of *Edward Stengel to do and perform all acts which may be required by law, including the execution of any and all transfer papers or other documents necessary to effectuate the sale of livestock, including 60 head of registered quarter horses, to collect sale proceeds and other monies paid to the estate; to pay the costs incurred in the sale; to supervise the operation of deceased's ranch and farm property, including payment of wages, utilities, and insurance; to pay all necessary taxes when due; and to perform any other acts necessary for the proper administration and preservation of the estate.*

(Emphasis supplied.)

The county court found that Stengel's attorney believed that the letter appointing Stengel as special administrator limited Stengel and prevented him from selling the real property contained in the Markus estate. On February 18, 1983, Jacobsen wrote to the attorney representing the appellants and indicated: "With the appeal acting as supersedeas, we of course can do nothing further as far as liquidating things in the estate . . . . I want everybody to understand that if certain property brings a lesser amount at a later date, it is not my doing and I don't expect to bear the consequences." The county court considered the fact that Stengel relied upon the advice of his attorney in deciding not to sell the real estate.

Neb. Rev. Stat. § 30-2476(21) (Reissue 1985) provides that a personal representative may properly "employ persons, including attorneys . . . to advise or assist the personal representative in the performance of his administrative duties; [and] *act without independent investigation upon their recommendations* . . . ." (Emphasis supplied.) The evidence clearly supports the county court's finding that Stengel consulted with his attorney regarding the sale of the real property and that his attorney advised that he could not sell real estate pending the appeal proceedings. There is sufficient evidence in the record to support the finding of the trial court that Stengel's reliance on the advice of his attorney was reasonable in this case, as nothing occurred that would cause a reasonable and prudent person to believe that the advice given by Stengel's attorney was incorrect.

We agree with the finding of the county court that there is no evidence that Stengel exercised bad faith or failed to use due prudence and diligence in the estate administration, and therefore we affirm.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. SYDNEY L. THIESZEN, APPELLANT.

442 N.W.2d 887

Filed July 21, 1989. No. 88-605.

1. **Juvenile Courts: Jurisdiction: Appeal and Error.** The standard of review applicable to an appeal from a denial of a motion to transfer to juvenile court is abuse of discretion.
2. **Juvenile Courts: Jurisdiction: Waiver.** In deciding whether to grant the requested waiver and to transfer the proceedings to juvenile court, the court having jurisdiction over a pending criminal prosecution must carefully consider the juvenile's request in the light of the criteria or factors set forth in Neb. Rev. Stat. § 43-276 (Reissue 1988).
3. **Juvenile Courts: Jurisdiction.** The statutory criteria or factors of § 43-276 (Reissue 1988) disclose a balancing test by which public protection and societal security are weighed against practical and not problematical rehabilitation of the juvenile.
4. **Sentences: Appeal and Error.** A sentence imposed within the statutory limits will not be disturbed on appeal absent an abuse of discretion.

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

Mark M. Sipple, of Luckey, Sipple, Hansen, Emerson & Schumacher, for appellant.

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

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

WHITE, J.

On September 17, 1987, 14-year-old Sydney L. Thieszen shot and killed his 12-year-old sister, Sacha L. Thieszen. Sydney Thieszen was originally charged with first degree murder and use of a firearm in the commission of a felony. On January 7, 1988, Thieszen filed a motion to transfer his case to juvenile court. Following an evidentiary hearing, this motion was denied by the district court for York County on February 2.

On May 3, 1988, pursuant to a plea bargain, an amended information was filed charging Thieszen with second degree murder and use of a firearm in the commission of a felony. Guilty pleas were accepted by the court. On June 7, the

appellant was sentenced to life imprisonment on the second degree murder charge and 80 months to 240 months on the firearm charge, the latter sentence to be served consecutively to the first. It is from these sentences that Thieszen appeals, alleging the district court abused its discretion in failing to transfer his case to juvenile court and in imposing an excessive sentence with respect to the firearm charge.

A brief history of the life of the appellant, Sydney Thieszen, is necessary to illuminate the circumstances under which this distressing crime took place. Sydney was born November 13, 1972, with the name of Michael Anthony Firuccia. He never knew his biological father, who left home when Sydney was 2 years old. Sydney was raised by his natural mother, an alcoholic, who often subjected him to physical abuse when she was intoxicated. This abuse included an attempt to drown him at age 2, an attempt to burn his eyes out with a cigarette lighter, and an attempt to run his hands through a meat grinder.

The parental rights of the natural mother were subsequently terminated by the juvenile division of the York County Court. After spending time in various foster homes, Sydney finally went to the Thieszen home as a foster child in 1979 and was formally adopted by the family in 1983, at the age of 11. At this time, the Thieszens changed his name from Michael Anthony Firuccia to Sydney Lamont Thieszen.

At the time of Sacha's death, only four of the Thieszens' six children were still living at home. Of those four children, only one, Stefani, was a natural child of the Thieszens. The other three children, Sydney, Shea, and Sacha, were all adopted.

The Thieszens are religious and strictly adhere to the Mennonite faith. Their home is very structured, with discipline including physical spankings with a hose or a belt. Until age 12, Sydney exhibited no behavior problems, and in fact was an outgoing, apparently well-adjusted, intelligent child. A good student, he enjoyed participating in science fair projects, working on the farm with his dad, and hunting. At age 12, a drastic change in his behavior occurred. He began to earn poor grades and to seriously misbehave at home and at school. Sydney was caught "spying" on his sisters while they were bathing, shooting one of his mother's chickens, destroying

farm and school property, and viciously kicking a fellow female student for no apparent reason. In view of these activities, the Thieszens began therapy with Sandra Hale Kroeker, a certified social worker, in an attempt to return Sydney to more normal behavior.

Throughout the time Sydney was living in the Thieszen home, a number of other foster children also resided there. In December 1986, it was discovered that Sydney had been sexually molesting a younger foster child who was living with the Thieszens. As a result of this activity, a charge was filed in the juvenile division of the York County Court, and after admitting the offense, Sydney was placed on 2 years' probation. Until the murder of Sacha, Sydney performed well on probation, demonstrating respect both for his probation officer and the legal system in general.

Exactly what happened on September 17, the day Sydney killed Sacha, is unclear. In his statement made to officers who arrested him in Kansas a few days after the crime, Sydney indicates that he had no premeditated plan to kill his sister. When he came home from school on September 17, Sydney contends, he found a note on the kitchen table from his mother to his father, indicating that he had done something wrong and that his father was to "take care of it with the hose." After discovering the note, Sydney decided to run away. He went to his brother's room and took a .22-caliber pistol to take with him on his "escape," and tucked it into the waistband of his pants. He and his sister Sacha were in the kitchen area of the home, when she began to argue with him regarding his intent to run away. He hit Sacha in the head with a dowel. Sacha, bleeding from the head, ran upstairs to the bathroom. Sydney followed her up the stairs and looked in the bathroom at Sacha. She was leaning over the sink, bleeding, and crying. On impulse, he pointed the pistol at the back of her head and shot her once. She fell to the floor. He picked her up, placed her in the bathtub, and shot her twice more. He then took the family van and drove to Salina, Kansas.

When questioned, Sydney could give no reason for the crime. He repeatedly stated he did not know why he did it, but indicated that the reason he shot her while she was in the

bathtub after shooting her in the head was because he did not want her to "suffer" in case the first shot had not killed her.

The Thieszens dispute this account of the events of September 17. They contend that subsequent to the murder, a number of Sydney's classmates told the Thieszens that on numerous occasions Sydney said he was going to kill his whole family. At the hearing regarding the motion to transfer to juvenile court, these classmates testified that although Sydney had threatened to kill his family, they did not take his threats seriously because Sydney was the type of child to say things in order to draw attention to himself. Nonetheless, the Thieszens indicate that they are very frightened of Sydney and what he might do to them if he is released.

A number of psychological experts testified on the motion to transfer to juvenile court. Kroeker, who began counseling Sydney during the seventh grade, testified that Sydney had a conduct disorder and could not be diagnosed as an individual with a personality disorder because his personality was not yet fully formed. Kroeker testified that in an adult penal system, incarceration would tend to reinforce the violent, self-protective stance that Sydney takes in situations in which he feels threatened, and further stated that the risks to society and to Sydney are substantial if he is placed in an adult facility. She suggested that the Lincoln Regional Center would be an appropriate place for Sydney to receive care, but because they would have custody over him for only 4 years if admitted as a juvenile offender, she did not feel that the Lincoln Regional Center was the best place for Sydney, as this is not long enough to deal with the conduct disorder. She felt that it would take 6 to 10 years for successful rehabilitation.

Dr. David Kentsmith is a board-certified psychiatrist who practices in Omaha, Nebraska. He examined Sydney on October 2, 1987, and was called as a witness for the defense. Dr. Kentsmith stated that Sydney appeared to suffer from no apparent mental illness and was subdued and remorseful. He diagnosed Sydney as suffering from a conduct disorder. Further, Dr. Kentsmith testified that he diagnosed the event as an isolated, aggressive, unsocialized act. Dr. Kentsmith found Sydney treatable at this point in his life and stated that he would

do best in a setting where everyone incarcerated is being treated. He testified further that the high risk offender program at the Lincoln Regional Center would provide an appropriate environment for Sydney.

Dr. William Logan also testified on behalf of Sydney. Dr. Logan is a psychiatrist experienced in dealing with juveniles that have been charged with serious criminal offenses. He agreed that Sydney was suffering from a conduct disorder and testified that Sydney was greatly troubled by what had occurred. Dr. Logan further investigated whether the Lincoln Regional Center would accept Sydney. He testified that the Lincoln Regional Center is specifically designed to treat individuals who have a conduct disorder problem. However, Dr. Logan stated that he could not guarantee that after treatment at the Lincoln Regional Center, Sydney would not be violent in the future. He also testified that the hospital phase of the therapy could probably be completed by the time Sydney turned 19, but he would need many years of individual outpatient psychotherapy, which he would have to pursue on his own.

The appellant claims that the district court abused its discretion in refusing to transfer his case to juvenile court. The State argues, first, that this claim was waived by entering a guilty plea following the juvenile court hearing and, second, that the district court was correct in denying the motion to transfer.

Due to our disposition of this cause, whether the appellant waived his challenge to the district court's denial of his motion to transfer by entering a guilty plea is not an issue that needs to be resolved. Instead, we will focus on whether the district court erred in denying the appellant's motion to transfer. The standard of review applicable to an appeal from a denial of a motion to transfer to juvenile court is abuse of discretion. *State v. Ryan*, 226 Neb. 59, 409 N.W.2d 579 (1987). In view of this standard, in order to reverse we must find that the district court abused its discretion in refusing to transfer this case.

In deciding whether to grant the requested waiver and to transfer the proceedings to juvenile court, the court having jurisdiction over a pending criminal prosecution must carefully

consider the juvenile's request in the light of the criteria or factors set forth in Neb. Rev. Stat. § 43-276 (Reissue 1988). *State v. Ryan, supra*; *State v. Alexander*, 215 Neb. 478, 339 N.W.2d 297 (1983).

Section 43-276 requires a consideration of the following criteria:

> (1) The type of treatment such juvenile would most likely be amenable to; (2) whether there is evidence that the alleged offense included violence or was committed in an aggressive and premeditated manner; (3) the motivation for the commission of the offense; (4) the age of the juvenile and the ages and circumstances of any others involved in the offense; (5) the previous history of the juvenile, including whether he or she had been convicted of any previous offenses or adjudicated in juvenile court, and, if so, whether such offenses were crimes against the person or relating to property, and other previous history of antisocial behavior, if any, including any patterns of physical violence; (6) the sophistication and maturity of the juvenile as determined by consideration of his or her home, school activities, emotional attitude and desire to be treated as an adult, pattern of living, and whether he or she has had previous contact with law enforcement agencies and courts and the nature thereof; (7) whether there are facilities particularly available to the juvenile court for treatment and rehabilitation of the juvenile; (8) whether the best interests of the juvenile and the security of the public may require that the juvenile continue in custody or under supervision for a period extending beyond his or her minority and, if so, the available alternatives best suited to this purpose; and (9) such other matters as the county attorney deems relevant to his or her decision.

In *State v. Alexander, supra*, and *State v. Ryan, supra*, we stated:

> "There is no arithmetical computation or formula required in a court's consideration of the statutory criteria or factors. . . . [T]he court need not resolve every factor against the juvenile. Also, there are no weighted factors,

> that is, no prescribed method by which more or less weight is assigned to each factor specified in the statute. [Citations omitted.]
>
> The statutory criteria or factors of [§ 43-276] disclose a balancing test by which public protection and societal security are weighed against practical and not problematical rehabilitation of the juvenile. [Citations omitted.] 'Rehabilitation has traditionally played a key role in the treatment of young offenders. . . . Nevertheless, the concept of deterrence and the need to balance individual justice with the needs of society—a balancing process that is basic and fundamental to the general scheme of the criminal law—also have a place in the juvenile justice system.' "

State v. Ryan, supra at 79-80, 409 N.W.2d at 592, quoting *State in the Interest of C. A. H. & B. A. R.*, 89 N.J. 326, 446 A.2d 93 (1982).

Based on the evidence summarized above, the trial court found that a sound basis existed for the court to retain jurisdiction of the defendant's case. These findings may be summarized as follows:

The trial court found that Sydney Thieszen was a 15-year-old adopted boy charged with first degree murder and with the use of a firearm in the commission of a felony.

The trial court stated that the acts were committed with violence, aggression, and perhaps premeditation, while no motivation for the crimes was shown.

The trial court also found that the defendant has been adjudicated in a juvenile court for a crime of violence against a person and has been involved in a number of incidents of antisocial behavior, including acts of physical violence against persons and property which have not been adjudicated.

As for sophistication, the trial court stated that the defendant is pseudomature, lacks sophistication, and has few social or verbal skills.

The trial court also found that the defendant suffers from a severe conduct disorder and may suffer a severe personality disorder, both of which may require controlled behavioral management therapy for 6 to 10 years or more.

Further, the trial court held that the juvenile court system of this State lacks jurisdiction and facilities for treatment and rehabilitation of this defendant for such an extended period of time.

Finally, the trial court found that the adult court system offers few satisfactory alternatives for the treatment and rehabilitation of the defendant, but the need for extended, controlled behavioral management and the security of the public outweigh the possible failure of such treatment and rehabilitation.

We find that the district court did not abuse its discretion in retaining jurisdiction. Although evidence exists indicating that perhaps the defendant could have been successfully rehabilitated within the time the juvenile court maintained jurisdiction over him, approximately 4 years, the record also supports the trial court's findings that the crime was violent and that the defendant may require treatment beyond the age of majority. Additionally, there was one previous adjudication for sexual molestation, and various other antisocial acts were committed by the defendant. This first assignment of error is therefore meritless.

The defendant next contends that his sentence on the firearm charge, 80 to 240 months to be served consecutively to the life sentence on the murder charge, is excessive and amounts to an abuse of discretion. In reviewing a sentence, a sentence imposed within the statutory limits will not be disturbed on appeal absent an abuse of discretion. *State v. Peters*, 231 Neb. 242, 435 N.W.2d 675 (1989).

Neb. Rev. Stat. § 28-1205(2) (Reissue 1985) makes the use of a firearm in the commission of a felony a Class III felony. A Class III felony, defined in Neb. Rev. Stat. § 28-105 (Reissue 1985), carries a maximum of 20 years' imprisonment, a $25,000 fine, or both, with a minimum of 1 year's imprisonment. Because the sentence given to the appellant is within the statutory limits, this sentence will not be disturbed on appeal absent an abuse of discretion. *State v. Peters, supra.*

Although this is a tragic case in all respects, as not one but two lives are lost, we cannot say that the trial court abused its discretion in imposing the sentence of 80 to 240 months'

imprisonment on the firearm charge. Therefore, this assignment of error is also without merit.

In view of the foregoing analysis, the judgment of the district court is affirmed.

AFFIRMED.

RANDALL E. MCDONALD, APPELLEE, V. LINCOLN U-CART CONCRETE CO. ET AL., APPELLANTS.

442 N.W.2d 892

Filed July 21, 1989. No. 88-924.

1. **Workers' Compensation: Words and Phrases.** A worker who, because of his injury, is unable to perform or obtain any substantial amount of labor, either in his particular line of work, or in any other for which he would be fitted except for the injury, is totally disabled.
2. _____: _____. Total disability means disablement of an employee to earn wages in the same kind of work that he was trained for or accustomed to perform, or work of a similar nature, or any other kind of work which a person of his mentality and attainments could do.
3. **Workers' Compensation: Expert Witnesses.** Under Neb. Rev. Stat. § 48-168 (Reissue 1988), the Nebraska Workers' Compensation Court has broad discretion to admit or exclude expert testimony to ascertain the substantial rights of the parties and to carry out justly the spirit of the Nebraska Workers' Compensation Act.
4. **Workers' Compensation: Appeal and Error.** The findings of fact made by the compensation court after rehearing shall have the same force and effect as a jury verdict in a civil case. A judgment, order, or award of the compensation court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
5. _____: _____. In reviewing workers' compensation cases, the Supreme Court

is not free to weigh the facts anew. The Supreme Court's standard of review accords to the findings of the compensation court the same force and effect as a jury verdict in a civil case, and such findings will not be set aside unless clearly wrong.

6. **Workers' Compensation: Evidence: Appeal and Error.** An order of the compensation court may be reversed or set aside with respect to the evidence only where there is not sufficient evidence in the record to warrant the order or judgment. In testing the sufficiency of the evidence to support the findings, every controverted fact must be resolved in favor of the successful party, and he should have the benefit of every inference that can be drawn therefrom. Such findings on rehearing will not be set aside on appeal unless clearly wrong.
7. **Workers' Compensation.** An employee may be totally disabled for all practical purposes and yet be able to obtain trivial occasional employment under rare conditions at small remuneration. The claimant's status in such respect remains unaffected thereby unless the claimant is able to get, hold, or do any substantial amount of remunerative work either in his previous occupation or any other established field of employment for which he is fitted.
8. **Workers' Compensation: Attorney Fees.** Attorney fees are authorized under Neb. Rev. Stat. § 48-125 (Reissue 1988) where there is no reasonable controversy regarding an employee's claim for workers' compensation.
9. **Workers' Compensation: Appeal and Error.** Whether a reasonable controversy exists is a question of fact, and this court is bound by the findings of the compensation court on rehearing, to the extent such findings have support in the evidence.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

David A. Barron, of Cline, Williams, Wright, Johnson & Oldfather, for appellants.

Hal Bauer, of Bauer, Galter & O'Brien, for appellee.

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

WHITE, J.

The defendants-appellants bring this action from the decision of a three-judge panel of the Nebraska Workers' Compensation Court. The panel, in a 2-to-1 decision, affirmed the decision of the judge at the first hearing, who found the plaintiff-appellee, Randall E. McDonald, permanently totally disabled. We affirm.

In September 1979, the appellee suffered a head injury while in the scope of his employment at his father's business, Lincoln

U-Cart Concrete Co. He was paid temporary total disability benefits from September 1979 through October 1980 and was paid benefits based on a 30-percent permanent partial disability to the body as a whole from October 1980 to February 1984. The original award was modified, and, in February 1984, the appellee began receiving benefits for temporary total disability. The court ordered the payment of benefits "for so long as the plaintiff remains temporarily totally disabled as a result of the plaintiff's accident and injury of September 8, 1979." Subsequently, in October 1987, appellant The Hartford Insurance Company unilaterally terminated the appellee's benefits.

Pursuant to an application by the appellee, one judge of the Workers' Compensation Court found the appellee totally disabled and ordered the appellants to pay the appellee $84 per week as total permanent disability benefits. The court also awarded the appellee $750 for attorney fees and a 50-percent waiting time penalty for delinquent payments after October 1987. See Neb. Rev. Stat. § 48-125 (Reissue 1988).

The appellants requested a rehearing before the Workers' Compensation Court, en banc. On June 3, 1988, when the rehearing was held, the appellee was employed with Perkins Restaurant. A two-judge majority affirmed the one-judge decision and awarded an additional $1,000 for attorney fees.

In their appeal to this court, the appellants assign three errors. They contend that the three-judge panel erred by (1) not sustaining the appellants' objection to questions asked of appellee's medical expert that called for responses beyond the scope of the witness' expertise and that required the witness to render opinions based upon incorrect statements of applicable law; (2) holding the appellee is permanently totally disabled; and (3) holding there was no reasonable controversy, and thus awarding to the appellee a penalty and attorney fees at the first hearing and rehearing level.

The appellants' first assignment of error relates to an opinion rendered by the appellee's medical expert, Dr. Eli S. Chesen. During a deposition, Dr. Chesen was given the following definition of total disability by the appellee's attorney: "A worker who, because of his injury, is unable to

perform or obtain any substantial amount of labor, either in his particular line of work, or in any other for which he would be fitted except for the injury, is totally disabled."

Based on that definition, Dr. Chesen stated that it was his opinion that the appellee was totally disabled. The appellants contend that Dr. Chesen's opinion must be disregarded because it is based on an improper legal definition of total disability. Specifically, they claim the definition proffered by the appellee is incorrect because an inquiry into the type of work "for which [the plaintiff] would be fitted except for the injury" is an element not contained in this court's current analysis of total disability.

We begin our analysis by noting that the definition of total disability offered by the appellee is verbatim the definition stated by this court in *Minshall v. Plains Mfg. Co.*, 215 Neb. 881, 341 N.W.2d 906 (1983), and its progenitors. See, also, *Parker v. St. Elizabeth Comm. Health Ctr.*, 226 Neb. 526, 412 N.W.2d 469 (1987). However, according to the appellants, this court's current and different definition of total disability is set forth in *Kleiva v. Paradise Landscapes*, 230 Neb. 234, 430 N.W.2d 550 (1988). In *Kleiva* we said that "[t]otal disability means disablement of an employee to earn wages in the same kind of work, or work of a similar nature, that he was trained for, or accustomed to perform, or any other kind of work which a person of his mentality and attainments could do." (Emphasis omitted.) *Id.* at 235, 430 N.W.2d at 552. The appellants' interpretation of *Kleiva* is not entirely correct. Since *Elliott v. Gooch Feed Mill Company*, 147 Neb. 309, 23 N.W.2d 262 (1946), this court has employed both definitions in defining total disability. See, e.g., *Craig v. American Community Stores Corp.*, 205 Neb. 286, 287 N.W.2d 426 (1980); *Camp v. Blount Bros. Corp.*, 195 Neb. 459, 238 N.W.2d 634 (1976); *Nordahl v. Erickson*, 174 Neb. 204, 116 N.W.2d 275 (1962); *Rapp v. Hale*, 170 Neb. 620, 103 N.W.2d 851 (1960), *overruled on other grounds, Gifford v. Ag Lime, Sand & Gravel Co.*, 187 Neb. 57, 187 N.W.2d 285 (1971); *Tilghman v. Mills*, 169 Neb. 665, 100 N.W.2d 739 (1960); *Crable v. Great Western Sugar Co.*, 166 Neb. 795, 90 N.W.2d 805 (1958); *Haler v. Gering Bean Co.*, 163 Neb. 748, 81 N.W.2d 152 (1957); *Dietz v. State*, 157 Neb. 324,

59 N.W.2d 587 (1953); *Franzen v. Blakley*, 155 Neb. 621, 52 N.W.2d 833 (1952); *Elliott v. Gooch Feed Mill Co.*, 147 Neb. 612, 24 N.W.2d 561 (1946). As *Minshall v. Plains Mfg. Co., supra*, and *Kleiva v. Paradise Landscapes, supra*, demonstrate, this court has on occasion used one or the other definition instead of applying them both to define total disability. That fact notwithstanding, they are both correct and current definitions of total disability as used by this court. Despite the appellants' assertions to the contrary, the two definitions legally mean exactly the same thing.

The appellants also argue that Dr. Chesen's opinion should have been excluded because there was no foundational showing that his expertise extended to employability. Under Neb. Rev. Stat. § 48-168 (Reissue 1988), the Nebraska Workers' Compensation Court has broad discretion to admit or exclude expert testimony to ascertain the substantial rights of the parties and to carry out justly the spirit of the Nebraska Workers' Compensation Act. See, also, *Sanchez v. Derby*, 230 Neb. 782, 433 N.W.2d 523 (1989) (in a civil case the admission or exclusion of expert testimony is largely within the broad discretion of the trial court). Our examination of the record does not indicate any abuse of discretion on the part of the court. Accordingly, Dr. Chesen's opinion, based on a correct definition of total disability, was properly admitted into evidence. The appellants' first assignment of error is without merit.

The appellants next assignment of error is that the three-judge panel erred in holding that the appellee was permanently totally disabled. Our scope of review is controlled by Neb. Rev. Stat. § 48-185 (Reissue 1988), which provides in part:

> The findings of fact made by the compensation court after rehearing shall have the same force and effect as a jury verdict in a civil case. A judgment, order, or award of the compensation court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers, (2) the judgment, order, or award was procured by fraud, (3) there is not sufficient competent evidence in the record to

warrant the making of the order, judgment, or award, or (4) the findings of fact by the compensation court do not support the order or award.

See *Elliott v. Midlands Animal Products*, 229 Neb. 823, 428 N.W.2d 920 (1988).

In reviewing workers' compensation cases, the Supreme Court is not free to weigh the facts anew. The Supreme Court's standard of review accords to the findings of the compensation court the same force and effect as a jury verdict in a civil case, and such findings will not be set aside unless clearly wrong.

An order of the compensation court may be reversed or set aside with respect to the evidence only where there is not sufficient evidence in the record to warrant the order or judgment. In testing the sufficiency of the evidence to support the findings, every controverted fact must be resolved in favor of the successful party, and he should have the benefit of every inference that can be drawn therefrom. Such findings on rehearing will not be set aside on appeal unless clearly wrong. *Kingslan v. Jensen Tire Co.*, 227 Neb. 294, 417 N.W.2d 164 (1987).

The record shows that McDonald was 18 years old at the time of the accident. He completed his senior year of high school, but lacked enough credits to graduate, though he was registered to go back to school to earn those credits. Prior to the accident, McDonald was a normal teenage boy who got along well with everyone, liked to roller skate, and was a member of the Boy Scouts. He worked for his father in several family businesses. In one of the businesses, Adco Signs Inc., McDonald performed electrical wiring; drove trucks; did metalwork; assembled, painted, and installed signs; and ran a crane. At Lincoln U-Cart Concrete, another family business, he mixed concrete, took orders, sold cement, collected money, drove trucks, and periodically ran the business.

In September 1979, in an attempt to secure help to repair a cement mixer, McDonald, while riding on his motorcycle, was injured in a collision with an automobile. He suffered a severe head injury, which manifested in a complete change in his personality. According to McDonald's father, his son "doesn't act normal." McDonald makes improper remarks, makes

funny faces, and "doesn't make sense some times." He tires easily, is not as alert as he once was, talks to himself, and is emotionally unstable. His IQ is 79, which is in the range between normality and mental retardation. McDonald also suffers from problems in his level of intellectual functioning. He has difficulty in processing the answers to simple questions; in expressing himself in a clear, concise fashion; and with his memory. In addition, McDonald suffers from seizures and epilepsy. In 1984, McDonald underwent a craniotomy to remove damaged and scarred portions of his brain. After the surgery, the seizures stopped for a period of time, only to resume again. Currently, McDonald is taking Dilantin and phenobarbital, anticonvulsant medications, to control his epilepsy. Dr. Chesen examined McDonald prior to the surgery in February 1984, and in December 1987. During Dr. Chesen's deposition he was asked what he observed during the later examination:

> A. . . . I observed a person who demonstrated similar problems to that seen on the first examination, although there was a *very slight improvement* in his condition in 1987 as compared to 1984.
>
> Q. Was there much change in his condition, did you say?
>
> A. There was a slight change.
>
> Q. And will you describe what that was?
>
> A. Yes. I felt that in comparing the examinations, which were done three years apart, that his mentation or thinking ability was slightly better. He was thinking a little more quickly, able to put sentences together with slightly greater facility. It didn't seem to be quite as much of a pause between my having asked him a question and his having attempted to answer those questions.

(Emphasis supplied.)

McDonald's work history is sporadic at best. After the injury, he did not work for more than a year. McDonald's father attempted to bring his son back into one of the family businesses. He worked for a short period at his father's liquor store, but did not perform well, since he could not get along with fellow employees, got into "problems with customers,"

and was "confused on selling." McDonald's father then placed him in the sign and concrete businesses. McDonald could not cope with the tasks incident to those jobs. He was unable to drive a truck because of his seizures. He experienced seizures on the job; he never finished any jobs assigned to him; he lacked the stamina to work; and the work he did do was of poor quality. McDonald was terminated after 1 month.

Sometime after being terminated, but before his surgery in 1984, McDonald worked for 9 months as a fry cook for the University of Nebraska. The circumstances of how he left the job at the university are not in the record. Further, the record is unclear regarding McDonald's employment status after this period until 1988, when he began working for Perkins Restaurant. Apparently, McDonald remained unemployed during this period, though he did participate in a rehabilitation program.

Just prior to the surgery in 1984, the rehabilitation services division of the Nebraska Department of Education began working with McDonald. From March to August of 1987, he participated in the food services training program operated in the State Capitol cafeteria. He was trained in cashiering and beverage and counter work. Sue Amiottee, an adjustment counselor with the rehabilitation services division, was McDonald's counselor. She testified that McDonald is a slow learner, slow at doing tasks, and has problems with his short-term memory. During the training program, when McDonald was switched from one job to another, he displayed regression and lack of emotional tolerance. McDonald also demonstrated forgetfulness and suffered from lapses in concentration. In addition, he did not handle stress very well. He swore under his breath and made other comments, exhibited inappropriate behavior when working with the public, and made faces. McDonald became very defensive and emotionally upset whenever he thought his abilities were being questioned. Finally, Amiottee testified that McDonald has a low emotional tolerance to noise. On at least one occasion, McDonald was observed shaking his fist, threatening to walk out of the job, and making threats under his breath about what he was going to do to other people. Though he successfully graduated from the

training program, Amiottee felt that he needed direct placement so that he could receive special assistance in finding a job and receive further training. It was her opinion that McDonald should work as a cashier at a place where he would not be required to work very fast. Progress reports showed that McDonald did improve his skills and, to a degree, alleviated some of his behavioral problems. Yet despite these improvements, Amiottee thought McDonald needed a job where the employer could provide close supervision. According to her, one reason McDonald was working at Perkins Restaurant was because the employer was willing to provide the extra supervision McDonald needs.

The appellants countered with their own expert, a rehabilitation counselor, who rendered the opinion that McDonald could obtain and hold significant, gainful employment. However, on cross-examination, the appellants' expert did admit that at one time she wrote a letter to an attorney representing the appellants stating that the appellee should not deal directly with the public. Finally, when questioned directly by the three-judge panel, this expert admitted that her opinion was based on McDonald's ability to care for himself in an independent living situation and that it is uncertain whether he can care for himself.

The record shows that when McDonald graduated from the training program the appellant The Hartford Insurance Company terminated his benefits on the basis that he was now able to resume working in the food services area, though McDonald did not have a job at that time. The appellee remained unemployed until some time prior to June 1988, when rehabilitation services managed to obtain a job for him at Perkins Restaurant. Rehabilitation services assisted in filling out McDonald's job application and provided special on-the-job training for 2 weeks, consisting of extra supervision. At best, the job at Perkins Restaurant can only be described as part-time work. The appellee works only 16 to 18 hours a week busing tables, scraping gum from underneath tables, and cleaning bathrooms.

It is abundantly clear that the accident has significantly reduced the appellee's intelligence and capacity. As previously

noted, there was expert opinion evidence that the appellee was totally disabled. Dr. Chesen also testified that the disability was a direct result of appellee's traumatic encephalopathy, which is an abnormality of the brain as a result of physical trauma, and that McDonald's condition is permanent because brain tissue does not regenerate. Based on the foregoing, there is sufficient evidence to demonstrate that McDonald is permanently totally disabled. The record also illustrates the appellee's need for a special environment to work in. It is evident that by any objective standard the appellee can only work at the sufferance of an employer willing to provide the extra supervision and who would tolerate his aberrational behavior. We also find persuasive the comment by the rehearing panel in its opinion that "[w]hile it may not come through in the printed word the Court, upon observation of the plaintiff, can fairly describe the plaintiff's handicap as obvious and profound." As this court said in *Craig v. American Community Stores Corp.*, 205 Neb. 286, 287 N.W.2d 426 (1980),

> " '[A]n employee may be totally disabled for all practical purposes and yet be able to obtain *trivial* occasional employment under rare conditions at small remuneration. The claimant's status in such respect remains unaffected thereby unless the claimant is able to get, hold, or do any substantial amount of remunerative work either in his previous occupation or any other established field of employment for which he is fitted.' "

(Emphasis supplied.) *Id.* at 291, 287 N.W.2d at 429. While noting that not all part-time work such as the appellee's is trivial, under the circumstances of this case, we fail to see how appellee's work can be considered anything but trivial. Accordingly, we hold that there are sufficient facts to support the rehearing panel's determination that the appellee was permanently totally disabled.

The last error relates to the appellants' contention that the rehearing panel erred by holding there was no reasonable controversy, and thus awarding to the appellee a penalty and attorney fees at the first hearing and at the rehearing level. Attorney fees are authorized under Neb. Rev. Stat. § 48-125 (Reissue 1988) where there is no reasonable controversy

regarding an employee's claim for workers' compensation. *Rodriquez v. Prime Meat Processors*, 228 Neb. 55, 421 N.W.2d 32 (1988). "Whether a reasonable controversy exists is a question of fact, and this court is bound by the findings of the compensation court on rehearing, to the extent such findings have support in the evidence." *Rodriquez v. Prime Meat Processors, supra* at 67, 421 N.W.2d at 40. The evidence clearly supports the award and penalty imposed by the panel. Without belaboring the point, it is fairly obvious that the appellee is permanently totally disabled and that he has been since at least the 1984 surgery. Other than giving temporary relief from his recurrent seizures, the surgery failed to improve the appellee's condition. Under these facts, the appellants were totally unjustified in unilaterally terminating the appellee's benefits.

Accordingly, the decision of the three-judge panel of the Nebraska Workers' Compensation Court is affirmed. Appellee's counsel is awarded a fee of $1,500 for services in this court.

AFFIRMED.

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