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IN RE INTEREST OF R.T. AND R.T., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. V.T., APPELLANT.

446 N.W.2d 12

Filed September 22, 1989. No. 88-837.

1. **Parental Rights: Evidence: Appeal and Error.** In an appeal from a judgment terminating parental rights, the Supreme Court tries factual questions de novo on the record, which requires the Supreme Court to reach a conclusion independent of the 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.
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, in whole or in part, with a material provision of the rehabilitation plan, and termination of parental rights is in the best interests of the children.
3. **Parental Rights.** A child cannot, and should not, be suspended in foster care, nor be made to await uncertain parental maturity.

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

John J. Bedel, of Byrne, Rothery, Lewis, Bedel, Tubach & Zielinski, 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.

GRANT, J.

V.T., the mother of R.T., born July 12, 1984, and R.T., born January 6, 1986, appeals from an order of the separate juvenile court of Douglas County, Nebraska, which terminated V.T.'s parental rights to the two children. The case was initiated by a petition filed November 4, 1986, with the juvenile court. The petition alleged the two minors were children within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988), in that the children were under 18 years old and lacked proper parental care by reason of the fault or habits of V.T., their mother. At the time of the filing of this petition, the children were in the custody of the Nebraska Department of Social

Services (DSS), where they had been placed on October 18, 1986, by the children's great-grandmother, who was unable to care for the children and was unable to locate V.T.

On December 11, 1986, a hearing was held before the juvenile court. V.T. was present with her court-appointed attorney and admitted the allegations of the petition that the children were within the meaning of § 43-247(3)(a). The court set a disposition hearing for January 16, 1987, and ordered the children to be left temporarily with DSS.

On January 16, a disposition hearing was held. V.T. was present at the hearing with her attorney. Statements to the court indicated that V.T. was in the Douglas County Correctional Center. The court ordered that the children remain in the temporary custody of DSS and ordered V.T. to comply with the court's order requiring her to obtain legal employment and establish suitable housing, to undergo psychological and chemical dependency evaluations and to follow the recommendations resulting from the evaluations, to participate in parenting classes, to maintain consistent visitation with the children as arranged by DSS, and to cooperate with all professionals in the case.

On July 16, 1987, a review hearing was held in the juvenile court. V.T. and her attorney were present. Evidence adduced at this hearing showed that V.T. had been released on January 26, 1987, from her incarceration at the time of the disposition hearing, but had not contacted DSS or any professionals involved in her case until February 10, 1987. DSS arranged visitations for V.T. with her children during the time between February 19 and March 12, 1987. On March 20, 1987, V.T. was sentenced to incarceration at the Douglas County Correctional Center for 6 months for shoplifting.

At the time of the July 16 hearing, V.T. was 18 years old and pregnant by a man who was not the father of either of the children involved in this case. V.T. sought visitation at the correctional center with her children, but those visitations were denied by the court because of the ages of the children and the location of the requested visitations. Also, the juvenile court ordered another review 6 months later and ordered V.T. to comply with the same general requirements of the January 16,

1987, order, with the additional order that she "refrain from all illegal activities."

A review hearing was held on January 15, 1988. V.T. and her attorney were present. Evidence at this hearing showed that V.T. had been released from incarceration on August 22, 1987, and had complied, in some respects, with the court's order of July 16, 1987, but not fully. V.T. was again ordered to comply with similar requirements, and another review hearing was scheduled 3 months later.

On April 15, 1988, another review hearing was held. V.T. and her attorney were present. Evidence showed that V.T. was again incarcerated, pursuant to a 1-year sentence for shoplifting imposed after the January 1988 hearing. Testimony showed that V.T. had not fully complied with the court's order even before her incarceration.

On May 26, 1988, a motion was filed seeking a termination of V.T.'s parental rights as to the two children involved because of V.T.'s refusal to substantially comply with orders of the juvenile court of January 16, 1987, July 16, 1987, and January 15, 1988.

A hearing was held on this motion on August 16, 1988. V.T. and her attorney were present. Evidence adduced from the clinical psychologist who examined V.T. in June 1987 showed that V.T. would not, or could not, cooperate with necessary treatment to improve her "personality functioning." Much of the problem was based on V.T.'s repeated incarceration, but the fact remained that for whatever reason, V.T. did not cooperate with her psychologist in treatment essential to V.T.'s ability to function in society.

Other testimony showed that V.T. was ordered to participate in individual counseling to deal with her "compulsive shoplifting." She saw a family therapist in that regard three times beginning November 10, 1987, did not attend any such sessions after November 24, 1987, and gave no reason for not continuing the counseling.

Other testimony showed that V.T.'s visitation with her children was sporadic during the times V.T. was not incarcerated. V.T. testified primarily to the effect that she could not visit her children while she was incarcerated because DSS

would not bring the children to the correctional center or to the women's detention center at York, Nebraska. Other testimony showed the inappropriateness of such visitations and the practical difficulties in arranging the visitations.

At the conclusion of the testimony, the court ordered V.T.'s parental rights terminated for V.T.'s noncompliance with the court-ordered plans. V.T. timely appealed to this court, assigning four errors, which may be consolidated into three: (1) The State failed to show by clear and convincing evidence that the mother's rights should be terminated for failure to comply with a plan of rehabilitation; (2) the mother was not allowed sufficient opportunity to comply with such a plan; and (3) the court based its decision to terminate the mother's parental rights solely on her incarceration.

> " '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., 232 Neb 80, 89-90, 439 N.W.2d 500, 506 (1989); *In re Interest of P.M.C.*, 231 Neb. 701, 437 N.W.2d 786 (1989); *In re Interest of P.D.*, 231 Neb. 608, 437 N.W.2d 156 (1989).

With respect to the mother's first assignment of error, the evidence shows that upon the mother's release from the Douglas County Department of Corrections in January 1987, she failed to cooperate with professionals when she waited over 2 weeks before contacting Child Protective Services. Although she occasionally visited her children when she was not incarcerated, she failed to maintain consistent visitation with them as arranged by DSS. She did not follow the recommendations of professionals when she stopped participating in family therapy sessions and when she failed to complete counseling. She also failed to maintain regular employment and housing, although her opportunities to do so were limited as a result of her incarceration. In addition, V.T. did not refrain from illegal

activities. At the time the motion for termination of her parental rights was filed, she was incarcerated for a third offense of shoplifting. 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, in whole or in part, with a material provision of the rehabilitation plan, and termination of parental rights is in the best interests of the children. *In re Interest of E.B.*, 232 Neb. 653, 441 N.W.2d 637 (1989). There was such clear and convincing evidence in this case. V.T.'s first assignment is without merit.

V.T. contends in her second assignment of error that she was not afforded a reasonable opportunity to comply with the plan of rehabilitation. She asserts that she was unable to maintain suitable housing and employment because of her incarceration and was not afforded reasonable time to comply with the plan's requirements after her release. She also asserts that she committed only one crime of shoplifting after she was ordered to refrain from illegal activities.

The evidence shows that at no time immediately before or after the mother's incarceration did she establish adequate employment, although she had ample opportunity to do so. She was convicted of shoplifting twice before the requirement that she refrain from illegal activities was added to the rehabilitation plan. After a court orders a rehabilitation plan, the court is not prohibited from considering prior events when deciding whether to terminate parental rights. See *In re Interest of P.D., supra*. In the present case, the mother's second assignment of error is without merit.

Finally, the mother assigns as error the trial court's finding that termination of parental rights was solely based on her conviction of a crime and incarceration therefor. This contention does not reflect the facts before the court. In this case, while the fact of incarceration was involuntary as far as V.T. was concerned, her illegal activities leading to incarceration were voluntary on V.T.'s part. "[T]he fact of incarceration may be considered along with other factors in determining whether parental rights should be terminated." *In re Interest of M.L.B.*, 221 Neb. 396, 403, 377 N.W.2d 521, 525 (1985). As stated in *In*

re Interest of Reed, 212 Neb. 208, 211, 322 N.W.2d 411, 413 (1982), "Furthermore, we cannot disregard the appellant's conduct which resulted in his incarceration . . . ."

In this case, V.T.'s repeated shoplifting and subsequent incarcerations, when coupled with the other evidence discussed herein, establish that V.T. willfully failed to comply with the reasonable provisions of the rehabilitation plan. Such refusal is grounds for termination of parental rights. Neb. Rev. Stat. § 43-292(6) (Reissue 1988); *In re Interest of E.B., supra*. In addition, it was clearly in the best interests of the children to terminate her parental rights. A child cannot, and should not, be suspended in foster care, nor be made to await uncertain parental maturity. *In re Interest of D.C.*, 229 Neb. 359, 426 N.W.2d 541 (1988). The judgment is affirmed.

AFFIRMED.

HARRY A. SCHLOTFELD, APPELLEE AND CROSS-APPELLANT, V. MEL'S HEATING AND AIR CONDITIONING, APPELLANT AND CROSS-APPELLEE, AND WALDINGER CORPORATION, APPELLEE.

445 N.W.2d 918

Filed September 22, 1989. No. 88-1009.

1. **Workers' Compensation: Appeal and Error.** The findings of fact made by the Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong.
2. **Workers' Compensation: 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.
3. **Workers' Compensation: Attorney Fees.** That portion of Neb. Rev. Stat. § 48-125 (Reissue 1988) which provides for the awarding of attorney fees against an employer who fails to obtain any reduction in the amount of an award on rehearing is applicable if the employer requests the rehearing and the total dollar award after rehearing is not less than the amount of the original award.
4. **Workers' Compensation: Wages.** Under Neb. Rev. Stat. § 48-126 (Reissue 1988), money amounts negotiated between a union and employers based on hours worked by union member employees and to be paid directly to the union to cover such things as health and welfare and pensions are not to be included

within the term "wages," unless the money value of such advantages to the employee has been agreed upon and fixed by the employer and employee at the time of hiring.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Stephen L. Ahl, of Wolfe, Anderson, Hurd, Luers & Ahl, for appellant.

Michael G. Goodman, of Matthews & Cannon, P.C., and Gary M. Bodnar for appellee Schlotfeld.

Walter E. Zink II and Michael A. England, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellee Waldinger Corporation.

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

HASTINGS, C.J.

Mel's Heating and Air Conditioning appeals from the award of the Workers' Compensation Court on rehearing finding that the accident which occurred while appellee Harry A. Schlotfeld was employed by appellant was the sole and proximate cause of Schlotfeld's disability and determining to extend the period that Schlotfeld was temporarily totally disabled. Schlotfeld cross-appeals from the compensation court's award excluding certain fringe benefits from calculation of the average weekly wage upon which his compensation award is based.

On May 27, 1986, Schlotfeld was employed by Mel's as an apprentice sheet metal worker. While helping with the installation of a new ventilation system, Schlotfeld was lifting a fitting for metal ductwork when he felt a sudden, extreme pain in his lower back with pain shooting through the buttocks and down his right thigh. In pain, and unable to straighten up, he left work early and went to see his physician, Dr. James Steier. Dr. Steier admitted Schlotfeld to the hospital for conservative treatment consisting of bed rest, heat application, physical therapy, muscle relaxation medication, and pain medication. Schlotfeld was released to return to work on June 24, 1986, without restriction, with a diagnosis of an acute lumbar strain.

After being discharged from the hospital, Schlotfeld's back was sore, and he suffered constant discomfort with bouts of extreme pain. He was under the impression that his back pain was part of the healing process and that the pain was not enough to warrant going to the physician.

In March 1987, Schlotfeld was working for Olson Bros., Inc., as an apprentice sheet metal worker. On March 19, 1987, he suffered low back pain after lifting a 30-inch elbow—the same type of pain in the same area of his back as he experienced on May 27, 1986, while working for Mel's. On March 20, 1987, Schlotfeld returned to see Dr. Steier because the pain got to the point where he had to have some relief. According to Schlotfeld, he went to see his physician again not because of back strain suffered while working on March 19, 1987, but because of the continuation of pain. Dr. Steier ordered Schlotfeld to take 2 days off from work and then released him to return to work without restriction.

There was evidence that Schlotfeld filled out a workers' compensation report of injury involving the incident on March 19, 1987, when he was moving the 30-inch elbow. However, Schlotfeld denies that he had an accident on March 19, 1987, while working at Olson Bros.

In May 1987, Schlotfeld was working for Waldinger Corporation as a sheet metal worker. On May 7, he worked an ordinary day without incident. The following morning, May 8, 1987, he was unable to get out of bed. He again went to see Dr. Steier.

When Schlotfeld's back failed to improve with conservative treatment, Dr. John Greene, a neurological surgeon, was consulted. After an MRI scan showed a minimal diffuse bulging disk at L4-5 and a myelogram revealed a disk herniation at L4-5 and disk bulging without herniation at L5-S1, surgery was recommended and carried out.

On September 22, 1987, Schlotfeld filed a petition in the Workers' Compensation Court, alleging two accidents, one on May 27, 1986, while working for Mel's, and one on May 7, 1987, while he was employed by Waldinger Corporation. After the initial hearing, one judge of the court concluded that all of Schlotfeld's injuries resulted from the first accident while

employed by Mel's, and dismissed the claim against Waldinger. The court awarded Schlotfeld $208 per week for a period of $20^{3}/_{7}$ weeks for temporary total disability, terminating on August 31, 1987, and $52 per week for a period of $279^{4}/_{7}$ weeks for 25 percent permanent partial disability to the body as a whole.

Mel's requested a rehearing. After rehearing, the compensation court found that all of Schlotfeld's injuries resulted from the first accident. Excluding money paid by Mel's to Schlotfeld's union as a result of Schlotfeld's employment, the court reduced Schlotfeld's award for temporary total disability from $208 per week to $118.20 per week. However, the court increased the amount of time Schlotfeld was to be considered temporarily totally disabled to May 23, 1988, and thereafter for as long as Schlotfeld remained temporarily totally disabled. No finding as to permanent disability was made at that time. As a result of the extension of the temporary total disability period, together with an increase in the amount awarded for medical expenses, and even considering the lower weekly award and the elimination of the permanent partial disability award, the total dollar amount of the judgment awarded Schlotfeld on rehearing exceeded the total amount of the judgment on the first hearing. Accordingly, the court on rehearing awarded Schlotfeld attorney fees of $1,500.

According to the record, Schlotfeld was paid wages of $6.14 per hour while working for Mel's. However, in addition thereto, and pursuant to the union contract with Mel's, an additional $2.31 per hour was paid to the union for every hour Schlotfeld worked to cover health and welfare, pension, a local training fund, and the national training fund. This was apparently a standard contract which applied equally to all employees regardless of their base wage. The record does not reveal whether these benefits were available to Schlotfeld when between jobs, or whether he had to make any contributions on his own to continue to be a recipient of any possible benefits from health and welfare and pension.

On appeal, Mel's assigns as error the finding by the compensation court that the accident of May 27, 1986, while Schlotfeld was working for Mel's, was the cause of Schlotfeld's

disability and the finding by the court on rehearing that Schlotfeld's award on rehearing was greater than his initial award so as to entitle him to an attorney fee. Schlotfeld cross-appealed, contending that the court erred in fixing his wages at $6.14 per hour, the amount actually paid him, rather than the correct wage, including the fringe benefits earlier set forth, totaling $8.45.

Dr. Greene, in a letter dated November 5, 1987, stated that based on the history given him by Schlotfeld, the appellee Schlotfeld herniated his disk as a result of the May 1986 injury. He testified to the same effect in a deposition taken on May 12, 1988.

Dr. Steier testified by deposition taken on May 16, 1988, that in his opinion Schlotfeld's injury and disability resulted from his accident of May 27, 1986, while he was working for Mel's. In a later, supplemental deposition taken of Dr. Steier on June 28, 1988, when told about the alleged second accident of March 19, 1987, he stated that if such an accident did in fact happen, it would be a contributing cause of Schlotfeld's present disability. However, on further questioning, he stated again that he believed the accident of May 27, 1986, was the cause of Schlotfeld's problem.

Taking the testimony of the two physicians and Schlotfeld's denial of a 1987 accident, a question of fact was presented to the compensation court, which found in favor of Schlotfeld. There was sufficient competent evidence to support such a conclusion.

The findings of fact made 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. Neb. Rev. Stat. § 48-185 (Reissue 1988); *Alley v. Titterington, ante* p. 71, 443 N.W.2d 615 (1989). 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. *Alley, supra.*

In its second assignment of error, Mel's contends that the compensation court erred in awarding attorney fees, because, in fact, on rehearing that court eliminated the permanent

disability award and reduced the amount of the weekly payments. However, as we have pointed out, with the running award as to temporary total disability and the increased award for medical expenses, the net amount of the judgment was increased.

Neb. Rev. Stat. § 48-125 (Reissue 1988) provides in pertinent part as follows:

> If the employer files an application for a rehearing before the compensation court from an award of a judge of the compensation court and fails to obtain any reduction in the amount of such award, the compensation court shall allow the employee a reasonable attorney's fee to be taxed as costs against the employer for such rehearing . . . .

Ordinarily, the phrase "reduction in the amount of such award" found in § 48-125 refers to the total amount of the award to the employee. See, *Behrens v. American Stores Packing Co.*, 228 Neb. 18, 421 N.W.2d 12 (1988); *Pollard v. Wright's Tree Service, Inc.*, 212 Neb. 187, 322 N.W.2d 397 (1982). This court interprets the portion of § 48-125 at issue in this case to mean the employee will be awarded an attorney fee if the employer requests the rehearing and the total dollar award after rehearing is not less than the amount of the original award.

In *Beavers v. IBP, Inc.*, 222 Neb. 647, 385 N.W.2d 896 (1986), the court held that the compensation court should have awarded the injured employee an attorney fee on rehearing. The court stated:

> As noted earlier, the compensation court on rehearing . . . doubled the amount of permanent partial disability benefits from a 15-percent disability of the body as a whole to a 30-percent loss of earning power, thereby increasing IBP's potential liability for permanent partial disability from $9,798.97 to $19,597.95. Obviously, IBP did not, by its application for rehearing, obtain any reduction in the amount of Beavers' award on original hearing.

Id. at 654, 385 N.W.2d at 900.

The plaintiff in *Mulder v. Minnesota Mining & Mfg. Co.*, 219 Neb. 241, 361 N.W.2d 572 (1985), was originally awarded

compensation for temporary total disability from September 1, 1982, through the date of the hearing, February 17, 1983, and thereafter so long as he remained totally disabled. Upon rehearing, the plaintiff was awarded compensation for temporary total disability from September 1, 1982, through March 1, 1983, and compensation for permanent partial disability for 274 weeks thereafter. The court decided that, under the circumstances of the case, an award for permanent partial disability on rehearing following an initial award only for temporary total disability entitled the plaintiff to an award of an attorney fee for the rehearing before the compensation court.

An award of attorney fees was upheld in *Sidel v. Travelers Ins. Co.*, 205 Neb. 541, 288 N.W.2d 482 (1980). According to the court:

> The contention that the plaintiff was not entitled to an attorney's fee under the provisions of section 48-125, R.R.S. 1943, because on rehearing the injury of July 11, 1978, was found to be noncompensable and medical expense in connection therewith was disallowed, is not meritorious. *The plaintiff did receive a net increase in compensation on rehearing.*

(Emphasis supplied.) *Sidel, supra* at 549, 288 N.W.2d at 486.

It is clear that the compensation court did not act outside the scope of its authority on rehearing when it awarded Schlotfeld compensation for an additional period of temporary total disability and for increased medical expenses. Equally clear is the fact that it is the net increase or decrease in a compensation award after rehearing that determines whether or not the employee is awarded an attorney fee. Mere reduction of one aspect of the compensation award without a corresponding reduction of the total award does not mean the employer obtained a reduction of the award such that the employee is not entitled to an attorney fee.

Schlotfeld's cross-appeal claims the compensation court erred in fixing his wage at $6.14 per hour instead of $8.45 per hour.

At the time of the May 27, 1986, accident, Schlotfeld was a member of the Sheet Metal Workers' International

Association. The union had negotiated, on behalf of its members, a total wage package that was to be paid by employers who hired workers from the union hall. That package consisted of a base wage that was dependent upon whether the worker was an apprentice or a journeyman (in the case of Schlotfeld it was $6.14 per hour), plus the following amounts to be paid by the employer to the union: $1.60 per hour for health and welfare, $.60 per hour for pension benefits, $.05 per hour for a local training fund, and $.06 per hour for the national training fund. The amount paid to the union did not vary depending upon whether the worker was married, whether he or she had any children, or the worker's age.

Schlotfeld's W-2 form showed wages of $6.14 per hour. According to Schlotfeld's testimony, he pays taxes only on the $6.14 per hour, and he never sees the $2.31 in "fringe benefits." The employer gives that money to the union for the various above-mentioned funds.

However, Schlotfeld claims that the $2.31 per hour paid to the union is part of his wage for the purpose of calculating the compensation to which he is entitled.

Neb. Rev. Stat. § 48-126 (Reissue 1988) provides in part:

> Wherever in the Nebraska Workers' Compensation Act the term wages is used, it shall be construed to mean the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident. It shall not include gratuities received from the employer or others, nor shall it include board, lodging, or similar advantages received from the employer, unless the money value of such advantages shall have been fixed by the parties at the time of hiring, except that if the insurance carrier shall have collected a premium based upon the value of such board, lodging, and similar advantages, then the value thereof shall become a part of the basis of determining compensation benefits.

It is Schlotfeld's position that the amount paid to the union was part of the "money rate" at which his work was recompensed.

There is a split of authority on the issue of whether fringe benefits should be included in the wage calculation for the

purpose of workers' compensation. The majority position excludes fringe benefits from the wage calculation. 2 A. Larson, The Law of Workmen's Compensation § 60.12(b) (1989).

The majority position is exemplified by the decision of the U.S. Supreme Court in *Morrison-Knudsen Constr. Co. v. Director, OWCP,* 461 U.S. 624, 103 S. Ct. 2045, 76 L. Ed. 2d 194 (1983), *rev'g, Hilyer v. Morrison-Knudsen Const. Co.,* 670 F.2d 208 (D.C. Cir. 1981). In *Morrison-Knudsen,* the Court held that an employer's contributions to union trust funds for health and welfare, pensions, and training are not "wages" for purposes of computing compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act. Under the act,

> "Wages" means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of injury, including the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer.

33 U.S.C. § 902(13) (1982). According to the Court, the employer's contributions to union trust funds were not " 'money . . . recompensed' or 'gratuities received . . . from others,' " and therefore the narrow question was whether the contributions were a "similar advantage" to board, rent, housing, or lodging. 461 U.S. at 630.

The Court held that the contributions were not a similar advantage. Board, rent, housing, and lodging were found to be benefits with a present cash value that can be readily converted into a cash equivalent on the basis of their market values, while the present value of the trust funds could not be so easily converted into a cash equivalent.

The suggestion that the value of the trust funds be calculated by reference to the employer's cost of maintaining the funds was rejected. According to the Court, the employer's cost was irrelevant, measuring neither the employee's benefit nor his compensation. The employer's cost does not measure the benefit to the employee because the money could not be taken to the open market to purchase private policies offering similar

benefits to the group policies administered by the union's trustees. The employer's cost likewise does not measure the employee's compensation because the collective bargaining agreement did not tie the employer's costs to its employees' labors. Finding that the employee's interest is "at best speculative," the Court also declined to calculate the value of the fringe benefits by reference to the employee's expectation interest in them. 461 U.S. at 631.

In considering the legislative history of the compensation act, the Court noted that fringe benefits were virtually unknown when the act was passed, but subsequently became common. Although the act has been amended several times, the Court could find no indication that Congress intended to expand the definition of wages to include fringe benefits. Significant to the Court was the fact that over the same years Congress amended the compensation act without including fringe benefits, Congress acted to include fringe benefits in other statutory schemes. *Morrison-Knudsen, supra.*

In further support of its decision to exclude fringe benefits from the wage calculation, the Court declared that a comprehensive statute such as the compensation act is not to be judicially expanded because of "recent trends" and that an expanded definition of wages would undermine the goal of providing prompt compensation to injured workers and their survivors. *Id.*

The issue before the court in *Gajan v. Bradlick Co.*, 4 Va. App. 213, 355 S.E.2d 899 (1987), was whether payments made to a third party to secure fringe benefits for an employee constitute allowances to an employee in lieu of wages. The Virginia statute defining wages for the purpose of workers' compensation provides in part that "[w]henever allowances of any character made to an employee in lieu of wages are a specified part of the wage contract, they shall be deemed a part of his earnings." Va. Code Ann. § 65.1-6 (1987).

According to the court:

> Payments to third parties made to secure fringe benefits to an employee are not payments made to an employee in lieu of wages. Fringe benefits or premiums made to secure them differ in character and purpose from direct

> payments made to employees to compensate them, directly or indirectly, for some aspect of work or to reimburse them for work related expenses.

Gajan, supra at 216, 355 S.E.2d at 901. The court held that health and hospitalization premiums paid by the employer for the employee were neither wages or allowances made to the employee nor payments in lieu of wages for purposes of calculating the employee's average weekly wage.

Health insurance, retirement contributions, and vacation time earned pursuant to a union contract were excluded from the compensation calculation in *Linton v. City of Great Falls*, 230 Mont. 122, 749 P.2d 55 (1988). The employee had argued that the benefits should be included because they were negotiated as part of a union contract and earned in exchange for his labor. Adopting the rationale of *Morrison-Knudsen Constr. Co. v. Director, OWCP*, 461 U.S. 624, 103 S. Ct. 2045, 76 L. Ed. 2d 194 (1983), the Montana Supreme Court held that "wages" does not include the employer's contributions to union funds that provide health or life insurance, retirement, training, vacation, pension, or disability payments.

The court in *Nelson v. SAIF*, 302 Or. 463, 731 P.2d 429 (1987), took a different approach. Ignoring the statute defining "wages" for the purpose of workers' compensation, the court instead focused on the statute creating the duty to pay compensation for temporary total disability and prescribing the formula for calculation of the amount to be paid. Under the statute, the injured employee's weekly wage is ascertained by multiplying "the daily wage the worker was receiving" at the time of injury by a figure that depends on how many days per week the employee was regularly employed. According to the court:

> The key question becomes whether claimant was "receiving" the fringe benefits as a part of his daily wage. Certainly, claimant was not receiving the funds in a literal sense. They never came into his physical possession. The money paid for medical and dental insurance was nothing more or less than premiums. The individual members of the class insured, *i.e.*, the employees, had no right *ever to receive* any part of the funds created by payment of those

> premiums. Until an employee might need medical or dental care, he would not even be entitled to any benefit of the insurance created by payment of the premiums, let alone any part of the money. Until an employee became eligible, through retirement or termination, he would have no right to receive any money in the pension fund.

(Emphasis in original.) *Id.* at 469, 731 P.2d at 432. The court held that the employee was not "receiving" the money paid by the employer into the pension fund and for premiums for medical and dental insurance, and thus those amounts were not included in the daily wage the employee was receiving for the purpose of calculating the amount of compensation to which he was entitled.

In *Still v. Industrial Commission*, 27 Ariz. App. 142, 551 P.2d 591 (1976), the court held that fringe benefits were not includable in computation of the employee's average monthly wage at the time of injury. The court focused on the fact that the fringe benefits, paid by the employer directly into the union health and welfare fund and the union pension fund, were not the result of the employee's individual labors but were instead the fruits of collective bargaining efforts. The fact that the employer had no role in determining when, if ever, or to what extent any employee would benefit from the union trust funds was significant to the court. Also important to the court in reaching its decision was the fact that the benefits are not paid to the employee by the employer and thus would not be recoverable in an action at law by the employee against the employer.

Pension plan contributions, health insurance benefits, and life insurance premiums were held to not be includable in the calculation of an employee's average weekly wage in *Rainey v. Mills*, 733 S.W.2d 756 (Ky. App. 1987). Under Kentucky's workers' compensation act, "wages" includes money payments for services rendered and " 'the reasonable value of board, rent, housing, lodging, and fuel or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer to the extent such gratuities are reported for income tax purposes.' " *Id.* at 758. The court found that the fringe benefits were not a "similar

advantage" to an employee as "board, rent, housing, lodging, and fuel." Therefore, given the express language of the statute and the failure of the Legislature to include fringe benefits in any amendments to the workers' compensation act, the court concluded that fringe benefits were not intended to be encompassed by the definition of "wages."

Other state courts have held that fringe benefits are to be included in wage calculations for the purpose of workers' compensation.

In *Ragland v. Morrison-Knudsen Co., Inc.*, 724 P.2d 519 (Alaska 1986), the court held that the value of vested union fringe benefits, including pension, health and welfare, legal fund, and trust benefits, paid by the employer on behalf of the employee is to be included as "wages" for the purpose of computing the employee's average weekly wage. At the time of the injury, under Alaska's workers' compensation act "wages" meant

> "the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury, and includes the reasonable value of board, rent, housing, lodging or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer."

Id. at 520. Rather than analyzing the fringe benefits under the "similar advantage" clause, the court analyzed them as part of "the money rate" at which an employee is paid.

The *Ragland* court found the rationale of *Morrison-Knudsen Constr. Co. v. Director, OWCP*, 461 U.S. 624, 103 S. Ct. 2045, 76 L. Ed. 2d 194 (1983), not applicable. Under the collective bargaining agreement with the union, a total hourly wage rate was negotiated by the union and the employer, and union members voted to determine how the total wage is divided between cash payments and fringe benefits. According to the court, the contribution to fringe benefits was not speculative but, rather, was tied directly to the number of hours worked by the employee. The court found: "There is no principled distinction between cash payments and payments into a fringe benefit plan. Employees may bargain to receive cash only, or may agree to forego some cash in exchange for

fringe benefits. However, their compensable earning power is the same in either case." *Ragland, supra* at 521. Believing that the total hourly wage, no matter how it is apportioned between cash payments and fringe benefits, is "the money rate at which the service rendered is recompensed," the court concluded that the readily identifiable and calculable value of fringe benefits should be included in the wage determination. See, also, *Hite v. Evart Products Co.*, 34 Mich. App. 247, 191 N.W.2d 136 (1971) (employer's contributions for pension fund and group insurance plan should have been included in determining average weekly wage).

Fringe benefits consisting of the weekly premium value of medical, hospitalization, and life insurance policies which were not provided gratuitously to the employee but, rather, were specified as part of the wage contract were held to constitute "allowances of any character" and therefore were includable in the computation of the employee's average weekly wage in *Ex parte Murray,* 490 So. 2d 1238 (Ala. 1986). The statute at issue provided in part that " '[w]hatever allowances of any character made to an employee in lieu of wages are specified as part of the wage contract shall be deemed a part of his earnings.' " *Id.* at 1240. The lower court, finding "whatever allowances" to be synonymous with "similar advantage," adopted the reasoning of *Morrison-Knudsen Constr. Co. v. Director, OWCP, supra*, and held fringe benefits to not be includable in computation of the worker's average weekly wage. On appeal, the Alabama Supreme Court found "similar advantage" and "whatever allowances" to not be synonymous.

According to the court:

> In this case the employer-paid premiums for medical, hospitalization, and life insurance coverage for the employee can be readily converted into a cash equivalent. Instead of providing the fringe benefits, International Paper could have added $10.80 to Murray's paycheck for him to provide his own fringe benefits. Thus, there is a direct relationship between the employer's contribution and the benefit eventually obtained by the worker. Finally, the *Morrison-Knudsen* Court's warning about computation disputes overlooks the likelihood that

> information on the cost of fringe benefits is routinely maintained by the employer for tax purposes and can be ascertained through generally accepted accounting principles and procedures.

Ex parte Murray, supra at 1240.

The court in *Murphy v. Ampex Corp.*, 703 P.2d 632 (Colo. App. 1985), held that the value of expanded group health coverage and supplemental life insurance coverage provided by the employer should have been included as "wages" in determining the amount of the employee's wage loss attributable to injury. The relevant statute provides:

> Whenever the term "wages" is used, it shall be construed to mean the money rate at which the services rendered are recompensed under the contract of hire in force at the time of injury, either express or implied, and shall not include gratuities received from employers or others . . . but the term "wages" shall include the reasonable value of board, rent, housing, lodging, or any other similar advantages received from the employer, the reasonable value of which shall be fixed and determined from the facts by the division in each particular case.

Colo. Rev. Stat. § 8-47-101(2) (1986). The court found that fringe benefits are advantages, often specifically bargained for, that are received by the employee, which are similar to benefits such as board and lodging and, thus, are part of the wages received by the employee.

This issue is one of first impression in Nebraska. The majority view appears to be the more practical and reasonable approach and is the position which we adopt. It seems clear from the definition of "wages" provided in § 48-126 that fringe benefits are not gratuities, nor are they "similar advantages" to board or lodging. The money paid to the union funds should not be considered part of the "money rate" just because it is specified at a per hour rate. The money is not paid to the employee and is not the result of the employee's individual labors, but is the fruit of collective bargaining.

An additional consideration is the fact that the Legislature has amended § 48-126 a few times over the years, yet has never acted to include fringe benefits in the definition of wages. On

the other hand, under Neb. Rev. Stat. § 48-1229(3) (Reissue 1988), fringe benefits are specifically listed as part of an employee's wage for the purpose of the Nebraska Wage Payment and Collection Act. We hold that under § 48-126, money amounts negotiated between the union and employers based on hours worked by union member employees, and to be paid directly to the union to cover such things as health and welfare and pensions are not to be included within the term wages, unless the money value of such advantages to the employee has been agreed upon and fixed by the employer and employee at the time of hiring. Such was not the case here.

The judgment of the compensation court is affirmed. Appellee Schlotfeld is awarded an attorney fee in this court of $2,000 to be taxed to the appellant.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. DON RAY WORKMAN, APPELLEE.

446 N.W.2d 16

Filed September 22, 1989. No. 89-114.

Motor Vehicles: Licenses and Permits. Under Neb. Rev. Stat. § 60-418 (Reissue 1988), a former resident of Nebraska whose Nebraska driver's license was suspended or revoked and who obtains a license issued by another state before the period of suspension or revocation expires is not authorized to operate a motor vehicle in Nebraska until a new license is obtained when and if permitted by the Nebraska Motor Vehicle Operator's License Act.

Appeal from the District Court for York County, BRYCE BARTU, Judge, on appeal thereto from the County Court for York County, CURTIS H. EVANS, Judge. Exception to judgment of District Court sustained.

Charles W. Campbell, York County Attorney, for appellant.

Don Ray Workman, pro se.

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

BOSLAUGH, J.

This is a proceeding under Neb. Rev. Stat. § 29-2319(3) (Reissue 1985) to review the order of the district court affirming the judgment of the county court dismissing the charge against the defendant for driving while his operator's license had been suspended.

The record shows that the defendant, Don Ray Workman, was stopped in York County, Nebraska, on June 25, 1988, while he was driving a truck owned by Roadrunner Freight of Milwaukee, Wisconsin, at 78 miles per hour in a 65-mile-per-hour zone. After being stopped, the defendant produced a New Mexico driver's license that had been issued on March 10, 1986. In checking the defendant's driving record, the patrolman learned that the defendant's Nebraska driver's license had been suspended in January 1986. Although when stopped the defendant was operating a Roadrunner truck, his medical and examination certificates indicated that he had been employed by a Nebraska trucking company as late as October 1987.

The abstract of the defendant's driving record shows that his Nebraska license was suspended on April 9, 1986, for insurance cancellation, and on April 16, 1986, for driving while under suspension. The April 9 suspension was for an indefinite period—until reinstated, and the April 16 suspension was for a period of 365 days from the date of his release from custody.

The defendant's Nebraska license had been revoked under the point system on April 19, 1985. On June 27, 1985, he was arrested in Nebraska for driving under suspension. The defendant testified that his license was suspended by a conviction in county court on or about September 18, 1985, for driving while his license was suspended. He appealed that conviction, but the judgment was affirmed by the district court, and his license was suspended by the judgment of the district court entered on April 16, 1986. Since his license was suspended, the defendant allowed his automobile insurance to expire, and an order of suspension for failure to maintain proof of financial responsibility was entered on April 9, 1986. The defendant did nothing thereafter to reinstate his Nebraska license, and he had no automobile insurance at the time he was arrested on June 25, 1988, except the coverage provided by his

employer, which was applicable while he was operating the employer's truck.

The State argues that the defendant's New Mexico license did not authorize him to drive in Nebraska because it was issued before the two periods of suspension in Nebraska had expired.

Neb. Rev. Stat. § 60-418 (Reissue 1988) provides:

> Any resident *or nonresident* whose operator's license or right or privilege to operate a motor vehicle in this state has been suspended or revoked as provided in this act, shall not operate a motor vehicle in this State under a license, permit or registration certificate issued by any other jurisdiction or otherwise during such suspension or after such revocation until a new license is obtained when and if permitted under this act . . . .

(Emphasis supplied.)

Apparently, the county court relied upon *State v. Reeder*, 188 Neb. 121, 195 N.W.2d 509 (1972), as the basis for finding the defendant not guilty.

The *Reeder* case involved a conviction for driving while the defendant's Nebraska operator's license was suspended. The defendant had moved to Colorado and obtained a Colorado license after the suspension period in Nebraska had expired. In this case, the defendant obtained his New Mexico license *before* the period of suspension in Nebraska had expired. Thus, the decision in the *Reeder* case is not applicable to the facts in this case.

Under § 60-418, the New Mexico license which had been issued during the periods of suspension, one of which is still in force, did not authorize the defendant to drive in Nebraska. Consequently, the order of the county court finding the defendant not guilty and the judgment of the district court affirming the order of the county court were erroneous.

EXCEPTION SUSTAINED.

RONALD O. BENDING, APPELLANT AND CROSS-APPELLEE, V. DIANA L. BENDING, APPELLEE AND CROSS-APPELLANT.

446 N.W.2d 236

Filed September 29, 1989. No. 87-984.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Affirmed.

Robert E. Roeder for appellant.

George E. Clough for appellee.

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

PER CURIAM.

This is an appeal from the Lincoln County District Court's order reducing appellant's alimony obligation from $450 per month to $300 per month. Appellant-petitioner has appealed, and appellee-respondent has cross-appealed.

As required, we have reviewed the trial court's action de novo on the record. *Smith v. Smith*, 232 Neb. 507, 441 N.W.2d 197 (1989). From that review, we determine that the trial court did not abuse its discretion in reducing appellant's alimony payments to $300 per month. The judgment of the trial court is affirmed.

Appellee's request for attorney fees is denied.

AFFIRMED.

JESSE GOMEZ, APPELLANT, V. KENNEY DEANS, INC., APPELLEE.

446 N.W.2d 209

Filed September 29, 1989. No. 88-031.

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

Robert M. Brenner, of Robert M. Brenner Law Office, for appellant.

Steven C. Smith, of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, for appellee.

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

WHITE, J.

This is an appeal from an order of the district court for Scotts Bluff County. The matter arose from the filing of a transcript of judgment from the Workers' Compensation Court to the district court.

Appellee, Kenney Deans, Inc., the judgment debtor, applied to the district court for orders directing the clerk to accept a surety bond of a Nebraska licensed insurer in the amount of $10,000 and to issue a release of the judgment lien against Kenney Deans' real estate in Scotts Bluff County. The district court accepted the surety bond and directed the clerk to issue the release. Gomez, the judgment creditor, appeals.

Two errors are assigned: (1) The district court lacks authority to order substitute security and direct the release of a real estate lien, and (2) the amount of the judgment bond is insufficient.

First, we observe that Kenney Deans, Inc., was insured for workers' compensation claims by the Continental Western Insurance Company, a Nebraska licensed company, and there is no assertion that all amounts due have not been promptly paid.

Putting aside the rather persuasive argument that the power to order a substitution of security is the exercise of the inherent authority of the district court under the Constitution of the State of Nebraska, the authority is also granted by statute. Neb. Rev. Stat. § 52-142 (Reissue 1988) provides:

> (1) Any person having an interest in real estate may release the real estate from liens which have attached to it by:
>
> (a) Depositing in the office of the clerk of the district court of the county in which the lien is recorded a sum of money in cash, certified check, or other bank obligation, or a surety bond issued by a surety company authorized to do business in this state, in an amount sufficient to pay the total of the amounts claimed in the liens being released plus fifteen percent of such total; and

(b) Recording, as provided in section 52-151, a certificate of the clerk of the district court showing that the deposit has been made.

(2) The clerk of the district court has an obligation to accept the deposit and issue the certificate.

(3) Upon release of the real estate from a lien under this section, the claimant's rights are transferred from the real estate to the deposit or surety bond and the claimant may establish his or her claim under sections 52-125 to 52-159, and upon determination of the claim the court shall order the clerk of the district court to pay the sums due or render judgment against the surety company on the bond, as the case may be.

The first assignment is meritless.

As to the second assignment, the appellant is secured by the statutorily directed promise by the insurer to pay "all installments of the compensation that may be awarded or agreed upon . . . ." Neb. Rev. Stat. § 48-146 (Reissue 1988). The record shows that the district court properly set the bond at an amount sufficient to cover the remaining payments of appellant's award. The district court has discretion to set the bond for an amount that has been awarded or agreed upon, not for amounts that are undetermined. The claim is without merit.

AFFIRMED.

DARLENE PERCIVAL, APPELLANT, V. DEPARTMENT OF CORRECTIONAL SERVICES ET AL., APPELLEES.

446 N.W.2d 211

Filed September 29, 1989. No. 88-100.

1. **Administrative Law: Appeal and Error.** In an appeal from a judgment pursuant to the Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 et seq. (Reissue 1987), the Supreme Court tries factual questions de novo on the record and reaches a conclusion independent of the trial court's findings.
2. **Administrative Law.** A commission's or agency's action is arbitrary if taken in disregard of facts or circumstances and without some basis which would lead a reasonable person to the same conclusion.

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

Robert Wm. Chapin, Jr., of Mowbray, Chapin & Walker, P.C., for appellant.

Robert M. Spire, Attorney General, and Charles E. Lowe for appellees.

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

SHANAHAN, J.

Darlene Percival appeals from the judgment of the district court for Lancaster County which affirmed the decision of the State Personnel Board of the State of Nebraska regarding Percival's demotion and transfer within the Department of Correctional Services (department).

In an appeal from a judgment pursuant to the Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 et seq. (Reissue 1987), the Supreme Court tries factual questions de novo on the record and reaches a conclusion independent of the trial court's findings. *Heithoff v. Nebraska State Bd. of Ed.*, 230 Neb. 209, 430 N.W.2d 681 (1988); *Haeffner v. State*, 220 Neb. 560, 371 N.W.2d 658 (1985).

Before the disciplinary action reviewed in this appeal, Percival was the assistant superintendent at the Nebraska Center for Women (NCW) in York, Nebraska, and became acquainted with Carolyn Stansberry, an inmate at NCW. In June 1986, Stansberry was released from NCW on parole to a halfway house in Hastings, Nebraska. In June and July of 1986, Percival visited Stansberry on four occasions, some of which related to Alcoholics Anonymous meetings, while other visits were social. On June 30, 1986, Percival wrote a check to Stansberry in the amount of $350 for Stansberry's purchase of an automobile. Percival's personal contacts with Stansberry and the automobile loan were not authorized by the parole administration and were not disclosed by Percival to her supervisor at NCW.

On August 19, Percival was charged with violating the department's administrative regulation No. 112.31A1, which

provides:

> No employee will give, accept, or exchange property, services, or favors with an inmate or parolee or with the friends or relatives of an inmate or parolee outside the scope of the employee's official duties. No employee will fraternize with an inmate or parolee or with friends or relatives of an inmate or parolee. If an employee has reason to believe that he or she may have violated one of the provisions of this section, the employee shall immediately notify his or her chief executive officer in writing. The chief executive officer of each institution may permit exceptions to the prohibitions set out in his [sic] paragraph, after considering all relevant information.

She was also charged with violating 273 Neb. Admin. Code, ch. 13, § 001 (1986), of the state's classified personnel rules and regulations, which states in part: "Appropriate disciplinary action may be taken for any of the following offenses: 001.01 Violation of, or failure to comply with, State constitution or statute; an executive order; published rules, regulations, policies or procedures of the employing agency or the State of Nebraska Classified Personnel System."

After a hearing on the charges against Percival, a departmental committee found that Percival had violated the department's administrative regulation No. 112.31A1 and § 001.01 of the state's rules and regulations. The superintendent of NCW sent a letter to Percival on September 19, 1986, which letter, as notice of departmental disciplinary action, stated that on account of the violation of departmental regulation No. 112.31A1 and the state rule, § 001.01, Percival was demoted in rank and grade from assistant superintendent II, grade 15, to unit manager, grade 13, and was transferred to the Lincoln Correctional Center. Also, Percival's salary was reduced by 10 percent, and she was put on 6 months' probation regarding her new position at Lincoln.

Percival appealed to the State Personnel Board, which, after a hearing, affirmed the disciplinary action imposed by the department. Percival then appealed to the district court for Lancaster County, which affirmed the State Personnel Board's

decision.

Percival does not contend that there is no rational relationship between the conduct proscribed by regulation No. 112.31A1 and legitimate departmental purposes or activities. Rather, Percival concedes that her conduct violated regulation No. 112.31A1, but argues that the nature and degree of the imposed discipline were contrary to the state's policy on progressive discipline of state employees, the departmental disciplinary action was arbitrary, and the imposed discipline is disproportionate to the infraction.

The state's personnel rules and regulations provide under 273 Neb. Admin. Code, ch. 13 (1986):

> 003 Disciplinary Actions. The following types and levels of disciplinary actions are prescribed in a progressive manner, however, the nature and severity of the violation will dictate the level of discipline imposed. More severe levels of disciplinary action may be imposed when a lesser action is deemed inadequate or has not achieved the desired results. . . .
>
> 003.01 The type and extent of disciplinary action shall be governed by the nature, severity and effect of the offense; the type and frequency of previous offenses; the period of time elapsed since a prior offensive act; and consideration of extenuating circumstances.

Administrative regulation No. 112.6 of the department provides in part:

> IV. This Department advocates the principle of progressive discipline when it is possible. Unless the security of the program is compromised or the employee has committed an offense of serious magnitude, all employees should be given the opportunity to improve and discipline should be progressive in nature.

Under administrative regulation No. 112.6, an employee's conduct which compromises the security of a departmental program or constitutes an offense of "serious magnitude" renders the progressive discipline policy inapplicable. In *Kemper v. State*, 230 Neb. 740, 433 N.W.2d 497 (1988), this court recognized that a financial transaction between a member of a correctional facility's staff and an inmate of the facility

may impair the integrity and security of the facility. In *Kemper*, the discipline imposed was termination of employment rather than progressive discipline. Although progressive discipline of a correctional facility's employee is authorized under both the state rule and departmental regulation, whether progressive discipline should be imposed and implemented is discretionary with the director of the department. We find no reason to overturn the discretionary exercise of disciplinary action taken by the director of the department.

A commission's or agency's action is arbitrary if taken in disregard of facts or circumstances and without some basis which would lead a reasonable person to the same conclusion. *In re Application of Renzenberger, Inc.*, 225 Neb. 30, 402 N.W.2d 294 (1987); *Haeffner v. State*, 220 Neb. 560, 371 N.W.2d 658 (1985); *In re Appeal of Levos*, 214 Neb. 507, 335 N.W.2d 262 (1983). Our de novo review of the record discloses relevant evidence substantiating Percival's infraction of the departmental regulation prohibiting a financial transaction between a correctional facility employee and a parolee of NCW. Moreover, Percival has admitted her infraction of the state rule and departmental regulation prohibiting the described financial transaction.

Percival next claims that the discipline imposed is disproportionate to the infraction, especially since there was no injury to the security or departmental program at NCW. The record reflects that on at least four occasions before disciplining Percival, the department terminated employment of personnel who had violated the same rules and regulations which were the bases for the disciplinary action against Percival. The record also shows that, but for Percival's satisfactory work history, her employment might have been terminated. We are unable to conclude that the discipline imposed is disproportionate to the infraction examined in this appeal.

Finally, Percival asserts that because her actions caused no "residual harm" to the department, the discipline was excessive. Percival knew about the regulation prohibiting financial transactions and fraternization with Stansberry as an NCW parolee. Yet, Percival violated the department's rules.

Under the circumstances, actual harm is not required to impose discipline; an employee's violation of a departmental rule, thereby compromising the security or integrity of NCW, is sufficient for disciplinary action. The fact that no adverse effect resulted from Percival's conduct does not preclude discipline under the circumstances.

The district court's judgment, affirming the decision of the State Personnel Board, is, therefore, affirmed.

AFFIRMED.

RICHARD W. SATTERFIELD, TRUSTEE, APPELLANT, V. KATHLEEN LUCILLE BONYHADY, APPELLEE.

446 N.W.2d 214

Filed September 29, 1989. No. 88-163.

1. **Decedents' Estates: Adoption.** An adopted child, in the absence of specific testamentary directions to the contrary, takes from the antecedents of an adoptive parent to the same extent as would the adoptive parent's natural children.
2. **Adoption.** No distinction between adult and minor adoptees will be made for the purposes of Neb. Rev. Stat. § 43-110 (Reissue 1988).
3. **Summary Judgment.** Summary judgment shall be granted where there is no genuine issue either as to any material fact or as to the ultimate inferences to be drawn therefrom, and the moving party is entitled to judgment as a matter of law.

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

Dan L. McCord for appellant.

Richard A. Vestecka, of Vestecka & Buethe, for appellee.

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

WHITE, J.

Plaintiff, Richard W. Satterfield, trustee, appeals from an order of the district court for Lancaster County granting summary judgment on the cross-petition of the defendant,

Kathleen Lucille Bonyhady, allowing her to take the remainder of a trust as a surviving child of Stanley N. Satterfield, the trust beneficiary.

Appellant Satterfield assigns as error the trial court's order granting defendant's motion for summary judgment. We affirm.

Katherine Satterfield executed her will on October 15, 1942. By the will, Frank Satterfield, her husband, was named as the beneficiary of the trust income during his lifetime. At his death, the property was to be divided among named children and grandchildren. However, in a codicil executed on June 20, 1950, Katherine Satterfield provided that the share of her son Stanley Satterfield should be held in trust for his lifetime and

> [u]pon his death the amount remaining in said fund is to be willed to his child or children *surviving him*, if any, otherwise the same is to be equally divided between those entitled to the same under subparagraph A, to those entitled to the same under subparagraph B and those entitled to the same under subparagraph C.

(Emphasis supplied.) The substitutional devisees—those under subparagraphs A, B, and C—are certain daughters and grandchildren of Katherine Satterfield. The trust in favor of Stanley Satterfield became effective on the death of Frank Satterfield on December 27, 1965.

Stanley Satterfield had no natural-born children. He and his first wife divorced in 1945; he then married Lucille Wozniak in 1958. At the time of this marriage, Lucille had a 16-year-old daughter, Kathleen, the defendant in this case.

On September 17, 1986, Stanley Satterfield, then 74 years old and some 4 1/2 months before his death, adopted Bonyhady, then 44 years old, pursuant to Neb. Rev. Stat. § 43-101 (Reissue 1988), which has allowed for the adoption of adult stepchildren since its amendment in 1984.

Shortly after Stanley Satterfield's death, appellant filed this action to declare that Bonyhady was ineligible to take the trust remainder as a surviving "child" of Stanley Satterfield.

Appellant's main contention is that Katherine Satterfield could not have intended an adopted adult daughter of Stanley Satterfield to come within the term "surviving child" in her

will. This contention invites us to do two things: (1) probe the mind of the testatrix to determine her intent; and (2) make distinctions between adult and minor adoptees as to the "rights, duties and other legal consequences of the natural relation of child and parent . . . ." Neb. Rev. Stat. § 43-110 (Reissue 1988).

Appellant argues that the testatrix's intent to exclude Bonyhady can be presumed because the testatrix was a stranger to the adoption, see *In re Estate of Clarke*, 125 Neb. 625, 251 N.W. 279 (1933), and because adult adoptions were not permitted by statute when the testatrix executed her will and codicil.

Among the cases that appellant cites in support of these presumptions are *Abramovic v. Brunken*, 16 Cal. App. 3d 719, 94 Cal. Rptr. 303 (1971); *Orme v. Northern Trust Co.*, 29 Ill. App. 2d 75, 172 N.E.2d 413 (1961); *First Nat. Bank of Dubuque v. Mackey,* 338 N.W.2d 361 (Iowa 1983); *In re Estate of Griswold,* 140 N.J. Super. 35, 354 A.2d 717 (1976); and *Estate of Goal,* 380 Pa. Super. 219, 551 A.2d 309 (1988).

We decline to look to the law of other states in this matter and rely instead on our own statutes and case law, and on the language in the testatrix's will.

The language and holding of *In re Trust Estate of Darling*, 219 Neb. 705, 708-09, 365 N.W.2d 821, 824 (1985), control:

> [A]n adopted child, in the absence of specific testamentary directions to the contrary, inherits from the antecedents of an adoptive parent to the same extent as do the adoptive parent's natural children.
>
> It is true, as certain of the natural children argue, that the testatrix could not have known of the adoptions, for she had both executed her will and died before they took place. Her lack of knowledge, however, is not significant. She would have been equally ignorant of any natural children sired by Darling after her death. The important point is that she had no control over who became Darling's children or by what means. She chose to benefit Darling's children. He elected to make the children produced by his fourth wife his own by adopting them. Having become his, those children qualify as beneficiaries of the testamentary trust.

Thus, the intent spelled out in Katherine Satterfield's codicil

is the intent to benefit Stanley Satterfield's children, whoever they may turn out to be. This is the plain meaning of the language, and we will go no further in guessing or assuming that Katherine Satterfield meant anything else.

The *Darling* opinion also states that it is clear that § 43-110 negates the *Clarke* holding, which appellant cites as supporting the stranger to the adoption rule.

Appellant would further have us make a distinction between adult and minor adoptees. See, *Williams v. Ward*, 15 Cal. App. 3d 381, 93 Cal. Rptr. 107 (1971); *Tafel Estate*, 449 Pa. 442, 296 A.2d 797 (1972). Section 43-101 provides that "any adult child may be adopted by the spouse of such child's parent . . . ." This statute is narrowly drawn to allow the adoption of adults only where they are stepchildren. Further, § 43-110 states:

> After a decree of adoption is entered, the usual relation of parent and child and all the rights, duties and other legal consequences of the natural relation of child and parent shall thereafter exist between such adopted child and the person or persons adopting such child and his, her or their kindred.

This statute, giving legal effect to the adoption decree as between the parties, makes no distinction between adult and minor adoptees. We refuse to infer any such distinction.

Therefore, in affirming the trial court, we hold that Bonyhady is the legally adopted child of Stanley Satterfield, and she thereby qualifies under Katherine Satterfield's codicil as a "surviving child" of Stanley Satterfield, thus making her the beneficiary of the testamentary trust.

Appellant also assigned error to the district court in granting Bonyhady's motion for summary judgment. Summary judgment shall be granted where there is no genuine issue either as to any material fact or as to the ultimate inferences to be drawn therefrom, and the moving party is entitled to judgment as a matter of law. *Peterson v. Minden Beef Co.*, 231 Neb. 18, 434 N.W.2d 681 (1989). The record shows no genuine issue as to any material fact, and this is further evidenced by both parties moving for summary judgment. Appellee was entitled to judgment as a matter of law, and the trial court was correct in granting her summary judgment.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DAVID SWIGART, APPELLANT.

446 N.W.2d 216

Filed September 29, 1989. No. 88-448.

1. **Convictions: Verdicts: Appeal and Error.** In determining whether evidence is sufficient to sustain a conviction in a jury trial, the Supreme Court does not resolve conflicts of evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented to a jury, which are within a jury's province for disposition. A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support the verdict.
2. **Verdicts: Appeal and Error.** On a claim of insufficiency of evidence, the Supreme Court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. Only where evidence lacks sufficient probative force as a matter of law may the Supreme Court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.
3. **Intent: Words and Phrases.** The intent involved in conduct is a mental process and may be inferred from the conduct itself, the actor's language in reference to the conduct, and the circumstances surrounding an incident.
4. **Criminal Law: Intent: Circumstantial Evidence: Proof.** When an element of a crime involves existence of a defendant's mental process or other state of mind of an accused, such elements involve a question of fact and may be proved by circumstantial evidence.
5. **Assault.** In reference to first degree assault, assaultive conduct which results in exposure to the specific harms described in Neb. Rev. Stat. § 28-109(20) (Reissue 1985), and not actual infliction of the harms described in the statute, is the gravamen of first degree assault and the criminal conduct proscribed by Neb. Rev. Stat. § 28-308(1) (Reissue 1985).

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

Dennis R. Keefe, Lancaster County Public Defender, and Joseph D. Nigro for appellant.

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

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

SHANAHAN, J.

A jury in the district court for Lancaster County convicted David Swigart of first degree assault, which is defined by Neb. Rev. Stat. § 28-308(1) (Reissue 1985): "A person commits the

offense of assault in the first degree if he [or she] intentionally or knowingly causes serious bodily injury to another person." Neb. Rev. Stat. § 28-109(20) (Reissue 1985) provides: "Serious bodily injury shall mean bodily injury which involves a substantial risk of death, or which involves substantial risk of serious permanent disfigurement, or protracted loss or impairment of the function of any part or organ of the body."

STANDARD OF REVIEW

> In determining whether evidence is sufficient to sustain a conviction in a jury trial, the Supreme Court does not resolve conflicts of evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented to a jury, which are within a jury's province for disposition. A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict.

State v. Brown, 225 Neb. 418, 428, 405 N.W.2d 600, 606 (1987); *State v. Willett, ante* p. 243, 444 N.W.2d 672 (1989).

> On a claim of insufficiency of evidence, the Supreme Court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. Only where evidence lacks sufficient probative force as a matter of law may the Supreme Court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.

State v. Robertson, 223 Neb. 825, 830, 394 N.W.2d 635, 638 (1986). See, also, *State v. Willett, supra*.

In the late evening of August 26, 1987, the female victim, who was 19 years old, was visiting at a Lincoln motel with an acquaintance, Sean Thompson, and David Swigart, age 23, a former boyfriend with whom the victim had been intimately involved in the spring of 1987. In the course of the visit, the victim imbibed a "mixed drink" of "gin and pop" and a "wine cooler"; Thompson drank straight gin; and Swigart had wine coolers. When Thompson became intoxicated, Swigart offered to walk the victim to her home, which was about nine blocks from the motel.

As Swigart and the victim walked, they discussed "the weirdest place . . . the most different, weirdest place we'd both

had sex." En route to the victim's home, the couple approached a van parked on the street and entered the parked vehicle, where they engaged in sexual relations. Having concluded that activity, the couple resumed their walking, which took them to the apartment of Swigart's sister. When they arrived at the apartment, Swigart told the victim that he no longer wished to walk the victim to her home. This upset the victim, who slapped Swigart's face. Swigart, more surprised than hurt by the slap, put his arms around the victim's waist, raised her from the ground, and "[t]hrew her to the ground," causing the victim to "kind of hit on her side" on the concrete surface. As the victim lay on the concrete, Swigart kicked the victim's stomach and then said, "I'm sorry." While the victim was still on the ground, Swigart kicked at the victim, lacerating her nose, and then kicked again, striking near the victim's spine and ribs. At this point, with his closed fist, Swigart delivered a blow to the defenseless victim's face. When the turmoil ended, Swigart went inside his sister's apartment, and the victim returned to Thompson's motel for help. Thompson and his roommate assisted the blood-covered victim, whom Thompson described as "bleeding" with "[t]wo black eyes." After the victim returned to her home, police were summoned and took the victim to the emergency room of a hospital. The victim had a bright crimson crescent-shaped mark, clinically described as "periorbital" bruising, around each eye and displayed lacerations on her nose as well as bruises inside her mouth.

Officers of the Lincoln Police Department went to the apartment of Swigart's sister, who admitted the officers into the apartment. After entering the apartment, the officers opened the bathroom door and found Swigart "holding a tub of potato salad." The officers arrested Swigart and, while transporting him to police headquarters, administered the *Miranda* admonition to Swigart. During interrogation, Swigart admitted that he had "body slammed" the victim to the ground, but asserted, "I didn't really intend to hurt her." Swigart stated that after he had thrown the victim to the concrete surface, "I apologized to her."

When called as a witness for the State, the physician who had attended the victim at the hospital emergency room testified that the physician's specialty was "emergency

medicine," a medical specialty which "basically deals with emergent care in an emergency room, [dealing] with all sorts of life-threatening emergencies and other related emergent care." According to the physician, the victim had sustained "obvious facial trauma . . . a lot of bruising about the face and her nose; she had severe trauma to her nose. It was very widened. It was seriously injured." The victim sustained a "nasal tip fracture of her nose," an injury which was disclosed by x ray and physical examination and was the type of extensive injury which caused one to "cough up blood from swallowing blood." Regarding the kick to the victim's face, the physician stated: "Any time [there is] that kind of an impact to the face and the cranial vault . . . that could be very life threatening. Also to the neck. A lot of people who have severe injuries to the face can also have significant neck trauma and fractures." In reference to a kick in the victim's back, the physician also testified: "That could also be a very serious, possibly life-threatening injury. It could cause damage to the kidneys, spleen. There are all sorts of abdominal organs." A kick to the stomach was also "potentially life-threatening" on account of possible injury to the spleen and liver. When asked whether the injury to the victim's nose would alter a person's appearance, without specialized "follow-up" treatment, the physician responded, "Absolutely."

At trial, testifying on his own behalf, Swigart denied that he had kicked the victim or struck her with his fist. Also, Swigart testified that he did not intend to cause serious bodily injury to the victim.

CLAIM OF INSUFFICIENT EVIDENCE

Swigart contends that there is insufficient evidence to support the verdict of guilty on the charge of first degree assault. Specifically, Swigart maintains that under Nebraska's first degree assault statute, the defendant must intentionally or knowingly cause serious bodily injury and that the victim must in fact suffer serious bodily injury.

Concerning an intent to cause serious bodily injury for a first degree assault, we stated in *State v. Ristau*, 201 Neb. 784, 787, 272 N.W.2d 274, 276 (1978): "To constitute the offense of assault with intent to do great bodily injury there must be an unlawful assault, coupled with a present ability and intent to

injure, but no actual battery need occur." We also stated in *Ristau, supra* at 786-87, 272 N.W.2d at 276:

> The record establishes that the defendant not only threw the victim to the pavement but admitted that he intended to use whatever force was necessary to take her purse. The intent with which an act is done is rarely, if ever, susceptible of proof by direct evidence, but may be inferred or gathered from outward manifestations, words, or acts, and the facts or circumstances surrounding or attendant upon the assault. It is not essential to a conviction for assault with intent to do great bodily injury that the accused should have intended the precise injury which followed as a result of the assault. It is sufficient if serious bodily harm of any kind was contemplated.

See, also, *State v. Tweedy*, 224 Neb. 715, 400 N.W.2d 865 (1987); *State v. Thielen*, 216 Neb. 119, 342 N.W.2d 186 (1983).

"The intent involved in conduct is a mental process and may be inferred from the conduct itself, the actor's language in reference to the conduct, and the circumstances surrounding an incident." *State v. Pierce*, 231 Neb. 966, 971, 439 N.W.2d 435, 440 (1989).

"When an element of a crime involves existence of a defendant's mental process or other state of mind of an accused, such elements involve a question of fact and may be proved by circumstantial evidence." *State v. Hoffman*, 227 Neb. 131, 140, 416 N.W.2d 231, 237 (1987). See, also, *State v. Blue Bird*, 232 Neb. 336, 440 N.W.2d 474 (1989).

Swigart's conduct toward the victim spoke so loudly that the jury apparently did not hear Swigart's self-serving disclaimer of intent. Although Swigart testified that he did not intend to cause serious bodily injury to the victim, the evidence presented to the jury supplied a sufficient basis for the reasonable inference that Swigart intended to inflict serious bodily injury on the victim.

Swigart also argues that to support a conviction of first degree assault, the victim must have actually sustained serious bodily injury, or as Swigart suggests: "The other element on which there was insufficient evidence to sustain a conviction for first degree assault is whether [the victim] did in fact suffer

serious bodily injury." Brief for appellant at 7. In § 28-109(20), which defines "serious bodily injury" in relation to the criminal offense of assault in the first degree, a significant phrase is "bodily injury which involves a substantial risk" of death, serious permanent disfigurement, or diminution of bodily function, that is, protracted loss or impairment sustained by any part of the human body. The word "risk" means "CONTINGENCY, DANGER, PERIL, THREAT . . . someone or something that creates or suggests a hazard or adverse chance: a dangerous element or factor . . . ." Webster's Third New International Dictionary, Unabridged 1961 (1981). As a synonym for risk, the word "danger" means "the state of being exposed to harm: liability to injury, pain, or loss: PERIL, RISK . . . ." *Id.* at 573. Thus, in reference to first degree assault, assaultive conduct which results in exposure to the specific harms described in § 28-109(20), and not actual infliction of the harms described in the statute, is the gravamen of first degree assault and the criminal conduct proscribed by § 28-308(1). Consequently, in *State v. Pribil*, 224 Neb. 28, 30-31, 395 N.W.2d 543, 546 (1986), which involved a conviction for attempted first degree assault, we stated: "Contrary to defendant's argument, it is not necessary that the injury *caused* death, or serious permanent disfigurement or impairment of the function of any part or organ of the body, but only that it *involved a substantial risk* of producing those results." (Emphasis in original.)

At Swigart's trial, the physician testified that a kick to a person's head "could be very life threatening" and that a kick to the back "could also be a very serious, possibly life-threatening injury." The physician's testimony very clearly substantiated and underscored a fact generally known in human experience. The degree or extent of exposure to the harms specified in § 28-109(20), that is, whether such exposure to harm was "substantial," was a submissible jury question under the circumstances.

The evidence supports the verdict. For that reason, we affirm Swigart's conviction.

AFFIRMED.

DAVID A. HENNINGS, APPELLEE, V. THERESA M. HENNINGS, APPELLANT.
446 N.W.2d 221

Filed September 29, 1989. No. 88-842.

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

Michael L. Getty for appellant.

David A. Hennings, pro se.

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

PER CURIAM.

This is an appeal in a proceeding for dissolution of a marriage. The trial court dissolved the marriage; divided the property of the parties; awarded custody of four of the parties' minor children to the petitioner husband and retained custody of the fifth child in the court, but awarded physical possession to the petitioner; awarded child support to the petitioner in the amount of $95 per month per child; and ordered the petitioner to pay $26,486.64 of the parties' debts. Later, the child support was reduced to $40 per month per child.

The respondent wife has appealed and contends that the trial court erred in awarding custody of the children and child support to the petitioner, in failing to award alimony to the respondent, and in awarding only personal property to the respondent.

The record shows that the respondent failed to keep a suitable home for the children or prepare adequate meals for them. It fully supports the award of custody to the petitioner.

The only real estate owned by the parties was the family residence and a farm the petitioner was purchasing from his family.

The trial court awarded the family residence to the petitioner. The equity in that property is approximately $17,500. Since the petitioner has custody of the children, it is appropriate that he have the property so that he can maintain a home for them.

The indebtedness on the farm far exceeds its value.

The record shows that the petitioner is employed as a salesman, with net earnings of approximately $2,700 per month. The respondent was employed at a Burger King restaurant, earning approximately $542 take-home pay per month.

The petitioner's income is adequate to pay the indebtedness on the residence property, support the children, and pay the other expenses and indebtedness, including the cost of the housekeeper and governess for the children, but will not support an award of alimony.

In view of the limited earning capacity of the respondent and the award of no alimony, we believe the decree should be modified to eliminate the award of child support to the petitioner.

Each party shall pay his or her own attorney fees. Costs in this court are taxed to the petitioner.

The judgment of the district court, as modified, is affirmed.

AFFIRMED AS MODIFIED.

IN RE INTEREST OF B.M.H., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, DEPARTMENT OF SOCIAL SERVICES, APPELLANT, V. E.M.H., APPELLEE.

446 N.W.2d 222

Filed September 29, 1989. No. 88-947.

1. **Motions for New Trial: Time: Appeal and Error.** An untimely motion for new trial is ineffectual, does not toll the time for perfection of an appeal to the Supreme Court, and does not extend or suspend the time limit for filing a notice of appeal.
2. **Jurisdiction: Time: Appeal and Error.** An appellate court acquires no jurisdiction unless the appellant has satisfied the requirements for appellate jurisdiction, including a notice of appeal filed within the prescribed time.

Appeal from the Separate Juvenile Court of Douglas County: COLLEEN R. BUCKLEY, Judge. Appeal dismissed.

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

Janet S. Gurwitch for appellee.

Carolyn A. Rothery, of Byrne, Rothery, Lewis, Bedel, Tubach & Zielinski, guardian ad litem.

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

SHANAHAN, J.

On June 9, 1988, the separate juvenile court of Douglas County adjudged that B.M.H. was a juvenile under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988) and ordered that B.M.H. remain in the temporary custody of the Department of Social Services (department). On September 14, the court ordered B.M.H.'s mother to participate in psychological evaluation and psychotherapy, including group therapy, and further ordered: "The cost of such therapy shall be borne by Nebraska Department of Social Services."

On October 19, the department filed a motion for rehearing or modification of the order which "required the Department of Social Services to bear the cost of psychological therapy" for B.M.H.'s mother, claiming that the court lacked authority to require that the department pay the cost of a parent's therapy. The court overruled the department's motion on November 1, 1988. The department filed its notice of appeal to this court on November 9, 1988.

The department's sole assignment of error is that the juvenile court erred in ordering the department to pay for the psychological treatment of B.M.H.'s parent. However, a prerequisite to a discussion of the department's assignment of error is a determination whether this court has jurisdiction.

Neb. Rev. Stat. § 43-2,126 (Reissue 1988) provides that "[a]ny final order or judgment entered by a separate juvenile court may be reviewed by the Supreme Court of Nebraska within the same time and in the same manner prescribed by law for review of an order or judgment of the district court . . . ."

Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 1988) prescribes the time within which a notice of appeal must be filed to vest jurisdiction in this court, namely:

[P]roceedings to obtain a reversal, vacation, or

> modification of judgments and decrees rendered or final orders made by the district court . . . shall be by filing in the office of the clerk of the district court in which such judgment, decree, or final order was rendered, within thirty days after the rendition of such judgment or decree or the making of such final order, a notice of intention to prosecute such appeal signed by the appellant or appellants or his, her, or their attorney of record and . . . by depositing with the clerk of the district court the docket fee required by law in appeals to the Supreme Court.

Section 25-1912(2) provides: "The running of the time for filing a notice of appeal shall be terminated as to all parties (a) by a motion for a new trial under section 25-1143, if such motion is filed by any party within ten days after the verdict, report, or decision was rendered . . . ."

A final order is "an order affecting a substantial right in an action . . . ." Neb. Rev. Stat. § 25-1902 (Reissue 1985).

The question is whether an order by the separate juvenile court that requires a parent to participate in psychological therapy and also requires the department to pay for such therapy is a final order.

Helpful in our determination whether there is a final order in this case is *In re Interest of G.B., M.B., and T.B.*, 227 Neb. 512, 418 N.W.2d 258 (1988). In *G.B.*, the separate juvenile court of Douglas County ordered, inter alia, that the department pay part of the costs for a juvenile who had been placed in a treatment center. Implicit in our decision to review the propriety of the juvenile court's order in *G.B.* is our conclusion that an order directed to the department to pay for the costs of future treatment is a final order for purposes of § 25-1902. Thus, the juvenile court's order sought to be reviewed in this appeal is a final order.

If a motion for new trial, authorized by law, has been filed within 10 days of a decision (see Neb. Rev. Stat. § 25-1143 (Reissue 1985) and § 25-1912(2)), the motion for new trial suspends the time limit for filing a notice of appeal. When the motion for new trial has been disposed of by the court rendering the decision, appellate jurisdiction is vested in the Supreme Court by compliance with the provisions prescribed by

§ 25-1912, i.e., timely notice of appeal and deposit of docket fee.

In the present appeal, the department's motion, which we characterize as a motion for new trial, was filed on October 19, 1988, more than 10 days after the juvenile court's decision of September 14, 1988, for which the department seeks appellate review. An untimely motion for new trial is ineffectual, does not toll the time for perfection of an appeal to the Supreme Court, and does not extend or suspend the time limit for filing a notice of appeal. *In re Interest of C.M.H. and M.S.H.*, 227 Neb. 446, 418 N.W.2d 226 (1988); *Novak v. Nelsen*, 209 Neb. 728, 311 N.W.2d 8 (1981). Hence, the department's motion was a procedural nullity.

Neb. Rev. Stat. § 25-1912.01(1) (Reissue 1985) states: "A motion for a new trial shall not be a prerequisite to obtaining appellate review of any issue upon which the ruling of the trial court appears in the record."

Pursuant to § 25-1912.01(1), the Supreme Court has appellate jurisdiction, notwithstanding the absence of a motion for new trial, if the requirements of § 25-1912 have been satisfied for appellate review of a final order, decision, or verdict in the trial court. See, *Caro, Inc. v. Roby*, 215 Neb. 897, 342 N.W.2d 182 (1983); *State v. Turner*, 221 Neb. 132, 375 N.W.2d 154 (1985).

In the present appeal, without a timely motion for new trial, the department had 30 days from September 14, 1988, to file its notice of appeal. § 25-1912(1). The department's notice of appeal, filed on November 9, 1988, was clearly filed beyond the 30-day limit for filing a notice of appeal. An appellate court acquires no jurisdiction unless the appellant has satisfied the requirements for appellate jurisdiction, including a notice of appeal filed within the prescribed time. *Federal Land Bank v. McElhose*, 222 Neb. 448, 384 N.W.2d 295 (1986).

Because the department failed to comply with the requirements of § 25-1912, this court has no jurisdiction, and, accordingly, the department's appeal is dismissed.

APPEAL DISMISSED.

STATE OF NEBRASKA, APPELLEE, V. KEVIN D. GERDES, APPELLANT.

446 N.W.2d 224

Filed September 29, 1989. No. 88-973.

1. **Judgments: Collateral Estoppel.** The doctrine of collateral estoppel means that when an issue of ultimate fact has once been determined by a valid and final judgment, the issue cannot again be litigated between the same parties in any future litigation.
2. _____: _____. Collateral estoppel may be applied where an identical issue was decided in a prior action, there was a judgment on the merits which was final, the party against whom the doctrine is to be applied is a party or is in privity with a party to the prior action, and there was an opportunity to fully and fairly litigate the issue in the prior litigation.
3. **Judgments: Res Judicata.** The doctrine of res judicata is based on the principle that a final judgment on the merits by a court of competent jurisdiction is conclusive upon the parties in any later litigation involving the same cause of action.
4. _____: _____. The doctrine of res judicata dictates that any right, fact, or matter in issue and directly adjudicated in a prior proceeding, or necessarily involved in the determination of the action before a competent court in which the judgment or decree was rendered upon the merits, is conclusively settled by the judgment and may not be litigated again between the parties, whether the claim, demand, purpose, or subject matter of the suits would or would not be the same.
5. **Criminal Law: Collateral Estoppel: Proof: Double Jeopardy.** A criminal defendant, relying on collateral estoppel in relation to constitutional protection against double jeopardy in a present proceeding, has the burden to prove that the particular issue which is sought to be relitigated, but which is constitutionally foreclosed by the double jeopardy clause, was necessarily or actually determined in a previously concluded criminal proceeding.
6. **Judgments: Res Judicata: Evidence.** A judgment will not operate as res judicata unless it appears on the face of the record, or is shown by extrinsic evidence, that the precise question was raised and determined in the former suit.

Appeal from the District Court for Lancaster County, DONALD E. ENDACOTT, Judge, on appeal thereto from the County Court for Lancaster County, JANICE L. GRADWOHL, Judge. Judgment of District Court affirmed.

Jerry L. Soucie for appellant.

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

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

SHANAHAN, J.

In its complaint filed in the county court for Lancaster County, the State charged that Kevin D. Gerdes, on December 7, 1987, operated a motor vehicle while he was under the influence of alcoholic liquor and alleged that the offense was Gerdes' third violation of the statute against drunk driving. See Neb. Rev. Stat. § 39-669.07 (Reissue 1988). On April 15, 1988, a jury convicted Gerdes of the drunk driving charge. Accompanied by his lawyer, Gerdes appeared for a sentence hearing on May 6, 1988, concerning the enhanced penalty authorized on account of Gerdes' prior convictions for drunk driving.

At the enhancement hearing, the State offered the court records for Gerdes' Nebraska convictions in September 1985 (exhibit 18) and February 1983 (exhibit 20). Over Gerdes' objection (relevance), see Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1985), the court received exhibit 20 as evidence. Exhibit 18 showed that in 1985 Gerdes was initially charged with drunk driving, alleged to be his third such offense, but that the State's complaint was later amended to eliminate reference to any offense before September 1985, that is, "amended to 1st offense." Because exhibit 18 appeared to be a partial record of Gerdes' 1985 drunk driving conviction, at Gerdes' request the enhancement hearing was adjourned until May 25, when Gerdes, accompanied by his lawyer, reappeared for the enhancement hearing.

At the resumed enhancement hearing, Gerdes offered exhibit 21, which supplemented exhibit 18 and thereby supplied the complete court record of Gerdes' 1985 drunk driving conviction. Exhibit 21 contained:

> The Court further finds that the evidence presented to the Court reflects that the Defendant has had no previous conviction(s) under this subsection since the effective date of this act, and that the Defendant has had no previous conviction(s) under this subsection as it existed prior to the effective date of this act and/or under a city or village ordinance enacted pursuant to this subsection as authorized by section 39-669.07 either prior or subsequent to the effective date of this act.

Gerdes again objected to exhibit 20 (1983 conviction) and

moved to strike the exhibit. The court rejected Gerdes' motion to strike exhibit 20. On the basis of exhibits 18, 20, and 21, the court found that Gerdes had been twice convicted of drunk driving before his 1988 conviction and, therefore, the 1988 conviction was Gerdes' third conviction for drunk driving, punishable pursuant to § 39-669.07(4)(c). Consequently, the county court sentenced Gerdes to 5 months in jail, fined him $500, and suspended his driver's license for 15 years. Gerdes appealed to the district court for Lancaster County, which affirmed Gerdes' conviction and sentence.

In his sole assignment of error, Gerdes contends that the county court erred in

> allowing the State to challenge and present evidence collaterally attacking the prior finding of September 25, 1985 that the defendant had no prior convictions under principles of res judicata and collateral estoppel incorporated in the Fifth and Fourteenth Amendments to the United States Constitution.

As we construe the assignment of error, Gerdes claims that the doctrines of collateral estoppel and res judicata preclude use of the 1983 conviction as a basis for imposition of the enhanced penalty for successive convictions of drunk driving.

The U.S. Supreme Court characterized the phrase "collateral estoppel" in *Ashe v. Swenson*, 397 U.S. 436, 443, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970):

> "Collateral estoppel" is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.

In *State ex rel. Douglas v. Morrow*, 216 Neb. 317, 320, 343 N.W.2d 903, 905 (1984), this court stated:

> Collateral estoppel may be applied where an identical issue was decided in a prior action, there was a judgment on the merits which was final, the party against whom the doctrine is to be applied is a party or is in privity with a party to the prior action, and there was an opportunity to fully and fairly litigate the issue in the prior litigation.

Gerdes also relies on the related doctrine of res judicata.

"The doctrine of res judicata is based on the principle that a final judgment on the merits by a court of competent jurisdiction is conclusive upon the parties in any later litigation involving the same cause of action." *NC+ Hybrids v. Growers Seed Assn.*, 228 Neb. 306, 310, 422 N.W.2d 542, 545 (1988). Similar to collateral estoppel, the doctrine of res judicata dictates that

> [a]ny right, fact, or matter in issue and directly adjudicated in a prior proceeding, or necessarily involved in the determination of the action before a competent court in which the judgment or decree was rendered upon the merits, is conclusively settled by the judgment and may not be litigated again between the parties, whether the claim, demand, purpose, or subject matter of the suits would or would not be the same.

Security State Bank v. Gugelman, 230 Neb. 842, 845, 434 N.W.2d 290, 292 (1989).

Implicit in the excerpts from *Ashe* and *Morrow* is the principle that collateral estoppel applies when an issue in a present proceeding has necessarily been determined in a prior proceeding. A criminal defendant, relying on collateral estoppel in relation to constitutional protection against double jeopardy in a present proceeding, has the burden to prove that the particular issue which is sought to be relitigated, but which is constitutionally foreclosed by the double jeopardy clause, was necessarily or actually determined in a previously concluded criminal proceeding. *U.S. v. Ragins*, 840 F.2d 1184 (4th Cir. 1988). See, also, *U.S. v. Gentile*, 816 F.2d 1157 (7th Cir. 1987).

Concerning the doctrine of res judicata, this court has stated: " 'The general rule is that a person relying upon the doctrine of res judicata as to a particular issue involved in the pending case bears the burden of introducing evidence to prove that such issue was involved and actually determined in the prior action.' " *State ex rel. Weasmer v. Manpower of Omaha, Inc.*, 163 Neb. 529, 534, 80 N.W.2d 580, 583 (1957) (quoting *Schroeder v. Homestead Corp.*, 163 Neb. 43, 77 N.W.2d 678 (1956)). Furthermore, " '[a] judgment will not operate as res judicata unless it appears on the face of the record, or is shown

by extrinsic evidence, that the precise question was raised and determined in the former suit.' " *Manpower of Omaha, supra* at 535-36, 80 N.W.2d at 584 (quoting *O'Connor v. Abbott*, 134 Neb. 471, 279 N.W. 207 (1938)).

In Gerdes' case, the record fails to establish that the existence of the 1983 conviction was an issue resolved by the court in Gerdes' 1985 conviction for drunk driving. In 1985, Gerdes was originally charged with driving under the influence of alcoholic liquor, which was alleged to be his third such offense. The complaint was later amended to eliminate references to any drunk driving conviction before 1985. In the 1985 prosecution and conviction of Gerdes, there is a high probability that the State may not have even attempted to introduce evidence of Gerdes' 1983 conviction since, as the result of the amendment of the 1985 complaint, Gerdes was convicted of "1st offense" drunk driving, and, therefore, the 1983 conviction was irrelevant to the prosecution and conviction of Gerdes in 1985. Moreover, the 1985 complaint against Gerdes, which alleged that the 1985 offense was a "third offense," does not specify the date for any of Gerdes' prior drunk driving convictions which could have been used to enhance the penalty for Gerdes' conviction in 1985. Thus, Gerdes has failed to establish that the court's statement "no previous conviction(s)," contained in the court record for the 1985 conviction, necessarily related to Gerdes' 1983 conviction for drunk driving.

As previously noted, for application of the doctrines of collateral estoppel and res judicata, the party relying on either of those principles in a present proceeding has the burden to show that a particular issue was involved and necessarily determined in a prior proceeding. In view of Gerdes' failure to present evidence for proper application of the doctrines of collateral estoppel and res judicata, the county court properly utilized Gerdes' 1983 and 1985 convictions as bases for imposition of the enhanced penalty on successive convictions of drunk driving.

Accordingly, we affirm the district court's judgment, which affirmed Gerdes' conviction and sentence in the county court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT D. MARCOTTE, JR., APPELLANT.

446 N.W.2d 228

Filed September 29, 1989. No. 88-1052.

1. **Motions to Suppress: Appeal and Error.** In determining the correctness of a ruling on a motion to suppress, the Supreme Court will uphold a trial court's findings of fact unless those findings are clearly wrong. In determining whether a trial court's findings on a motion to suppress are clearly erroneous, this court recognizes the trial court as the trier of fact and may take into consideration that the trial court has observed witnesses testifying regarding such motion.
2. **Constitutional Law: Search and Seizure: Warrants: Arrests: Words and Phrases.** Both the U.S. and Nebraska Constitutions guarantee an individual the right to be free from unreasonable searches and seizures. The failure to obtain a warrant is not fatal to the legality of every warrantless arrest. A warrantless arrest of an individual is a species of seizure which, the courts have ruled, must be reasonable. A person is seized when he is arrested.
3. **Police Officers and Sheriffs: Warrants: Arrests: Evidence.** A peace officer may arrest a person without a warrant if the officer has reasonable cause to believe such person has committed a misdemeanor, and the officer has reasonable cause to believe that such person either (1) will not be apprehended unless immediately arrested; (2) may cause injury to himself or others or damage to property unless immediately arrested; (3) may destroy or conceal evidence of the commission of such misdemeanor; or (4) has committed a misdemeanor in the presence of the officer.
4. **Police Officers and Sheriffs: Arrests: Probable Cause.** When a law enforcement officer has knowledge, based on information reasonably trustworthy under the circumstances, which justifies a prudent belief that a suspect has committed a crime, the officer has probable cause to arrest without a warrant. If the offense is a misdemeanor, then one of the conditions set forth in Neb. Rev. Stat. § 29-404.02 (Reissue 1985) must be present.
5. **Criminal Law: Eyewitnesses: Presumptions.** An informant's detailed eyewitness report of a crime supplies its own indicia of reliability, and a citizen informant who has personally observed the commission of a crime is presumptively reliable.
6. **Police Officers and Sheriffs: Drunk Driving: Warrants: Arrests: Evidence.** Because evidence of a defendant's intoxication would be lost if the police had to wait to obtain a search warrant, a warrantless arrest is valid.
7. **Drunk Driving: Arrests: Blood, Breath, and Urine Tests.** Where a driving under the influence arrest is lawful, the refusal to take a chemical test is unjustified.

Appeal from the District Court for Douglas County, STEPHEN A. DAVIS, Judge, on appeal thereto from the County Court for Douglas County, JOHN J. MCGRATH, Judge. Judgment of District Court affirmed.

Gregory J. Benak, of Hotz, Kizer & Weaver, P.C., for appellant.

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

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

FAHRNBRUCH, J.

Complaining that evidence should have been suppressed because he was illegally arrested and that he was justified in refusing to submit to a breath test, Robert D. Marcotte, Jr., asks this court to set aside his convictions for refusing to provide a breath test and for third-offense driving while under the influence of alcoholic liquor. We reject Marcotte's contentions and affirm.

The defendant was originally convicted of the two offenses after a Douglas County Court bench trial. On the refusal to provide a breath test, Marcotte was fined $200 and sentenced to jail for 7 days, and his driver's license was suspended for 180 days. On the third-offense driving while under the influence of alcoholic liquor, Marcotte received a $500 fine and a 90-day jail sentence, and his motor vehicle operator's license was suspended for 15 years. The defendant was also charged with leaving the scene of an accident, but was found not guilty of that charge. He appealed the two convictions to the Douglas County District Court. They were affirmed. Marcotte timely appealed to this court.

In reviewing Marcotte's claim that certain evidence should have been suppressed because he was illegally arrested, we are reminded of this court's holding:

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

State v. Andersen, 232 Neb. 187, 199, 440 N.W.2d 203, 213 (1989); *State v. Boysaw*, 228 Neb. 316, 422 N.W.2d 346 (1988).

At the suppression hearing in this case, there was evidence that shortly after midnight on February 24, 1988, Marcotte, a regular customer of a Quick Pic store in Omaha, entered the convenience store. The clerk, Rosemarie Akiens, reported to police that the defendant, who she said was highly intoxicated, purchased some items in the store and after a few minutes left the building. Akiens said she saw the defendant get into his pickup truck, proceed to back up rather quickly, and strike an unoccupied automobile in the parking lot. Marcotte exited his vehicle while it was leaning against the car he had struck. He then pulled his truck forward a little bit.

Akiens went to the accident scene and obtained some information from Marcotte, after which he left the scene. Akiens notified the police, and Officer Michael Kurt Spomer was dispatched to the scene at 12:38 a.m. Spomer arrived at the scene about 10 minutes later. Marcotte telephoned Akiens twice before the police officer arrived at the Quick Pic store. Marcotte gave Akiens his address and telephone number at that time, stating he was sorry and "wanted to take care of it." Upon arrival at the scene, Officer Spomer examined the struck vehicle, a Ford Fairmont, and found that it was damaged. The officer then talked to the clerk, who related that she had seen the accident and what had occurred after the collision. The clerk provided the officer with a description of Marcotte's truck, a license plate number, and the address and telephone number that Marcotte had given her.

The police officer, treating the incident as a hit-and-run accident, went to the address Marcotte had given Akiens, but was unable to locate the defendant. After further investigation, the officer proceeded to a location about six blocks from the Quick Pic store. It developed that Marcotte lived in an apartment complex at that location. It was later determined that the address Akiens reported to the officer as being Marcotte's was one where the defendant had lived previously. The officer observed Marcotte's truck and that it was damaged. Officer Spomer contacted the police dispatcher and requested that the dispatcher call Marcotte at his apartment and ask him

to step outside to talk to Spomer.

About 55 minutes after Spomer had been dispatched, and shortly after the dispatcher was contacted, Marcotte stumbled out the front door of the apartment complex and was hesitant as he walked to the police cruiser. Although it was a clear, chilly night, the defendant wore no shoes. He was dressed in jeans and a flannel shirt. When the defendant arrived at the police cruiser, the officer rolled down his window and smelled a strong odor of alcoholic beverage on Marcotte's breath. The defendant's eyes were bloodshot and glazed. His speech was somewhat mumbled. When Spomer asked him about the accident at the Quick Pic store, Marcotte said that he had been at the store and that he had not been involved in an accident, or "if he was that he didn't do any damage to the car." When asked, the defendant denied drinking any alcohol after leaving the Quick Pic store.

Marcotte, at Officer Spomer's request, performed sobriety tests. He flunked some and refused to perform others. The officer formed an opinion that Marcotte's breath-alcohol content was above the legal limit of .10. Thereupon, the officer placed Marcotte under arrest for suspicion of driving while under the influence of alcoholic liquor and for suspicion of leaving the scene of a property damage accident.

Marcotte claims that in the telephone call to him, the police dispatcher ordered him to leave his apartment and go outside to meet Officer Spomer. Marcotte argues that at that point he was under arrest. Contrary to that contention, it can be inferred from the State's evidence that Marcotte was requested to meet Officer Spomer outside of the apartment complex. On that point, the issue is one of credibility. The trial court believed the State's version of what occurred. Applying the rule in *State v. Andersen, supra*, we cannot say that the trial court was clearly wrong in finding that Marcotte was requested, not ordered, to meet Officer Spomer outside of his apartment complex. Nor can we say that the trial court was clearly wrong in finding (1) that the defendant, without being under arrest, voluntarily complied with the request to meet and talk with Officer Spomer and (2) that Marcotte was not under arrest until Spomer told him he was under arrest.

The defendant claims that because no warrant was issued

before he was arrested, his arrest was illegal, and therefore any evidence obtained as a result of the arrest should have been suppressed. Both the U.S. and Nebraska Constitutions guarantee an individual the right to be free from unreasonable searches and seizures. U.S. Const. amend. IV; Neb. Const. art. I, § 7. The failure to obtain a warrant is not fatal to the legality of every warrantless arrest. As the defendant acknowledges, "A warrantless arrest of an individual is a species of seizure which, the courts have ruled, must be reasonable." Brief for appellant at 7. See *Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980). A person is seized when he is arrested. *Dunaway v. New York*, 442 U.S. 200, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979). Whether the arrest of Marcotte was legal depends upon the reasonableness of his seizure under the circumstances.

The defendant correctly points out that (1) when he was arrested, the arrest was without a warrant; (2) each of the three charges filed against him is a misdemeanor; and (3) none of the offenses for which he was arrested was committed in the presence of the arresting officer. The defendant also correctly argues that without an exigent circumstance, a police officer may not arrest an individual for a misdemeanor unless it is committed in the officer's presence. Marcotte claims that no exigent circumstance existed at the time of his arrest.

The Nebraska Legislature has addressed the reasonableness of a warrantless arrest. Neb. Rev. Stat. § 29-404.02 (Reissue 1985), in regard to arresting persons for misdemeanors without a warrant, provides:

> A peace officer may arrest a person without a warrant if the officer has reasonable cause to believe such person has committed:
>
> . . . .
>
> (2) A misdemeanor, and the officer has reasonable cause to believe that such person either (a) will not be apprehended unless immediately arrested; (b) may cause injury to himself or others or damage to property unless immediately arrested; (c) may destroy or conceal evidence of the commission of such misdemeanor; or (d) has committed a misdemeanor in the presence of the officer.

There is sufficient evidence to support the trial court's finding that when Officer Spomer arrested the defendant, the officer had reasonable cause to believe that Marcotte had committed the misdemeanor of driving while under the influence of alcoholic liquor. "When a law enforcement officer has knowledge, based on information reasonably trustworthy under the circumstances, which justifies a prudent belief that a suspect has committed a crime, the officer has probable cause to arrest without a warrant." *State v. Wickline*, 232 Neb. 329, 333, 440 N.W.2d 249, 252-53 (1989). If the offense is a misdemeanor, then one of the conditions set forth in § 29-404.02 must be present.

Before Marcotte's arrest, an eyewitness, the Quick Pic clerk Akiens, had detailed to Officer Spomer that a highly intoxicated man had exited her store, had quickly driven his pickup truck in reverse, and had struck a parked car before driving from the parking lot. Akiens had provided Spomer with a detailed description of the man and the pickup he was driving; his name, address, and telephone number; and the pickup's license plate number. An informant's detailed eyewitness report of a crime supplies its own indicia of reliability, and a citizen informant who has personally observed the commission of a crime is presumptively reliable. *State v. Ege*, 227 Neb. 824, 420 N.W.2d 305 (1988); *State v. Duff*, 226 Neb. 567, 412 N.W.2d 843 (1987).

Before arresting the defendant, in addition to the detailed information that Akiens had provided him, Officer Spomer also had observed that both the car in the parking lot and Marcotte's pickup were damaged, that the defendant's breath had a strong odor of alcohol, that the defendant's eyes were bloodshot and glazed, that Marcotte's balance was unsure, and that he had stumbled and mumbled and had failed some field sobriety tests. The officer had also established, through questioning, the defendant's identity, that Marcotte had been at the Quick Pic store, and that he claimed not to have been in an accident, or if he had been, that he "didn't do any damage to the car." The officer further established by questioning Marcotte that the defendant had drunk no alcohol after he left the Quick Pic store. Based upon these facts and his training and

experience as a police officer, Spomer concluded that Marcotte's breath-alcohol content was above the legal limit for driving. Obviously, the defendant had driven to his apartment from the Quick Pic store. With the facts provided him and upon that gained by his observations, Spomer arrested the defendant.

After a review of the record, we cannot say that the trial court was clearly wrong in finding that Spomer had probable cause to arrest the defendant. However, this does not end the analysis. It remains to be determined whether the warrantless arrest was proper under these circumstances.

Marcotte argues that his warrantless arrest was not lawful because (1) his identity was known to the officer, and the defendant could be arrested at any time; (2) he was at home, and there was no probable cause to believe that he would injure himself or others or damage property; and (3) there was no probable cause to believe that he would destroy or conceal evidence of the commission of a misdemeanor, as required by § 29-404.02. The State contends that destruction of evidence through dissipation of Marcotte's blood-alcohol or breath-alcohol level over time is sufficient justification under § 29-404.02(2)(c) for a warrantless arrest. The issue has previously been decided favorably to the State's position.

In *State v. Bishop*, 224 Neb. 522, 399 N.W.2d 271 (1987), this court held that because evidence of a defendant's intoxication would be lost if the police had to wait to obtain a search warrant, a warrantless arrest is valid. See, also, *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966) (holding that because the delay in obtaining a warrant threatened the destruction of evidence due to the diminishment of the alcohol in the blood, a warrantless seizure of a blood sample from a suspected drunk driver was appropriate). There being probable cause to arrest Marcotte and because the warrantless arrest was necessary to preserve evidence, Marcotte's first assignment of error is without merit.

In his last assignment of error, Marcotte argues that his refusal to submit to a chemical test was justified because his arrest was unlawful. However, Marcotte's arrest was lawful. Therefore, his refusal to take the chemical test was unjustified. See *Hoyle v. Peterson*, 216 Neb. 253, 256, 343 N.W.2d 730, 733

(1984) (stating that "[j]ustifiable refusal of the test depends upon some illegal or unreasonable aspect in the nature of the request, the test itself, or both"). Marcotte's last assignment of error is meritless.

The defendant's convictions and sentences are affirmed.

AFFIRMED.

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

446 N.W.2d 233

Filed September 29, 1989. No. 88-1068.

1. **Parental Rights: Abandonment: Words and Phrases.** Abandonment is an intentional withholding from the child, without just cause or excuse, by the parent of the parent's presence, care, love, and protection; maintenance; and the opportunity for the display of filial affection.
2. _____: _____: _____. The parental obligation is a positive duty which encompasses more than a financial obligation. It requires continuing interest in the child and a genuine effort to maintain communication and association with that child.
3. _____: _____: _____. Abandonment is not an ambulatory thing the legal effects of which a parent may dissipate at will by token efforts at reclaiming a discarded child.

Appeal from the County Court for Dodge County: DANIEL J. BECKWITH, Judge. Affirmed.

Roger R. Holthaus and Patrick T. Riskowski for appellant.

Dean Skokan and Brian L. Halstead for appellee.

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

PER CURIAM.

R.D., the mother of J.M.D., born June 22, 1987, has appealed from the judgment of the county court terminating her parental rights to the child.

The child was born in a motel in Fremont, Nebraska, and removed to the Dodge County Memorial Hospital by the

Fremont Fire Department rescue squad. Temporary custody of the child was given to the Department of Social Services (DSS) by a detention order made June 26, 1987. The child has been in foster care continuously since that time. The father of the child relinquished his parental rights on August 30, 1988.

The petition filed June 26, 1987, alleged that the child lacked proper parental care by reason of the fault or habits of her parents, who neglected or refused to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of such child, or that the child was in a situation dangerous to life or limb.

At the detention hearing that same day, Jay Moss, protective services worker for DSS, testified that the child was born in a bathroom at Berry's Motel in Fremont. R.D. had never reported to DSS that she was pregnant. When questioned at an evaluation hearing in another proceeding on March 18, 1987, R.D. denied that she was pregnant. The record shows that the mother had denied to DSS that she was pregnant and had received no prenatal care. However, she had planned to have her husband's sister adopt the child, and custody papers had been prepared. When the rescue squad arrived at the motel, she told one of the members of the squad that he should take the child because she was going to give the child away anyway.

The appellant's parental rights to her two older children were terminated on December 31, 1987. All three children are now together in the same foster home.

The supplemental petition to terminate the parental rights of the appellant which was filed June 29, 1988, alleged that the appellant had abandoned the child for a period of 6 months or more immediately prior to the filing of the petition, as provided in Neb. Rev. Stat. § 43-292(1) (Reissue 1988), and that it was in the best interests of the child that the appellant's parental rights be terminated.

It is unnecessary to set out the evidence in detail. The record shows not only an inability to properly care for the child, but a lack of interest in the welfare of the child. The appellant furnished no support for the child, and visitation was sporadic or nonexistent. The appellant visited the child in July 1987 when the child was hospitalized with an infection, but at the time of

the hearing on the supplemental petition to terminate parental rights on September 21, 1988, the appellant had not visited the child since December 29, 1987.

When Sharon Davis, a Child Protective Services worker, called the appellant on June 24, 1988, to notify her of the June 27 evaluation hearing and asked about visitation, the appellant changed the subject to relinquishment and the possibility of adoption. Further, the appellant was angry that she had been called and told Davis to never call again and to mind her own business.

Although the appellant attempted to excuse her failure to visit the child on the ground that she had no transportation, the record shows that was not true.

Between February and March 1988, the appellant lived in Fremont with her parents and drove to Omaha to work. She did not see the child during that time and later conceded that her problems with visitation at that time were not caused by lack of transportation, but with having her "head screwed up." She spent 30 days in jail from January 12 through February 12, 1988, for driving under suspension, second offense, and 7 days in jail in March 1988 for third offense driving under suspension. After that, she moved to Omaha and worked at a restaurant, the Chartroose Caboose. She was afraid to return to Fremont because there was a bench warrant for her arrest. She further testified that she went to see her husband on weekends in Bellevue by taking a bus. She had to ask for time off from work to do this, but she did not ask for time off or take a bus to Fremont to visit her child.

Abandonment has been defined as an intentional withholding from the child, without just cause or excuse, by the parent of the parent's presence, care, love, and protection; maintenance; and the opportunity for the display of filial affection. *Young v. Young*, 588 S.W.2d 207, 209 (Mo. App. 1979), cited in *In re Application of S.R.S. and M.B.S.*, 225 Neb. 759, 408 N.W.2d 272 (1987).

"The parental obligation is a positive duty which encompasses more than a financial obligation. It requires continuing interest in the child and a genuine effort to maintain communication and association with that child." *In re*

Adoption of Simonton, 211 Neb. 777, 784, 320 N.W.2d 449, 454 (1982). "Abandonment is not an ambulatory thing the legal effects of which a parent may dissipate at will by token efforts at reclaiming a discarded child." *In re Interest of Z.D.D. and N.J.D.*, 230 Neb. 236, 241, 430 N.W.2d 552, 555 (1988).

The finding by the trial court that the appellant "had neither established nor maintained any form of meaningful contact or desire to maintain or develop a relationship with the infant child from the child's birth" and had abandoned the child is supported by clear and convincing evidence. It is in the best interests of the child that the parental rights of the appellant be terminated.

The judgment is, therefore, affirmed.

AFFIRMED.

HELEN L. HAINES, APPELLEE, V. RAY MENSEN AND BARBARA MENSEN, APPELLANTS.

446 N.W.2d 716

Filed October 13, 1989. No. 87-722.

1. **Equity: Reformation.** A proceeding to reform a written instrument is an equity action.
2. **Equity: Appeal and Error.** On appeal to the Supreme Court, an equity action is a trial de novo on the record, requiring this court to reach a conclusion independent of the findings of a trial court, but subject to the rule that where credible evidence is in conflict on material issues of fact, 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 over another.
3. **Reformation.** Reformation is based on the premise that the parties had reached an agreement concerning an instrument, but while reducing their agreement to a written form, and as the result of mutual mistake or fraud, some provision or language was omitted from, inserted, or incorrectly stated in the instrument intended to be an expression of the actual agreement of the parties.
4. **Reformation: Evidence: Proof.** Before reformation of an instrument will be allowed, the party seeking such reformation on a claim of mutual mistake must, by clear and convincing evidence, prove existence of such mistake in reference to the instrument to be reformed.
5. **Evidence: Words and Phrases.** Clear and convincing evidence means and is that

amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of the fact to be proved.

6. **Reformation: Intent.** A mutual mistake exists where there has been a meeting of the minds of the parties and an agreement actually entered into, but the agreement in its written form does not express what was really intended by the parties.
7. **Trial: Rules of Evidence: Appeal and Error.** Error cannot be predicated upon a ruling which excludes evidence where the substance of the evidence was neither made known to the judge by an offer of proof nor apparent from the context within which questions were asked.

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

Thomas J. Young, of Young & LaPuzza, for appellants.

H. Daniel Smith and Thomas V. Van Robays, of Smith, Trustin & Schweer, for appellee.

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

MCGINN, D.J.

Ray and Barbara Mensen, husband and wife, appeal the order of the Douglas County District Court quieting title to property in the appellee, Helen L. Haines. We affirm.

Since 1958, the Mensens have leased on a month-to-month basis a house owned by the appellee and her husband, Clarence, who died June 22, 1984. In approximately 1963, the Mensens considered purchasing property in Washington County. When the Mensens told the Haineses about the possibility of terminating their lease, the Haineses indicated that they did not want the Mensens to move, as the Haineses had hoped the Mensens would look after them in their old age, since the Haineses had no known relatives.

Over a period of time, Clarence Haines showed Ray Mensen several drafts of deeds and explained the intentions of himself and Helen to deed property to the Mensens in exchange for care and assistance during the Haineses' older years. In December 1980 or early January 1981, Clarence Haines delivered to the Mensens the deed which is the subject of this action. The deed was then filed on January 13, 1981. The Mensens understood that the Haineses were deeding them what was referred to as

"the farm," based upon the Mensens' promise to care for the Haineses during their older years, and that the Haineses would exercise control over the property until the Haineses died, even though the deed had already been delivered.

The deed delivered to the Mensens was executed by Clarence and Helen Haines, conveying to Ray and Barbara Mensen, as joint tenants with the right of survivorship, the following described real estate, which was later quieted in Helen by the trial court: "Part of the Northeast Quarter of the Northeast Quarter of Section 9 Township 16 North Range 13 East all in Douglas County Nebraska as recorded in the Douglas County Register of Deeds office." However, the warranty deed that originally conveyed the property in question to Clarence and Helen as joint tenants described by metes and bounds a 15.34-acre tract of real estate in the northeast quarter of the northeast quarter of Section 9. The Mensens contended the deed should be reformed to include said metes and bounds description.

Approximately 7 months after the death of Clarence, Helen filed her petition, alleging three causes of action: failure of consideration to support the deed because of failure to care for Helen, inadequacy of the legal description, and undue influence on the part of Clarence in Helen's execution of the deed. Through a cross-petition, the Mensens alleged that the legal description contained in the deed was not complete and requested reformation.

The trial court found that there was adequate consideration to support the deed but that the legal description was inadequate, making the deed insufficient to convey title. The court found that there was insufficient evidence to support a reformation of the deed.

The appellants assigned as error the trial court's refusal to allow into evidence testimony of statements of Helen's deceased spouse, Clarence, the failure to order reformation of the deed, the failure to find that Helen was estopped to deny the validity of the deed, and the court's finding that the deed was void. We can consolidate these assignments of error into two issues: the sufficiency of the deed's legal description and the Mensens' request for reformation. A proceeding to reform a written

instrument is an equity action. *Newton v. Brown*, 222 Neb. 605, 386 N.W.2d 424 (1986); *Hohneke v. Ferguson*, 196 Neb. 505, 244 N.W.2d 70 (1976). On appeal to the Supreme Court, an equity action is a trial de novo on the record, requiring this court to reach a conclusion independent of the findings of a trial court, but subject to the rule that where credible evidence is in conflict on material issues of fact, 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 over another. *Giger v. City of Omaha*, 232 Neb. 676, 442 N.W.2d 182 (1989); *Hulinsky v. Parriott*, 232 Neb. 670, 441 N.W.2d 883 (1989).

We said in *Franz v. Nelson*, 183 Neb. 137, 138-39, 158 N.W.2d 606, 607 (1968):

> "While it is true that a deed must describe land so that it can be identified, yet that is certain which by evidence aliunde can be made certain." City of Warsaw v. Swearngin (Mo.), 295 S.W.2d 174. "If the description in a deed identifies, or furnishes the means of identifying, the property conveyed, it performs its function, it being sufficient when from it the property can be identified." Harrison v. Everett, 135 Colo. 55, 308 P.2d 216.

In *Franz*, the following legal description was held to be sufficiently definite, when taken together with external evidence:

> "a strip of land commencing 425 feet East of the middle of the public highway/ betwee (sic) section Nine (9) and Ten (10) Eldorado Township and 900 feet North of the Quarter line of the South west Quarter of section Number Ten (10), Eldorado Township, and running thence due South 2200 feet/ through the South West Quarter of sec. 10 Eldorado Twp. same to be a strip in width 10 feet during the whole of said course."

Franz, supra at 138, 158 N.W.2d at 607. Although "a strip of land" and a "part of" certain land might at first perusal be considered analogous, the "strip of land" in *Franz* was followed by a legal description which gave directions to the strip of land. However, the "part of" land in the deed in the instant case was not followed by directions in the form of a legal

description as to how to find the land.

In *Rupert v. Penner*, 35 Neb. 587, 53 N.W. 598 (1892), the legal description at issue referred to an unspecified, undivided quarter section of Section 16. We held that because the precise quarter of Section 16 was not stated, the description was so defective and imperfect that nothing passed by that writing. Although the deed in *Rupert* was eventually saved because of reference to another instrument, there is no other instrument to make reference to regarding the "part of" land sought to be conveyed in this case. Just as the precise quarter sought to be conveyed in *Rupert* was not described, neither is the precise "part of" land described in the Haines deed.

Because we find that the deed itself was insufficient to convey title, we next review the Mensens' request for reformation of the deed. We said in *Newton, supra* at 612-13, 386 N.W.2d at 429-30:

> Reformation is based on the premise that the parties had reached an agreement concerning an instrument, but while reducing their agreement to a written form, and as the result of mutual mistake or fraud, some provision or language was omitted from, inserted, or incorrectly stated in the instrument intended to be an expression of the actual agreement of the parties. See, *Schweitz v. State Farm Fire & Cas. Co.*, 190 Neb. 400, 208 N.W.2d 664 (1973); Restatement (Second) of Contracts § 155 (1981). . . .
>
> . . . Before reformation of an instrument will be allowed, the party seeking such reformation on a claim of mutual mistake must, by clear and convincing evidence, prove existence of such mistake in reference to the instrument to be reformed. *Johnson v. Stover*, [218 Neb. 250, 354 N.W.2d 142 (1984)]; *Cunningham v. Covalt*, 204 Neb. 512, 283 N.W.2d 53 (1979). Clear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of the fact to be proved. . . .
>
> . . . "A mutual mistake exists where there has been a meeting of the minds of the parties and an agreement actually entered into, but the agreement in its written form

> does not express what was really intended by the parties." *Sierra Blanca Sales Co., Inc. v. Newco Industries, Inc.*, 84 N.M. 524, 530, 505 P.2d 867, 873 (1972).

If reformation is to be granted, then, we must first find that the Haineses and the Mensens had reached a meeting of the minds regarding the property. An essential element of a meeting of the minds between the Haineses and the Mensens is the extent of the land that was to be conveyed. Testimony did include statements from both Ray and Barbara Mensen and other neighbors and acquaintances that the Haineses' farm had been left to the Mensens or that the Haineses intended to leave the farm to the Mensens. However, there was no testimony indicating with any detail what property was included when referring to the Haineses' farm. We are left to speculate as to whether the Haineses' farm was in reference to one house and part of the farmland or any other possible combination of property that to the various testifiers represented the Haineses' farm. Furthermore, testimony indicating that several different deeds were drafted over a period of time, and Ray Mensen's testimony that the Haineses approached the Mensens with the deed and that there were no propositions or negotiations regarding the deed, more closely describes a gift than a meeting of the minds. The testimony is not indicative of a meeting of the minds.

The appellants assert that the record demonstrates that if there was insufficient evidence to demonstrate the extent of property to be conveyed, it was the result of the trial court's improperly excluding evidence regarding statements made by Clarence Haines. Testimony from witnesses as to alleged statements made by Clarence was offered by the appellants to prove the truth of the alleged agreement regarding the deed, but was excluded as hearsay. Appellants argue that such testimony should have been permitted because it constituted an admission against interest and because Clarence was acting as an agent authorized to speak for Helen pursuant to Neb. Rev. Stat. § 27-801 (Reissue 1985) or, in the alternative, that the statements represented an exception to the hearsay rule according to Neb. Rev. Stat. § 27-804 (Reissue 1985) because of the death and unavailability of Clarence. We need not decide this issue.

Because no offer of proof was made by the appellants, our review of this alleged error leads us to Neb. Rev. Stat. § 27-103(1) (Reissue 1985), which provides: "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and . . . (b) . . . the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked." There is no doubt but that a substantial right of the appellants was affected by the excluding of the evidence regarding statements made by Clarence. However, our de novo review of the record indicates that the context of the questioning did not make apparent the substance of the evidence. We find that the need for an offer of proof was not superfluous in this case, and instead reiterate that there is no question but that the better trial practice is always to make an offer of proof when evidence is excluded. *Sherman County Bank v. Kallhoff*, 205 Neb. 392, 288 N.W.2d 24 (1980). Because we find that the substance of the evidence was not apparent from the context of the questioning, the appellants are precluded from alleging this issue as error.

Our de novo review does not reveal clear, convincing, and satisfactory evidence of a meeting of the minds, and therefore there is no basis for reformation. The action of the trial court in quieting title to the property in the appellee is affirmed.

AFFIRMED.

EUNICE BURKEY, APPELLANT, V. SANDRA K. ROYLE AND DONALD H. ROYLE, APPELLEES.

446 N.W.2d 720

Filed October 13, 1989. No. 87-983.

1. **Motor Vehicles: Negligence.** It is a motorist's duty to use reasonable care to prevent a collision or injury from the operation of a motor vehicle, considering the conditions and circumstances existing on the public street or highway.
2. _____: _____. A motorist must keep a proper lookout in the direction in which the motorist's vehicle is operated, take notice of conditions on the street or

highway traveled, and know what is in front of her or him for a reasonable distance.

3. **Negligence.** To determine whether conduct constitutes negligence, the invariable standard is reasonable care, although reasonable care is directly proportional to the danger inherent in the conduct and may vary depending on the circumstances.
4. **Motor Vehicles: Negligence.** Ordinarily, the question of the defendant's negligence is one of fact for the jury; however, negligence generally arises 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 her or his vehicle or turn it aside without colliding with an object or obstruction on the street or highway within the operator's range of vision.
5. _____: _____. The range of vision rule is applicable, notwithstanding that a motorist's vision is impaired by atmospheric or weather conditions, such as falling or blowing snow, rain, mist, or fog, and notwithstanding that a motorist's ability to maneuver the vehicle is impaired by the presence of ice or snow upon the road surface.
6. _____: _____. 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 it because it is similar in color to the road surface and is thus relatively indiscernible.
7. _____: _____. If the presence of ice or snow upon the road surface is known or should have reasonably been anticipated, the snow and ice are considered conditions rather than intervening causes and thus do not exonerate a motorist from the application of the range of vision rule.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Reversed and remanded for a new trial on the issue of damages.

Graten D. Beavers, of Knapp, Mues, Beavers & Luther, for appellant.

Thomas W. Tye II, of Tye, Hopkins & Associates, for appellees.

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

CAPORALE, J.

Plaintiff, Eunice Burkey, appeals the dismissal pursuant to verdict of the suit she brought because of a collision between an automobile in which she was a passenger and which was being driven by her husband, Roger Burkey, and an automobile coowned by defendant-appellee Donald H. Royle and his

daughter, defendant-appellee Sandra K. Royle, who was driving that automobile. Plaintiff seeks recovery in her own right for damages she sustained as a consequence of injuries she suffered and for damages her husband incurred and assigned to her. Among plaintiff's assignments of error is the claim that the trial court erroneously and prejudicially refused to instruct the jury, as plaintiff requested, that Royle was negligent and that such negligence proximately caused the collision. Finding merit in that assignment of error, we reverse the judgment of the trial court and remand the cause for a new trial solely on the issue of damages.

The collision occurred in Kearney, Nebraska, at the intersection of 39th Street, an east-west street, and Second Avenue, a north-south street. Second Avenue consists of four traffic lanes, two in either direction, and at the intersection with 39th Street is augmented by left turn lanes for southbound and northbound traffic. At the location of the collision, the two northbound lanes are separated from the southbound lanes by a median.

A grocery store parking lot is located at the northwest corner of the intersection, with two exits onto Second Avenue. The southernmost of these exits is 160 feet from the intersection, and the northernmost exit is 300 feet from the intersection. An automobile dealership is located north of the grocery store parking lot.

The weather was inclement on the day of the collision. According to Roger Burkey, "The roads were definitely getting a lot slicker and the further west we come, the worse it got." By the time the Burkeys reached Kearney, it was snowing—"all the streets were snow packed . . . and they were warning everybody to stay put . . . ." Plaintiff testified that the streets were covered with ice which in turn was blanketed with wet snow, making the streets "slippery and icy." Raul Vasquez, a police sergeant for the city of Kearney who investigated the collision, testified that at the place of the collision the streets were covered with snow and ice and that there was an accumulation of snow which was encroaching on the furthest west driving lane along the eastern side of the grocery store parking lot. However, according to Sandra Royle, it was sleeting, not snowing, at the time of the

collision. "There was a small amount of mist. The roads were starting to get icy as it got later on in the evening. However there wasn't that much snow. What snow there was was packed." "[I]t was more icy than snowy . . . ."

Just before the collision the Burkeys, who had been traveling south on Second Avenue, stopped in the center lane, or furthest left through-traffic lane, at the intersection of Second Avenue with 39th Street because the traffic light was red. Roger Burkey testified that the snow at the intersection was about 6 to 8 inches deep and covered the street markings, so that he could not see them. Because of this, he merely stopped in the tracks other vehicles had made in the snow. He stated, "[T]here was just one set of tracks. There was no lanes or you didn't know where you were at. You were just in the tracks. If you got out of the tracks you'd been stuck."

The parties disagree as to the circumstances of the collision. According to Roger Burkey:

> We were sitting there waiting for the light to turn, and I happened to glance in the rear view mirror. I could see that there was a car coming right behind us further up the road and I happened to see that . . . the vehicle was coming at a pretty good speed. And the closer she come or the vehicle come, why I saw her hit the brakes because the car started to fishtailing and I knew that there was no way she was ever going to get stopped before they hit us. And just right before we got hit, why I threw my arm out. I told [plaintiff] we were going to get hit. If there probably wouldn't have been any vehicles going on 39th Street, I probably would have just drove out in the intersection, because I knew we were going to get smacked.

When Roger Burkey first saw the Royle vehicle, it was approximately at the northern exit of the grocery store parking lot.

Corresponding with Roger Burkey's version of the incident, Vasquez reported that after the collision, Royle told him that "she was southbound on Second Avenue approaching 39th and she couldn't get stopped due to the icy roadway and collided with a vehicle in front of her with the left front portion of her vehicle." Royle also told the officer that "she attempted to steer

to the right but for some reason couldn't." Vasquez testified similarly to Roger Burkey that because the streets were covered with ice and snow, the lane markings were not visible.

Royle's version of the collision is generally to the effect that she and her friends had left Kearney to travel to another town, but decided it was "too icy" and turned around to return to Kearney. When questioned by her attorney on direct examination, she stated:

> As I got to about [the automobile dealership], I could see that there was a red stop light. I could see the Burkey car in the center lane. I was still in the center lane until the first entrance into the [grocery store] parking lot. Sometime in between that entrance and the second entrance I realized that I probably wouldn't be able to stop behind their car. I thought it would be safer to get into the right-hand lane of traffic. There was nothing coming, so I did. I would have been able to stop and not go through the intersection. However, I hit something, I don't know for sure what. It was—it either had to be ice or a clump of snow which caused me to veer to the left, therefore striking the back end of their car.

She further testified that when she reached the northernmost entrance into the parking lot,

> I started tapping my brakes or pumping the brakes. I did feel like I had it under control although we did hit a little ice and again I thought I could probably stop behind the car. But to be safe, it was better to get into the other lane because I did start to slide. If I would not have hit whatever it was that was in the side of the road, I probably would have been able to stop beside them.

When questioned by plaintiff's attorney earlier, during plaintiff's case in chief, Royle stated that she changed lanes because the street began to get icy, and she realized she was not in control of her vehicle and would not be able to stop behind the Burkey vehicle.

Royle testified that she did not see the clump of ice or snow before she hit it. Royle also testified that she began slowing down when she saw the red light. Although she could not recall her exact speed, she was driving "extra cautious" and "slow"

because of the weather conditions, and she did not "fishtail." Royle also contradicted Roger Burkey's and Vasquez' testimony by testifying that she could tell where the lanes should be.

In general, Royle's version of the collision was confirmed by Dave Tietjen, a passenger in her automobile. He testified that she never "fishtailed." He also testified that when the Royle vehicle struck the chunk of ice or snow which caused it to veer left, it was probably traveling at 10 miles per hour, but could have been traveling 5 miles an hour faster or slower. He did state that he could see big chunks of ice and snow along the curb.

According to Royle, the Burkey vehicle was not directly in the center lane of traffic but, instead, impeded the right-hand lane of traffic "a little bit." While she stated that the Burkey vehicle "definitely" narrowed the right-hand lane, she could have gone around it on the right had she not hit the clump of ice or snow. Vasquez testified that after the collision, the position of the Burkey vehicle "seem[ed] to indicate . . . that it was encroaching on the west . . . driving lane." Tietjen stated that Royle's vehicle pushed the Burkey vehicle "a few feet" forward as a result of the collision.

Vasquez testified that when he arrived at the scene of the collision, the Burkey vehicle was in front of the Royle vehicle, both vehicles were facing south, and both were positioned in approximately the center lane. He estimated that the point of impact between the two vehicles was "about 20 feet north of the north curbline of 39th Street."

According to Vasquez, after the collision the front end of the Burkey vehicle was very close to the intersection. Plaintiff remembered that after the collision she was concerned that the front end of their automobile might be hit by 39th Street traffic. Both Royle and Tietjen contradicted the plaintiff, stating that after the collision the Burkey vehicle was not impeding 39th Street traffic.

It is a motorist's duty to use reasonable care to prevent a collision or injury from the operation of a motor vehicle, considering the conditions and circumstances existing on the public street or highway. *Prime Inc. v. Younglove Constr. Co.*, 227 Neb. 423, 418 N.W.2d 539 (1988). A motorist must keep a

proper lookout in the direction in which the motorist's vehicle is operated, take notice of conditions on the street or highway traveled, and know what is in front of her or him for a reasonable distance. See, *Converse v. Morse*, 232 Neb. 925, 442 N.W.2d 872 (1989); *Mantz v. Continental Western Ins. Co.*, 228 Neb. 447, 422 N.W.2d 797 (1988); *Prime Inc. v. Younglove Constr. Co., supra.*

To determine whether conduct constitutes negligence, the invariable standard is reasonable care, although reasonable care is directly proportional to the danger inherent in the conduct and may vary depending on the circumstances. *Union Pacific RR. Co. v. Kaiser Ag. Chem. Co.*, 229 Neb. 160, 425 N.W.2d 872 (1988); *Prime Inc. v. Younglove Constr. Co., supra.*

Ordinarily, the question of the defendant's negligence is one of fact for the jury. *Schuster v. Baumfalk*, 229 Neb. 785, 429 N.W.2d 339 (1988). As plaintiff indicates, however, we have held that negligence generally arises 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 her or his vehicle or turn it aside without colliding with an object or obstruction on the street or highway within the operator's range of vision. *Converse v. Morse, supra*; *Kasper v. Carlson*, 232 Neb. 170, 440 N.W.2d 195 (1989); *Prime Inc. v. Younglove Constr. Co., supra.* The range of vision rule is applicable, notwithstanding that a motorist's vision is impaired by atmospheric or weather conditions, such as falling or blowing snow, rain, mist, or fog, *Mantz v. Continental Western Ins. Co., supra*, and *Prime Inc. v. Younglove Constr. Co., supra*, and notwithstanding that a motorist's ability to maneuver the vehicle is impaired by the presence of ice or snow upon the road surface. See, *Vrba v. Kelly*, 198 Neb. 723, 255 N.W.2d 269 (1977); *Newkirk v. Kovanda*, 184 Neb. 127, 165 N.W.2d 576 (1969); *Kuffel v. Kuncl*, 181 Neb. 770, 150 N.W.2d 908 (1967).

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 it because it is similar in color to the road surface and is thus relatively indiscernible. See, *Converse v.*

Morse, supra; *Prime Inc. v. Younglove Constr. Co., supra.*

Therefore, the question resolves itself into whether Royle operated her vehicle in such a manner that she was unable to stop it or turn it aside without colliding with the Burkey automobile, an object on the street within her range of vision, and thus was negligent as a matter of law notwithstanding that her ability to control her vehicle may have been impaired by the presence of ice or snow on the street.

We have said that if the presence of ice or snow upon the road surface is known or should have reasonably been anticipated, the snow and ice are considered conditions rather than intervening causes and thus do not exonerate a motorist from the application of the range of vision rule. See, *Vrba v. Kelly, supra*; *Newkirk v. Kovanda, supra*; *Kuffel v. Kuncl, supra.*

There is nothing in the evidence which excuses Royle from being aware of the conditions and circumstances under which she was driving and from knowing of the presence of the snow or ice she encountered. Accordingly, the trial court erred in failing to instruct the jury as plaintiff requested.

REVERSED AND REMANDED FOR A NEW TRIAL ON THE ISSUE OF DAMAGES.

H.L. JELSMA AND TOMMY JELSMA, DOING BUSINESS AS SPA, INC., APPELLEES, V. ACCEPTANCE INSURANCE COMPANY, APPELLANT.

446 N.W.2d 725

Filed October 13, 1989. No. 88-050.

1. **Reformation: Intent.** The right to reformation depends on whether the instrument to be reformed reflects the intent of the parties. Reformation may be granted to correct an erroneous instrument to express the true intent of the parties to the instrument.
2. **Reformation.** Reformation is based on the premise that the parties had reached an agreement concerning an instrument, but while reducing their agreement to a written form, and as the result of mutual mistake or fraud, some provision or language was omitted from, inserted, or incorrectly stated in the instrument intended to be an expression of the actual agreement of the parties.
3. **Reformation: Fraud.** Reformation may be ordered where there has been a

mutual mistake or where there has been a unilateral mistake caused by the fraud or inequitable conduct of the other party.

4. **Reformation: Presumptions: Intent: Evidence.** To overcome the presumption that the written instrument correctly expresses the intention of the parties and obtain reformation, the evidence must be clear, convincing, and satisfactory.
5. **Contracts: Insurance: Reformation: Intent.** Reformation of an insurance contract may be granted when through a mistake the policy fails to express the contract intended by the parties.
6. **Contracts: Insurance: Agents: Fraud: Reformation.** Where a mistake of the insurer's agent is relied upon, the same principles governing reformation for mistake generally are applied. Consequently, where a mistake of an agent is relied on, it must be mutual to warrant reformation, or there must be mistake of one party and fraud of the other, for, in the absence of fraud, a unilateral mistake, while it may afford ground for rescinding, does not justify the reforming of the contract.
7. **Reformation: Words and Phrases.** For purposes of reformation, mutual mistake is defined as a belief shared by the parties, which is not in accord with the facts. A mutual mistake is one common to both parties in reference to the instrument to be reformed, each party laboring under the same misconception about their instrument.
8. **Reformation: Intent.** A mutual mistake exists where there has been a meeting of the minds of the parties and an agreement actually entered into, but the agreement in its written form does not express what was really intended by the parties.

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

Donn E. Davis, of Crosby, Guenzel, Davis, Kessner & Kuester, for appellant.

Hal Bauer, of Bauer, Galter & O'Brien, for appellees.

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

BOSLAUGH, J.

The plaintiffs, H.L. Jelsma and Tommy Jelsma, doing business as Spa, Inc., commenced this action for a declaratory judgment to determine whether a policy of fire insurance issued by the defendant, Acceptance Insurance Company, to the plaintiffs was in effect on July 29, 1986, the date that the plaintiffs' property was destroyed by fire, or whether the policy had been canceled prior to the loss.

The trial court found that it was the intent of the parties that the policy be issued for the period of time from September 10, 1985, through September 10, 1986; that the notice of cancellation sent to the plaintiffs was ineffective; and that the policy was in effect on July 29, 1986. The defendant has appealed, alleging as error these three findings of the district court.

The record shows that the plaintiffs were represented in the transaction by Alexander & Alexander, Inc., and the defendant by River City Underwriters, Inc. Prior to September 10, 1985, the plaintiffs contacted Alexander & Alexander, seeking renewal of fire insurance coverage for their property known as the Royal Grove. Alexander & Alexander then requested coverage through River City Underwriters, a managing general agent for Acceptance. River City Underwriters arranged for coverage by six insurers, one of which was Acceptance. The term of each policy issued was for a year, from September 10, 1985, through September 10, 1986, except the Acceptance policy, which had a term from September 10, 1985, through May 4, 1986.

Since the policy issued by the defendant was effective only from September 10, 1985, through May 4, 1986, the policy would not be in effect on July 29, 1986, unless it was subject to being reformed. Thus, in effect, this action was a suit in equity by the plaintiffs to reform the insurance policy which the defendant had issued. See *First Fed. Sav. & Loan Assn. v. Thomas*, 230 Neb. 465, 432 N.W.2d 222 (1988).

This court reviews actions in equity de novo on the record and is required to reach a conclusion independent of the trial court's findings; however, subject to the rule that where credible evidence is conflicting on material issues of fact, this court may consider the fact that the trial court observed the witnesses and accepted one version of facts over the other. *Id.*

The right to reformation depends on whether the instrument to be reformed reflects the intent of the parties. Reformation may be granted to correct an erroneous instrument to express the true intent of the parties to the instrument. In *Newton v. Brown*, 222 Neb. 605, 612, 386 N.W.2d 424, 429 (1986), we stated:

> Reformation is based on the premise that the parties had reached an agreement concerning an instrument, but while reducing their agreement to a written form, and as the result of mutual mistake or fraud, some provision or language was omitted from, inserted, or incorrectly stated in the instrument intended to be an expression of the actual agreement of the parties.

Reformation may be ordered where there has been a mutual mistake or where there has been a unilateral mistake caused by the fraud or inequitable conduct of the other party. *Ridenour v. Farm Bureau Ins. Co.*, 221 Neb. 353, 377 N.W.2d 101 (1985). To overcome the presumption that the written instrument correctly expresses the intention of the parties and obtain reformation, the evidence must be clear, convincing, and satisfactory. *Id.*

Reformation of an insurance contract may be granted when through a mistake by the insurer's agent the policy fails to express the contract as intended by the parties.

> Where the mistake of the insurer's agent is relied upon, the same principles governing reformation for mistake generally are applied. Consequently where a mistake of an agent is relied on, it must be mutual to warrant reformation, or there must be mistake of one party and fraud of the other, for, in the absence of fraud, a unilateral mistake, while it may afford ground for rescinding, does not justify the reforming of the contract.

17 G. Couch, Cyclopedia of Insurance Law § 66:43 (rev. 2d ed. 1983).

> For purposes of reformation, mutual mistake is defined as a belief shared by the parties, which is not in accord with the facts. . . . A mutual mistake is one common to both parties in reference to the instrument to be reformed, each party laboring under the same misconception about their instrument. . . . "A mutual mistake exists where there has been a meeting of the minds of the parties and an agreement actually entered into, but the agreement in its written form does not express what was really intended by the parties."

Newton, supra at 613, 386 N.W.2d at 430, quoting *Sierra*

Blanca Sales Co., Inc. v. Newco Industries, Inc., 84 N.M. 524, 505 P.2d 867 (1972).

The record shows that the Acceptance policy, which was effective from September 10, 1985, through May 4, 1986, was not written until April 29, 1986. The policy was written then because Thomas Harper, a River City Underwriters employee who had handled the matter prior to April 1986, had failed to obtain a policy from Lloyd's of London. On April 22, 1986, Michael J. Mertz, an underwriter at River City Underwriters, discovered that Harper had not obtained the policy from Lloyd's which would cover $95,000, or 16 percent of the risk. Mertz then arranged for the defendant to issue a short-term policy covering the period from September 10, 1985, to May 4, 1986. The notice of cancellation which was sent to the plaintiffs was intended to advise them that they had no coverage under the defendant's policy after May 4, 1986.

The record further shows that the defendant had issued a similar policy to the plaintiffs in a prior year, but had canceled that policy because it considered the risk substandard. Mertz testified that if the risk had come to his attention at the time it was originally submitted, it would have been declined by the defendant. There is a complete absence of evidence of mistake or fraud on the part of the defendant concerning its intention to write a policy extending beyond May 4, 1986.

There is no evidence that Acceptance intended the policy to be for a term of 1 year from September 10, 1985, to September 10, 1986. Although the Jelsmas intended to obtain a policy for 1 year, Acceptance declined to provide such coverage because the risk did not meet its underwriting standards. Only when River City Underwriters discovered that coverage had not been placed with Lloyd's of London did Acceptance agree to furnish coverage on a short-term basis as an accommodation.

The record further shows that the plaintiffs were aware of a lack of full coverage on their property after several other carriers had canceled policies issued to the plaintiffs. Although Alexander & Alexander was able to obtain additional coverage for the plaintiffs, they decided not to obtain new policies because of the increase in premiums that they would have to pay.

It is unnecessary to consider the other assignments of error.

The judgment is reversed and the cause remanded with directions to dismiss the petition.

REVERSED AND REMANDED WITH DIRECTIONS.

NOGG BROTHERS PAPER CO., A NEBRASKA CORPORATION, APPELLEE, V. WILLIAM J. BICKELS, APPELLANT.

446 N.W.2d 729

Filed October 13, 1989. No. 88-127.

1. **Contracts: Guaranty.** A guaranty is interpreted using the same general rules as are used for other contracts.
2. **Contracts: Intent.** A written contract expressed in unambiguous language is not subject to rules of construction, and the intention of the parties must be determined from the contents of the contract.
3. **Contracts.** The fact that there exist more than one arguable interpretation of a contract term does not necessarily indicate that it is ambiguous.
4. **Contracts: Intent.** A contract is only ambiguous if, upon considering the contract as a whole, the contract leaves uncertain which of two or more meanings represents the true intentions of the parties.

Appeal from the District Court for Douglas County, THEODORE L. CARLSON, Judge, on appeal thereto from the County Court for Douglas County, WILLIAM F. RYAN, Judge. Judgment of District Court affirmed.

Daniel W. Evans, of Steier & Kreikemeier, P.C., for appellant.

Eric H. Lindquist, of Abrahams, Kaslow & Cassman, for appellee.

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

GRANT, J.

This action was brought in the county court for Douglas County by the plaintiff-appellee, Nogg Brothers Paper Co. (Nogg), on a personal guaranty executed by the defendant-appellant, William J. Bickels. The county court

found in favor of defendant Bickels. Nogg appealed to the district court for Douglas County, where the county court decision was reversed and judgment entered for Nogg. Bickels appealed to this court. We affirm.

The facts of the case were stipulated at trial and show the following. Defendant was president and part owner of Bill & Buck, Inc., doing business as Bic's Deli Mart (Bic's). Bic's applied to Nogg for a credit account. As part of the application and pursuant to the specific demand of Nogg, Bickels executed a document provided by Nogg entitled "Individual Personal Guaranty." The guaranty stated:

> I, William Bickels . . . for and in consideration of your extending credit at my request to Bic's Deli Mart (hereinafter referred to as the "Company"), of which I am President, hereby personally guarantee to you the payment at NOGG BROTHERS PAPER COMPANY in the State of NEBRASKA of any obligation of the Company and I hereby agree to bind myself to pay you on demand any sum which may become due to you by the Company whenever the Company shall fail to pay the same. It is understood that this guaranty shall be a continuing and irrevocable guaranty and indemnity for such indebtedness of the Company. I do hereby waive notice of default, non-payment and notice thereof and consent to any modification or renewal of the credit agreement hereby guaranteed.

Nogg did not send Bickels any documents purporting to accept the guaranty.

Nogg granted credit and delivered goods and services to Bic's in the amount of $4,424.05. Nogg demanded payment from Bic's and Bickels. Both refused to pay. Nogg did not pursue its remedies against Bic's, but initiated this action against Bickels.

The county court found that Bickels' guaranty was conditioned upon Nogg's exhaustion of its remedies against Bic's, thus finding that the guaranty was a guaranty of collection. Because Nogg had failed to exhaust its remedies against Bic's, the county court dismissed the cause without prejudice. Nogg appealed to the district court for Douglas County. Bickels cross-appealed, assigning error in the county

court's action dismissing the cause without prejudice. The district court reversed the decision of the county court and gave judgment in favor of Nogg in the amount of $4,424.05 plus costs.

Bickels appeals to this court and assigns, in substance, that the district court erred (1) in reversing the county court's determination that Bickels' guaranty was conditioned on Nogg's exhaustion of its remedies against Bic's, (2) in failing to require notice of acceptance to validate the guaranty, and (3) in not dismissing plaintiff's case with prejudice.

Both parties agree that the issue raised by the first assignment is whether the guaranty created a guaranty of payment or a guaranty of collection. Under a guaranty of payment the guarantor undertakes that if the obligation is not paid when due, the guarantor will pay it according to its terms without regard to whether the guaranteed person has exhausted all remedies against the primary debtor. See, *First Nat. Bank v. Benedict Consol. Indus.*, 224 Neb. 860, 402 N.W.2d 259 (1987); *Bain v. King*, 128 Neb. 682, 259 N.W. 751 (1935); *Bloom v. Warder*, 13 Neb. 476, 14 N.W. 395 (1882); Neb. U.C.C. § 3-416(1) (Reissue 1980) (defining guaranty of payment with reference to negotiable instruments). In contrast, under a guaranty of collection the guarantor undertakes the obligation to pay only after the guaranteed person has unsuccessfully exhausted all reasonable means of collection against the primary debtor. See, *McCague Bros. v. Irey*, 73 Neb. 602, 103 N.W. 281 (1905); § 3-416(2) (defining guaranty of collection with reference to negotiable instruments).

A guaranty is interpreted using the same general rules as are used for other contracts. *Aetna Life Ins. Co. v. Anderson*, 848 F.2d 104 (8th Cir. 1988). Cf. *First Trust Co. v. Airedale Ranch & Cattle Co.*, 136 Neb. 521, 286 N.W. 766 (1939). A written contract expressed in unambiguous language is not subject to rules of construction, and the intention of the parties must be determined from the contents of the contract. *Fisbeck v. Scherbarth, Inc.*, 229 Neb. 453, 428 N.W.2d 141 (1988). The fact that there exist more than one arguable interpretation of a contract term does not necessarily indicate that it is ambiguous. *Bedrosky v. Hiner*, 230 Neb. 200, 430 N.W.2d 535 (1988). A

contract is only ambiguous if, upon considering the contract as a whole, the contract leaves uncertain which of two or more meanings represents the true intentions of the parties. *Id.*

There is no ambiguity in the guaranty that Bickels signed. Bickels stated in the guaranty, "I . . . personally guarantee to you the payment" of Bic's obligations to Nogg "whenever [Bic's] shall fail to pay the same." Bickels contends that the phrase "shall fail to pay" in the guaranty is ambiguous because it is unclear whether the phrase refers to failure to pay upon demand or failure to pay after judgment and unsatisfied execution. The ordinary and plain meaning of the phrase "fail to pay" is failure to pay at maturity or demand and not upon judgment and unsatisfied execution, as argued by Bickels.

Where a guaranty uses unqualified language of payment, it has historically been interpreted to guarantee the payment of the underlying obligation upon maturity. The term "shall fail to pay," as used in the guaranty, is not an added condition to Bickels' guaranty of payment to Nogg and is not indicative of a guaranty of collection. In *Murphy v. Stuart Fertilizer Co.*, 221 Neb. 767, 770-71, 380 N.W.2d 631, 634 (1986), we held that a guaranty which stated, " 'We hereby guarantee the payments as set-forth in this Agreement . . .' " was a guaranty which "contained no conditions and as such obligated [the guarantors] to make payment if [the primary debtor] failed to do so." In *Murphy* the very definition of an unconditional guaranty was that the guarantors were obligated to pay upon the primary debtor's failure to pay. A guaranty is considered unconditional even though no liability arises until maturity. Use of the unqualified phrase "fail to pay" is merely a reference to that fact.

Moreover, our law with respect to negotiable instruments has long determined that the unqualified use of language of payment in a guaranty creates an obligation upon maturity. See *International Harvester Co. v. Schultz*, 102 Neb. 753, 169 N.W. 428 (1918) (holding the language " 'For value received, I hereby guarantee the payment of the within note . . .' " (syllabus of the court) did not require the guaranteed person to undertake the collection of the notes from the makers thereof). Article 3 of the Nebraska Uniform Commercial Code has

codified this common-law rule. Although not controlling in this action because we are not here concerned with a negotiable instrument, § 3-416(1) and (3) mandate that a guaranty which uses the language "payment guaranteed" or its equivalent, or does not otherwise specify its nature, will be considered a guaranty of payment. As set out in the comment to § 3-416, the definitions contained in that section reflect "the commercial understanding as to the meaning and effect of words of guaranty . . . ." The law with respect to instruments indicates that commercial usage, as well as common usage, views language of "payment" in a guaranty as creating liability upon maturity and not upon judgment and unsatisfied execution.

The following example clarifies the difficulty with Bickels' proposed interpretation of the term "fail to pay." In *Mayo v. Bloomberg*, 290 Mass. 168, 195 N.E. 99 (1935), the defendant guaranteed payment to the plaintiffs if the primary debtor failed to pay the obligation within 10 days of maturity. If one would follow Bickels' proposed interpretation of the phrase "fail to pay," the guaranty in the *Mayo* case would mean that the defendant was only obligated to pay the plaintiffs if the plaintiffs were able to obtain a judgment against the primary debtor and have execution returned unsatisfied within 10 days of maturity. The primary debtor would have "failed to pay" only if the plaintiffs were unable to obtain judgment and have execution returned unsatisfied within 10 days of maturity. Bickels' interpretation would reduce the *Mayo* guaranty to a nullity, contrary to the objective intent of the parties. The court in *Mayo* held that the guaranty was an unconditional guaranty of payment.

Next, Bickels contends that by including the word "indemnity" in the guaranty Nogg limited the guaranty to one of collection. Even though a cause of action for a contract of indemnity does not accrue until a loss occurs, *Lyhane v. Durtschi*, 144 Neb. 256, 13 N.W.2d 130 (1944), the mere inclusion of the word "indemnity" in a contract does not by itself control the conditions of liability or create ambiguity. We held in *Steinheider & Sons, Inc. v. Iowa Kemper Ins. Co.*, 204 Neb. 156, 161, 281 N.W.2d 539, 542 (1979), that "in construing a contract, the instrument must be read as a whole, giving force

and effect to all its provisions to determine whether or not any ambiguity exists . . . ." The guaranty in this case, viewed as a whole, uses language of "payment," as discussed above. The indemnity language is merely cumulative language within the guaranty and can be given effect without limiting the guaranty or making it ambiguous.

The language of the guaranty, taken as a whole, indicates an objective intention of the parties to execute a guaranty of payment. Upon considering the guaranty with a view to its plain and ordinary language, there do not remain two or more meanings which could represent the true intent of the parties.

In arguing that the guaranty must be construed as a guaranty of collection, Bickels relies on the rule of construction stated in *Metropolitan Utilities Dist. v. Fidelity & Deposit Co.*, 200 Neb. 635, 640, 264 N.W.2d 854, 857 (1978), that "[i]f an obligee in a guaranty draws it in a form requiring explanation, the guarantor is a favorite of the law in the interpretation of the ambiguous provision." A contract written in unambiguous language is not open to construction against the drafter or otherwise. *Fisbeck v. Scherbarth, Inc.*, 229 Neb. 453, 428 N.W.2d 141 (1988); *Cillessen Constr. v. Scotts Bluff Co. Hous. Auth.*, 217 Neb. 39, 348 N.W.2d 418 (1984). There is no ambiguity in the guaranty, and therefore, there is no reason to consider the rules of construction relied upon by the defendant.

Because we hold that the guaranty executed by Bickels was an unconditional guaranty of payment, we need not consider the second and third assignments of error. Bickels concedes under the second assignment that under Nebraska law no notice of acceptance is required for a guaranty of payment. See, *Standard Oil Co. v. Hoese*, 57 Neb. 665, 78 N.W. 292 (1899); *Lininger v. Wheat*, 49 Neb. 567, 68 N.W. 941 (1896); *Wilcox v. Draper*, 12 Neb. 138, 10 N.W. 579 (1881). The third assignment, that the trial court erred in not dismissing the cause with prejudice, is not in issue because we affirm the district court's determination that the cause should not have been dismissed at all.

The judgment of the district court is affirmed.

AFFIRMED.

HORST WOELLNER, APPELLEE, V. ERNA WOELLNER, APPELLANT.
446 N.W.2d 733

Filed October 13, 1989. No. 88-151.

Appeal from the District Court for Douglas County: KEITH HOWARD, Judge. Affirmed.

Thomas R. Wolff for appellant.

Howard L. Neuhaus for appellee.

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

PER CURIAM.

This is an appeal from the Douglas County District Court, which denied the application of the respondent-appellant to modify the divorce decree by extending the period of alimony payments indefinitely.

As required, we have reviewed the trial court's action de novo on the record. *Bending v. Bending, ante* p. 506, 446 N.W.2d 236 (1989). From that review, we determine that the trial court did not abuse its discretion in denying the application of appellant to extend the period of alimony payments indefinitely. The judgment of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LEE OTIS MARSHALL, APPELLANT.
446 N.W.2d 733

Filed October 13, 1989. No. 88-558.

1. **Postconviction: Evidence: Witnesses.** In an evidentiary hearing for postconviction relief, the trial judge, as the trier of fact, resolves conflicts in evidence and questions of fact, including the credibility and weight to be given the testimony of a witness.
2. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used as a substitute for an appeal or to receive a further review of issues already litigated.

3. **Effectiveness of Counsel: Proof.** To maintain a claim of ineffective assistance of counsel, defendant must show counsel's performance was deficient and that the deficiency prejudiced defendant.
4. **Postconviction.** An evidentiary hearing may be denied on a motion for postconviction relief when the records and files in the case affirmatively establish that the defendant is not entitled to relief.

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

Hal W. Anderson, of Berry, Anderson, Creager & Wittstruck, P.C., for appellant.

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

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

GRANT, J.

Defendant, Lee Otis Marshall, appeals from a May 26, 1988, order of the district court for Lancaster County denying his motion for postconviction relief.

The record shows the following. On October 4, 1977, in Lancaster County, defendant entered pleas of not guilty and not guilty by reason of insanity to the charge of first degree murder in the killing of Wilson Eugene Field IV while in the perpetration of a robbery on August 11, 1977. On January 16, 1978, defendant and his counsel appeared before a judge of the district court for Lancaster County for the stated purpose of withdrawing his pleas. Defendant informed the court that he, the defendant, had called a lawyer friend in Phoenix, who had advised the defendant to request a conference with the defendant, his lawyer, the prosecuting attorney, and the court. The court told defendant that defendant was free to talk to his attorney and free to confer with his attorney and the prosecuting attorney, but that the court would not engage, as a judge, in any such conference. Defendant requested more time "to talk with [his] lawyer," and the court continued the hearing until 4:30 p.m. the next day.

On January 17, 1978, defendant and his counsel, together with the Lancaster County chief deputy county attorney, again

appeared before the court. Defendant and his counsel asked leave to withdraw defendant's previous pleas of not guilty and not guilty by reason of insanity. After inquiries directed to the defendant, the court granted leave to defendant to withdraw his previous pleas, and the hearing then proceeded to rearraignment.

The deputy county attorney again read the information to defendant. At the court's request, the deputy county attorney and defendant's counsel set out the plea agreement between the State and defendant. That agreement was that if the defendant pled no contest to the charge, the State would recommend to the court that defendant not receive the death sentence because the State felt that "when the Court sees all of the evidence relevant to the offense and the defendant's situation, that it is likely to find that the mitigating circumstances outweigh any aggravating circumstances." There was a further agreement that if the court did not accept the State's recommendation, defendant would be permitted to withdraw his plea and the case would proceed to trial.

The court then explained to defendant the meaning of a no contest plea. Defendant then stated to the court, "They got down [in the information] 'in the perpetration of a robbery.' Well, I'm not denying that I didn't [sic] kill him, but I am denying I wasn't [sic] robbing the man." When asked what the plea of no contest meant to him, defendant stated to the court, "My understanding is that I'm not pleading not guilty but I can't contest against the State's evidence and that anyway, after a trial, most likely that I would be found guilty anyway."

The court then reexplained, in detail, the meaning of a no contest plea, and defendant's questions were answered by the court. The court then requested the deputy county attorney to state a factual basis for the proposed plea. The attorney was sworn and stated that the State's evidence would show that defendant and his girlfriend, Bonnie Brooks, had broken off their relationship on August 9, 1977, after Brooks told defendant she did not wish to see him any more. Defendant apparently lost his temper and damaged the Brooks house. On the morning of August 11, defendant talked to a female acquaintance who was a worker at an employment service in the

YMCA building in Lincoln. This worker saw that defendant was carrying a concealed object in his pant leg. During their conversation, defendant told the worker that she would not see him again and that he was going to rob a store. The deputy county attorney stated that the other evidence would show that in the afternoon of August 11, defendant went to the residence of Brooks, threw $100 in cash on a table, and said this was to pay for the damage he had done to the Brooks house.

Other evidence would show that defendant had been hired a few days before August 11, 1977, by Field, who owned and operated a floral shop at 48th and Calvert Streets in Lincoln. In the afternoon of August 11, defendant drove a car belonging to Field's Floral Shop into the Lancaster County sheriff's garage, where he immediately volunteered to a deputy sheriff that defendant had just "clubbed" his boss, Field, and that he was sure the man was dead. Defendant was advised of his *Miranda* rights and later, at the Lincoln police station, gave the following answers to questions addressed to him:

> [Q:] Okay, going back to what occurred in the florist shop, did you come up from behind the man that owned the flower shop?
>
> [A]: Yeah.
>
> [Q]: Do you think he even saw you?
>
> [A]: He didn't see me, when I hit him he turned around and started screaming and I just wanted to hit him once right then and knock him out and I didn't want to kill him.
>
> [Q]: Okay, how many times did you hit him?
>
> [A]: Three or four times.
>
> [Q]: Three or four times?
>
> [A]: I just hit him until he stopped screaming, that's all.
>
> . . .

Field was found that afternoon at the floral shop, covered with blood, but still conscious. He died the following morning at Bryan Memorial Hospital of injuries resulting from numerous blows to the head. A metal bar approximately 18 inches long was found lying on the counter of the store near the cash register. All the cash, consisting of approximately $100, was missing from the register.

In response to a question from the court, defendant's counsel

advised the court that defendant had been seen on three occasions by a psychiatrist selected by defense counsel and that in the opinion of the psychiatrist, defendant was competent to stand trial and had no mental illness that would prevent defendant from fully understanding the plea he was making.

After defendant's plea of no contest, the court stated:

> All right. On the basis of the proceedings and testimony this afternoon, the Court finds that the plea is freely and voluntarily made, with full realization of the consequences, after full and fair opportunity for consultation with counsel, that the plea was made at a time when the defendant was free of any affects [sic] of drugs or intoxicants, that he was, according to the representation of his counsel as to previous mental examinations, that he is not only competent at this time, but at the time of the offense, that the facts tendered by the State through the testimony of Mr. McGinn support a finding of guilty.

Throughout the rearraignment, defendant stated he understood all that was said by the deputy county attorney. Before the court accepted defendant's plea, the trial court meticulously explained to defendant all of the constitutional rights in an arraignment that completely complied with our later holding in *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986). The court determined that defendant understood those rights and held defendant's plea was free and voluntary.

After a presentence investigation, the court sentenced defendant to life imprisonment. Defendant appealed the sentence. Counsel representing defendant at that time determined that the appeal was frivolous and filed a motion and brief seeking to withdraw from the case following the procedure set out in *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967). The motion to withdraw was granted and defendant's sentence affirmed by this court in *State v. Marshall* (case No. 42071, June 19, 1978).

No further appeals were taken until October 7, 1987, when defendant filed a pro se motion to vacate his sentence pursuant to Nebraska's Postconviction Act, Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1985). The trial court denied a hearing on all but

2 of the 20 allegations because the files and records of the case showed to the court's satisfaction that defendant was not entitled to relief on those grounds.

The court did grant an evidentiary hearing on two allegations and appointed counsel to represent defendant at that hearing and on this appeal. Those allegations were set out in paragraphs 8 and 12 of defendant's pro se motion and alleged that defendant's counsel was ineffective in not objecting to the deputy county attorney's negotiating with defendant in the absence of defendant's counsel. A hearing was held on those allegations. Following the hearing the trial court found that defendant's trial counsel was not ineffective; that no representative of the Lancaster County Attorney's office had ever discussed the then pending case with defendant in the absence of defendant's counsel; that defendant's plea of January 17, 1978, was made freely, voluntarily, and intelligently; that defendant was not entitled to relief based on his allegations in paragraphs 8 and 12 of his motion; and that the files and records of the case showed that defendant was not entitled to a hearing or relief on the other allegations of his motion. The court denied defendant's motion for postconviction relief.

Defendant timely appealed, assigning four errors, which can be consolidated into two. Defendant contends that the trial court erred (1) in denying his motion for postconviction relief on the matters considered at the evidentiary hearing and (2) in denying an evidentiary hearing on the other matters raised in the motion. We affirm.

With respect to the first assignment of error, an evidentiary hearing was held on May 23, 1988, concerning defendant's allegation that his plea was involuntary because his counsel was ineffective in failing to object to the deputy county attorney's action in negotiating with defendant in the absence of defendant's counsel. Defendant testified that he pled no contest because he was under duress resulting from pressure by the deputy county attorney in talking to and threatening defendant when defendant's counsel was not present, and that defendant's counsel knew of such improper conduct. Defendant's only evidence that such threats were made was his own testimony. He

testified that on January 16, 1978, the deputy county attorney told him, outside defendant's counsel's presence, that the State would seek imposition of the death penalty if defendant did not plead guilty to the felony murder charge.

Defendant's counsel testified that he knew of no such improper conduct and that he met with defendant the evening of January 16, and defendant did not mention the conversation he allegedly had earlier that evening with the deputy county attorney. The deputy county attorney testified that at no time did he meet with or speak to defendant outside the presence of defendant's counsel.

In an evidentiary hearing for postconviction relief, the trial judge, as the trier of fact, resolves conflicts in evidence and questions of fact, including the credibility and weight to be given the testimony of a witness, and the trial court's findings will be upheld unless the findings are clearly erroneous. *State v. Wiley*, 232 Neb. 642, 441 N.W.2d 629 (1989). The trial court found that no "member or representative of the County Attorney's Office ever had any . . . discussions . . . with defendant outside the presence of defense counsel." In light of the above testimony, we cannot say that the trial court's evidentiary findings are clearly erroneous, and we determine that the evidence fully supports the court's findings. Defendant's first assignment of error is without merit.

Defendant's second assignment of error concerns the allegations made in his motion on which no evidentiary hearing was held. Defendant contends that an evidentiary hearing should have been granted on the other allegations, all of which concerned the voluntariness of defendant's plea or the effectiveness of his counsel.

While defendant makes the general allegation that the trial court erred in not granting an evidentiary hearing on all the allegations in his postconviction motion, his brief specifically discusses only some of those allegations.

At page 10 of his brief, defendant states, "The record shows no order for examination of Appellant by psychiatrists to determine his competency either for trial or to enter any plea." It is clear that the court did not order any psychiatric examination to determine defendant's competency for trial or

to plead, but it is equally clear that at the time of defendant's plea on January 17, 1978, defendant's counsel specifically informed the court that defendant had been examined on three occasions by a practicing psychiatrist in Lincoln, chosen by defendant's counsel, and the conclusion of that doctor was that defendant "is not incompetent to stand trial, that he is not in any way mentally deficient, has no mental illness which would prevent him from knowing and understanding the things he intends to do." Defendant stated on the record that he agreed with the conclusion of that doctor. The fact that the court did not order evaluations which were made is of absolutely no consequence.

At the time of the rearraignment the court was not aware of the previous psychiatric examinations of defendant, and the court had arranged for an examination of defendant by another psychiatrist. That examination was conducted on January 23, 1978. The report of that examination was included in the defendant's presentence investigation and was available to both the court and defendant before sentencing in the case. After examination, the second psychiatrist found that "[t]he subject [defendant], in my opinion, is legally competent to stand trial and was legally sane at the time of the commission of his offense." Defendant's contentions on this point are frivolous.

Defendant also contends that his plea was not freely given but, instead, was the result of coercion by the court as an active participant in plea negotiations taking place in open court. Our examination of the 56-page arraignment and rearraignment of defendant shows that the original trial court scrupulously protected all the constitutional rights of defendant and fully explained all those rights to defendant. The record is clear that the original court did not coerce defendant in any way. The evidence that defendant's plea was free and voluntary is without any contradiction in the record before us.

Defendant specifically contends that an evidentiary hearing should have been granted because of the ineffectiveness of counsel because counsel (1) failed to obtain a determination of his competency to stand trial or to enter a plea, (2) improperly advised him to enter a plea contrary to his desire for a jury trial, and (3) failed to represent him on direct appeal.

To maintain a claim of ineffective assistance of counsel, defendant must show counsel's performance was deficient and that the deficiency prejudiced defendant. *State v. Bostwick, ante* p. 57, 443 N.W.2d 885 (1989); *State v. Gagliano*, 231 Neb. 911, 438 N.W.2d 783 (1989).

As shown above, defendant's counsel had defendant examined three times before defendant's plea on January 17, 1978. Defendant's statement that his counsel "failed to obtain a determination of his competency" is an absolute misstatement of fact. The bill of exceptions further shows that counsel's advice was not contrary to defendant's wishes. There is nothing in the record to substantiate defendant's claim that he sought to exercise his right to a jury trial. The record shows that counsel acted competently in advising defendant to negotiate a plea, given the facts of the case. Those facts showed that the evidence against defendant was overwhelming. A plea will be found to be freely and voluntarily entered upon the advice of counsel if the advice was within the range of competence demanded of attorneys in criminal cases. *State v. Wakeman*, 231 Neb. 66, 434 N.W.2d 549 (1989).

Defendant's argument that counsel improperly withdrew from the case is also without merit. Counsel's withdrawal was considered and granted by this court in *State v. Marshall* (case No. 42071, June 19, 1978). That question is entitled no further review.

All of the allegations in defendant's postconviction motion have been examined, and none have merit. An evidentiary hearing may be denied on a motion for postconviction relief when the records and files in the case affirmatively establish that the defendant is not entitled to relief. *State v. Threet*, 231 Neb. 809, 438 N.W.2d 746 (1989). See, also, *State v. Reddick*, 230 Neb. 218, 430 N.W.2d 542 (1988). The files and records show that defendant received effective counsel and that defendant's plea was voluntary and made after a proper arraignment.

The trial court did not err in refusing to grant an evidentiary hearing on all of the issues raised in defendant's motion for postconviction relief, and the trial court did not err in refusing to grant relief on the two issues submitted at the hearing.

The judgment of the district court is affirmed.

AFFIRMED.

LOIS LAPAGE, APPELLEE, V. CITY OF LINCOLN, NEBRASKA, APPELLANT.

446 N.W.2d 738

Filed October 13, 1989. No. 89-013.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

James D. Faimon, Assistant Lincoln City Attorney, for appellant.

Robert R. Gibson, of Professional Legal Associates of Nebraska, P.C., for appellee.

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

PER CURIAM.

On rehearing, the Nebraska Workers' Compensation Court entered an award for Lois LaPage concerning her injuries sustained as the result of accidents arising out of and in the course of LaPage's employment with the City of Lincoln. The city appeals and claims that the 2-year statute of limitations, see Neb. Rev. Stat. § 48-137 (Reissue 1988), bars recovery by LaPage.

> " '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 Workers' 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.' "

Osborne v. Buck's Moving & Storage, 232 Neb. 752, 752-53, 441 N.W.2d 906, 906-07 (1989). See *Fees v. Rivett Lumber Co.*, 228 Neb. 617, 423 N.W.2d 483 (1988). See, also, Neb. Rev. Stat. § 48-185 (Reissue 1988).

"A defendant alleging the statute of limitations as an affirmative defense has the burden to prove such defense." *League v. Vanice*, 221 Neb. 34, 42, 374 N.W.2d 849, 854 (1985). Determination of causation is, ordinarily, a matter for the fact finder. *Fees v. Rivett Lumber Co., supra.*

The record supplies sufficient evidence to sustain the factual disposition of the question concerning the statute of limitations and supports the award by the Workers' Compensation Court. Finding no clear error regarding the award, we affirm the judgment of the Workers' Compensation Court.

As authorized by Neb. Rev. Stat. § 48-125(1) (Reissue 1988), we award LaPage an attorney fee of $750 for her lawyer's services in this court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JULIE L. TOMLINSON, APPELLANT.
446 N.W.2d 740

Filed October 13, 1989. No. 89-086.

Ordinances: Presumptions: Appeal and Error. Where an ordinance charging an offense is not properly made part of the record, the Supreme Court presumes the existence of a valid ordinance creating the offense charged.

Appeal from the District Court for Douglas County, JERRY M. GITNICK, Judge, on appeal thereto from the County Court for Douglas County, RICHARD M. JONES, Judge. Judgment of District Court affirmed.

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

Herbert M. Fitle, Omaha City Attorney, Gary P. Bucchino, Omaha City Prosecutor, and J. Michael Tesar for appellee.

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

WHITE, J.

Julie L. Tomlinson appeals from the district court for Douglas County, which affirmed the conviction and sentence of the county court for Douglas County. After a bench trial, the county court found appellant guilty of prostitution in violation of Omaha Mun. Code, ch. 20, art. V, § 20-132 (1980), and ordered her to pay a fine of $75.

Appellant's sole assignment of error is the trial court's finding beyond a reasonable doubt that appellant practiced an indiscriminate sex act expressly for compensation.

The record shows the following. On August 31, 1988, Brian Smith, a vice officer with the Omaha Police Division, went to the Tub & Tan massage parlor at 7644 Pierce Street in Omaha to investigate alleged prostitution activity occurring there. Smith had called the night before and set up an appointment for a massage.

Officer Smith arrived at the Tub & Tan at approximately 12:30 p.m., where he was subsequently let inside the premises by the appellant. The appellant then presented Smith with a list of massage services offered and their respective prices. The list

also stated that there was a $10 first-time membership fee. Smith gave appellant $50 ($40 for a massage, plus the $10 membership fee), whereupon appellant directed Smith to a room and told him that he should undress and that he could take a whirlpool bath, which he did. Appellant then led Smith, now with a towel around his waist, into a room with a massage table, where she instructed him to take the towel off and lie on his stomach, which he did.

Appellant proceeded to massage Officer Smith's back side and then told him to turn over and lie on his back. Officer Smith complied, and appellant massaged his feet, legs, and chest. She then proceeded to his genital area, and, as Smith testified, "She placed a towel on my stomach, and then poured oil on my penis, and began stroking it." Smith then told appellant to stop, and she immediately did.

Smith then dressed, tipped appellant $10, and left the establishment. He met with two other police officers, Cyronek and Clark, and advised them of the events in the massage parlor. All three officers then went back to the Tub & Tan and served appellant with a citation for the offense of lewd conduct. Smith testified that appellant asked why she was being cited, and Officer Cyronek stated, "You had poured oil on his penis and were stroking him," to which appellant replied, "That's part of the massage."

The issue in this case is whether appellant did unlawfully, purposefully, or knowingly engage or agree to engage in an act of prostitution. Appellant argues that there was no agreement to exchange money for a sex act. There was certainly an exchange of money for a service (the massage). Appellant freely admitted in response to Officer Cyronek's explanation of the citation that her genital manipulation of Officer Smith was "part of the massage." Appellant therefore purposely and knowingly performed this act as part of the services she offers in exchange for money.

What remains is a determination of whether this act constituted a sex act and amounted to prostitution under the prosecuted ordinance; however, that ordinance has not been made part of the record and is therefore not before this court. We have held that where an ordinance charging an offense is not

properly made part of the record, the Supreme Court presumes the existence of a valid ordinance creating the offense charged, and that in the absence of the applicable municipal ordinances from the record, we must presume the evidence sustained the findings and the sentences were within the limits as set in the ordinances. *State v. Cottingham*, 226 Neb. 270, 410 N.W.2d 498 (1987).

The district court reviewed the record of the county court in making its determination that the conviction and sentence of the county court should be affirmed. We agree. The order of the district court affirming the judgment and sentence of the county court is affirmed.

AFFIRMED.

HENRY J. SCHMID, JR., APPELLEE AND CROSS-APPELLANT, V. MALCOLM SCHOOL DISTRICT, A NEBRASKA POLITICAL SUBDIVISION, APPELLANT AND CROSS-APPELLEE.

447 N.W.2d 20

Filed October 20, 1989. No. 87-483.

1. **Appeal and Error.** Findings of fact of the trial court will not be reversed on appeal unless clearly wrong.
2. _____. In reviewing the findings of the trial court, we presume the court resolved any controverted facts in favor of the successful party, and we will consider the evidence and permissible inferences therefrom most favorably to that party.

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

Alan L. Plessman for appellant.

Joseph K. Meusey, of Fraser, Stryker, Veach, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellee.

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

GRANT, J.

This is an appeal from a judgment of the district court for Lancaster County in favor of Henry J. Schmid, Jr., plaintiff-appellee, in his negligence action against Malcolm School District, defendant-appellant.

Schmid sustained personal injuries when his vehicle collided with a Malcolm School District schoolbus. The district stipulated that it was negligent, through its employee, and that its negligence was the sole proximate cause of appellee's injuries. Trial was had on the issue of damages. The trial court found the damages to be $25,000 and entered judgment in that amount in favor of Schmid. The district did not file a motion for new trial, but timely appealed from the judgment.

The district assigns error in the trial court's action in finding the evidence was sufficient to support its judgment. In support of its sole assignment of error, the district contends that Schmid failed to submit any evidence of compliance with the Political Subdivisions Tort Claims Act, then Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983), now Neb. Rev. Stat. §§ 13-901 et seq. (Reissue 1987) (hereinafter referred to as the Tort Claims Act or the Act). The district's contention is without merit, and we affirm the judgment of the trial court.

The determination of compliance with the Tort Claims Act is a factual determination. The findings of fact of the trial court will not be reversed on appeal unless clearly wrong. *Engleman v. Nebraska Public Power Dist.*, 228 Neb. 788, 424 N.W.2d 596 (1988). In reviewing the findings of the trial court, we presume the court resolved any controverted facts in favor of the successful party, and we will consider the evidence and permissible inferences therefrom most favorably to that party. *Fisbeck v. Scherbarth, Inc.*, 229 Neb. 453, 428 N.W.2d 141 (1988).

The trial court had before it a record of Schmid's compliance with the Tort Claims Act. Although Schmid did not submit evidence of compliance with the Tort Claims Act at trial, the district's answer admitted that the negligence action was brought "pursuant to" the Tort Claims Act. In paragraph II of his petition, Schmid alleged, "This action is brought pursuant to the Political Subdivisions Tort Claims Act as enacted by the

State of Nebraska, Neb. Rev. Stat. §§ 23-2401 to -2420 (1983 & Cum.Supp. 1984)." In paragraph 1 of its answer, the district specifically admitted the allegation contained in paragraph II of the petition. As we stated in *State ex rel. Douglas v. Morrow*, 216 Neb. 317, 322, 343 N.W.2d 903, 906 (1984), "Admissions contained in a defendant's answer are judicial in nature and waive all controversy concerning the matter." We presume the trial court relied on this admission in entering judgment in favor of Schmid. The issue is whether, considering the admission and permissible inferences therefrom most favorably to Schmid, the trial court was clearly wrong in inferring from the answer that the district admitted Schmid's compliance with the Tort Claims Act. The petition stated that the action was brought "pursuant to" the Tort Claims Act. Webster's Third New International Dictionary, Unabridged 1848 (1981), defines "pursuant to" as "in the course of carrying out: in conformance to or agreement with: according to." Under the circumstances, the trial court could reasonably infer that an admission that the action was brought "pursuant to" the Tort Claims Act was an admission that it was brought in complete "conformity" with the Tort Claims Act.

This inference of conformity or compliance is particularly compelling when the phrase "pursuant to" is used with reference to the Tort Claims Act, which is procedural in nature. The Tort Claims Act is not part of Schmid's cause of action in negligence, but sets out the procedural means through which the district waives its sovereign immunity. Without compliance with the procedural requirements of the Tort Claims Act, the political subdivision's sovereign immunity applies, and not the Tort Claims Act. A plaintiff who sues a political subdivision for negligence and has not complied with the procedures in the Tort Claims Act could not be said to have properly brought an action pursuant to the Act, because it would not apply.

Arguably, a statement that an action was brought pursuant to the Tort Claims Act could be interpreted as referring only to the fact that the Act is relevant to the action, but that does not mean under these circumstances that the court erred in inferring that the admission referred to complete compliance. The district, which was well aware of the procedural conditions to

bringing tort actions against it, never challenged compliance with the Act either by summary judgment, motion for a directed verdict, motion for a new trial, or otherwise. We are not holding that the phrase "pursuant to" necessarily implies complete conformity, but, rather, we hold that in considering the admission and the inferences therefrom, in this case, in a light most favorably to Schmid, the trial court was not clearly wrong in finding that the district's admission that the action was brought pursuant to the Tort Claims Act was sufficient record of compliance with the Act. The judgment of the trial court is affirmed.

Appellee's cross-appeal "for attorneys' fees and expenses incurred as a result of Appellant's appeal to the Nebraska Supreme Court" is not a cross-appeal, but a motion seeking fees in this court. Fees can be awarded in this court if the appeal is frivolous. Under the circumstances of this case, we do not feel the appeal can be considered frivolous. Appellee's motion for fees is denied.

AFFIRMED.

BOSLAUGH, J., concurs.

DIAN KELLY CARROLL, APPELLANT, V. GARY HOLTHUS, APPELLEE.
447 N.W.2d 22

Filed October 20, 1989. No. 87-1059.

Landlord and Tenant: Leases: Actions. In the absence of a statute to the contrary, a tenancy cannot be terminated for the breach of a covenant, condition, or collateral agreement by the lessee unless there is an express and distinct provision in the lease for a forfeiture or right of reentry on the occurrence of the breach.

Appeal from the District Court for Lancaster County, JEFFRE CHEUVRONT, Judge, on appeal thereto from the County Court for Lancaster County, DONALD R. GRANT, Judge. Judgment of District Court affirmed.

Dalton W. Tietjen, of Tietjen, Simon & Boyle, for appellant.

Robert R. Gibson, of Professional Legal Associates of Nebraska, P.C., for appellee.

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

WHITE, J.

This is an appeal from the district court for Lancaster County, which reversed the judgment of the Lancaster County Court and dismissed appellant's petition for forcible entry and detainer, which sought the return of possession of the leased garage located on appellant's property.

Appellant, Dian Kelly Carroll, assigns error by the district court in considering and ruling on the availability of forcible entry and detainer as a remedy and in holding that appellee had not breached the "maintenance and repair" provisions of the lease agreement.

This case involves the adjoining properties of 337-339 N. 32d Street and 349 N. 32d Street in Lincoln, Nebraska. Philip Meade originally owned both properties, and in 1980, he sold 337-339 N. 32d Street to appellee, Gary Holthus, pursuant to a land contract. The contract contained a provision that gave Holthus a 10-year lease of the garage at 349 N. 32d Street for the sum of $1. The lease provision also stated that Holthus had "the responsibility for maintenance and repair" of the garage.

Carroll purchased the property at 349 N. 32d Street from Meade in 1984, subject to Holthus' lease. Carroll eventually became dissatisfied with Holthus' "maintenance and repair" of the garage, and in July 1986, she gave Holthus a 30-day notice demanding performance of lease obligations. On September 5, 1986, Carroll gave Holthus a 3-day notice to vacate, with which Holthus did not comply. There is conflicting evidence as to whether Holthus properly maintained and repaired the garage.

Appellant argues that the district court erred in holding that a forcible entry and detainer action was not an appropriate remedy in this case. Appellant was bound by the contract between Meade and Holthus, as paragraph 15 of the contract states: "This Agreement shall bind the successors in interest of the parties." Appellant therefore complied with the notice provision in paragraph 11 regarding default:

> The failure to make any payment for a period of 45 days or the failure to perform any other provision of this Agreement for a period of 30 days after written demand for performance, shall be a default. Upon a default by Buyer, Seller may declare the unpaid balance immediately due and payable and institute foreclosure proceedings or any other remedy that may be available to Seller in law or equity.

Appellant asserts that the last sentence in paragraph 11 reserves to her the remedy of forcible entry and detainer. It does not. The words "may be available" in the above paragraph indicate only that permissible or allowable remedies are reserved.

> "[I]n the absence of a statute to the contrary a tenancy cannot be terminated for the breach of a covenant, condition, or collateral agreement by the lessee unless there is an express and distinct provision in the lease for a forfeiture or right of reentry on the occurrence of the breach. . . ." *Olson v. Pedersen*, 194 Neb. 159, 165, 231 N.W.2d 310, 314 (1975).

Hogan v. Pelton, 210 Neb. 530, 536, 315 N.W.2d 644, 647-48 (1982).

The Meade-Holthus lease contains no express and distinct provision for forfeiture upon any breach of the lease except for the failure to pay rent. The district court was therefore correct in ruling that forcible entry and detainer was not an available remedy to appellant.

Appellant also argues that the district court improperly reviewed the record in determining that appellee did not breach the maintenance and repair provisions of the lease.

The district court, having properly found that the remedy of ejectment was not available to appellant, did not possess jurisdiction to further "inquire into the matters between the two litigants." Neb. Rev. Stat. § 24-568 (Reissue 1985). The matter of compelling repair or of damages sustained must be left to a different day and, dependent on the relief prayed for, a different forum.

The judgment of the district court is therefore affirmed.

AFFIRMED.

PEARL STUTHMAN, APPELLANT, V. ADELAIDE D. HULL TRUST ET AL., APPELLEES.

447 N.W.2d 23

Filed October 20, 1989. No. 88-004.

1. **Injunction: Equity.** An action for an injunction sounds in equity.
2. **Equity: Appeal and Error.** In an appeal of an equity action, this court tries the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court; provided, where the credible evidence is in conflict on a material issue of fact, we consider and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Injunction: Proof.** A party seeking an injunction must establish by a preponderance of the evidence every controverted fact necessary to entitle the claimant to relief.
4. **Waters.** Owners of land may drain the same in the general course of natural drainage by constructing an open ditch or tile drain, discharging the water therefrom into any natural watercourse or into any natural depression or draw, whereby such water may be carried into some natural watercourse; and when such drain or ditch is wholly on the owner's land, he shall not be liable in damages therefor to any person or corporation. Neb. Rev. Stat. § 31-201 (Reissue 1988).
5. **Waters: Negligence.** An owner of land has the right in the interest of good husbandry to drain ponds or basins thereon of a temporary character, which have no natural outlet or course of flow, by discharging the waters therefrom by means of an artificial channel into a natural surface water drain on his own property and through such drain over the land of another proprietor in the general course of drainage in that locality, even though the flow in such natural drain is thereby increased over the lower estate, provided that this is done in a reasonable and careful manner and without negligence.

Appeal from the District Court for Cuming County: RICHARD P. GARDEN, Judge. Affirmed.

Lynn D. Hutton, Jr., and Jan L. Remmich, of Hutton and Freese, for appellant.

John M. Thor for appellees.

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

WHITE, J.

This is an appeal from an order of the Cuming County District Court dismissing plaintiff's petition for equitable relief. We affirm.

On December 1, 1986, plaintiff filed a petition alleging that the defendants constructed a ditch which drained accumulated surface water from a depression or basin area located on defendants' land, across the defendants' land, and ultimately onto plaintiff's land. This drainage water caused the plaintiff's land to become soggy, preventing 11 acres of corn from being harvested by the tenant in 1986. The plaintiff sought a permanent injunction ordering defendants, in effect, to return defendants' land to its condition prior to the ditch's construction. The petition also requested $660 in money damages for rental loss for 1986.

The trial judge reviewed the evidence, which was received by stipulation, and made specific findings, including findings that the defendants brought themselves within the protection of Neb. Rev. Stat. § 31-201 (Reissue 1988) and that the plaintiff did not allege or prove negligence or lack of reasonable care on the part of the defendants. Consequently, he ordered that plaintiff's petition be dismissed at plaintiff's costs. From this order, the plaintiff appeals to this court.

On appeal, plaintiff alleges 11 assignments of error, all of which concern alleged erroneous factual findings. All assigned errors will be considered in our de novo review.

An action for an injunction sounds in equity. *Selection Research, Inc. v. Murman*, 230 Neb. 786, 433 N.W.2d 526 (1989). In an appeal of an equity action, this court tries the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court; provided, where the credible evidence is in conflict on a material issue of fact, we consider and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. In its de novo review of the record, this court is guided by the rule that a party seeking an 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, 438 N.W.2d 765 (1989).

We have reviewed the record de novo and make the following findings of material fact. The plaintiff, Pearl Stuthman, owns a parcel of farmland described as the west half of the

southwest quarter of Section 23, Township 23 North, Range 4 East of the 6th P.M., less approximately 4.6 acres owned by Melvin Brokaw, all in Cuming County, Nebraska. Since 1971, this land has been rented to Vernon Schultz, who has farmed the property.

The defendant Adelaide D. Hull Trust owns a parcel of farmland legally described as the southeast quarter of Section 22, Township 23 North, Range 4 East of the 6th P.M., in Cuming County, Nebraska. Since 1981, this land has been rented to Willis and Weslie Geu, who have farmed the property. Henry E. Hull, who is also a defendant, is the trustee.

The trust property lies immediately west of the Stuthman property, and the two properties are separated by a county road which runs to the north and south. A drainage culvert, which was installed by someone other than the defendants, lies under the surface of this road. The natural slope of the surrounding land deposits water into the road ditch on the west side of the road, and the water flows through the culvert from the west to the east onto the Stuthman land.

To the south and east of the Stuthman property lies the Anderson property. The Anderson and Stuthman properties are separated by a county road which runs to the east and west. A drainage culvert lies under the surface of this road and drains water from the north to the south and southeast into a creek which eventually flows into the Elkhorn River.

There is a natural basin or depression area located in the northwestern area of the trust property. Land surrounding the depression to the north, west, and south is higher in elevation than the depression. The east rim of the depression has a ridge about 2 feet higher than the lowest point of the depression. Surface waters accumulate in the depression during periods of above-normal moisture from either rainfall, irrigation runoff, or melting snows. Water which does not flow over the top of the eastern rim or ridge remains in the depression until it evaporates or percolates down through the soil. Water retention in the depression is only temporary, and the depression does not constitute a permanent lake or pond. This depression has periodically and temporarily accumulated surface water.

In July of 1986, Henry Hull, as trustee, directed that a

drainage ditch be dug to facilitate drainage by preventing the accumulation of surface water in the depression. The general direction of the flow of surface waters on the trust property is from the west to the east and southeast. The ditch was constructed through the ridge on the east side of the basin. The ditch terminates on the trust property, and the water flowing from this ditch empties into a natural drainage course or draw also located on the trust property. After the water leaves the trust property, it flows into the county road ditch, through the culvert, and across the Stuthman land, following the natural course of drainage in an east to southeast direction. After following this natural drainage course across the Stuthman property, the water flows through the drainage culvert under the east-west county road into a creek on the Anderson property, eventually draining into the Elkhorn River.

At the time the ditch was dug, the depression contained no water, and there was no sudden release of impounded waters. By constructing the ditch, the defendants have not diverted any water upon the lands of any others except into a natural draw or drainageway where the water would generally flow.

The wet areas on the Stuthman land would have been present even without the construction of the drainage ditch. Charles Mahnke, a soil scientist and soil specialist for the Soil Conservation Service for 29 years, testified for the defendants that there has been increased irrigation and precipitation runoff in the area since the early 1980s. The soil in the area of both properties is sandy. Sandy soil, because of its porous character, allows water to travel downward until it reaches "hardpan." When the water reaches the hardpan, it begins to migrate toward the general course of drainage, which is usually toward lower elevations, where it congregates or accumulates. Eventually, water will begin to appear on the surface of the land when the accumulations come to a point where the elevations have leveled out in the course of drainage. He testified that even without the construction of the ditch, both properties would have had wet areas in 1986 and 1987 and possibly into later years. This is because the wet areas on both properties are migrating to the east, following the natural course of drainage. Thus, even without the drainage ditch, wet areas or

accumulations of surface water would be migrating under the surface of the soil from the trust property onto the Stuthman property, which lies in the natural course of drainage. The Stuthman property is in no worse condition than it would be but for the construction of the ditch.

Moreover, it is likely the construction of the ditch will benefit the Stuthman property. Mahnke testified that the construction of the ditch will help reduce the wet areas that will exist on both the Stuthman and trust properties, because construction of the ditch allows runoff waters to travel at greater velocities across the surface of the ground, rather than allowing the water to percolate and then migrate under the surface of the ground. Although initially there may be some added water on the surface, in the long run the wet areas should dry faster because there will not be the slower percolation and migration of water through the porous soil to the lower elevations in the natural course of drainage. In sum, the construction of the ditch should actually benefit the Stuthman property because it allows runoff water to be removed from both properties in a shorter time period.

In light of the foregoing factual findings of this court, we hold that the trial judge properly dismissed the plaintiff's petition. Section 31-201 provides:

> Owners of land may drain the same in the general course of natural drainage by constructing an open ditch or tile drain, discharging the water therefrom into any natural watercourse or into any natural depression or draw, whereby such water may be carried into some natural watercourse; and when such drain or ditch is wholly on the owner's land, he shall not be liable in damages therefor to any person or corporation.

This court has also stated:

> An owner of land has the right in the interest of good husbandry to drain ponds or basins thereon of a temporary character, and which have no natural outlet or course of flow, by discharging the waters thereof by means of an artificial channel into a natural surface-water drain on his own property, and through such drain over the land of another proprietor in the general course of

> drainage in that locality, even though the flow in such natural drain is thereby increased over the lower estate, and provided that this is done in a reasonable and careful manner and without negligence.

(Syllabus of the court.) *Aldritt v. Fleischauer*, 74 Neb. 66, 103 N.W. 1084 (1905). See, also, *Pospisil v. Jessen*, 153 Neb. 346, 44 N.W.2d 600 (1950).

In *Todd v. York County*, 72 Neb. 207, 220-21, 100 N.W. 299, 305 (1904), we said:

> An owner has the undoubted right to protect his land from mere surface water and, in the interest of good husbandry, to drain lagoons or basins thereon of a temporary character, by discharging such surface waters by means of artificial channels into a natural surface water drain and through such drain or channel on and over the land of another, provided such person acts in a reasonable and careful manner and without negligence, and the injury, if any, resulting therefrom to such lower proprietor by reason of the increased flowage in the natural surface water drain will be accounted *damnum absque injuria*. For negligence in the manner of accomplishing the improvement, such owner is responsible and accountable to those injured by his negligent acts.

Applying these principles to the facts of this case, it is clear that the defendants fall within the protection of § 31-201 and this court's precedent. The depression or basin does not constitute a permanent lake or pond. It constitutes, at best, a temporary pond. The defendants rightfully constructed an open ditch which drained surface water from the depression into a natural draw or surface water drain located on the trust property. Through this draw, the water traveled onto and across the Stuthman land. Eventually, the drainage water, still following the natural course of drainage, would drain into a watercourse on the Anderson property. At no time after leaving the depression did the water travel on any land other than land in the natural and general course of drainage. Further, because the ditch was constructed entirely on the trust land, the trust is not liable for damages. The actions of the defendants are protected by § 31-201 and precedent from this court.

The protection afforded a defendant by § 31-201 is not absolute. A defendant can still be held responsible if plaintiff alleges and proves defendant acted negligently or without reasonable care. See, *Todd v. York County, supra*; *Aldritt v. Fleischauer, supra*; *Pospisil v. Jessen, supra*; *Halligan v. Elander*, 147 Neb. 709, 25 N.W.2d 13 (1946). Here, Stuthman made no attempt to show negligence or lack of reasonable care.

The order of the district court dismissing plaintiff's petition is affirmed.

AFFIRMED.

GRAPHIC RESOURCES, INC., APPELLEE, V. BRUCE E. THIEBAUTH, APPELLEE, AND RICHARD C. KEKEISEN, INTERVENOR-APPELLANT.

447 N.W.2d 28

Filed October 20, 1989. No. 88-179.

1. **Contracts.** The words used in a contract must be given their plain and ordinary meaning, as ordinary, average, or reasonable persons would understand them.
2. _____. When a written contract is expressed in clear and unambiguous language, it is not subject to interpretation or construction.
3. **Summary Judgment.** Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from material facts, and when the moving party is entitled to judgment as a matter of law.

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

Mark J. Daly, of Nelson & Harding, for intervenor-appellant.

Frederick D. Stehlik, of Stehlik & Associates, for appellee Graphic Resources.

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

GRANT, J.

This is an appeal from an order of the district court for Douglas County granting Graphic Resources, Inc.'s, motion for summary judgment on Richard C. Kekeisen's petition to intervene in a replevin action.

This case began as an action in replevin brought by Graphic against Bruce E. Thiebauth to recover video equipment in Thiebauth's possession valued at $48,416. Kekeisen filed a petition to intervene, claiming a security interest in the equipment. On January 8, 1988, the court sustained Graphic's motion for summary judgment against the intervenor, Kekeisen, and dismissed the petition to intervene in the case. Kekeisen's motion for a new trial was denied, and he timely appealed, assigning seven errors, which may be summarized in Kekeisen's allegation that the trial court erred in finding that the word "additions" in Kekeisen's security agreement did not include after-acquired equipment as a matter of law. We affirm.

The record shows that on July 20, 1984, Kekeisen loaned $30,000 to Aircraft Video Marketing, Inc., and entered into a security agreement with Aircraft Video to cover items of equipment owned by Aircraft Video as of that date. Kekeisen later filed a financing statement perfecting his interest in the video equipment. The collateral was listed in the security agreement as follows: "All of Debtor's equipment, including replacement parts, additions, repairs, and accessories incorporated therein or affixed thereto. Without limitation the term 'equipment' includes all items used in recording, processing, playing back, or broadcasting moving or still pictures, by whatever process."

Additional video equipment was apparently purchased by Aircraft Video after the execution of the security agreement with Kekeisen. Kekeisen sums up the facts as follows: "In early 1985, Aircraft Video Marketing purchased the additional video equipment which is the subject of dispute in the instant action, for use with the existing video equipment in its business." Brief for appellant at 6. Graphic's petition in replevin listed specific equipment, and there is no argument but that the property listed in the petition was purchased by Aircraft Video after the execution of Kekeisen's security agreement.

On May 17, 1985, Graphic entered into a purchase agreement with Aircraft Video to purchase all of the assets of Aircraft Video with funds procured through a loan from First National Bank of Omaha. As security for the loan, First National took a security interest in all of Aircraft Video's assets, including all property "now owned or hereafter acquired" by Aircraft Video.

Use of after-acquired property clauses in security agreements are expressly allowed by Neb. U.C.C. § 9-204 (Reissue 1980). The only limitation on their use with which we are presently concerned relates to the sufficiency of the description of collateral. Neb. U.C.C. § 9-110 (Reissue 1980) provides, "For the purposes of this article any description of personal property or real estate is sufficient whether or not it is specific if it reasonably identifies what is described."

The term "additions," as it is used in the security agreement, does not sufficiently describe in legal or lay terms the equipment acquired by Aircraft Video after the execution of the security agreement. "Addition" is defined in Black's Law Dictionary 35 (5th ed. 1979) as an "[e]xtension; increase; augmentation." This definition in no way contemplates that "additions" is sufficient to reasonably identify the after-acquired collateral.

Furthermore, considering the context in which "additions" is used in Kekeisen's security agreement, no reasonable interpretation could lead us to conclude that after-acquired property was intended as its meaning. "The words used in the contract must be given their plain and ordinary meaning, as ordinary, average, or reasonable persons would understand them." *Bedrosky v. Hiner*, 230 Neb. 200, 206, 430 N.W.2d 535, 540 (1988). "Additions" is not set out distinctly, but is listed among the words "replacement parts . . . repairs, and accessories," and, in its ordinary sense, clearly and unambiguously refers to items like replacement parts, repairs, and accessories, which can be incorporated in or affixed to the existing equipment. A written contract is not subject to interpretation or construction if it is expressed in clear and unambiguous language. *Young v. Tate*, 232 Neb. 915, 442 N.W.2d 865 (1989).

Had the parties chosen to do so, they could have easily included language clearly stating that after-acquired equipment would be included in the security agreement. While a description need not refer to the items of collateral with specificity, the description must, at a minimum, reasonably identify the after-acquired collateral. § 9-110. The security agreement presently before us contains no such language.

> It [summary judgment] is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from material facts, and when the moving party is entitled to judgment as a matter of law.

International Harvester Credit Corp. v. Lech, 231 Neb. 798, 801, 438 N.W.2d 474, 477 (1989). Kekeisen's assignment of error is without merit because there was no genuine issue as to any material fact, and Graphic was entitled to judgment as a matter of law. The decision of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DAVID L. BROADSTONE, APPELLANT.

447 N.W.2d 30

Filed October 20, 1989. No. 88-915.

1. **Convictions: Appeal and Error.** In determining whether the evidence is sufficient to sustain a conviction in a jury trial, the Supreme Court does not resolve conflicts in the evidence, pass on the witnesses' credibility, determine the plausibility of explanations, or reweigh the evidence. These matters are for the finder of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
2. **Disturbing the Peace: Words and Phrases.** A breach of the peace is a violation of public order. It is the same as disturbing the peace. The definition of breach of the peace is broad enough to include the offense of disturbing the peace; it

signifies the offense of disturbing the public peace or tranquility enjoyed by the citizens of a community.

3. _____: _____. The term "breach of the peace" is generic and includes all violations of public peace, order, or decorum, or acts tending to the disturbance thereof.
4. **Constitutional Law: Disturbing the Peace: Words and Phrases.** Language that tends to incite assault or other immediate breach of the peace constitutes "fighting" words, which are not constitutionally protected forms of speech.
5. _____: _____: _____. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. Such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.
6. **Constitutional Law.** Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.
7. **Disturbing the Peace: Words and Phrases.** The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others.
8. **Disturbing the Peace.** Provocative language consisting of profane, indecent, or abusive remarks directed to the person of the hearer may amount to a breach of the peace.
9. **Appeal and Error.** The Supreme Court does not consider assignments of error not discussed in the brief.
10. **Appeal Bonds.** Generally, an objection to an appeal bond cannot be made by appeal.

Appeal from the District Court for Lancaster County, DONALD E. ENDACOTT, Judge, on appeal thereto from the County Court for Lancaster County, GALE POKORNY, Judge. Judgment of District Court affirmed.

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

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

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

BOSLAUGH, J.

After trial to a jury the defendant, David L. Broadstone, was convicted of disturbing the peace and was sentenced to probation for 18 months. Upon appeal to the district court, the judgment was affirmed. The defendant has now appealed to this court.

The defendant's assignments of error allege that the evidence was not sufficient to support the verdict and that the trial court erred in allowing the complaining witness to testify about the defendant's disturbing the peace and quiet of someone other than the person alleged in the complaint, in overruling the defendant's motion in limine, and in prohibiting the defendant from being around children under 14 years of age or going within a block of places normally frequented by children.

Neb. Rev. Stat. § 28-1322(1) (Reissue 1985) describes the offense of disturbing the peace as intentionally disturbing the peace and quiet of any person, family, or neighborhood. The complaint in this case alleged that the defendant had intentionally disturbed the peace and quiet of a person, family, or neighborhood, "to-wit: Jerry L. Gulizia . . . ."

The record shows that on March 31, 1988, Jerry Gulizia and Randall Keefe were waiting in Gulizia's front yard for their children to get out of Merle Beattie elementary school in Lincoln, Nebraska. Gulizia's daughter attended school at Merle Beattie, which was located just across the street from his house. While Gulizia and Keefe were waiting for their children, their attention was drawn to the defendant and a child, who were across the street. The defendant was using foul language and had a stick in his hand which he was hitting against a telephone pole. Children were coming out of the school at the time, and Gulizia saw 15 or 20 children walk by during that time. Gulizia testified that the defendant was using foul language when the children were near him.

Gulizia testified he heard the defendant say words like "motherfucker," and the child with the defendant would then repeat what the defendant had said. When the language continued, and their children started to cross the street, Gulizia and Keefe decided to cross the street and talk to the defendant because some of the children appeared to be frightened. Gulizia

said that he was not shocked by what he heard, but he was upset that the children were exposed to it.

After Gulizia and Keefe had crossed the street, Gulizia asked the defendant if he was waiting for some children. The defendant replied it was none of his "fucking business." Gulizia then asked the defendant if he would leave. The defendant became violent and began shaking the stick, striking Gulizia on the arm and yelling obscenities such as "cocksucker" and "motherfucker." Gulizia then pushed the defendant against the fence and tried to settle him down.

After Gulizia released the defendant, the defendant ran down the sidewalk and said, "Your wife is a whore. Your daughter is a whore. Your whole family's a whore. I fucked her last night." At that time there were 15 or 20 children scattering to get away from the defendant.

When asked how the defendant's comments made him feel, Gulizia stated, "It didn't make me feel too good," and he was upset by the defendant's behavior.

Gulizia further testified that he was upset by the defendant's swearing in front of the children. He was not bothered by the defendant's swearing at him, but it was the fact the defendant was swearing in front of the children that bothered him. Gulizia asked his wife to call the police.

Keefe's testimony generally corroborated the testimony of Gulizia.

Officer Michael Martin, who responded to the call, testified that in response to his questions, the defendant said that he was standing on the sidewalk in front of the school with his nephew, who was slightly retarded, and that the nephew had been yelling obscenities at the children. The defendant said he was trying to get the nephew to be quiet when two men came over and pushed him against the fence.

The defendant testified that while he and his nephew were taking a walk, his nephew started mumbling something when the children started coming out of school. The defendant was not swearing at the children, but the nephew was because one of the children had kicked him. The defendant then told his nephew to "quit saying those fucking words," which was when Gulizia and Keefe came across the street. According to the

defendant, Gulizia pushed him against the fence and threatened to kill him. When Gulizia released the defendant, the defendant said, Gulizia made an obscene remark to the defendant. The defendant responded by saying, "Well, I screwed your wife last night, and I thought she was a whore." The defendant admitted using profanity toward Gulizia, but not toward the children.

The jury returned a verdict of guilty, and the defendant was sentenced to probation for 18 months. Upon appeal to the district court, the judgment was affirmed.

In determining whether the evidence is sufficient to sustain a conviction in a jury trial, this court does not resolve conflicts in the evidence, pass on the witnesses' credibility, determine the plausibility of explanations, or reweigh the evidence. These 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. Culver, ante* p. 228, 444 N.W.2d 662 (1989).

The evidence of the State which has been summarized was sufficient, if believed, to permit the jury to find the defendant guilty beyond a reasonable doubt.

In *State v. Coomes*, 170 Neb. 298, 301-02, 102 N.W.2d 454, 457 (1960), we said:

> A breach of the peace is a violation of public order. It is the same as disturbing the peace. The definition of breach of the peace is broad enough to include the offense of disturbing the peace; it signifies the offense of disturbing the public peace or tranquility enjoyed by the citizens of a community. [Citations omitted.]
>
> Breach of the peace is a common law offense. The term "breach of the peace" is generic and includes all violations of public peace, order, decorum, or acts tending to the disturbance thereof.

In *State v. Sukovaty*, 178 Neb. 779, 135 N.W.2d 467 (1965), the defendant was charged with disturbing the peace by publicly cursing, swearing, and using profane, obscene, indecent, abusive, and offensive language against the complaining witness. The evidence showed that the defendant failed to leave after being requested to do so and used profane and abusive language against the complaining witness and disturbed his

peace and quiet by disorderly conduct. In affirming the conviction, we approved a definition of disorderly conduct as any act which tends to breach the peace or disturb those who see or hear it, and a definition of peace, as used in this phrase, as the tranquility enjoyed by members of a community where good order reigns.

The defendant argues that his language was protected speech under his right to freedom of speech under the 1st and 14th amendments to the U.S. Constitution. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S. Ct. 766, 86 L. Ed. 1031 (1942), defines language that tends to incite assault or other immediate breach of the peace as "fighting" words, which are not constitutionally protected forms of speech. In the *Chaplinsky* case the Court said at 571-72:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument." *Cantwell v. Connecticut*, 310 U.S. 296, 309-310.

In *Cantwell v. Connecticut*, 310 U.S. 296, 308-10, 60 S. Ct. 900, 84 L. Ed. 1213 (1940), the Court said:

> The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others. . . .
>
> . . . .
>
> . . . One may, however, be guilty of the offense if he

> commit acts or make statements likely to provoke violence and disturbance of good order, even though no such eventuality be intended. Decisions to this effect are many, but examination discloses that, in practically all, the provocative language which was held to amount to a breach of the peace consisted of profane, indecent, or abusive remarks directed to the person of the hearer. Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.

This court has held words such as those used by the defendant are fighting words. See *State v. Groves*, 219 Neb. 382, 363 N.W.2d 507 (1985).

The defendant's motion in limine sought to prevent the State from arguing the evidence because the evidence related to the defendant's disturbing the peace and quiet of someone other than the person named in the complaint. The evidence established that, in addition to the defendant's statements directed at Gulizia personally, the defendant's use of profanity in the presence of the children disturbed Gulizia.

In *The State v. Burns*, 35 Kan. 387, 11 P. 161 (1886), the defendant's conviction for disturbing the peace was affirmed, although the objectionable words and acts of the defendant were directed toward her former husband and not the complaining witness. The Kansas Supreme Court approved an instruction which stated in part:

> "Although the words and acts of the defendant may have been primarily directed against some person other than [the complaining witness] or his family, yet if the defendant's words and acts were wrongful and willful, and the natural and necessary consequences of them were the disturbance of [the complaining witness] and his family, the defendant is equally guilty as though she had no other intention than the disturbance of [the complaining witness] and his family. . . ."

Id. at 390, 11 P. at 162. The assignment of error is without merit.

The trial court included the following conditions in the order of probation:

> 10. Shall have no contact with children 14 years of age or younger, except in the presence of any such child's parent or guardian. This term includes Mr. Broadstone's immediate family. For purposes of this term, "no contact" means that Mr. Broadstone shall not affirmatively remain in the physical presence of children. Further, he shall not telephone, write or converse directly or indirectly with children.
>
> 11. To physically stay away from every public or private schoolground, public or private playground, recreational center, athletic field, swimming pool and any other place, public or private, where children habitually congregate. For the purposes of this term "stay away" means that Mr. Broadstone shall not be found within one city block of any of the above places.

Although the defendant assigned error as to these conditions, the matter was not argued in the defendant's brief. This court does not consider assignments of error not discussed in the brief. *State v. Bonczynski*, 227 Neb. 203, 416 N.W.2d 508 (1987).

Similar conditions were included in the defendant's bonds. Generally, an objection to a bond cannot be made by appeal. See, *State v. Harig*, 192 Neb. 49, 218 N.W.2d 884 (1974); *State v. Watkins*, 190 Neb. 450, 209 N.W.2d 184 (1973).

The judgment is affirmed.

AFFIRMED.

RICHARD G. McMICHAEL, APPELLEE, V. LANCASTER COUNTY SCHOOL DISTRICT 001, ALSO KNOWN AS LINCOLN PUBLIC SCHOOLS, APPELLANT.

447 N.W.2d 35

Filed October 20, 1989. No. 88-1019.

1. **Workers' Compensation: Appeal and Error.** The findings of fact made by the Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong.
2. **Workers' Compensation: 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.
3. **Workers' Compensation: Expert Witnesses.** 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.
4. **Workers' Compensation: Proof.** A workers' compensation award cannot be based on mere possibility or speculation, and if an inference favorable to the plaintiff can only be reached on the basis thereof, then he cannot recover.

Appeal from the Nebraska Workers' Compensation Court. Reversed.

John M. Guthery and Maureen A. Lauren, of Perry, Guthery, Haase & Gessford, P.C., for appellant.

Hal W. Anderson, of Berry, Anderson, Creager & Wittstruck, P.C., for appellee.

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

GRANT, J.

This is an appeal from an order of the Nebraska Workers' Compensation Court awarding the plaintiff employee, Richard G. McMichael, compensation for an injury he sustained while he was employed as an assistant building superintendent for Lancaster County School District 001.

Plaintiff states in his petition that he sustained an injury to his back while moving a file cabinet at a Lincoln public school on September 23, 1987. The school district does not contest the fact that the plaintiff suffered an injury which arose within the scope of his employment or that plaintiff gave timely notice of

the injury.

The medical evidence was submitted on various hospital patient summaries, doctors' notes, and doctors' reports. Plaintiff sought medical treatment for pain in his leg and back on October 22, 1987. Plaintiff's physician diagnosed the injury as a herniated lumbar disk and referred plaintiff to a neurological surgeon, Dr. Benjamin Gelber. On November 13, 1987, Dr. Gelber performed a "[p]artial hemilaminectomy, fourth lumbar, left, with removal of protruded intervertebral disk, foraminotomy, 11-13-87." On December 28, 1987, Dr. Gelber prepared a written statement containing the following: "He [plaintiff] has made an excellent recovery. He can return to his previous employment without medical restriction as of 1-2-88." In a letter dated January 7, 1988, Dr. Gelber stated: "The protruded disc was most likely caused by the accident at work . . . . A protruded disc requiring laminectomy at a single level without neurologic deficit, in my opinion, should produce a permanent partial impairment of the whole man of 15%."

On August 9, 1988, a judge of the Workers' Compensation Court awarded plaintiff temporary disability benefits and ordered the school district to reimburse plaintiff for the medical expenses he incurred resulting from the injury. The court denied compensation for a permanent partial disability because plaintiff failed to prove a loss or reduction in his earning power.

The case was submitted for rehearing before a three-judge panel on the stipulated set of facts contained in a September 9, 1988, pretrial order. The stipulated facts show that sometime after plaintiff returned to work, he was promoted to building superintendent and received an increase in pay and that plaintiff is able to perform all the job-related duties he was performing before the injury and all of the duties currently required of him as building superintendent. However, it was also stipulated that plaintiff, on occasion, suffers pain and discomfort in the area of the injury. The stipulation also contained the medical report, as quoted above, as to "permanent partial impairment."

Based upon these facts, the panel found that plaintiff sustained a loss of earning power insofar as his ability to procure employment generally had been impaired, and

concluded that plaintiff suffered a permanent disability of 15 percent to the body as a whole. The panel modified the one-judge order and awarded plaintiff additional compensation for a permanent partial disability and awarded plaintiff attorney fees.

The school district timely appeals, assigning two errors. The school district contends (1) that there was insufficient evidence to support the Workers' Compensation Court's award of permanent partial disability and (2) that the Workers' Compensation Court erred in awarding plaintiff attorney fees. We reverse.

With regard to the first assignment of error, the school district does not contest the fact that plaintiff suffered a work-related injury and does not contest the payment of the medical expenses and temporary disability for the injury. The issue here only relates to whether the Workers' Compensation Court correctly found that plaintiff has proved his injury resulted in a compensable permanent partial disability.

Whether plaintiff suffers from such a disability is a factual question. The findings of fact made 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. *Alley v. Titterington, ante* p. 71, 443 N.W.2d 615 (1989).

The school district contends that there is insufficient evidence to sustain the panel's finding that plaintiff suffered a permanent partial disability, because plaintiff failed to adduce sufficient medical evidence showing that the injury resulted in such a disability. 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. *Roesler v. Farmland Foods*, 232 Neb. 842, 442 N.W.2d 398 (1989).

In considering the evidence required, we stated in *Fees v. Rivett Lumber Co.*, 228 Neb. 617, 621, 423 N.W.2d 483, 486 (1988):

> "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."

Plaintiff urges that the panel's order is supported by Dr. Gelber's expert opinion as reflected in his January 7, 1988, letter showing the nature and extent of the disability. Dr. Gelber's letter stated: "A protruded disc requiring laminectomy at a single level without neurologic deficit, in my opinion, should produce a permanent partial impairment of the whole man of 15%." The school district contends that the use of the word "should" in the statement is merely speculative and does not support the finding that plaintiff's injury did result in a disability.

We need not decide whether the opinion of the doctor, as phrased, constitutes a sufficient opinion to support a finding that plaintiff did, in fact, suffer a 15-percent permanent partial disability. The opinion is a sort of syllogism. The doctor states that plaintiff suffered from a protruded disk and was operated on and that such a condition, after operation, should result in 15 percent disability. What is lacking, of course, is the conclusion that this plaintiff, therefore, has suffered a 15-percent disability. However, for the purposes of this opinion only, we shall treat the doctor's opinion as sufficient to support a 15-percent disability finding, if the opinion is otherwise sufficient.

It is our conclusion that the opinion cannot be sufficient to support the 15-percent finding in this case. In the doctor's surgical notes and in the hospital summaries the operation performed by Dr. Gelber on plaintiff is described as a "partial hemilaminectomy." The letter opinion states that a "laminectomy at a single level" should result in a 15-percent permanent partial impairment. Whether a "partial hemilaminectomy" is identical with a "laminectomy," and whether the two operations result in the same disability, is certainly beyond the ken of a nonmedical fact finder, without further evidence.

In 2 J. Schmidt, Attorney's Dictionary of Medicine and Word Finder H-48 and H-49 (1987), hemilaminectomy is defined as follows:

> The word "laminectomy," without the prefix hemi-, denotes a surgical operation for the removal of the laminae (singular, *lamina*) of one or more vertebrae. . . . The prefix hemi- means *half*, and the word *hemilaminectomy* means the removal of one or more laminae on *one side* of the vertebral column . . . .

(Emphasis in original.) See, also, to the same effect, R. Sloane, The Sloane-Dorland Annotated Medical-Legal Dictionary (1987).

Whether the additional word "partial" in the surgeon's notes is redundant or signifies a lesser removal is not known. Without explanation, the terms "laminectomy" and "partial hemilaminectomy" cannot be considered synonymous.

Dr. Gelber's letter is not sufficiently definite to provide the basis of an award for permanent disability to the plaintiff in this case. A workers' compensation award cannot be based on mere possibility or speculation, and if an inference favorable to the plaintiff can only be reached on the basis thereof, then he cannot recover. *Erving v. Tri-Con Industries*, 210 Neb. 339, 314 N.W.2d 253 (1982).

When the evidence in the record is insufficient to warrant the making of the award, or the factual findings made by the Workers' Compensation Court do not support the award, the Supreme Court must modify, reverse, or set aside that award. Neb. Rev. Stat. § 48-185 (Reissue 1988); *Kingslan v. Jensen Tire Co.*, 227 Neb. 294, 417 N.W.2d 164 (1988). The Workers' Compensation Court erred as contended in the school district's first assignment of error.

The school district contends in its second assignment of error that the panel erred in awarding plaintiff attorney fees. In view of the result reached herein, the district is correct in that contention also. The judgment is reversed and the cause remanded to enter judgment in accordance with this opinion.

REVERSED.

WHITE, J., concurs.

SCOULAR GRAIN COMPANY, A NEBRASKA CORPORATION, APPELLEE, V. PIONEER VALLEY SAVINGS BANK, AN IOWA CORPORATION, APPELLANT, AND JAMES L. WAGNER, SHERIFF, APPELLEE.

447 N.W.2d 38

Filed October 20, 1989. No. 89-100.

1. **Judgments: Liens: Real Estate: Vendor and Vendee.** A judgment recovered against one who has agreed to sell land but has made no deed nor received the whole of the purchase money constitutes a lien on the seller's interest in the land.
2. **Judgments: Liens: Real Estate.** A judgment lien on real estate in the name of the judgment debtor is a lien only on the actual interest of the judgment debtor and is subject to all existing equities whether of record or not.

Appeal from the District Court for Dakota County: ROBERT E. OTTE, Judge. Affirmed.

Mohummed Sadden for appellant.

Frederick S. Cassman, of Abrahams, Kaslow & Cassman, for appellee Scoular Grain Company.

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

PER CURIAM.

Defendant-appellant, Pioneer Valley Savings Bank, challenges the district court's issuance of an injunction as sought by the plaintiff-appellee, Scoular Grain Company, in this declaratory judgment action. The injunction prevents Pioneer from proceeding with an execution sale of certain real estate in which both Pioneer and Scoular claim interests. Pioneer's operative assignments of error merge to claim that the district court's judgment is legally erroneous. We affirm.

The record reveals the relevant stipulated facts to be that on August 31, 1987, Eugene M. O'Neill and Scoular entered into a written agreement under the terms of which O'Neill undertook to sell and Scoular undertook to purchase certain real and personal property located in South Sioux City, Dakota County, Nebraska, for a total of $900,000. The agreement recites that the sale was for the purpose of enabling O'Neill to "make appropriate provisions for satisfaction or treatment of all valid

interests of the Internal Revenue Service . . . ."

The agreement was never recorded, but on January 8, 1988, a memorandum calling attention to its existence and identifying the properties involved was filed with the Dakota County register of deeds.

The record further reveals that Scoular had occupied at least part of the real estate and possessed at least some of the personal property under the terms of certain leases it had made with O'Neill in 1979 and 1984, the first of which was recorded with the Dakota County register of deeds, but the second of which was not recorded. In mid-1984, O'Neill assigned the percentage rents due him under said leases to Pioneer, as security for his then indebtedness to Pioneer. This document was recorded with the Dakota County register of deeds. On September 3, 1987, O'Neill's attorney wrote a letter informing Pioneer that O'Neill was in the process of selling his properties and requesting documentation as to Pioneer's interests.

On September 29, 1987, Pioneer recovered a judgment against O'Neill in the district court for Dakota County in the sum of $21,740.28 and interest. On an undisclosed date, Pioneer issued a writ of execution upon the subject real estate, under which an execution sale was scheduled to be held on February 3, 1988.

On January 21, 1988, an escrow agreement was executed between Scoular, as buyer, O'Neill, as seller, and Security Land Title Company, as escrow agent, whereby the transaction was closed, and Scoular made payment of the entire purchase price, which was deposited with the escrow agent to be disbursed to satisfy various mortgage liens, federal tax liens, real estate taxes, and special assessments against the property. The warranty deed conveying title to the property from O'Neill to Scoular was recorded on January 25, 1988, in the office of the register of deeds of Dakota County.

This court last addressed the issue presented by this appeal but a decade ago in *Monroe v. Lincoln City Employees Credit Union*, 203 Neb. 702, 279 N.W.2d 866 (1979). There, applying law announced earlier in *Doe v. Startzer*, 62 Neb. 718, 87 N.W. 535 (1901), and *Courtnay v. Parker*, 16 Neb. 311, 20 N.W. 120 (1884), *on appeal after remand* 21 Neb. 582, 33 N.W. 262

(1887), we restated the rule that a judgment recovered against one who has agreed to sell land but has made no deed nor received the whole of the purchase money constitutes a lien on the seller's interest in the land. And as noted in *Halsted v. Halsted*, 169 Neb. 325, 327-28, 99 N.W.2d 384, 386 (1959), "[A] judgment lien on real estate in the name of the judgment debtor is a lien only on the actual interest of the judgment debtor and is subject to all existing equities whether of record or not." See, also, *Knaak v. Brown*, 115 Neb. 260, 212 N.W. 431 (1927).

Applying the principles from *Monroe* and *Halsted*, it is clear that Pioneer's judgment lien was subject to the earlier unrecorded contract for the sale of real estate between O'Neill and Scoular. Pioneer's interest in the subject property consisted of a lien on O'Neill's interest as the seller of real estate. While prior liens against the property prevented either O'Neill or Pioneer from receiving any of the proceeds from the sale to Scoular, O'Neill's interest as the seller was conveyed by the sale to Scoular. Similarly, Pioneer's interest in the property, being derived from O'Neill's, was also conveyed by such sale. Thus, we must and do hereby affirm the judgment of the district court.

AFFIRMED.

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

447 N.W.2d 40

Filed October 20, 1989. No. 89-127.

1. **Constitutional Law: Appeal and Error.** Generally, a constitutional issue not presented to or passed upon by the trial court is not appropriate for consideration on appeal.
2. **Constitutional Law: Equal Protection.** Equal protection guarantees that similar persons will be dealt with similarly by the government.
3. _____: _____. When examining a claim of deprivation of equal protection, the first inquiry is whether the statute discriminates among those who are similarly situated.

4. **Juvenile Courts: Minors.** The theory of the law is that a commitment of a juvenile to a youth training center is not punishment but is the furnishing of protection, care, and training by the State as a substitution for parental authority.
5. **Constitutional Law: Equal Protection: Juvenile Courts: Minors.** Since juvenile offenders and adult offenders are not similarly situated, there is no deprivation of equal protection when a juvenile adjudged to be a juvenile within the meaning of Neb. Rev. Stat. § 43-247(1), (2), or (4) (Reissue 1988) is, pursuant to Neb. Rev. Stat. § 43-286 (Reissue 1988), confined for a longer period than an adult convicted of the same offense could be incarcerated.
6. **Appeal and Error.** This court normally will not consider assignments of error which are not discussed in the brief.
7. _____. This court does always reserve the right to note plain error.
8. **Appeal and Error: Words and Phrases.** Plain error is error which was unasserted or uncomplained of at trial or on appeal, but is plainly evident from the record, which prejudicially affects a litigant's substantial right and which is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.
9. **Juvenile Courts: Records.** In the absence of a valid waiver by all parties to the proceedings in a juvenile court, a verbatim transcript of those proceedings shall be made and preserved.
10. **Juvenile Courts: Appeal and Error.** An adjudication under the Juvenile Code is an appealable order.
11. _____: _____. In an appeal from a separate juvenile court, the Supreme Court reviews the findings of that court de novo on the record.

Appeal from the Separate Juvenile Court of Sarpy County: WILLIAM D. STALEY, Judge. Reversed and remanded with directions.

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

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

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

HASTINGS, C.J.

This is an appeal by a juvenile from the order of the separate juvenile court of Sarpy County which committed her to the custody of the Nebraska Department of Correctional Services in the care and custody of the Youth Development Center-Geneva. The juvenile appellant assigns as error that her

commitment to the Youth Development Center-Geneva is contrary to law and that the juvenile commitment statute, Neb. Rev. Stat. § 43-286 (Reissue 1988), is unconstitutional, and her commitment therefore is invalid.

The appellant was born on June 6, 1971. The original charges filed against her were: count I, that on September 6, 1987, she operated a motor vehicle without having first obtained a valid, current operator's license and, count II, that she exerted unauthorized control over a propelled motor vehicle of another without the owner's consent. It was also charged that she deported herself so as to injure or endanger seriously the morals or health of herself or others, as described in Neb. Rev. Stat. § 43-247(3)(b) (Reissue 1988).

At her rearraignment held on March 1, 1988, which was attended by the juvenile, her attorney, and her mother, the appellant, pursuant to a plea bargain whereby count II was dismissed, admitted the allegations as to count I. Accordingly, the court found and adjudged the appellant a child within § 43-247(1) and (3)(b) on proof beyond a reasonable doubt. An inquiry as to disposition was held immediately and was done off the record at the request of the appellant's counsel. Disposition was apparently based upon the appellant's confidential social file, which was made a part of the record. It consisted of various dispositional worksheets, reviews, and evaluations. The court ordered the appellant committed "to the care and custody of the Department of Correctional Services, State of Nebraska, by delivery to the Youth Development Center, Geneva, Nebraska," but then ordered the commitment suspended under certain terms and conditions. This appears only in the findings and order contained in the transcript. No other record was made of those proceedings.

Further hearings were had on June 1 and December 2, 1988, and January 12 and February 9, 1989. At the January 12 hearing, the court ordered the previous suspension of commitment vacated and ordered the appellant committed to the care and custody of the Department of Correctional Services by delivery to the Youth Development Center-Geneva. No reason for this action was given in the order of the court found in the transcript on appeal, and no reported record of

those proceedings appears in the bill of exceptions. As a matter of fact, in response to a request by the State for a record of that hearing, as well as hearings held on June 1 and December 2, 1988, the court reporter responded that she had made no record of those proceedings. A motion to vacate that commitment was overruled on February 9, 1989. The juvenile has appealed.

We will deal first with the appellant's second assignment of error, which is based on the contention that § 43-286 denies equal protection to those juveniles who have been adjudicated as juveniles within the meaning of § 43-247(1), (2), or (4), because such juveniles could potentially be confined for a longer period of time than an adult could be incarcerated if convicted of the same offense. In this particular case, appellant could be confined to the Youth Development Center-Geneva until she reaches the age of 19, a possible period of a year and a half, whereas the longest period for which an adult convicted of operating a motor vehicle without an operator's license could be incarcerated is 3 months. See, Neb. Rev. Stat. § 60-430 (Reissue 1988) and § 28-106(1) (Cum. Supp. 1988).

Appellant raises the equal protection issue for the first time in this appeal. A constitutional issue not presented to or passed upon by the trial court is not appropriate for consideration on appeal. *Gardner v. Beatrice Foods Co.*, 231 Neb. 464, 436 N.W.2d 542 (1989); *State v. Jordan*, 229 Neb. 563, 427 N.W.2d 796 (1988).

Notwithstanding appellant's failure to properly raise the constitutional issue, her assignment of error is without merit.

Equal protection guarantees that similar persons will be dealt with similarly by the government. *In re Interest of S.L.P.*, 230 Neb. 635, 432 N.W.2d 826 (1988); *State v. Michalski*, 221 Neb. 380, 377 N.W.2d 510 (1985). When examining a claim of deprivation of equal protection, the first inquiry is whether the statute discriminates among those who are similarly situated. *In re Interest of S.L.P., supra*; *In re Interest of M.B., R.P., and J.P.*, 222 Neb. 757, 386 N.W.2d 877 (1986). Section 43-286 does not deny equal protection to juveniles adjudged to be juveniles within the meaning of § 43-247(1), (2), or (4), because such juvenile offenders are not similarly situated to adult offenders inasmuch as an institutional placement of a minor is not to be

equated with the incarceration of an adult offender.

As expressed by the court in *Smith v. State*, 444 S.W.2d 941, 944-45 (Tex. Civ. App. 1969):

> The purpose of our statutes relating to the handling of youthful offenders is, as in other states having juvenile court systems, the education, treatment and rehabilitation of the child, rather than retributive punishment. The emphasis on training and rehabilitation, rather than punishment, is underscored by the declaration that juvenile proceedings are civil, rather than criminal, in nature. Instead of a complaint or indictment we have a "petition." The hearing never results in a conviction, but may lead to an "adjudication of delinquency." Where confinement of the delinquent child is indicated as the proper treatment, the child is not sentenced to prison but, instead, is "committed" to a "training school." The adjudication of delinquency does not carry with it any of the civil disabilities ordinarily resulting from conviction of crime, nor is the child considered to be a criminal because of such adjudication.

The issue before the court in the case of *In re T. D.*, 81 Ill. App. 3d 369, 401 N.E.2d 275 (1980), was whether a juvenile misdemeanant is denied due process and equal protection of the laws by commitment to the Department of Corrections for an indeterminate term. Although the minor failed to raise the constitutional issue in the trial court, the court nevertheless addressed the merits of the issue and found that the minor was not deprived of due process or equal protection by virtue of the dispositional order imposed. The court explained:

> We do not find adult offenders and juveniles adjudicated delinquent to be "similarly circumstanced" and, indeed, it is not the purpose of the Illinois Criminal Code and Juvenile Court Act to treat them as similarly circumstanced. The Juvenile Court Act has a legitimate and salutary goal, "to provide for the rehabilitation of delinquent minors at a stage before they have embarked upon the commission of substantive criminal offenses." . . . The primary purpose of the Act is remedial and preventive rather than punitive. . . .

> To this end the juvenile court acts as *parens patriae* . . . and the court and its allied agencies must be enabled to give the minor the care and guidance the Act is designed to provide . . . . As the indeterminate sentencing scheme of the Act is considered to play a useful role in achieving this goal and is applied similarly to all juveniles declared to be delinquent, it meets constitutional standards.
>
> . . . We note further that the Act offers unique benefits and favorable treatment to juvenile offenders which are not available to adult offenders. A juvenile may at any time apply to the court for a change in custodianship from the Department of Corrections or for restoration to the custody of his parents . . . and the court must terminate its wardship of a minor and all proceedings under the Act if at any time it finds the best interests of the minor and the public no longer require it to be continued . . . . In addition to this continuous opportunity to seek early release, the juvenile incurs no criminal record and is not disqualified from subsequently holding public office or receiving any license other than, in an appropriate case, one relating to the operation of motor vehicles. . . . There is also special provision for the confinement of minors, who, if under 17 years of age, may not be incarcerated with adult criminal offenders. . . .

(Citations omitted.) 81 Ill. App. 3d at 372-73, 401 N.E.2d at 277.

Although this court has not previously addressed the equal protection issue raised by appellant, this court's decision in *State v. Pinkerton*, 186 Neb. 225, 182 N.W.2d 198 (1970), suggests that in Nebraska, juvenile offenders are not considered to be similarly situated to adult offenders. In *Pinkerton*, a 15-year-old boy was convicted of petit larceny and committed to the custody of the Department of Public Institutions, in the care and custody of the Boys' Training School. He argued that his sentence was excessive because he might be held at the Boys' Training School for years, whereas an adult could not be imprisoned in the county jail for more than 6 months for the same offense.

At issue was the right of the trial court to commit the juvenile

to the custody of the Department of Public Institutions instead of imposing the penalty prescribed by Neb. Rev. Stat. § 28-512 (Reissue 1964) (imprisonment in county jail for not more than 6 months, a fine of not more than $500, or both). This court stated:

> The procedure which was followed in this case is not specifically authorized by any statute of this state. However, it is unnecessary to determine in this case whether the commitment was valid under the Juvenile Court Act because commitment of the defendant to the Boys' Training School is specifically authorized under section 83-465, R.S. Supp., 1969.
>
> It has been the policy of this state, at least since 1879, to authorize special treatment for juvenile offenders. Although prosecuting officers have a discretion as to whether to proceed against juvenile offenders directly under the criminal statutes or under the Juvenile Court Act, the Legislature has provided that in either case a child under the age of 18 may be committed to the Boys' Training School. . . . Section 83-465, R.S. Supp., 1969, provides that when a boy of sane mind under the age of 18 years, has been found guilty of any crime, except murder or manslaughter, in any court of record, the court may order that the boy be committed to the Boys' Training School. It was within the discretion of the district court to commit the defendant in this case to the Boys' Training School.
>
> A commitment to the Boys' Training School is not for a definite period. § 83-472, R.S. Supp., 1969 . . . . The theory of the law is that commitment to the Boys' Training School is not punishment but is the furnishing of protection, care, and training by the State as a substitution for parental authority. The object is reformation, not incarceration for a fixed period.

(Citations omitted.) 186 Neb. at 227, 182 N.W.2d at 199.

As authority for her equal protection argument, appellant relies on *People v. Olivas*, 17 Cal. 3d 236, 551 P.2d 375, 131 Cal. Rptr. 55 (1976). *Olivas* is distinguishable from the case before this court. Olivas was prosecuted as an adult, adjudged by the

same standards that apply to any competent adult, and convicted as an adult in an adult court. *Id.* In the present case, appellant was brought before the juvenile court, adjudged under provisions of the Nebraska Juvenile Code, and committed by the juvenile court to a juvenile facility.

In *Olivas*, the California Supreme Court acknowledged:

> We are not confronted by a situation in which a juvenile adjudged *under the Juvenile Court Law as a juvenile* contends that his term of involuntary confinement may exceed that which might have been imposed on an adult or juvenile who committed the identical unlawful act and was thereafter convicted *in the criminal courts*. Since that situation is not before us, we reserve consideration of the issue should it arise in some future case and we express no opinion on the merits of such a contention.

(Emphasis in original.) *Id.* at 243 n.11, 551 P.2d at 379 n.11, 131 Cal. Rptr. at 59 n.11.

In the case of *In re Eric J.*, 25 Cal. 3d 522, 601 P.2d 549, 159 Cal. Rptr. 317 (1980), the California Supreme Court had before it the type of juvenile case not before it in *Olivas*. The court held that a juvenile is not denied equal protection by the California Welfare and Institutions Code section under which a juvenile may be confined longer than an adult may be incarcerated for the same offense, because minors adjudged wards of the juvenile courts and committed to the Youth Authority are not similarly situated to adults convicted in the criminal courts.

Other courts have addressed the issue of whether equal protection is violated by confinement of a juvenile for a period longer than an adult would be incarcerated for the same offense and have found no violation. See, *People In Interest of M.C.*, 774 P.2d 857 (Colo. 1989); *United States v. Lowery*, 726 F.2d 474 (9th Cir. 1983), *cert. denied* 469 U.S. 837, 105 S. Ct. 133, 83 L. Ed. 2d 73 (1984) (Federal Youth Corrections Act); *State v. Rice*, 98 Wash. 2d 384, 655 P.2d 1145 (1982); *Appeal, In Maricopa Cty. Juvenile No. J-86509*, 124 Ariz. 377, 604 P.2d 641 (1979), *vacating* 124 Ariz. 380, 604 P.2d 644, *cert. denied* 445 U.S. 967, 100 S. Ct. 1660, 64 L. Ed. 2d 245 (1980); *In re Interest of J. K.*, 68 Wis. 2d 426, 228 N.W.2d 713 (1975); *People ex rel. Cromwell v. Warden*, 74 Misc. 2d 642, 345 N.Y.S.2d 381

(1973); *State in Interest of K. V. N.*, 116 N.J. Super. 580, 283 A.2d 337 (1971), *aff'd* 60 N.J. 517, 291 A.2d 577 (1972); *Wilson Appeal*, 438 Pa. 425, 264 A.2d 614 (1970) (juvenile may be confined for a period longer than an adult would be incarcerated for the same offense provided longer commitment will result in the juvenile's receiving appropriate rehabilitative care and not just deprivation of his or her liberty for a longer period); *State v. Pitt*, 28 Conn. Supp. 137, 253 A.2d 671 (1969); *Brisco v. United States*, 368 F.2d 214 (3d Cir. 1966) (Federal Youth Corrections Act).

Since juvenile offenders and adult offenders are not similarly situated, there is no deprivation of equal protection when a juvenile adjudged to be a juvenile within the meaning of § 43-247(1), (2), or (4) is, pursuant to § 43-286, confined for a longer period than an adult convicted of the same offense could be incarcerated.

Appellant's brief contains no discussion of her first assignment of error, i.e., that her commitment to the Youth Development Center-Geneva is contrary to law. This court normally will not consider assignments of error which are not discussed in the brief. *Federal Land Bank of Omaha v. Victor*, 232 Neb. 351, 440 N.W.2d 667 (1989); *State v. Narcisse*, 231 Neb. 805, 438 N.W.2d 743 (1989). However, we have always reserved the right to note plain error. *In re Estate of Fischer*, 227 Neb. 722, 419 N.W.2d 860 (1988); *State v. Beyer*, 218 Neb. 33, 352 N.W.2d 168 (1984).

> "Plain error" is error which was unasserted or uncomplained of at trial or on appeal, but is plainly evident from the record, which prejudicially affects a litigant's substantial right and which is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.

GFH Financial Serv. Corp. v. Kirk, 231 Neb. 557, 562, 437 N.W.2d 453, 456 (1989).

We have noted at the outset the absence of a record of several court proceedings. The separate juvenile court is a court of record. Neb. Rev. Stat. § 43-2,111 (Reissue 1988). In the absence of a valid waiver by all parties to the proceedings, a

verbatim transcript of those proceedings shall be made and preserved. See, also, *In re Interest of R.A.*, 226 Neb. 160, 410 N.W.2d 110 (1987).

Furthermore, the court below found the appellant to be a child within § 43-247(1), in other words, a juvenile who has committed a misdemeanor or an act in violation of a city ordinance, other than a traffic offense. The juvenile in this case, a traffic violator, should have been found to be within § 43-247(4). Additionally, we know of no statutory authority for the court to issue a suspended commitment to the Department of Correctional Services, as was done in this case. Finally, Neb. Rev. Stat. § 43-279 (Reissue 1988) requires that the court advise the juvenile of his or her right to counsel, the privilege against self-incrimination, the right to confront witnesses, the right to testify and call witnesses in his or her behalf, the right to a speedy adjudication, and the right to appeal and to have a transcript for such purpose. This appears to be a prerequisite to the acceptance of an in-court admission, which was not done in this case. However, as we have held before, the adjudication is an appealable order, and the time for appeal of that portion of these proceedings has long since passed. *In re Interest of Z.R.*, 226 Neb. 770, 415 N.W.2d 128 (1987).

We note as plain error the primary deficiency, which, although hidden in a maze of statutory redundancy, is the apparent lack of authority to commit a juvenile to the Department of Correctional Services as a status offender, i.e., one under § 43-247(3)(b).

Section 43-286 provides that a juvenile who is adjudicated to be a juvenile described in § 43-247(1), (2), (3)(b), or (4) may have his or her dispositional portion of the hearing continued from time to time under such terms and conditions as the court may prescribe, may be placed on probation subject to the supervision of a probation officer, or may be placed in a suitable family home or institution subject to the supervision of the probation officer. However, § 43-286(2) contains an exception, which provides that "*[e]xcept as provided in section 43-287*, the court may commit such juvenile to the care and custody of the Department of Correctional Services . . . ."

(Emphasis supplied.)

Neb. Rev. Stat. § 43-287 (Reissue 1988) provides:

> Notwithstanding the provisions of subdivision (2) of section 43-286, when any juvenile is found by the court to be a juvenile defined by subdivision (3)(b) of section 43-247, the court may (1) enter such order as it is empowered to enter in the case of a juvenile described in subdivision (1) or (2) of section 43-247, *except that no such juvenile shall be committed to the Youth Development Center at Kearney or Geneva* . . . .

(Emphasis supplied.)

Assuming that the appellant originally had been placed on probation (she was subjected to a suspended commitment, which is not probation), § 43-286(4)(e) provides that if a juvenile is found to have violated the terms of his or her probation, the court may modify the terms of probation, enter any order which could have been made at the time of the original order of probation, or in the case of a juvenile adjudicated to be within the definitions of § 43-247(3)(b), "the court, after considering the dispositions available, may in addition commit such juvenile to the . . . Department of Correctional Services *under section 43-287* . . . ." (Emphasis supplied.) We thus move full circle back to § 43-287, which prohibits the commitment of a subsection (3)(b) juvenile to the Youth Development Center at Kearney or Geneva.

Therefore, it would seem, the statute forbids the treatment of a child in such a setting as the Geneva institution, which apparently was created for the very purpose of dealing with a subsection (3)(b) juvenile, i.e., one who is habitually disobedient, is uncontrolled by his or her parent, or "who deports himself or herself so as to injure or endanger seriously the morals or health of himself, herself, or others; or who is habitually truant from home or school." § 43-247(3)(b).

We seriously doubt that the Legislature intended to prohibit such a result, particularly when it seems to be that the interests of the juvenile and the welfare of the community demanded such commitment as suggested in § 43-286(2). However, it is not within the province of this court to attempt to interpret what we consider to be the plain and unambiguous language of the

statutory provisions.

Thus, we examine the reasonableness of the commitment in this case. It possibly will restrict appellant's freedom for approximately 18 months for the violation of a traffic rule prohibiting the operation of a motor vehicle without a license.

We must review the findings of the trial court de novo on the record. *In re Interest of Jones*, 230 Neb. 462, 432 N.W.2d 46 (1988); *In re Interest of T.C.*, 226 Neb. 116, 409 N.W.2d 607 (1987).

The court made no findings supporting the commitment other than that the juvenile was adjudged a child "within Subdivision (1) and (3b) of Section 43-247, R.R.S. Nebraska, 1979 Supp. . . . ." It would seem apparent that she was committed not for driving an automobile without a license, but because of her consistent failure to deal with her alcohol abuse problem, including the falsification of attendance certificates at AA meetings; her neglect and the continued deterioration of her school responsibilities; her disregard of various court orders for a period of months; and the perceived abandonment of parental responsibilities by the juvenile's mother. Had the juvenile been lawfully committed to the care of the Department of Social Services as a subsection (3)(b) status offender, we would have little trouble finding an absence of an abuse of discretion by the trial court. However, confinement in the Youth Development Center-Geneva for the sole offense of driving without a license is unreasonable and an abuse of discretion, and cannot stand.

The judgment of the separate juvenile court is reversed, and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

STEPHEN M. WATSON, APPELLEE, V. ARCADIAN FOODS, INC., DOING BUSINESS AS THEO'S RESTAURANT, APPELLANT, AND FIRST NATIONAL BANK OF BELLEVUE, APPELLEE.

447 N.W.2d 477

Filed October 27, 1989. No. 87-149.

1. **Real Estate: Forcible Entry and Detainer.** The right to possession of real estate is determined in an action for forcible entry and detainer.
2. **Waiver: Words and Phrases.** Waiver has been defined as a voluntary and intentional relinquishment or abandonment of a known existing legal right, advantage, benefit, claim, or privilege, which except for such waiver the party would have enjoyed; the voluntary abandonment or surrender, by a capable person, of a right known by him to exist, with the intent that such right shall be surrendered and such person forever deprived of its benefits; or such conduct as warrants an inference of the relinquishment of such a right; or the intentional doing of an act inconsistent with claiming it.

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

Frank Meares for appellant.

Tamra Wilson Setser, of Erickson & Sederstrom, P.C., for appellee Watson.

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

BROWER, D.J.

This is an appeal from the district court for Douglas County, wherein restitution of premises was granted to the plaintiff landowner, Stephen M. Watson, against the defendants, Arcadian Foods, Inc., doing business as Theo's Restaurant (Theo's), and the First National Bank of Bellevue (Bank).

On September 20, 1984, Theo's entered into a lease agreement with Watson for a commercial building for a term ending January 31, 1997, unless sooner terminated. Monthly payments of $3,096.25 were to be made by Theo's. On January 9, 1985, Theo's assigned its rights under the lease to the Bank as collateral for a loan. The assignment, made with Watson's consent, specifically provided that the borrower lessee, Theo's, and the lessor, Watson, would not, alone or by agreement between them, modify or terminate the lease without the

consent of the Bank, except through default as provided in the lease. The assignment further provided that in the event Theo's defaulted, Watson had the right to terminate the tenancy in accordance with the terms of the lease. Watson agreed to provide the Bank with 30 days' written notice of such default, and the Bank, during such period, had a right to cure the default. During the 30-day period, Watson would take no action to enforce his claim arising from the default without the consent of the Bank.

Theo's failed to pay the rental installment due June 1, 1986, and on June 9 notice was given by Watson granting Theo's 10 days to cure the default as provided in the lease. Theo's issued a check to Watson for the June rent on June 15, which check was returned for insufficient funds. Watson gave a second notice to Theo's on July 10, granting Theo's 10 days to cure the default. On August 12, a 3-day notice was given by Watson to quit, vacate, and yield possession. Watson filed suit for forcible entry and detainer of property on August 29.

A trial was scheduled for October 23, 1986, but instead, an agreement and stipulation was entered into by the parties, whereby certain payments were made to Watson and the future rents were increased by $1,000 per month in order to clear up the unpaid back rent. The agreement provided that when final payment of back rents was received by Watson, the pending action for restitution would be dismissed. It was stipulated that this was an addendum to the lease and was not a waiver of any of the terms and conditions of the lease, and it provided that Watson could immediately institute proceedings for restitution upon Theo's failure to pay rents when due.

Theo's failed to pay rent for the month of November. On December 1, notice was given to Theo's to vacate for failure to pay rent.

Watson filed a second amended petition in the still pending restitution action, joining the Bank and alleging notice had been served on the Bank on December 19. The matter went to trial on January 22, 1987. The Bank appeared at trial, consented to the restitution, and waived its rights under the assignment. The court-ordered restitution of the premises and the trial on the matters of back rent and damages were deferred

to a later time. From the order for restitution, Theo's brings this appeal. We affirm.

Theo's assigns as error the court's failure (1) to dismiss the action, (2) to find that Watson waived any right under the forcible entry and detainer statute, and (3) to find Watson assigned his interest in the lease to the Bank and was without authority to proceed.

Theo's first assignment of error goes to the trial court's failure to sustain the motion to dismiss, which had been coupled with a request for continuance. Theo's does not assign any error concerning the refusal to continue the hearing.

Watson's action was a summary proceeding under Neb. Rev. Stat. §§ 24-568 et seq. (Reissue 1985), wherein a determination is made as to the right to possession of real estate and the method by which that possession may be restored. This court has held that the right to possession of real estate is determined in an action for forcible entry and detainer. *Towles v. Hamilton*, 94 Neb. 588, 143 N.W. 935 (1913). The procedure outlined in the statutes sets forth notice requirements, which provide that at least a 3-day notice to quit be given prior to the commencement of the action. Section 24-573 provides that only a summons shall be issued stating the cause of the complaint and setting forth the time and place of trial. The statutory proceedings are designed to provide a speedy and summary method for obtaining possession of premises for those rightfully entitled thereto after notice. *Sporer v. Herlik*, 158 Neb. 644, 64 N.W.2d 342 (1954).

The record shows Theo's received the statutory notice and filed an answer to the petition. Trial on the issue was continued, and on the scheduled trial date, October 23, 1986, a stipulation was entered into creating a method by which Theo's could pay back rents, thus, canceling the hearing. Upon Theo's failure to comply with the agreement, Watson, having retained his right to proceed on his initial action, gave additional notice to Theo's and the Bank, and then filed an amended petition.

The record reflects that Watson complied with the statutory steps and that the trial court was correct in overruling the motion to dismiss.

Theo's second assignment of error claims that by accepting

part of the delinquent rent after the commencement of the action for forcible entry and detainer, Watson waived said action. Theo's cites a number of cases holding that where a party to a contract, with full knowledge of the facts and with knowledge of a breach by the other party, receives money in performance of the contract, the breach will be deemed to have been waived. *Einot, Inc. v. Einot Sales Co., Inc.*, 154 Neb. 760, 49 N.W.2d 625 (1951); *Barber v. Raichart*, 207 Neb. 278, 298 N.W.2d 359 (1980); *Snyder v. Hill*, 153 Neb. 721, 45 N.W.2d 757 (1951).

However, these cases are not controlling in this factual situation. In each case, the party in default paid the total amount due on the delinquency either before or after commencement of the suit for breach of contract. Here, the parties entered into the stipulation wherein Watson specifically retained his right to proceed in his action for forcible entry and detainer if Theo's failed to carry out the lease provisions.

The stipulation entered into by the parties specifically provided the action was to remain on file and be dismissed only when the total delinquency was paid, an event which never occurred. The record also clearly shows that subsequent to the stipulation, Theo's failed to pay rent, was given a second notice, and was still in default for the month of November at the time of trial.

To be effective, a waiver must be a clear, unequivocal, and decisive act of a party showing such a purpose. See *Five Points Bank v. Scoular-Bishop Grain Co.*, 217 Neb. 677, 350 N.W.2d 549 (1984).

> Waiver has been defined as a voluntary and intentional relinquishment or abandonment of a known existing legal right, advantage, benefit, claim, or privilege, which except for such waiver the party would have enjoyed; the voluntary abandonment or surrender, by a capable person, of a right known by him to exist, with the intent that such right shall be surrendered and such person forever deprived of its benefits; or such conduct as warrants an inference of the relinquishment of such a right; or the intentional doing of an act inconsistent with claiming it.

Id. at 681, 350 N.W.2d at 552.

We find that under the stipulation, Watson retained all of his rights to proceed with the suit on file. At the time the stipulation was entered into, Theo's was still delinquent in the rent payments originally agreed to in the lease. By entering into the stipulation, Watson did not waive any right to proceed in forcible entry and detainer.

Finally, Theo's asserts there was a complete assignment by both Theo's and Watson to the Bank, and Watson had to obtain the consent of the Bank prior to filing an action for forcible entry and detainer. This contention is not correct. Although Watson consented to the assignment, he reserved all of his rights to proceed against Theo's in the event of a default. While Watson agreed to give the Bank notice of Theo's delinquency 30 days prior to commencement of any action to terminate the lease, Watson did not need the Bank's consent to proceed against Theo's.

Theo's also argues that Watson, because of the lease assignment, is not the real party in interest. Neb. Rev. Stat. § 25-301 (Reissue 1985) provides that every action must be prosecuted in the name of the real party in interest. This court has steadfastly held that the statute applies to actions for restitution of real estate. *Gregory v. Pribbeno*, 143 Neb. 379, 9 N.W.2d 485 (1943). Either the lessor or the lessee is a proper party to maintain the action. *Id.*

The Bank was given written notice of the default on December 19, 1986, more than 30 days prior to trial, and took no action to exercise its option to cure the default. The Bank was joined as a party defendant by Watson and appeared at trial, notifying the trial court that it consented to Watson's proceeding with the action to enforce his claim for restitution. Theo's claim that Watson had assigned all of his interest in the lease, and therefore the action was not prosecuted by the real party in interest, is erroneous and without merit.

For the foregoing reasons, the ruling of the trial court is correct and is affirmed.

AFFIRMED.

WILLIAM GRAY, APPELLEE, V. GAIL M. GRAY, APPELLANT.
447 N.W.2d 220

Filed October 27, 1989. No. 87-974.

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

Donald E. Earnshaw and Horace H. Reynolds IV for appellant.

No appearance for appellee.

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

PER CURIAM.

As part of a property settlement in the district court, the appellant, Gail M. Gray, caused certain shares of a family corporation to be sold to the corporation. The corporation's president, William Gray, Gail's ex-husband, caused corporation notes to be executed in payment of the stock. William agreed in the settlement document that "[s]aid note[s] shall be personally guaranteed by William." The notes were not paid as they came due, and Gail sought to collect the same from William and/or the corporation by various proceedings in aid of execution.

William and the corporation objected to the proceedings, contending in substance: (1) that no judgment has been had against the corporation and that absent such judgment, the corporation is not a judgment debtor; (2) that William has fully performed the promise made in the agreement to "guarantee" the notes, and to enforce the guaranty a separate action is required; and (3) that the corporation notes are not the obligation of William simply by being mentioned in a settlement agreement in a dissolution matter.

We agree with the trial court. Since the claims have not been reduced to judgments, proceedings in aid of executions cannot be maintained.

AFFIRMED.

JACK J. WORTH, APPELLANT, V. TAMRA F. SCHILLEREFF, APPELLEE.

447 N.W.2d 480

Filed October 27, 1989. No. 87-1151.

1. **Negligence: Proximate Cause: Words and Phrases.** Proximate cause of an injury is that cause which, in a natural and continuous sequence, unaccompanied by any efficient intervening cause, produces an injury, and without which the result would not have occurred.
2. _____: _____: _____. 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.
3. **Motions for New Trial: Appeal and Error.** A motion for a new trial is addressed to the discretion of the trial court, and absent an abuse of discretion, the trial court's ruling will be upheld on appeal.
4. **Negligence: Proximate Cause: Proof.** There are three basic requirements in establishing proximate cause. The first requirement is that the negligence be such that without it the injury would not have occurred, commonly known as the "but for" rule. The second requirement is that the injury be the natural and probable result of the negligence. The third requirement is that there be no efficient intervening cause.
5. **Jury Instructions.** Whether requested to do so or not, the trial court has the duty of instructing the jury on issues presented by the pleadings and the evidence.
6. **Juries: Evidence.** It is for the jury, as trier of the facts, to resolve conflicts in the evidence and to determine the weight and credibility to be given to the testimony of the witnesses.
7. **Jury Instructions: Appeal and Error.** The Supreme Court examines an instruction to determine whether it is a correct statement of law.
8. **Words and Phrases.** Reasonable certainty and reasonable probability are one and the same thing.
9. **Jury Instructions: Proof: Appeal and Error.** In order to establish as error the trial court's refusal to give a tendered instruction, an appellant is under a threefold burden to show that he or she was prejudiced by the court's refusal, that the tendered instruction is a correct statement of the law, and that the instruction is applicable to the evidence in the case.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Affirmed.

Robert P. Chaloupka, of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, for appellant.

Steven W. Olsen, of Simmons, Raymond, Olsen, Ediger, Selzer & Ballew, P.C., for appellee.

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

FAHRNBRUCH, J.

Claiming the district court for Scotts Bluff County erred in instructing the jury on intervening cause and standard of proof, Jack J. Worth appeals the trial court's denial of a new trial. We affirm.

"Intervening cause" is better understood when discussed in relation to proximate cause. Proximate cause of an injury is that cause which, in a natural and continuous sequence, unaccompanied by any efficient intervening cause, produces an injury, and without which the result would not have occurred. *Union Pacific RR. Co. v. Kaiser Ag. Chem. Co.*, 229 Neb. 160, 425 N.W.2d 872 (1988). "[A]n 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." *Butorac v. Dixon County*, 232 Neb. 598, 600, 441 N.W.2d 620, 622 (1989) (citing *Looney v. Pickering*, 232 Neb. 32, 439 N.W.2d 467 (1989)).

A motion for a new trial is addressed to the discretion of the trial court, and absent an abuse of discretion, the trial court's ruling will be upheld on appeal. *Lemke v. Northwestern Public Serv. Co., ante* p. 223, 444 N.W.2d 326 (1989).

On November 6, 1985, appellant was stopped at an intersection in Gering, Nebraska, when his truck was struck from behind by an automobile driven by appellee, Tamra F. Schillereff. Approximately 5 days after the accident, appellant saw Dr. Daryl D. Wills, a chiropractor. Worth complained of acute back pain, overall aching, and some catching in his upper back, as well as an upset stomach. Worth was a patient of Dr. Wills' until April 14, 1986, when appellant changed chiropractors and became the patient of Dr. Thomas K. Tomoi. On September 12, 1986, Dr. Tomoi referred appellant to Dr. Ernest W. Beehler, a neurosurgeon. On September 29, 1986, Dr. Beehler performed a laminectomy at the L4-5 level of Worth's spine.

On April 23, 1987, appellant brought suit against Schillereff to recover damages for the personal injuries he sustained as a result of the accident. In his first cause of action, Worth sought $31,531.65 in special damages, in addition to general damages. In his second cause of action, which was assigned to him by his

wife, Worth sued for the loss to his wife of his services and his consortium. On June 25, 1987, the trial court granted Worth's motion for summary judgment and found Schillereff liable for the accident. The case was ultimately submitted to a jury only upon the issue of damages proximately caused by appellee's negligence.

At the conclusion of the evidence, the trial court instructed the jury on proximate cause, intervening cause, and damages. The trial court instructed that future damages must be "reasonably certain." The jury returned a verdict for Worth in the amount of $7,443.

In his assignments of error, Worth claims the trial court erred (1) in giving that portion of an instruction dealing with efficient intervening cause; and (2) in instructing that Worth must "prove the various elements of damage by the standard, 'reasonably certain', when the standard which has been recognized in this state since 1981 is 'reasonably probable'."

In arguing that it was error to give an instruction on intervening cause, Worth notes that Schillereff did not plead intervening cause as a defense in her answer.

In *Greening v. School Dist. of Millard*, 223 Neb. 729, 735, 393 N.W.2d 51, 56 (1986), we stated that intervening cause was an element of proximate cause.

> "There are three basic requirements in establishing proximate cause. The first requirement is that the negligence be such that 'without which the injury would not have occurred,' commonly known as the 'but for' rule. . . .
>
> The second requirement is that the injury be the natural and probable result of the negligence. . . .
>
> . . . .
>
> The third requirement is that there be no efficient intervening cause."

See, also, *Daniels v. Andersen*, 195 Neb. 95, 237 N.W.2d 397 (1975).

Whether requested to do so or not, the trial court has the duty of instructing the jury on issues presented by the pleadings and the evidence. *Anderson v. Union Pacific RR. Co.*, 229 Neb. 321, 426 N.W.2d 518 (1988); *Juniata Feedyards v. Nuss*,

216 Neb. 29, 342 N.W.2d 1 (1983). The remaining question, therefore, is whether the evidence supported an instruction on intervening cause.

During the trial, Dr. Wills testified that tests performed after the accident on Worth's cervical thoracic spine led him to conclude that Worth "sustained an acute traumatic cervical thoracic strain, sprain syndrome and an internal derangement of the right shoulder." Dr. Wills further testified that from tests performed on the lumbosacral spine, he felt appellant "had suffered an acute traumatic lumbar lumbosacral strain, sprain syndrome with severe myalgia and lumbalgia."

On cross-examination, Dr. Wills testified that Worth "did not have the classic symptoms of an acute disk herniation but he did have indication of nerve root irritation which could have been discogenic in origin." Dr. Wills attributed the leg pain to a nerve irritation in the lumbar spine, possibly related to sleeping posture. He stated that if the leg pain had been symptomatic of a disk herniation, the pain would be acute and unrelenting. "Usually a disk lesion is exemplified by extreme back and leg pain, more so in the leg. It comes on very acutely from a specific instance, it's not relenting, it does not give up." Dr. Wills also testified that Worth had a preexisting degenerated L5-S1 disk of the lumbar spine that "definitely would predispose him to nerve root irritation if in fact a nerve were impinged or pressed upon."

Other evidence at trial revealed that Worth had suffered an electrical shock on September 3, 1986. As Worth was working in a tree, he touched a branch that was in contact with a 220-volt powerline. Dr. Tomoi's history taken from Worth indicated that the resulting electrical shock caused appellant to jerk backward. Dr. Tomoi was the only person treating Worth immediately before and immediately after the shock incident. Before the electrical shock, Dr. Tomoi diagnosed appellant as having a "hyperextension whiplash region to the lower cervical, upper thoracic spine" and "a mild sprain, strain of the lumbosacral spine." Dr. Tomoi testified that before the shock, appellant did not persistently complain of low back pain. He termed Worth's low back pain a "mild low back irritation." Dr. Tomoi testified that there was no relationship between the severity of the car accident and the severity of Worth's

whiplash. Dr. Tomoi said that the day after the shock, Worth began complaining of sciatic pain. Dr. Tomoi said that sciatic pain was consistent with nerve root irritation at the L4-5 level. Tests performed on Worth by Dr. Tomoi revealed that appellant had suffered a disk protrusion. Appellant was referred to Dr. Beehler.

Worth testified that on September 19, 1986, before seeing Dr. Beehler, a sneeze caused him to experience severe pain in his lower back. On September 21, 1986, appellant was admitted to the hospital for back surgery. Dr. Beehler testified that a sneeze could cause the rupture of a disk which had started to rupture earlier.

Worth relies upon the opinion of Dr. Beehler, who testified that "the car wreck, the accident, was a major factor in probably starting this thing rolling." However, on cross-examination, Dr. Beehler acknowledged that the electrical shock was a factor in the production of the ruptured disk. He declared that if the electrical shock was of a severe magnitude, "it could have produced a total rupture right then and there."

Evidence at trial also showed that Worth had a history of chiropractic treatments, including 28 treatments in 1967, 52 treatments in 1983 after falling from a truck, and 10 treatments in 1984 for low back pain. Dr. Tomoi testified that all these factors were important in evaluating appellant's condition. Worth never told Dr. Beehler of the electrical shock or, apparently, the sneeze. Dr. Beehler did not know of the electrical shock until Worth's attorney informed him of it prior to trial. Evidence also revealed that on December 20, 1985, Worth fell on some ice onto his back. Dr. Tomoi testified that appellant stated that the fall had aggravated his condition.

The testimony of the treating chiropractors, Dr. Wills and Dr. Tomoi, as well as the testimony of the neurosurgeon, Dr. Beehler, provides sufficient evidence to support an instruction on intervening cause. The evidence presented a question of fact for resolution by the jury, and the jury resolved it. "It is for the jury, as trier of the facts, to resolve conflicts in the evidence and to determine the weight and credibility to be given to the testimony of the witnesses." *Joyner v. Steenson*, 227 Neb. 766,

769, 420 N.W.2d 278, 280 (1988).

Worth's second assignment of error claims that since "the standard which has been recognized [for proof of future damages] in this state since 1981 is 'reasonably probable,' " the trial court erred in refusing to include, as Worth requested, the words "reasonably probable" rather than "reasonably certain" in its damages instruction to the jury. The trial court instructed the jury that if proven by a preponderance of the evidence, damages were to be awarded in an amount of money that would fairly and reasonably compensate Worth for disability and mental or physical pain and suffering "[r]easonably certain" to be experienced in the future. The trial court also instructed the jury that damages proven by a preponderance of the evidence were to be awarded for the value of the society, companionship, conjugal relationship, and services of which Worth's spouse is "reasonably certain" to be deprived in the future.

The Supreme Court examines an instruction to determine whether it is a correct statement of law. *Cassio v. Creighton University, ante* p. 160, 446 N.W.2d 704 (1989). This court has said that "reasonable certainty" and "reasonable probability" are one and the same thing. *Lane v. State Farm Mut. Automobile Ins. Co.*, 209 Neb. 396, 308 N.W.2d 503 (1981). The instruction given was a correct statement of law.

> In order to establish as error the trial court's refusal to give a tendered instruction, an appellant is under a threefold burden to show that he or she was prejudiced by the court's refusal, that the tendered instruction is a correct statement of the law, and that the instruction is applicable to the evidence in the case.

(Emphasis omitted.) *Cassio v. Creighton University, supra* at 177, 446 N.W.2d at 715. Appellant has failed to show that he was prejudiced by the court's refusal to tender the requested instruction.

We conclude that the evidence supported an instruction on intervening cause. The trial court did not err in refusing appellant's request that the instruction on future damages include the words "reasonably probable" rather than "reasonably certain."

The trial court did not abuse its discretion in refusing to grant

appellant's motion for a new trial.

AFFIRMED.

MAURICE A. NICHOLS ET AL., APPELLANTS, V. HOWARD F. ACH, APPELLEE.

447 N.W.2d 220

Filed October 27, 1989. No. 88-038.

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 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. **Principal and Agent: Presumptions.** The knowledge of the agent is conclusively presumed to be the knowledge of the principal.
3. **Malpractice: Limitations of Actions: Damages: Negligence.** Any action to recover damages based on alleged professional negligence or upon alleged breach of warranty in rendering or failure to render professional services shall be commenced within 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: Torts: Time.** Traditionally, a statute of limitations begins to run as soon as the action accrues, and a cause of action in tort accrues as soon as the act or omission occurs.
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 discovery. It is not necessary that the plaintiff have knowledge of the exact nature or source of the problem, but only knowledge that the problem existed.
6. _____: _____. For a statute of limitations to begin running, the plaintiff need not have suffered actual damages; however, there must be injury, which is the invasion of a legally protected interest.

7. _____: _____. The point at which a statute of limitations begins to run must be determined from the facts of each case.
8. **Attorney and Client: Malpractice: Negligence: Contracts.** A client has knowledge of his attorney's alleged negligence at the time the client signs the contract.
9. **Contracts: Fraud.** In the absence of fraud one who signs an instrument without reading it, when he can read and has the opportunity to do so, cannot avoid the effect of his signature merely because he was not informed of the contents of the instrument. One who enters into a contractual relationship is charged with knowledge of the contract's contents and is bound thereby.
10. **Constitutional Law: Appeal and Error.** A constitutional issue not presented to or passed upon by the trial court is not appropriate for consideration on appeal.

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

David W. Jorgensen, of Nye, Hervert, Jorgensen & Watson, P.C., for appellants.

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

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

FAHRNBRUCH, J.

Maurice A. Nichols and his three adult children appeal a Saline County District Court's summary judgment ruling that their legal malpractice lawsuit against attorney Howard F. Ach is time-barred by Nebraska's statute of limitations Neb. Rev. Stat. § 25-222 (Reissue 1985). 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 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. *State Farm Fire & Cas. Co. v. Victor*,

232 Neb. 942, 442 N.W.2d 880 (1989).

Considering only those facts which are uncontroverted, the record reflects the following.

Nichols and his three children, Gene, Linda, and Julie, were the sole stockholders of Maury Corporation (Maury). Maury was engaged in highway construction for more than 20 years, with its principal place of business in Geneva, Nebraska. John Anderson contacted the senior Nichols and asked whether he and his children would be interested in selling their stock in Maury to Wm. Anderson Co., Inc. (Anderson Company). It was owned by the Anderson brothers, John, Jeff, and Tim, and was involved in mechanical work and utility contracting for municipalities.

Maury's stockholders were interested in selling their stock. They appointed Maurice Nichols (Nichols) to negotiate the sale to Anderson Company of all the outstanding stock of Maury. Nichols also owned another corporation, a ready-mix concrete company, which he hoped to sell to the Andersons, but that sale never materialized.

In analyzing this case, it is well to remember that the knowledge of the agent, Nichols, is conclusively presumed to be the knowledge of the principal, the Nichols children. *City of Gering v. Smith Co.*, 215 Neb. 174, 337 N.W.2d 747 (1983).

In June or July of 1981, Nichols, along with his accountant, met with the Anderson brothers and their accountant and discussed the sale of the Maury stock. It was agreed that the Andersons would have their attorney draft a stock purchase agreement. Another meeting was scheduled.

Nichols employed Ach, who practiced law in Geneva and Friend, to attend the scheduled meeting and advise Nichols regarding the stock purchase agreement. At or before the meeting, and in any event before he signed the document, Nichols read the final stock purchase agreement. In substance, the agreement provided that all outstanding stock of Maury was being sold to Anderson Company for $200,000 in excess of the book value of the corporation. The total estimated purchase price was $577,762.33. The downpayment was $127,762.33. The $450,000 balance of purchase price was scheduled to be paid in 10 yearly installments—$40,000 for the first 9 years and

the balance of $90,000 on the 10th anniversary of the sale. Interest of 10 percent on the unpaid principal balance was to be paid annually with the installments of principal. The indebtedness was to be represented by notes executed and delivered by Anderson Company proportionally to the stockholders in accordance with the number of shares owned by each stockholder.

Except for placing the stock in escrow, originally the purchase agreement did not provide for security of payment to the stockholders. Nichols knew that Ach "wanted to get some security." At the meeting he attended, Ach, in the presence of Nichols, requested that one or more of the Anderson brothers secure the transaction with a mortgage on farmland. That request was rejected by the Andersons. After the rejection, it was agreed that John and Jeff Anderson would personally guarantee payment of the purchase price and promissory notes, which they did. The purchase agreement was executed some time after the meeting with the Andersons. Before he signed the purchase agreement, Nichols knew there was no mortgage securing the purchase price, and he, at that time, felt the guaranties were sufficient for his purposes under the sale. Nichols' personal guaranty was sufficient when he borrowed money from the bank, Nichols testified in his deposition. He also knew that the Andersons owned a dozen corporations with assets of $5,000,000. Accountants for both the Andersons and Nichols were present at the meeting with the Andersons. Nichols was aware of the contents of Andersons' financial statements before he signed the agreement on August 31, 1981. Nichols testified that he signed the agreement on the basis of what he perceived was the financial strength of the Anderson Company. Nichols also testified that at the time he read and later signed the purchase agreement, he understood he was giving up the voting rights to Maury's stock.

Anderson Company made two annual payments in the combined sum of $80,000, together with interest, to Maury's original stockholders, the Nicholses. By the time the third annual payment was due, misfortune had fallen upon the company. The Andersons were indicted for bid rigging, Nichols testified. Nichols contacted a lawyer, other than Ach, to discuss

Nichols' concerns that Anderson was going to default on the third payment. Nichols and the lawyer met to discuss the matter on July 18, 1984. On August 21, 1984, Nichols and his newly employed attorney met with one or more of the Andersons and Andersons' attorney to discuss Andersons' situation. At that meeting, Andersons' attorney informed both Nichols and Nichols' lawyer that Maury would be a creditor behind the bank. First National Bank & Trust Company of Lincoln was the escrow agent for the stock purchase agreement. Later, because of a potential conflict between the bank and Nichols, Nichols' new lawyer withdrew from the case.

The third payment, together with interest, was payable September 1, 1984. By that time, Nichols knew that Anderson Company had sold some of Maury's assets. Anderson Company did not pay the September installments of principal and interest.

In their lawsuit against Ach, the Nicholses claim that had they been given security, they would have recovered $440,800 by July 1, 1985. Instead, as of July 1, 1985, they claim they only recovered $300,000 and expended $29,200 in attorney fees to collect that amount. They sued Ach for $170,000.

On appeal, the Nicholses allege two assignments of error: (1) The trial court erred in sustaining the motion for summary judgment because there were unresolved issues of material fact, and (2) the district court erred in granting the motion for summary judgment because § 25-222 is unconstitutional.

As relevant here, § 25-222 provides:

> Any action to recover damages based on alleged professional negligence or upon alleged breach of warranty in rendering or failure to render professional services shall be commenced within two years next after the alleged act or omission in rendering or failure to render professional services providing the basis for such action; *Provided*, if the cause of action is not discovered and could not be reasonably discovered within such two-year period, then the action may be commenced within one year from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier . . . .

The relevant questions under this statute are: Was there an act of malpractice? If so, when did it occur and when did plaintiffs' cause of action accrue? *Smith v. Ganz*, 219 Neb. 432, 363 N.W.2d 526 (1985); *Interholzinger v. Estate of Dent*, 214 Neb. 264, 333 N.W.2d 895 (1983). For purposes of disposing of this case, without deciding the issue, we assume there was legal malpractice involved.

Summarized, appellants allege in their petition that Ach provided legal services through August 31, 1981, and failed to inform them that they were unsecured under the stock purchase agreement, failed to advise them of the effect of a personal guarantor's insolvency, and failed to advise the appellants of the effect of granting the stock voting rights to the Anderson Company.

Traditionally, a statute of limitations begins to run as soon as the action accrues, and a cause of action in tort accrues as soon as the act or omission occurs. *Rosnick v. Marks*, 218 Neb. 499, 357 N.W.2d 186 (1984). However, the Legislature has tempered the traditional rule, known as the occurrence rule. Section 25-222 requires that an action for malpractice "be commenced within two years next after the alleged act or omission" but contains a provision for deferred commencement "if the cause of action is not discovered and could not be reasonably discovered within such two-year period."

> 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 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.' " *Sherbeck v. Schaper*, 232 Neb. 754, 762, 442 N.W.2d 364, 369 (1989). For the statute to begin running, the plaintiff need not have suffered actual damages; however, there must be injury, which is the invasion of a legally protected interest. *Rosnick, supra*. "The point at which a statute of limitations begins to run

must be determined from the facts of each case . . . ." *McCook Equity Exch. v. Cooperative Serv. Co.*, 230 Neb. 758, 761, 433 N.W.2d 509, 511 (1988). Under these principles, we find that there are three bases for rejecting the Nicholses' first assignment of error, any one of which is sufficient to bar Nicholses' claim under § 25-222.

First, this court has held under similar circumstances that a client has knowledge of his attorney's alleged negligence at the time the client signs the contract. As we observed in *Smith, supra* at 437, 363 N.W.2d at 530 (quoting *Interholzinger, supra*), " 'Under our law, in the absence of fraud one who signs an instrument without reading it, when he can read and has the opportunity to do so, cannot avoid the effect of his signature merely because he was not informed of the contents of the instrument.' " One who enters into a contractual relationship "is charged with knowledge of [the contract's] contents and is bound thereby." *Interholzinger, supra* at 271, 333 N.W.2d at 899.

It is initially noted that Nicholses do not allege fraud, nor does the record reflect any. Here, the case is even stronger against Nicholses than the cases were against clients in *Smith, supra*, and *Interholzinger, supra*. The evidence is conclusive that Nichols read the purchase agreement before signing it. He is charged with the knowledge of the contents of the contract on August 31, 1981, the date of signing. The statute of limitations bars any action based on legal malpractice 2 years from that date. Nicholses, however, would have this court modify the rule stated in *Smith, supra*, and *Interholzinger, supra*, which raises the second basis for dismissing the Nicholses' claim.

The appellants argue that simply because Nichols signed the contract, he should not be presumed to have been aware of the agreement's deficiencies on the date of signing. Appellants contend that a rule that one understands a contract which he or she signs should be rebuttable by evidence that the contract contained a serious error which could not reasonably have been discovered by a client who was unskilled in the law and who was assured by his attorney that the contract did not jeopardize his interests. Even if the court was inclined to consider modifying the foregoing rule, it would not do so under the facts and

circumstances of this case. The evidence shows unequivocally that Nichols read and understood the purchase agreement before he signed it. The uncontroverted evidence shows that the purchase agreement provided for no security other than placing the stock in escrow and the guaranties and that it transferred the right to vote the stock to the Anderson Company. Moreover, the evidence is conclusive that before he signed the agreement, Nichols knew that the Andersons refused to give the collateral security requested by Ach, that the agreement provided that the buyer would vote all of the shares of stock, and that the Nicholses would retain no voting rights. Before he signed the agreement, Nichols, an experienced businessman, made a deliberate business judgment to accept the personal guaranties of two Anderson brothers. He thought that the personal guaranties were sufficient to protect the appellants. At the time, he was experienced with personal guaranties because he had given them to his bank. The evidence is uncontroverted that in signing the purchase agreement Nichols also relied upon the financial strength of the Andersons' corporations. He had reviewed financial statements of the corporations, which had assets of $5,000,000. The uncontroverted evidence demonstrates that as of August 31, 1981, Nichols was aware that appellants were giving up their stock voting rights and that appellants were unsecured and were depending upon the personal guaranties of the Andersons instead. Therefore, on that date, August 31, 1981, Nichols discovered or reasonably could have discovered Ach's alleged malpractice. Accordingly, a legal malpractice cause of action was barred 2 years thereafter.

There remains the third justification for finding that the Nicholses' cause of action is barred under the statute of limitations. Assuming arguendo that Nichols did not discover or could not reasonably have discovered a cause of action against Ach within 2 years after its occurrence, he did discover facts constituting the basis of the alleged malpractice or the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to discovery of Ach's purported negligence no later than August 21, 1984. That was more than a year before Nicholses filed their lawsuit. It is uncontroverted that Nichols was aware

of Anderson Company's financial difficulties and contacted a second attorney on July 18, 1984, concerning the Andersons' possible default under the stock purchase agreement. The undisputed evidence also shows that Nichols was advised by Anderson Company's lawyer on August 21, 1984, that the bank was also a creditor and had priority superior to the Nicholses' claims against the Anderson Company. See *Sherbeck v. Schaper*, 232 Neb. 754, 442 N.W.2d 364 (1989) (holding that knowledge of three mortgages on real estate and a lack of priority was sufficient to trigger the 1-year statute of limitations provided in § 25-222). At that point, August 21, 1984, Nichols was aware of the potential for default by the Anderson Company and that as a creditor, a problem existed concerning appellants' lack of security. Since appellants did not file their cause of action until August 30, 1985, more than 1 year after Nichols acquired this knowledge, their cause of action is barred under the second clause of § 25-222.

There is no genuine issue of material fact. Nichols discovered or reasonably could have discovered the alleged malpractice on August 31, 1981. The uncontradicted evidence also shows that as of August 21, 1984, Nichols discovered Ach's alleged negligence or the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to discovery of the malpractice asserted. Summary judgment was proper. The first assignment of error is without merit.

As to appellants' second assignment of error, neither the transcript nor the bill of exceptions shows that the Nicholses claimed § 25-222 was unconstitutional in the trial court. A constitutional issue not presented to or passed upon by the trial court is not appropriate for consideration on appeal. *In re Interest of A.M.H., ante* p. 610, 447 N.W.2d 40 (1989); *Gardner v. Beatrice Foods Co.*, 231 Neb. 464, 436 N.W.2d 542 (1989).

The judgment is affirmed.

AFFIRMED.

CAPORALE, J., concurring.

I agree with the resolution reached in this case but write separately because I think the tenor of the majority's opinion

exalts the holdings of *Interholzinger v. Estate of Dent*, 214 Neb. 264, 333 N.W.2d 895 (1983), and *Smith v. Ganz*, 219 Neb. 432, 363 N.W.2d 526 (1985), to a level they do not deserve. The majority, by saying "[e]ven if the court was inclined to consider modifying the [*Interholzinger-Smith*] rule, it would not do so under the facts and circumstances of this case," seems to cite those cases for the proposition that a client necessarily becomes aware of a defectively drawn document by being given an opportunity to read it, irrespective of the nature of the defect. Neither *Interholzinger* nor *Smith* so holds.

The relevant act of malpractice claimed in *Interholzinger* was that the attorney had not, as contemplated, excluded certain real property from the operation of an agreement to sell a corporation. In deciding that the malpractice action was time barred, we said that the client had to have known of that failure when he, after the purchaser of the corporation defaulted, signed an agreement listing the subject property for sale as an asset of the corporation. In *Smith*, we said that a cotenant was obligated to inquire about and know the rights of his cotenant in real estate. Limited to their facts, *Interholzinger* and *Smith* stand only for the proposition that for purposes of determining when an action for alleged legal malpractice begins to run, a client must know what lay persons of ordinary intelligence are deemed to know. That is a far cry from saying that in every instance a client has knowledge of his or her attorney's malpractice at the time he or she is given the opportunity to read a document the attorney drew, irrespective of the nature of the malpractice claimed. Were that so, lay persons would need to be as sophisticated in the law as lawyers are required to be. The cardinal rule remains, as the majority acknowledges, that the point at which a statute of limitations begins to run must be determined from the facts of each case. *McCook Equity Exch. v. Cooperative Serv. Co.*, 230 Neb. 758, 433 N.W.2d 509 (1988).

In this case the plaintiffs knew the transaction was not secured and made an informed business decision to proceed on the strength of certain guaranties. Moreover, their unsecured position was confirmed for them by another lawyer more than a year before they instituted suit. What plaintiffs are really

claiming is that their attorney somehow should have prevented them from making what subsequently proved to be a bad business decision. That is patent nonsense.

SHANAHAN, J., joins in this concurrence.

K N ENERGY, INC., APPELLANT, V. CITY OF SCOTTSBLUFF, A MUNICIPAL CORPORATION, ET AL., APPELLEES.

447 N.W.2d 227

Filed October 27, 1989. No. 88-937.

1. **Municipal Corporations: Public Utilities: Rates.** A municipal corporation in fixing rates to be charged by a public utility acts in a legislative rather than a judicial capacity.
2. **Appeal and Error.** There can be no appeal from legislative action.
3. **Collateral Attack: Appeal and Error.** The proper method of questioning the validity of legislative action is by collateral attack, that is, by injunction, quo warranto, or other suitable equitable action.
4. **Appeal and Error.** An appeal or error proceeding does not lie from a purely legislative act by a public body to which legislative power has been delegated.
5. **Collateral Attack: Appeal and Error.** The validity of a legislative act from which there is no appeal is subject to judicial review through a collateral attack.
6. **Constitutional Law: Courts: Jurisdiction: Equity.** The equity jurisdiction of the district court is granted by the Constitution and cannot be legislatively limited or controlled.
7. **Public Utilities: Rates: Ordinances: Injunction: Equity: Courts.** A proceeding for judicial review of a rate ordinance under Neb. Rev. Stat. § 19-4616(7) (Reissue 1987) of the Nebraska Municipal Natural Gas Regulation Act in the form of a suit to declare the rate ordinance invalid and enjoin the municipality from putting it into effect is a suit in equity in which the validity of the rate is the proper subject of a full hearing de novo in the district court.
8. **Public Utilities: Rates.** In determining the cost of service for a public utility, costs should be allocated to those customers who cause the utility to incur the costs.
9. _____: _____. In determining the capital structure of a public utility, only the debt, stock, and common equity that is used to finance rate-base assets should be included.
10. _____: _____. A fair rate of return for a public utility is one that permits the company to maintain its financial integrity and attract capital on reasonable terms and that permits the company to achieve a level of return comparable to other firms with corresponding risk.

11. **Public Utilities: Rates: Pensions.** Pension expense is a legitimate labor expense and should be included as a part of the cost of service for a public utility.

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

M.J. Bruckner, W. Scott Davis, and Anne E. Winner, of Bruckner, O'Gara, Keating, Sievers & Hendry, P.C.; and B.J. Becker and A.R. Madigan for appellant.

Clark G. Nichols and Philip M. Kelly, of Winner, Nichols, Douglas, Kelly and Arfmann, P.C.; Bevin B. Bump, of Bump and Bump; James D. Larson, of Wurst, Pearson, Larson, Underwood & Mertz; James L. Haszard, of McHenry & Watson; and George P. Burke, of Van Steenberg, Myers, Burke & Wilson, for appellees.

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

BOSLAUGH, J.

This action was commenced by the plaintiff, K N Energy, Inc. (K N), against the City of Scottsbluff to enjoin the defendant city from enforcing ordinance No. 3071, which established rates to be charged by the plaintiff for natural gas service furnished to customers in the City of Scottsbluff, Nebraska, beginning 30 days after February 22, 1988. Similar actions were commenced against the municipalities of Minatare, Bridgeport, Mitchell, Terrytown, Lyman, Gering, Morrill, Bayard, Lodgepole, Kimball, Potter, Chappell, Sidney, Broadwater, Alliance, Lewellen, Oshkosh, Rushville, Hemingford, Hay Springs, Gordon, Crawford, and Chadron, all of which had adopted ordinances similar to ordinance No. 3071 of the City of Scottsbluff.

Since all 24 cases involved similar questions of fact and law, they were consolidated for trial in the district court. For the same reason, all 24 cases have been consolidated for briefing and argument in this court.

The plaintiff is engaged in the gathering, transmission, distribution, and sale of natural gas and provides natural gas service to customers in each of the defendant municipalities. On

September 1, 1987, pursuant to Neb. Rev. Stat. § 19-4608 (Reissue 1987), the plaintiff filed notices of its intent to change the rates for gas service in 31 municipalities in western Nebraska.

Section 19-4608 is a part of the Municipal Natural Gas Regulation Act, Neb. Rev. Stat. §§ 19-4601 to 19-4623 (Reissue 1987), enacted by the Legislature in 1987. The act prescribes the procedure for filing and establishing or modifying rates for natural gas service to customers within municipalities. None of the parties have raised any issue concerning the validity of the act.

In addition to filing for a rate increase, the plaintiff submitted a "Notice of Proposed Rate Area Boundaries" in accordance with § 19-4606 of the act. Since no objections were made to the proposed rate area boundaries, they became effective as provided in the act. The significance of rate area boundaries is that the act contemplates that rates shall be uniform throughout each rate area.

Since the municipalities failed to take final action within 90 countable days, as provided in § 19-4607(1), the rates proposed by the plaintiff became effective, subject to refund, on December 1, 1987.

As contemplated by the act, the plaintiff supplied detailed information in support of its proposed increase in rates. See § 19-4611.

The 24 municipalities which are defendants in these actions employed Dahlen, Berg & Co., which reviewed the plaintiff's proposed increase in rates and submitted a report to the defendants which proposed rates lower than those requested by the plaintiff. The plaintiff then filed its "rebuttal," as provided in § 19-4616(3).

Thereafter, area rate hearings were held before a hearing officer selected by the defendants, all as provided in § 19-4616(4). The defendants then adopted findings of fact and conclusions of law and rate ordinances, as provided in § 19-4616(6).

Section 19-4616(7) provides:

> Within thirty days of the date of final action by the municipalities within a rate area, a utility may initiate

> proceedings for judicial review of the decision of any municipality in the rate area to the district court. At the time the utility initiates action for judicial review, it shall join in such action as parties all municipalities in the rate area whose actions are being challenged.

Section 19-4602(8) provides: "Judicial review shall mean, but shall not be limited to, injunctive relief and other equitable relief."

The plaintiff then commenced actions against each of the defendants to enjoin enforcement of the rate ordinances.

Section 19-4612 of the act provides in part:

> (1) The municipality, in the exercise of its power under the Municipal Natural Gas Regulation Act to determine just and reasonable rates for public utilities, shall give due consideration to the public need for adequate, efficient, and reasonable natural gas service and to the need of the utility for revenue sufficient to enable it to meet the cost of furnishing the service, including adequate provisions for depreciation of its utility property used and useful in rendering service to the public, and to earn a fair and reasonable return upon the investment in such property.
>
> (2) Cost of service shall include operating expenses and a fair and reasonable return on rate base, less appropriate credits.
>
> (3) In determining a fair and reasonable return on the rate base of a utility, a rate of return percentage shall be employed that is representative of the utility's weighted average cost of capital including, but not limited to, long-term debt, preferred stock, and common equity capital.

The plaintiff alleged that the rates in force at the time of its filing for a rate increase

> did not and would not provide K N with revenue sufficient to enable it to meet the cost of furnishing such service, including adequate provision for depreciation on its utility property used and useful in rendering service to customers within the rate area (hereinafter "property"), and to earn a fair and reasonable return upon its investment in such property.

The plaintiff further alleged:

> The adjustments to K N's rate filing in Exhibit 17 are improper, unreasonable and arbitrary. The rates purportedly adopted by the City do not provide K N with a fair and reasonable return upon the reasonable value of the property being used to provide natural gas service to the rate area, are not consistent with findings and conclusions in Exhibit 17 and under the facts alleged in this petition, the rate [sic] purportedly established by Ordinance No. 3071 are not just, not reasonable, inadequate and confiscatory.
>
> . . . By their failure and refusal to establish the new rates requested by K N's Application, the Defendants are acting in a confiscatory and arbitrary manner and are depriving K N of its property without due process of law and are in violation of the Fourteenth Amendment of the Constitution of the United States and in violation of Article I, Section 3 of the Constitution of the State of Nebraska and the statutes of the State of Nebraska, including Section 19-4601, et seq., R.R.S. (Supp. 1987).

In each case, the plaintiff prayed that the court find the rates established by the defendant were not just, not reasonable, inadequate, arbitrary, and confiscatory and did not provide K N with a fair and reasonable return on its property used and useful to provide service to the natural gas consumers in the defendant city; that the court find that any lesser rates than the new rates set out in exhibit 12 were not just, not reasonable, inadequate, arbitrary, and confiscatory; and that the defendant be enjoined and prohibited by proper order of the court from preventing K N from continuing the rates set out in exhibit 12 in force and effect and from collecting the same for natural gas consumption billings until such time as the defendant by proper action passed an ordinance putting the rates set out in exhibit 12 into effect or until such time as the defendant by proper exercise of its regulatory powers established just, reasonable, adequate, and compensatory rates to be charged for gas sold to K N's customers in the defendant city.

The defendants' answers prayed that the plaintiff's petitions be dismissed.

Trial in the district court commenced on July 19, 1988, and was concluded on July 28. The evidence consisted of the rate ordinances, the plaintiff's rate filings with supporting documents, the reports submitted by the defendants, the plaintiff's rebuttals, the records made at the rate area hearings, and the testimony of expert witnesses offered by the parties.

On September 15, 1988, the trial court found that the plaintiff had failed to sustain its burden of proving that the rates established by the defendants were unjust, unreasonable, and confiscatory and dismissed each of the plaintiff's petitions. From those judgments the plaintiff has appealed.

The trial court's judgments made detailed findings on the controverted issues, including the issue of the scope of its review in these actions. The trial court found: "The scope of this Court's review is de novo on the record made at the various rate hearings."

The plaintiff's first assignment of error is that the trial court erred in holding that the scope of its review was de novo on the record made at the various rate hearings.

There are several problems with the trial court's finding as to its scope of review in these actions.

The rate hearings contemplated by the act are not hearings of a quasi-judicial nature, but are for the purpose of assembling and recording information to be used as a basis for later legislative action by the municipalities, which determine the rates to be charged within their jurisdictions.

A municipal corporation in fixing rates to be charged by a public utility acts in a legislative rather than a judicial capacity. *Kansas-Nebraska Nat. Gas Co., Inc. v. City of Sidney*, 186 Neb. 168, 181 N.W.2d 682 (1970). As a consequence, the "findings of fact and conclusions of law" referred to in § 19-4616(6) and adopted by each municipality at the time the rate ordinance is adopted are really legislative findings which are not subject to judicial review.

There can be no appeal from legislative action. In *Williams v. County of Buffalo*, 181 Neb. 233, 147 N.W.2d 776 (1967), we held that a statute which attempted to provide for an appeal from the action of a city council in an annexation matter was invalid as an attempt to delegate legislative powers to the

judiciary. In that case we noted: "The passage of the ordinance presumes a finding that the conditions and limitations contained in the delegating statute exist or have been complied with. The findings of the city council thereon are legislative and are in a sense merged in the ordinance upon its passage." *Id.* at 236, 147 N.W.2d at 780.

After describing the provisions of the act which provided for an "appeal from the annexation ordinance to the district court," we said:

> A reading of this section shows that its intent was to lodge jurisdiction in the district court by appeal to review the propriety of the legislative action taken by the city. It prescribed the hearing on appeal to be as one in equity de novo, a plain indication that the court was to assume the position of a superior legislative body in hearing the appeal. This is clearly an attempt by the Legislature to impose a legislative function upon the judiciary and is violative of Article II, section 1, of the Constitution. The proper method of questioning the validity of such legislative action is by collateral attack, that is, by injunction, quo warranto, or other suitable equitable action.
>
> . . . .
>
> We think the correct rule is stated in Wagner v. City of Omaha, *supra*, which holds that where the annexation of lands to a city is by legislative action, constitutional and statutory limitations on the nature and extent of the territory to be annexed must be observed, and where such annexation is illegal injunction is a proper remedy. It is our considered opinion that a collateral attack is not only a proper remedy but the exclusive remedy. We do not mean to infer, however, that an appeal will not lie from judicial or quasi-judicial findings of a public officer or administrative board as to whether or not he or it has complied with standards and guidelines imposed for the administration of a legislative act.
>
> In the instant case, the Legislature delegated the power to the city to include by ordinance any contiguous or adjacent lands, lots, tracts, streets, or highways as are

> urban or suburban in character within the city. The exercise of the power excluded the right to annex agricultural lands which are rural in character. The determination by the mayor and council that the lands being annexed were not agricultural lands rural in character is a legislative finding essential to the delegated legislative right to annex the lands. Likewise, the finding that such lands were contiguous or adjacent is a legislative finding necessary to the passage of a valid ordinance. While these legislative findings are necessary to the exercise of the right to annex by ordinance, they are a part of the exercise of the delegated legislative power and are in no sense of the word judicial in character. Since the motive, policy, wisdom, or expediency of legislation is for the Legislature and not the courts, the legislation is presumed constitutional until declared unconstitutional by a proper authority. But an appeal or error proceeding does not lie from a purely legislative act by a public body to whom legislative power has been delegated. If the jurisdictional findings of the legislative body to whom legislative powers have been delegated, such as the mayor and council in the instant case, are not true, and it is so established in a proper action, the ordinance is void as to anyone injured thereby for the reason that it takes property without due process of law.

181 Neb. at 239, 241-42, 147 N.W.2d at 781-82.

The validity of a legislative act from which there is no appeal is subject to judicial review through a collateral attack. *Reimer v. K N Energy, Inc.*, 223 Neb. 142, 388 N.W.2d 479 (1986). That is the judicial review contemplated by the act, and the only type of judicial review that could be provided by the act. Although the word "appeal" appears at some places in the act, there is no appeal in the technical sense from the action of the defendants in adopting rate ordinances, and there could not be.

This analysis is also supported by the legislative history of the act. During debate on the floor of the Legislature, Senator Landis, a cosponsor of the bill, stated: "A utility desiring judicial review of a municipalities [sic] action in setting natural gas rates is entitled to seek an injunction from the district court

in Lancaster County. The district court will conduct a de novo review of the municipalities [sic] action determining utility rates." Floor Debate, L.B. 663, Urban Affairs Committee, 90th Leg., 1st Sess. 6304 (May 26, 1987).

Later, when asked what items the cities gave up in negotiating the terms of the act, Senator Landis stated on the floor of the Legislature:

> I think most of all they would like to have had a review on the record so that the utility would be bound by the information which had previously been developed and available to the parties. We found, however, some very explicit language in the Williams case saying that this . . . the Legislature does not have the power to invest the courts with that level of authority because of a separation of powers argument that they are in fact were [sic] some constitutional limitations. That probably was significant to the cities.

Floor Debate, 90th Leg., 1st Sess. 6306 (May 26, 1987).

As a final statement of legislative intent, Senator Landis made the following statement just prior to the bill's final reading:

> A municipality acts in the legislative capacity when setting natural gas rates. Legislative acts are presumed valid. Generally, courts cannot inquire into the motive, policy, wisdom, or expediency of legislative acts. However, utility rates must be fair, reasonable, and compensatory, and municipalities must not set rates for natural gas which are arbitrary, unreasonable, or confiscatory. A municipality's legislative action in setting natural gas rates is subject to judicial review only through collateral attack by an equitable or injunctive action to determine whether the rates are fair, reasonable, and compensatory. A court may not set utility rates. A court may only judge whether the municipality acted within the scope of its legislative authority. The Municipal Natural Gas Regulation Act is intended to provide a framework within which municipalities can regulate, determine, and fix natural gas rates. A utility desiring judicial review of the municipality's action in setting natural gas rates is entitled

> to seek such review by means of a collateral attack on the municipal action in the District Court of Lancaster County. Having reviewed the relevant Nebraska case law . . . and having reviewed constitutional concerns relating to due process and the separation of powers, the drafters have endeavored to ensure under this act that those remedies for judicial review available to utilities under current Nebraska law continue to be available upon adoption of this bill, and that the standards and scope of review under current law also remain intact.

Floor Debate, 90th Leg., 1st Sess. 6637-38 (May 29, 1987).

The contention of the defendants in this case is similar to that made by the defendant in *Erickson v. Metropolitan Utilities Dist.*, 171 Neb. 654, 107 N.W.2d 324 (1961). In the *Erickson* case, the issue was whether a rate established by the board of directors of the district was valid. The defendant district contended that if there was competent and relevant evidence before the district court to sustain the action of the district and on which evidence it could not be said that the action was arbitrary and unreasonable, the court could not of right declare the rate invalid. This contention was rejected because the district did not have powers similar to the railway commission. We stated:

> In practice, if not by specific declaration, it has been the rule that public service corporations having power to adopt rules and regulations are required to exact reasonable requirements, the reasonableness of which may be inquired into in a full hearing in the courts. . . .
>
> The conclusion reached is that the question of the validity of the exactions made by the district which are here for review was the proper subject of a full hearing de novo by the district court.

Id. at 660, 107 N.W.2d at 327-28.

The equity jurisdiction of the district court is granted by the Constitution and cannot be legislatively limited or controlled. *Village of Springfield v. Hevelone*, 195 Neb. 37, 236 N.W.2d 811 (1975). See, also, *Omaha Fish and Wildlife Club, Inc. v. Community Refuse, Inc.*, 208 Neb. 110, 112, 302 N.W.2d 379, 380 (1981), in which we held: "Jurisdiction in suits for

injunction are [sic] in the district courts. Neb. Const. art. 5, § 9. This cannot be legislatively limited or controlled."

These actions are suits in equity, similar to the *Erickson* case, which are collateral attacks upon the rate ordinances adopted by the defendants. The plaintiff had the burden to prove that the rates fixed by the defendants were arbitrary, unreasonable, and confiscatory. *Kansas-Nebraska Nat. Gas Co., Inc. v. City of Sidney*, 186 Neb. 168, 181 N.W.2d 682 (1970). To carry this burden the plaintiff had the right to offer any evidence which was relevant to the issue and was not limited to the evidence received at the area rate hearings. Since the trial court received nearly all of the evidence which was offered, and any evidence which was offered but not received appears in the record, the cases may be disposed of on the record made in the district court. The review in this court of the judgments of the district court is, of course, de novo on the record.

The remaining assignments of error relate to the rates which the defendants established by their rate ordinances. The plaintiff contends that the trial court erred in failing to find that the rates established by the defendants are unjust and unreasonable and in failing to enjoin the unjust and unreasonable rates established by the defendants.

The parties are in agreement that a reasonable rate of return on common equity for the plaintiff is 13.5 percent.

The controversy centers around the calculation of the cost of service and the determination of the plaintiff's capital structure and its common equity. The plaintiff contends that the rates adopted by the defendants are unjust, unreasonable, and confiscatory because of erroneous treatment of the following matters: (1) allocation of distribution costs to irrigators who are not within municipal boundaries and who do not use municipal distribution facilities; (2) allocation of some distribution costs on the basis of volume of gas sold rather than by the number of meters served; (3) inclusion of short-term debt as part of K N's capital structure, which reduced K N's requested rate of return on its common equity; (4) failure to include the cost of pension benefits as a cost of service to be allocated among the municipalities; (5) reduction of K N's cash working capital requirement from the approximately $7 million requested to a

negative requirement; (6) failure to include as a cost of service the amount of royalties paid for product extraction and the cost of unrecovered amounts of gas lost from the Huntsman storage field; and (7) amortization of the expense for filing for the rate increase over a period of 3 years instead of allowing K N to collect a 1-year surcharge to cover the rate case expense.

We sustain the plaintiff's contentions except as to the claimed working capital requirement and recovery of the rate case expense.

The plaintiff claims that as a result of the improper allocation of distribution costs by the defendants in calculating the cost of service, the rates which they adopted resulted in reduced revenue for the plaintiff in the amount of $493,314 for rate area 1, $147,669 for rate area 2, $89,790 for rate area 3, and $92,360 for rate area 4. This decrease in revenue decreased the plaintiff's return on common equity by 5.88 percent in rate area 1, 5.1 percent in rate area 2, 3.05 percent in rate area 3, and 3.37 percent in rate area 4. This claimed reduction in the plaintiff's return on common equity is based on its proposed capital structure, which also is a contested issue.

Briefly stated, the plaintiff contends that costs should be allocated to the customers who cause the utility to incur the costs. Edward Cecil, an engineer employed by R.W. Beck and Associates and who prepared the cost of service study for the plaintiff, testified concerning the allocation of distribution costs. Cecil testified that in allocating costs the basic principle is that costs should be allocated among customers who use the facilities. The basic concept is that customers who make use of transmission facilities should pay a portion of the cost of them. If a part of the system does not serve a customer, no costs of the part should be allocated to that customer. This is a generally accepted principle in the industry and is not unique to the plaintiff's case. Cecil testified that Dahlen and the cities violated this cost of service principle by allocating costs of facilities to customers who do not use the facilities. Cecil testified that Dahlen's allocation resulted in costs' being allocated away from customers who use the distribution facilities, and therefore, the costs appeared lower for those customers who were subject to the hearing than the actual costs

of providing service to those customers. The rates adopted by the cities are too low for the plaintiff to recover its costs of providing service.

With respect to the allocation of distribution costs, the plaintiff's principal complaint is that the defendants included irrigators in the group to which distribution costs were allocated. To understand the plaintiff's contention it is necessary to know how a gas company such as the plaintiff operates.

Gas is transported from the wells and gathering points through large pipelines, or mains, 10 to 16 inches in diameter, at high pressure. At the cities, the gas goes through a town border station, where the pressure is reduced from 800 psi (pounds per square inch) to 10 to 35 psi. The town border stations and equipment for sales at wholesale and industrial points are classified as transmission metering and regulating equipment. The gas then moves through a grid of distribution lines to the customer's location, where the pressure is again reduced to perhaps 4 ounces.

Distribution mains are laid out in a grid fashion to serve all customers on the system, so the number of customers using the system has a strong influence on the amount of investment in facilities.

Distribution costs are caused primarily by the number of customers on the system, although some weight should be given to the peak demands placed on the system by the customers served. Distribution costs are normally allocated on a customer basis or some combination of customers and demands during peak periods. Distribution costs should not be allocated on annual volumes because annual volumes do not cause the distribution costs to be incurred.

Irrigators use relatively large quantities of gas during their operating season and, ordinarily, cannot be served from a city distribution system because the pressures are inadequate to deliver gas in the quantities that the engine on an irrigation well pump requires. An irrigator can use service from a city distribution system if the well can function on 5 pounds of pressure. As a result, most irrigators, as well as large industrial customers, are served directly from transmission lines or from

irrigation transmission lines carrying gas at 100 to 300 psi. Thus, irrigators in general derive no benefit from city distribution systems, and city distribution costs should not be allocated to them.

Although the meters which irrigators use are classified as distribution facilities, the costs of those meters are allocated to the irrigators by the plaintiff.

There are approximately 10,000 irrigators in Nebraska, of which only 27 are inside city limits and only a few are downstream from city distribution systems. There are only 124 irrigation meters in rate areas 1, 2, 3, and 4 out of a total of 10,490 in Nebraska. These represent only 1 percent served by the plaintiff's facilities of all the irrigation meters in Nebraska. The vast majority of irrigation meters are in south central and north central Nebraska.

Of the 23 million MCF (thousand cubic feet) of gas sold at retail, irrigators used 5.5 million in a 30- to 45-day period in the summer. In comparison, an average domestic customer uses about 120 MCF per year.

The error in the allocation was compounded by the defendants' allocating distribution costs on a volume basis. When the costs are allocated by the number of meters, as the plaintiff proposed, rate areas 1, 2, 3, and 4 are allocated 27 percent of the total cost of providing service to Nebraska. Thirty-one percent of the municipal customers in Nebraska are located in the four rate areas involved in this case. The total sales for rate areas 1 through 4 was 4,079,121 MCF, or 18 percent of the total sales by volume.

The plaintiff's investment in facilities in the four rate areas totaled 32 percent of its total investment in distribution facilities in Nebraska. The number of meters in the four rate areas was 31 percent. There was a direct correlation of the investment dollars to the number of customers in the rate area. The costs associated with the distribution system are related to the number of customers served by the system.

The defendants used all irrigation meters as part of the denominator in both the allocation by number of meters and the volumetric allocation. The defendants included, in the volume of gas sold, commercial customers who are served from

transmission lines, not distribution lines, and who should not bear costs of the distribution facilities.

The size of the distribution mains cannot be based on the annual volumes, because if it were, the system would be too small to meet the peak demands. Larger pipe costs more money, so it is logical to allocate some of the costs on a demand basis. The annual volume of gas used has no influence on how the distribution system is laid out, but the system is influenced by the peak demands placed on it during the winter months.

The effect of the double allocation made by the defendants' using the wrong number of customers and allocating distribution costs by volume resulted in a cost allocation 11.4 percent lower than that produced by the plaintiff's allocation.

The plaintiff had requested a revenue increase of $886,472 for rate area 1, and the rates set by the defendants allowed only revenue of $230,981; the amount not allowed was $655,491. For rate areas 1, 2, 3, and 4, the plaintiff was unable to recover the following dollar amounts, specifically because of the different distribution cost allocation by Dahlen, which was adopted by the cities in setting the rates: area 1, $493,314; area 2, $147,669; area 3, $89,790; and area 4, $92,360. These amounts total $823,133 of the plaintiff's requested revenue increase of $1,784,527. Approximately half of the requested increase was disallowed because of the allocation factors used by the cities. The incorrect distribution allocations made by the defendants resulted in the rates set by the cities being unjust and unreasonable.

The controversy in regard to the plaintiff's capital structure is whether short-term debt and current maturities of long-term debt and preferred stock should be included as a part of the plaintiff's capital structure. The defendants adopted the recommendation of Dahlen and included short-term debt and current maturities of long-term debt and preferred stock as a part of the plaintiff's capital structure. The plaintiff claims that this resulted in a dilution of its rate of return on common equity and increased the risk factor to investors in the plaintiff's common stock.

It would appear that the determining factor in regard to this issue is whether the plaintiff used short-term debt to finance

assets which make up the rate base.

On September 30, 1985, the plaintiff had no short-term debt. On March 31, 1988, the short-term debt balance was $60.3 million, but during the same period, the rate base declined by $876,112. If short-term debt had been used to finance rate-base assets, the rate base would have increased.

Hassel Sanders, a certified public accountant and the plaintiff's vice president of rates and consolidated accounting, testified that the plaintiff does not finance its rate-base assets with short-term debt. The plaintiff's policy is to use only long-term debt to finance long-term assets. The Federal Energy Regulatory Commission (FERC) does not include short-term debt or current maturities in the capital structure of a company unless the corporation uses short-term debt to finance the rate base.

The plaintiff also offered the testimony of Professor R. Charles Moyer. Moyer, who is a professor of finance in the graduate school of management at Wake Forest University, and who has testified as an expert witness in many rate proceedings, testified about the plaintiff's capital structure and the components of capital upon which it could base its requested rate of return. At the time of trial, the plaintiff's short-term debt balance was $33.5 million. Moyer testified that short-term debt was not a regular portion of the plaintiff's financing, but was used primarily to handle seasonal cash-flow. During the heating season, the plaintiff has a large cash-flow, but after the heating season, cash-flow dwindles and the short-term debt balance builds up. In the last 2 or 3 years, because of seasonal and market changes, the plaintiff performed poorly financially. The current short-term debt balance is being reduced, and Moyer predicted that it would disappear over the next year. Moyer concluded that the plaintiff did not use short-term debt as a substantial, necessary, and regular portion of capital financing.

Moyer testified that some utility commissions and the FERC have included short-term debt in capital structure for three reasons: if the short-term debt is a substantial, necessary, and regular portion of a company's financing; if the short-term debt finances fixed assets includable in the rate base; and if it is

continuous in that it is rolled over regularly in similar amounts from time to time. The plaintiff's use of short-term debt does not meet any of these tests.

Moyer testified that the plaintiff does not use short-term debt to finance fixed assets includable in its rate base. On September 30, 1985, the plaintiff had no short-term debt and a net rate base of $220,814,444. As of March 31, 1988, the net rate base had declined to $219,938,332, but the plaintiff had a short-term debt balance of $60.3 million. The short-term debt could not have financed rate-base assets, since all assets were financed in 1985 when the company had no short-term debt outstanding. Moyer testified that the plaintiff does not roll over its short-term debt with new short-term loans when the old notes become due, but has used the short-term debt to finance fluctuating cash-flow needs.

Sanders testified that the plaintiff's capital structure for rate area 1 included the following components: (1) Long-term debt made up 37.45 percent of total capitalization, and the plaintiff requested a return of 9.93 percent in order to pay the effective interest rate on its 20-year debenture bonds; (2) preferred stock comprised 9.94 percent of the plaintiff's total capital structure, and the dividend return which had to be paid to preferred stockholders to prevent default was 7.49 percent; and (3) common equity was 52.61 percent of the plaintiff's capital structure and was defined as the remaining balance of return dollars available to pay dividends to common stockholders and to reinvest in gas plant additions to continue providing service.

Sanders testified that of the $9.8 million rate base for rate area 1, common stockholders have provided $5,171,940 of the rate base. The final rates adopted by the cities in that area gave common stockholders only 2.69 percent return. From the rate-base amounts for each element of the capital structure, the plaintiff determined the weighted cost of capital by dividing the total return dollars using the rates adopted by the cities. The result for area 1 was that the plaintiff was earning only 5.88 percent. For rate areas 2, 3, and 4, the plaintiff determined it would earn returns of 6.28 percent, 7.31 percent, and 6.8 percent, respectively, on common equity.

Professor Moyer has had experience with utility ratemaking

as an expert on determining capital structure, costs of equity, stream of working capital, and financial liability and integrity. The costs of debt components of capital are usually noncontroversial in that they are embedded costs—such as the costs of interest paid on bonds or dividends paid on preferred stock. The cost of common equity changes over time depending on conditions in capital and financial markets. That cost of common equity is the return that ultimately accrues to shareholder investors in the corporation.

Moyer testified that a fair rate of return is one that permits a company to maintain its financial integrity and attract capital on reasonable terms and that permits the company to achieve a level of return comparable to other firms with corresponding risk. Moyer testified that this definition was developed by the Bluefield Water Works and Hope Natural Gas cases. In *Bluefield Co. v. Pub. Serv. Comm.*, 262 U.S. 679, 43 S. Ct. 675, 67 L. Ed. 1176 (1923), the U.S. Supreme Court held that a public utility is, under the due process clause of the federal Constitution, entitled to the independent judgment of the court as to both law and facts upon review of rates fixed by a public service commission. The Court said:

> The prescribing of rates is a legislative act. The commission is an instrumentality of the State, exercising delegated powers. Its order is of the same force as would be a like enactment by the legislature. If, as alleged, the prescribed rates are confiscatory, the order is void. Plaintiff in error is entitled to bring the case here on writ of error and to have that question decided by this court.

262 U.S. at 683.

> The question in the case is whether the rates prescribed in the commission's order are confiscatory and therefore beyond legislative power. Rates which are not sufficient to yield a reasonable return on the value of the property used, at the time it is being used to render the service are unjust, unreasonable and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment. This is so well settled by numerous decisions of this Court that citation of the cases is scarcely necessary.

262 U.S. at 690.

> A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility, and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties. A rate of return may be reasonable at one time, and become too high or too low by changes affecting opportunities for investment, the money market and business conditions generally.

262 U.S. at 692-93.

In *Power Comm'n v. Hope Gas Co.*, 320 U.S. 591, 603, 64 S. Ct. 281, 88 L. Ed. 333 (1944), the U.S. Supreme Court said:

> The rate-making process under the Act, i.e., the fixing of "just and reasonable" rates, involves a balancing of the investor and the consumer interests. Thus we stated in the *Natural Gas Pipeline Co.* case that "regulation does not insure that the business shall produce net revenues." 315 U. S. p. 590. But such considerations aside, the investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. Cf. *Chicago & Grand Trunk Ry. Co. v. Wellman*, 143 U. S. 339, 345-346. By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be

sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.

Moyer testified that an optimal capital structure for a corporation is one which finds a weighted cost of capital which balances debt and equity, minimizing the cost of capital. The weighted cost of capital is the cost of each component source of capital times the percent that it exists in the firm's capital structure.

Moyer testified that the cost of common equity ultimately determines the financial liability, integrity, and ability of a company to attract capital in financial markets. Once the cost is estimated, it is multiplied by the equity portion of the rate-base assets, which have been financed with equity to get the return dollars needed to provide cash to the equity investors. If the rate of return on equity is inadequate because of too low rates, the ability of a company to attract capital and provide service is impaired. If a corporation does not maintain rates of return competitive with other investments of similar level of risk, an investor will turn elsewhere in the investment market and buy another security.

The capital structure of a company is the permanent source of financing which is used to finance long-term or rate-base assets. Its components include long-term capital as well as long-term preferred and common stock, plus all common equity of the company. A company with 50 percent equity is less risky than a company with 35 percent equity.

In evaluating the rates adopted by the defendant cities, Moyer concluded that none of the rates would provide the level of return that investors can get from other utility companies in the natural gas industry. Moyer concluded that the rates were unfair, unreasonable, and confiscatory. He compared the rate of return allowed the plaintiff by the cities' rates to the return paid on U.S. Government bonds, the lowest risk security. The plaintiff's return was even lower than the return on Government bonds.

Moyer stated that using Dahlen's capital structure, one would have to make a substantial upward adjustment in the required rate of return on equity to reflect the greater financial

risk embedded in the financial structure. In looking at the risk of a company, one compares the amount of debt capital and the amount of equity capital. The greater the proportion of equity, the lower the chance that the company will have financial difficulties. The greater the proportion of common equity, the less volatile earnings will be as operating income increases. The use of more debt in a capital structure increases the volatility of earnings, which is a risk an investor must consider. Investors would demand a higher rate of return if short-term debt was included in the plaintiff's capital structure. He stated that the rates established by the municipalities would impact investors' risk perception of the plaintiff. Fluctuating short-term debt is not a material factor in evaluation of the risk of the company because it is a temporary source of financing.

There is no mention in the Municipal Natural Gas Regulation Act of short-term debt as a component of capital structure to be considered in establishing a rate of return. The act provides that as part of the information to be provided a municipality, the utility must show:

> Rate-of-return and cost-of-capital schedules showing:
>
> (a) Long-term debt, preferred stock, and common equity amounts, ratios, and percentage cost rates for the base year and test year; and
>
> (b) Long-term debt, preferred stock, and common equity amounts at the beginning and end of the base year and test year . . . .

§ 19-4611(5). The utility must also provide rate-base schedules showing beginning and ending balances for the base year and test year of, among other things, "[o]ther rate-base components." § 19-4611(3)(c). The statute makes no other mention of short-term debt as a cost of capital or a consideration in finding a proper rate of return.

As a result of the inclusion of short-term debt and current maturities of long-term debt and preferred stock in the plaintiff's capital structure, the rates adopted by the defendants had the effect of reducing the rate of return on common equity by 1.92 percent for area 1, 1.94 percent for area 2, 2 percent for area 3, and 1.99 percent for area 4.

The issue with regard to pension expense resulted from the

failure of the defendants to include $1,787,712 as a part of the cost of service. This was due in part to confusion caused by the failure of the plaintiff to include this item in the original application and adequately explain this item at the time of area rate hearings.

Part of the problem was caused by a Financial Accounting Standards Board rule that required a portion of the pension expenses to be recorded as prepaid items.

The defendants adopted Dahlen's recommendation of $195,000 as pension expense and further compounded the error by reducing that amount by $90,000.

The plaintiff's actual pension expense for the year ending April 30, 1987, was $2,073,761, and the test year amount was $1,982,896. Pension expense is a legitimate labor expense and should be included as a part of the cost of service. The failure to include the proper amount as pension expense as a cost of service reduced the plaintiff's requested rate of return by 1.4 percent, 1.45 percent, 1.45 percent, and 1.95 percent for rate areas 1, 2, 3, and 4, respectively, based on the plaintiff's proposed capital structure, and reduced by about 10 percent the plaintiff's requested return of 13.5 percent. Alone, this was not a significant factor, but when considered with the distribution allocation and capital structure issues, it contributed to making the rates adopted by the cities unjust and unreasonable.

The issues as to royalties on product extraction and Huntsman unrecovered storage gas resulted from the plaintiff's inadvertent failure to include these items in its application. These items were noted in the rebuttal report and evidence concerning them was presented at the rate area hearings and at the trial in the district court.

At the trial, Sanders testified that the royalties on products extracted were the royalty obligation which the plaintiff pays to the owners of the gas stream for liquids extracted from the gas stream. These products are subsequently sold by the plaintiff and the proceeds credited back to reduce the cost of service. Sanders testified that the royalty obligation for system-wide products extracted was $1,844,393 and for rate area 1 was $26,751. Sanders testified that was a cost of service and to exclude the cost reduced the plaintiff's rate of return on

common equity.

Sanders explained that the Huntsman unrecovered storage expense concerned the Huntsman underground storage field in western Nebraska, where the plaintiff stores gas in the off-season. The costs were the cost of gas that migrated from the Huntsman storage field into an adjacent field. Huntsman sued Marathon Oil, the operator of the adjacent field, to recover the cost of the lost gas and settled with Marathon for $11 million. However, that settlement did not recoup the entire value of the gas, and the administrative law judge in that case found that the $2.1 million in remaining value could be recovered over a period of 5 years.

The failure to include these two items as a cost of service reduced the plaintiff's rate of return on common equity by .48 percent, .48 percent, .44 percent, and .64 percent for rate areas 1, 2, 3, and 4, respectively.

The defendants were aware of the exclusion of the Huntsman unrecovered storage amounts and the royalties on products extraction at the time the plaintiff's rebuttal report was filed on January 7, 1988. The rate area hearings were held later that month. The defendants had time to respond to the revised cost of service study prepared by the plaintiff, and the amounts should have been included as a cost of service and allocated to the rate areas in question. The failure to do so magnified the unjust and unreasonable rates adopted by the cities.

The remaining two items in dispute relate to the plaintiff's claim that $7 million should have been included as the cost of working capital and that it should have been allowed to recover the rate case expense in 1 year rather than over a 3-year period. We find that neither contention has merit.

With respect to the working capital issue, the plaintiff relied on a rule that assumes that a utility carries its customers for a 45-day period before it collects from its customers. The FERC now requires utility companies to perform full lead-lag studies if they request positive cash working capital. If no lead-lag study is performed, the FERC presumes a zero cash working capital.

Sanders testified that cash working capital is an investment in funds necessary to pay bills as they come due prior to the time

the cash is collected from customers. If there is a cash working capital requirement, it is relevant to the rate base and can be included as a cost of service. The plaintiff used the one-eighth formula, also called the 45-day rule, to determine its cash working capital needs.

A lead-lag study determines what the actual working capital requirement is, if any. The lead is the period of time between when the plaintiff receives supplies and goods and the time it pays for the goods. Lag is the time period between when the plaintiff renders service to the customer and the time it collects the bill for the service.

Although the study made by Dahlen may have been unreliable, that did not establish that the plaintiff had a positive working capital requirement.

As to rate case expense, the rates adopted by the defendants allow the plaintiff to recover the expense of the rate case by a surcharge made over a period of 3 years. The plaintiff proposed a 1-year surcharge to recover the rate case expense. The plaintiff claims that the rate case expense affects the plaintiff's return on common equity by reducing it .27 percent, .27 percent, .26 percent, and .37 percent for rate areas 1, 2, 3, and 4, respectively. Apparently, this reflects what the plaintiff would lose on interest earned if the funds were collected in 1 year. Sanders admitted, however, that the plaintiff would still recover the proper amount if the surcharge was spread over a 3-year period.

The statute does not provide any specific method for utilities to collect rate case expense, except to allow for its collection. § 19-4617(1)(b). It is reasonable that the surcharge be amortized to reflect the actual cost of the rate case expense.

The trial court found that the cities' taking Dahlen's suggestion and amortizing the rate case expense over 3 years was not arbitrary or unreasonable. We reach the same conclusion.

From our de novo review of the record, we conclude that the rates adopted by the defendants in rate areas 1, 2, 3, and 4 are unreasonable and confiscatory. The judgments are reversed and the causes remanded with directions to enter judgments granting the plaintiff the injunctive relief requested.

REVERSED AND REMANDED WITH DIRECTIONS.

SHANAHAN, J., concurring.

Injunctive relief for K N Energy, Inc., is the correct disposition of this appeal. However, in reaching the correct result, the majority refers to the content of the Nebraska Municipal Natural Gas Regulation Act, Neb. Rev. Stat. §§ 19-4601 et seq. (Reissue 1987), enacted in 1987; for example, "There is no mention in [the act] of short-term debt as a component of capital structure to be considered in establishing a [reasonable] rate of return," and "The statute makes no other mention of short-term debt as a cost of capital or a consideration in finding a proper rate of return." By those and other references to the content of the Nebraska Municipal Natural Gas Regulation Act, the majority has attributed unnecessary and unwarranted significance to the act in relation to this appeal.

Quite apart from the Nebraska Municipal Natural Gas Regulation Act, the true foundations for injunctive relief regarding a utility rate are the guarantee of due process, see Neb. Const. art. I, § 3, and U.S. Const. amend. XIV, and a district court's constitutionally conferred equity jurisdiction, namely: "The district courts shall have both chancery and common law jurisdiction . . . ." Neb. Const. art. V, § 9.

On several occasions, this court has reiterated the longstanding constitutional premise that pursuant to the power conferred by Neb. Const. art. V, § 9, a district court has equity jurisdiction, which exists independent of statute and is exercisable without legislative enactment. See, *State, ex rel. Sorensen, v. Nebraska State Bank*, 124 Neb. 449, 247 N.W. 31 (1933); *State v. Odd Fellows Hall Ass'n*, 123 Neb. 440, 243 N.W. 616 (1932); *Hall v. Hall*, 123 Neb. 280, 242 N.W. 607 (1932); *Matteson v. Creighton University*, 105 Neb. 219, 179 N.W. 1009 (1920).

In *Bluefield Co. v. Pub. Serv. Comm.*, 262 U.S. 679, 690, 43 S. Ct. 675, 67 L. Ed. 1176 (1923), the U.S. Supreme Court stated: "[W]hether the rates prescribed in the commission's order are confiscatory and therefore beyond legislative power" depends on whether the imposed rates are "confiscatory, and their enforcement deprives the public utility of its property in violation of the Fourteenth Amendment." Injunctive

protection for a utility concerning a confiscatory rate was acknowledged in *Kansas-Nebraska Natural Gas Co. v. City of St. Edward*, 167 Neb. 15, 23, 91 N.W.2d 69, 74 (1958), when this court recognized the availability of an injunction as part of a district court's equity jurisdiction to prevent " 'unreasonable delay in putting an end to confiscatory rates . . . .' " (Quoting from *Smith v. Ill. Bell Tel. Co.*, 270 U.S. 587, 46 S. Ct. 408, 70 L. Ed. 747 (1926).)

After an examination of the Nebraska Municipal Natural Gas Regulation Act in relation to the present appeal, the words of Daniel Webster, echoing Brougham's observation, are indeed appropriate: "What is valuable is not new, and what is new is not valuable." The valuable constitutional role of the judiciary in connection with the ratemaking process is not new. See, *Bluefield Co. v. Pub. Serv. Comm., supra*; *Kansas-Nebraska Natural Gas Co. v. City of St. Edward, supra*. The recently enacted Nebraska Municipal Natural Gas Regulation Act has little value, if any at all, concerning judicial activity in reference to the ratemaking process, which still remains a legislative function or activity. See *Kansas-Nebraska Nat. Gas Co., Inc. v. City of Sidney*, 186 Neb. 168, 181 N.W.2d 682 (1970). Any legislative attempt to involve a court in establishing a utility rate has serious constitutional implications.

Under the circumstances in the present appeal, municipal failure to adopt an ordinance affording a reasonable rate of return on the value of K N's property used for public service imposed a confiscatory rate on K N and is state action which deprives K N of its property, contrary to the constitutional guarantee of due process. Injunctive relief prevents such unconstitutional confiscation.

Even if the Nebraska Municipal Natural Gas Regulation Act had never been enacted, the injunction granted to K N would be constitutionally authorized and available in a district court's equity jurisdiction. Any use of the act to determine the present appeal is seduction by legislation.

CAPORALE, J., joins in this concurrence.

STATE OF NEBRASKA, APPELLEE, V. ONE 1987 TOYOTA PICKUP, APPELLEE, DENNIS R. JURGENS, APPELLANT.
STATE OF NEBRASKA, APPELLEE, V. DENNIS R. JURGENS, APPELLANT.

447 N.W.2d 243

Filed October 27, 1989. Nos. 88-979, 88-980.

1. **Motions to Suppress: Appeal and Error.** In determining the correctness of a ruling on a motion to suppress, the Supreme Court will uphold a trial court's findings of fact unless those findings are clearly wrong.
2. **Constitutional Law: Search and Seizure: Motor Vehicles.** 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.
3. **Constitutional Law: Search and Seizure: Actions.** The exclusionary rule applies to forfeiture actions.
4. **Search Warrants: Affidavits: Probable Cause.** Where an affidavit used for the purpose of obtaining a search warrant includes illegally obtained facts as well as facts derived from independent and lawful sources, a valid search warrant may issue if the lawfully obtained facts, considered by themselves, establish probable cause to issue the warrant.
5. **Criminal Law: Trial: Evidence: Appeal and Error.** Error in admitting or excluding evidence in a criminal trial, whether of constitutional magnitude or otherwise, is prejudicial unless it can be said the error was harmless beyond a reasonable doubt.

Appeal from the District Court for Pawnee County: ROBERT T. FINN, Judge. Judgment in No. 88-979 reversed, and cause remanded for a new trial. Judgment in No. 88-980 affirmed.

Kirk E. Naylor, Jr., for appellant.

Robert M. Spire, Attorney General, and Kenneth W. Payne for appellee State.

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

WHITE, J.

After a bench trial on September 19, 1988, appellant, Dennis R. Jurgens, was found guilty of unlawful manufacture and distribution of a controlled substance and possession of marijuana weighing more than 1 pound (case No. 88-980). Subsequently, Jurgens' 1987 Toyota pickup was condemned in a forfeiture action brought by the State pursuant to Neb. Rev.

Stat. § 28-431 (Reissue 1985) (case No. 88-979). Jurgens appeals from both determinations; the appeals have been consolidated in this court.

For the reasons set forth below, both criminal convictions are affirmed. The forfeiture order is reversed and remanded for a new trial.

On October 23, 1987, the Nebraska State Patrol conducted a vehicle check stop selective at the junction of Highways 4 and 99 in Pawnee County, Nebraska. This check stop selective was conducted by four troopers and was to last from 10 a.m. to noon. A "selective" is a concentration of officers in a certain area for a particular purpose. The purpose of this selective was to check drivers for licensing and vehicles for registration and equipment violations. All vehicles were required to stop, whereupon the license, registration, and vehicle were inspected.

That morning, Jurgens was a passenger in a 1987 Toyota pickup driven by Michael Harms. Jurgens was the registered owner of the pickup. At approximately 11:15 a.m., the vehicle stopped at the check stop, where it was inspected by Troopers Gill and Chrans. Upon approaching the passenger compartment of the vehicle, Trooper Gill detected a strong marijuana odor and noticed a "marijuana substance" on the seat. During the course of their inspection of the pickup's exterior safety equipment, Troopers Gill and Chrans observed, through windows on the vehicle's camper shell, several filled canvas bags. A marijuana leaf was seen on top of one of the bags.

Consequently, Jurgens and Harms were arrested and taken to the Pawnee County jail, and the pickup was impounded and stored at a local auto body shop. That afternoon, Troopers Gill and Chrans obtained a search warrant for the pickup based upon their observations of the pickup earlier that day. A search of the vehicle uncovered large quantities of marijuana and various instruments used in cultivating marijuana.

That same day, Nebraska State Patrol Investigator Dishong obtained a search warrant for Jurgens' farm, located near Table Rock, Nebraska. Investigator Dishong had been investigating marijuana cultivation on the farm since July 1987. On several occasions he made surreptitious inspections of the premises,

finding marijuana in various stages of cultivation. The affidavit used to obtain this search warrant detailed Investigator Dishong's extensive investigations and observations of marijuana cultivation on the Jurgens farm. It also contained a one-paragraph reference to the results of the vehicle search conducted earlier that day. A search warrant was issued, and a subsequent search of the farm uncovered large quantities of marijuana and equipment used to produce marijuana.

On January 13, 1988, informations were filed against both Jurgens and Harms. On April 11, Jurgens filed a motion to suppress all evidence discovered as a result of the seizure of the pickup. On April 20, a hearing on this motion was held. Considerable testimony was elicited concerning the State Patrol's method of establishing and conducting the check stop selective. The motion to suppress was later overruled.

On September 19, both Jurgens and Harms were tried at a bench trial. The court admitted, over both defendants' continuing objection, all evidence obtained as a result of the seizure of the pickup at the check stop, including evidence obtained as a result of the search of Jurgens' farm. Jurgens was found guilty of unlawful manufacture and distribution of a controlled substance and possession of marijuana weighing more than 1 pound. He was subsequently sentenced, respectively, to terms of imprisonment of not less than 3 nor more than 10 years and not less than 1 nor more than 3 years, these sentences to run concurrently.

On October 30, 1987, the State initiated forfeiture proceedings against the pickup pursuant to § 28-431. In his answer, Jurgens contended that the vehicle was seized in violation of the fourth amendment to the U.S. Constitution. This issue was treated as a motion to suppress related to the unconstitutional seizure of the vehicle and was considered in the motion to suppress hearing conducted in the criminal case on April 20. The motion was overruled. By stipulation of both parties, evidence adduced at the suppression hearing and at the criminal trial was considered as the sole evidence in the forfeiture determination. On November 14, 1988, the trial court ordered Jurgens' pickup forfeited.

Jurgens appeals from both of these decisions. His sole assignment of error is that the trial court erred in overruling his motions to suppress.

This court has stated that in determining the correctness of a ruling on a motion to suppress, the Supreme Court will uphold a trial court's findings of fact unless those findings are clearly wrong. *State v. Marcotte, ante* p. 533, 446 N.W.2d 228 (1989). Our review of the record in this case does not disclose whether the trial court made factual findings. In any event, it is not necessary for this court to examine those findings, if any, because it is evident that the trial court erroneously applied the law in overruling the motions to suppress.

Initially, we note that standing is not an issue in this appeal. The State has conceded that Jurgens has standing to challenge the search and seizure of his vehicle.

In *State v. Crom*, 222 Neb. 273, 383 N.W.2d 461 (1986), the defendant was convicted of driving while under the influence of alcohol after he was arrested at a vehicle check stop. This check stop was established and conducted by several patrolmen and a sergeant from the Omaha Police Division. These officers in the field were free to determine when, where, and how to establish and operate the check stop and were not acting under any standards, procedures, or guidelines promulgated by the police department or other law enforcement agency. This court held, in the majority opinion, that the check stop was constitutionally infirm because "a driver's reasonable expectation of privacy was rendered subject to arbitrary invasion solely at the unfettered discretion of officers in the field." *Crom, supra* at 277, 383 N.W.2d at 463. Thus, the defendant in *Crom* was unreasonably seized in violation of the fourth amendment to the U.S. Constitution.

On the facts of this case, it is clear that the check stop was established at the unfettered discretion of officers in the field. Originally, the selective's enforcement list promulgated by the Beatrice office of the State Patrol indicated a "roving Patrol" selective for October 24, 1987. This list was promulgated by Trooper Morris and approved by Lieutenant Winkler on September 23, 1987. At some point after September 23, but before October 23, Sergeant Nedley changed the date of the selective from October 24 to October 23 to allow him to

participate in the selective. Sergeant Nedley is the immediate supervisor to Troopers Gill and Stake and was one of four troopers involved in conducting the check stop selective. The new selective date was never resubmitted to anyone in the State Patrol command structure for reapproval. The State Patrol command structure was never aware that a selective of any type would be conducted on October 23.

Sergeant Nedley testified that the new selective, which was to be conducted on October 23, was to be a roving patrol selective. However, the testimony at the suppression hearing shows that Trooper Stake, on the morning of October 23, made the decision to change the selective from a roving patrol selective to a check stop selective. Trooper Stake was present and involved with conducting the check stop and was not in a supervisory capacity. Sergeant Nedley testified that when he arrived at work on the morning of the 23d, he expected to engage in a roving patrol selective. Shortly after arriving at work, he learned that Trooper Stake had decided to change the roving patrol selective to a check stop selective. Sergeant Nedley testified that he had no prior knowledge of the change, but that he did not object to the change.

Moreover, the evidence clearly establishes that Trooper Stake also made the decision as to when and where the check stop would be conducted. None of Trooper Stake's supervisors made this decision. Lieutenant Reitz, who on October 23 was administrative lieutenant for the headquarters troop traffic division in Lincoln, testified that he did not choose the location. Trooper Balthazor, who on October 23 was on temporary assignment as duty sergeant in the Lincoln office, testified that Trooper Stake was solely responsible for choosing the time and location of the check stop. On cross-examination the following colloquy took place between Trooper Balthazor and Jurgens' attorney:

> Q Now, the — the General Operations Order also proceeds to indicate that the site of the vehicle check stop will be chosen by the supervisor at the time he decides to order such vehicle check stop. I take it you did not choose this location.
>
> A It was chosen — It was called in by Trooper Stake and

he asked for approval for this location and it was approved at that time —

Q Okay.

A — for this location.

Q You didn't check the locat- — You didn't choose the location, he did.

A Yes.

Q And he is one of the officers who was involved in the vehicle check stop, or was scheduled to be. Is that right?

A Yes, he is.

Q Did you know anything before receiving this call from Trooper Stake that Trooper Stake and these other officers intended to conduct a — a vehicle check at the intersections of Highways 99 and 4 on this date?

A No, I did not.

Q Okay. Let me make sure I understand, and I think this will just summarize it. Apparently you received a telephone call from Stake around 7:15 in the morning. Is that correct?

A Yes, sir.

Q On the 23rd. And what Stake said to you was, in essence, we want to conduct a vehicle check; we want to do it at the intersections of Junctions 99 and 4; we want to do it between 1000 hours and 1200 hours on that date; and here are the officers that are gonna be involved by number. Is that correct?

A Yes.

Q Did he give you any other information?

A No, sir.

In addition, at no time was affirmative approval given the troopers in the field to establish and conduct the check stop. At 7:15 a.m. on October 23, Trooper Stake contacted the State Patrol office in Lincoln and left a message that a check stop selective would be conducted that morning. It was the understanding that if the troopers in the field did not receive communication to the contrary, approval was to be assumed. Trooper Stake testified that he never received any sort of affirmative approval from the Lincoln office regarding the October 23 check stop selective. The record indicates that no

trooper involved in the check stop ever received affirmative approval from anyone in the State Patrol command structure.

Based on this evidence, it is clear that the troopers in the field acted with unchecked discretion when they established and conducted the check stop selective. The date, time, location, and type of selective were chosen by certain troopers in the field who conducted the check stop selective, without the State Patrol high command's being involved. Moreover, once the specifics of the check stop were determined by the troopers, no affirmative approval authorizing the check stop selective was ever given by supervisory personnel within State Patrol headquarters. Because of these facts, Jurgens' reasonable expectation of privacy "was rendered subject to arbitrary invasion solely at the unfettered discretion of officers in the field." *State v. Crom*, 222 Neb. 273, 277, 383 N.W.2d 461, 463 (1986). We hold that Jurgens was unreasonably seized in violation of the fourth amendment to the U.S. Constitution. Thus, the trial court erred in overruling Jurgens' motion to suppress evidence seized pursuant to the check stop selective.

We note further that several years prior to 1987, the Nebraska State Patrol promulgated the general operations manual for vehicle check stops. The policy of the State Patrol, as indicated by this manual, is that "vehicle check stops will be handled with the least intrusion possible and without an unconstrained exercise of discretion." In regard to procedure, the manual provides in pertinent part:

> 2. The initial decision to conduct a vehicle check stop must be made by a neutral source, such as a supervisor who is not involved in conducting the operation in the field.
>
> a. Such decision will be communicated to the officers in the field who will conduct the stops at least 2 hours in advance.
>
> . . . .
>
> 4. The site of the vehicle check stop will be chosen by the supervisor at the time he decides to order such vehicle check stop.

Presumably, this manual was formulated to guide the State Patrol in the wake of *Delaware v. Prouse*, 440 U.S. 648, 99 S.

Ct. 1391, 59 L. Ed. 2d 660 (1979), and its progeny. It appears the manual would meet the constitutional requirement of *State v. Crom, supra*. However, merely having such rules in effect, without adhering to these rules, is not enough. When the State Patrol disregards its own rules, the troopers in the field are free to act with unconstrained discretion.

We also hold that the trial court erred in overruling the motion to suppress Jurgens' Toyota pickup as evidence in the forfeiture action. We have determined that Jurgens was unreasonably seized in violation of the fourth amendment to the U.S. Constitution. Evidence which is obtained in violation of the fourth amendment may not be relied on to sustain a forfeiture. *Boyd v. United States*, 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746 (1885). The U.S. Supreme Court has held that the exclusionary rule applies to forfeiture actions. *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 85 S. Ct. 1246, 14 L. Ed. 2d 170 (1965). Because Jurgens was seized in violation of his fourth amendment rights, the trial judge erred in failing to suppress the Toyota pickup as evidence in the forfeiture determination.

Jurgens also contends that the trial court erred in admitting evidence obtained from a search of Jurgens' real property pursuant to a search warrant. He argues the evidence is tainted and therefore inadmissible because the affidavit upon which the search warrant was obtained included information regarding the marijuana found in the pickup. He urges that the evidence from the search of the real property was not derived from a source independent of the initial illegal search and seizure.

Jurgens' contentions are without merit. This court has held that where an affidavit used for the purpose of obtaining a search warrant includes illegally obtained facts as well as facts derived from independent and lawful sources, a valid search warrant may issue if the lawfully obtained facts, considered by themselves, establish probable cause to issue the warrant. *State v. Guilbeault*, 214 Neb. 904, 336 N.W.2d 593 (1983); *State v. Welsh*, 214 Neb. 60, 332 N.W.2d 685 (1983). If the lawfully obtained facts establish probable cause to issue the warrant, then there is no fourth amendment violation.

In the present case, an examination of the affidavit discloses that even if the reference to the search of Jurgens' vehicle is disregarded, there were more than ample independent facts contained in the affidavit which would have justified the trial court in issuing a search warrant. Investigator Dishong submitted an affidavit which detailed observations of marijuana cultivation made during an extensive investigation of Jurgens' real property. This investigation was conducted in its entirety before the October 23 check stop selective. The affidavit contained a one-paragraph reference to the marijuana discovered in the search of the vehicle. Clearly, the lawfully obtained facts contained in the affidavit would have provided sufficient probable cause upon which to issue a search warrant. The trial court properly admitted evidence obtained as a result of the search of Jurgens' real property.

We hold that the State Patrol, in conducting the October 23 check stop selective, unreasonably seized Jurgens in violation of the fourth amendment to the U.S. Constitution. Thus, the trial court erred in overruling Jurgens' motions to suppress evidence obtained as a result of the stop. However, with respect to the criminal convictions, this error is harmless. This court has stated that error in admitting or excluding evidence in a criminal trial, whether of constitutional magnitude or otherwise, is prejudicial unless it can be said that the error was harmless beyond a reasonable doubt. *State v. Lenz*, 227 Neb. 692, 419 N.W.2d 670 (1988); *State v. Watkins*, 227 Neb. 677, 419 N.W.2d 660 (1988). The search of Jurgens' real property, pursuant to the valid search warrant, uncovered 120 pounds of marijuana, along with elaborate equipment used to manufacture and distribute marijuana. This admissible evidence provides an ample basis upon which Jurgens could have been convicted of unlawful manufacture and distribution of a controlled substance and possession of marijuana weighing more than 1 pound. We are convinced the trial court's error was harmless beyond a reasonable doubt. Therefore, both criminal convictions are affirmed.

However, the trial court committed reversible error in overruling the motion to suppress Jurgens' pickup as evidence in the forfeiture action. To determine if double jeopardy

principles apply, we must inquire whether the forfeiture statute is criminal and punitive or civil and remedial. The U.S. Supreme Court, in *United States v. Ward*, 448 U.S. 242, 100 S. Ct. 2636, 65 L. Ed. 2d 742 (1980), has stated that this inquiry proceeds on two levels. First, a court determines whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or another. Second, where Congress has indicated an intention to establish a civil penalty, a court inquires further whether the statutory scheme was so punitive, either in purpose or effect, as to negate that intention.

We conclude that § 28-431 is criminal in character. Therefore, double jeopardy principles apply. Recognizing this, however, the trial court's error in admitting evidence obtained in violation of Jurgens' constitutional rights is properly characterized as trial error, which does not bar retrial of the forfeiture determination after this reversal. See *State v. Chambers, ante* p. 235, 444 N.W.2d 667 (1989). For this reason, the forfeiture order is reversed and the cause remanded for a new trial.

JUDGMENT IN NO. 88-979 REVERSED, AND CAUSE REMANDED FOR A NEW TRIAL. JUDGMENT IN NO. 88-980 AFFIRMED.

STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLANT, V. GERALD S. BOHAM, APPELLANT AND CROSS-APPELLEE.

447 N.W.2d 485

Filed October 27, 1989. No. 89-054.

1. **Convictions: Appeal and Error.** In reviewing a criminal conviction, it is not the province of an appellate court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact, whose findings must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support them.
2. **Hearsay.** A statement of a party defendant is not hearsay.
3. **Appeal and Error.** An issue not properly presented and passed upon by the trial

court may not be raised on appeal.

4. **Criminal Law: Courts: Appeal and Error.** Upon appeal from a county court in a criminal case, the district court acts as an intermediate appellate court, rather than as a trial court. Its review is limited to an examination of the county court record for error or abuse of discretion.
5. **Criminal Law: Motor Vehicles: Intent: Words and Phrases.** Any person who drives any motor vehicle in such a manner as to indicate an *indifferent or wanton disregard* for the safety of persons or property shall be guilty of reckless driving.
6. _____: _____: _____: _____. Any person who drives any motor vehicle in such a manner as to indicate a *willful disregard* for the safety of persons or property is guilty of willful reckless driving.
7. **Words and Phrases.** "Willful" means intentional.
8. **Criminal Law: Motor Vehicles: Proof.** For there to be willful reckless driving, it is not necessary for there to be property damage or injuries inflicted.
9. **Verdicts: Appeal and Error.** A finding of guilty by the trier of fact will not be overturned on appeal unless it is based on evidence so lacking in probative force that it can be said as a matter of law that the evidence is insufficient to support a guilty finding.

Appeal from the District Court for Douglas County, J. PATRICK MULLEN, Judge, on appeal thereto from the County Court for Douglas County, THOMAS G. MCQUADE, Judge. Judgment of District Court reversed, and cause remanded with directions.

Marc B. Delman 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.

Gerald S. Boham appeals and the State cross-appeals the Douglas County District Court's finding that Boham was guilty of reckless driving.

Boham claims he should not have been convicted of any traffic offense. The State claims that when Boham appealed to the district court, the Douglas County Court's finding that Boham was guilty of *willful* reckless driving should have been affirmed.

We vacate the district court's judgment and remand the cause to that court with directions to affirm the Douglas County

Court's conviction and sentence of Boham. After a bench trial in the county court, Boham was fined $100 and sentenced to jail for 30 days, and his motor vehicle operator's license was suspended for 365 days.

In his assignments of error, Boham claims the county court and the district court erred in (1) allowing Keith Bement to testify to hearsay, and (2) not dismissing the complaint due to the inaccurate and perjured affidavit of the complaining witness.

In reviewing a criminal conviction, it is not the province of an appellate court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact, whose findings must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support them. See, *State v. Wokoma, ante* p. 351, 445 N.W.2d 608 (1989); *State v. Andersen*, 232 Neb. 187, 440 N.W.2d 203 (1989).

Taking the view most favorable to the State, the record reflects the following. Boham was charged in the Douglas County Court with willful reckless driving on July 26, 1988, in Omaha. The complainant, Jay Iske, was employed as a nonunion truckdriver for Brown Transfer. At all times relevant herein, Brown Transfer was involved in a labor dispute with its union employees. Although Boham was not a Brown Transfer employee, he supported the striking union members. Before July 26, Iske, who did not know the defendant, had encountered Boham. At that time, the defendant used his black Thunderbird automobile to block Iske's truck. Boham moved the Thunderbird only after a security guard asked him to move it.

The next time Iske encountered Boham was on July 26, while Iske was driving home from work in a vehicle that had no license plate. Just as Iske entered an entrance ramp to Interstate 80, the defendant drove his Thunderbird in front of Iske's vehicle and then proceeded up the ramp slowly. Iske had to apply the brakes of his vehicle. Once on the Interstate, Iske drove to the extreme left lane in an effort to accelerate his vehicle. There was a semi-truck in the middle lane. Boham was

in a lane to the right of the truck. When Iske accelerated around the truck, the defendant accelerated, drove around the right side of the truck, and cut off Iske before Iske could get too far in front of the truck. To avoid being struck by the defendant's vehicle, Iske was forced to apply his brakes and swerve, at least partially, off the traveled portion of the highway, so that he "was on the dirt temporarily."

When Iske was able to completely return to the traveled portion of the highway, Boham drove alongside him and shouted obscenities at Iske for some distance. Iske tried to elude Boham by pulling onto the entryway of an exit ramp, but Boham followed him. At the last minute, Iske swung back onto the Interstate. Boham also turned back onto the Interstate, followed Iske for some distance, and then drove alongside him again. Iske turned off the highway and onto Hamilton Street, where he stopped to find out what the defendant wanted. Boham told Iske that he was "screwing these union guys out of their job." The defendant asked Iske why he wanted to be a "scab." Boham warned Iske that "if he'd seen me in a personal vehicle or on my motorcycle, that he would make sure I didn't go anywhere." Iske filed a complaint against Boham.

Boham's first assignment of error claims that his hearsay objection to certain testimony of witness Keith Bement should have been sustained. Bement, a security guard who knew Boham, testified that on or about August 1, 1988, he heard Boham tell some people that the defendant had a "run in" with Iske. The objection and assignment of error have no merit. A statement of a party defendant is not hearsay. Neb. Rev. Stat. § 27-801(4)(b)(i) (Reissue 1985).

Defendant's second assignment of error claims that the trial court "erred in not dismissing the complaint due to the inaccurate and perjured affidavit of the complaining witness," Iske.

Although the defendant challenged Iske's credibility by cross-examining him in regard to a purported affidavit, parts of which Iske denied dictating, the document was never introduced in evidence. There is nothing in the record of the trial court reflecting that Boham moved to dismiss the case because of the "inaccurate and perjured affidavit of the

complaining witness." An issue not properly presented and passed upon by the trial court may not be raised on appeal. See *State v. Blair*, 230 Neb. 775, 433 N.W.2d 518 (1988). Boham's second assignment of error is meritless.

The State's cross-appeal claims that the district court erred in remanding the cause to the county court for sentencing on the lesser offense of reckless driving.

"[U]pon appeal from county court in a criminal case, the district court acts as an intermediate appellate court, rather than as a trial court. . . . [Its] review is limited to an examination of the county court record for error or abuse of discretion." *State v. Horr*, 232 Neb. 380, 382, 441 N.W.2d 139, 141-42 (1989); *State v. Sock*, 227 Neb. 646, 419 N.W.2d 525 (1988).

The distinction between reckless driving and willful reckless driving is determined by the driver's state of mind. "Any person who drives any motor vehicle in such a manner as to indicate an *indifferent or wanton disregard* for the safety of persons or property shall be deemed to be guilty of reckless driving." (Emphasis supplied.) Neb. Rev. Stat. § 39-669.01 (Reissue 1988).

"Any person who drives any motor vehicle in such a manner as to indicate a *willful disregard* for the safety of persons or property is guilty of willful reckless driving." (Emphasis supplied.) Neb. Rev. Stat. § 39-669.03 (Reissue 1988). "Willful" means intentional. NJI 14.10. See, also, *State v. Gascoigen*, 191 Neb. 15, 213 N.W.2d 452 (1973); *State v. Schott*, 222 Neb. 456, 384 N.W.2d 620 (1986).

Boham, at the entry ramp to Interstate 80, drove in front of Iske and forced him to brake his vehicle. Once on the Interstate, Boham drove his vehicle around a truck to prevent Iske from outdistancing the truck. Boham forced Iske's vehicle to leave, at least partially, the traveled portion of the highway and put Iske "on the dirt temporarily." At the trial, there was sufficient evidence for a fact finder to conclude beyond a reasonable doubt that the motor vehicle maneuvers by Boham indicated a disregard for the safety of Iske. There was also sufficient evidence, not only from the defendant's conduct but also from his spoken words, for a fact finder to conclude beyond a reasonable doubt that Boham's disregard for Iske's safety was

intentional. Iske testified that Boham told him "if he'd seen me in a personal vehicle or on my motorcycle, that he would make sure I didn't go anywhere." The trial judge found that there was "terrible intent" on the part of Boham and that the testimony of the defendant and his witness was "preposterous." We note that there was no property damage to the vehicle Iske was driving, and he did not receive any injuries. However, for there to be willful reckless driving, it is not necessary for there to be property damage or injuries inflicted. *Goodloe v. Parratt*, 453 F. Supp. 1380 (D. Neb. 1978), *rev'd on other grounds* 605 F.2d 1041 (1979).

The trial court found beyond a reasonable doubt that the defendant was guilty of willful reckless driving. A finding of guilty by the trier of fact will not be overturned on appeal unless it is based on evidence so lacking in probative force that it can be said as a matter of law that the evidence is insufficient to support a guilty finding. See *State v. Costanzo*, 227 Neb. 616, 419 N.W.2d 156 (1988).

It cannot be said as a matter of law that the evidence before the Douglas County Court was so lacking in probative force that the evidence was insufficient to support the trial court's finding that Boham was guilty of willful reckless driving.

The district court judgment is vacated, and that court is ordered to affirm the Douglas County Court's conviction of Boham and the sentence it imposed upon the defendant.

REVERSED AND REMANDED WITH DIRECTIONS.

GEORGE T. ROBERTSON, APPELLANT, V. SOUTHWOOD, A PARTNERSHIP, ET AL., APPELLEES.

447 N.W.2d 616

Filed November 3, 1989. No. 87-898.

1. **Demurrer: Waiver.** Where there is no ruling on a demurrer in the record and there has been a trial on the merits, the demurrer will be considered waived.
2. **Receivers: Final Orders.** The appointment of a receiver may be treated as a final order. Neb. Rev. Stat. § 25-1090 (Reissue 1985).
3. **Partnerships: Accounting.** The rules for determining accounts among partners after dissolution are found in Neb. Rev. Stat. § 67-340 (Reissue 1986).

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Reversed and remanded for further proceedings.

Steve Windrum for appellant.

Donald W. Pederson and Michael E. Piccolo, of Murphy, Pederson, Piccolo & Pederson, for appellees.

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

GRANT, J.

This matter began by a petition filed by plaintiff-appellant, George T. Robertson, against Southwood partnership and 11 persons described as partners in Southwood. Plaintiff initially prayed for an accounting, along with other relief, but later amended his petition to seek a declaration that he was free from all liability to the partners or the partnership because plaintiff had terminated his interest in the partnership as of April 7, 1984. Six of the original twelve partners individually answered and counterclaimed for an accounting of sums due them by virtue of their payment of plaintiff's share of necessary capital contributions. These six parties were Sharon K. Bourne, Nola M. Moog, Charmaine T. LaFontaine, Wesley W. Grady, Mark H. Richardson, and David C. Cotton. They will be referred to herein as defendants-appellees. Four of the original partners withdrew from the partnership by mutual agreement and were not partners at any time relevant to this action.

The six defendants-appellees each cross-claimed against

Elden S. Wolfe, who had been one of the original partners, alleging that Wolfe, as well as plaintiff, had failed to pay his proportionate share of the partnership obligations. Plaintiff states that Wolfe was "similarly situated to plaintiff in his action throughout," but that Wolfe "settled and compromised his dispute with the partnership prior to trial . . . and is not now part of this action or appeal." Brief for appellant at 5. It is not shown how Wolfe disposed of his obligations to the partnership or to the individual partners, including plaintiff and defendants. Wolfe has apparently taken no position in the proceeding, but he has been specifically listed as a defendant throughout the case, up to and including plaintiff's notice of appeal. In determining the respective liabilities among the partners, the trial court correctly considered eight partners—the plaintiff, the six defendants-appellees, and Wolfe.

After pleadings and a subsequent trial, the trial court, on September 29, 1986, determined that the partnership had been dissolved but not terminated, and appointed a receiver to account for the liabilities among the partners and to wind up the partnership. All parties objected to the appointment of a receiver. On November 24, 1986, the trial court overruled all objections to the appointment. On March 16, 1987, the receiver filed a report.

On April 8, 1987, plaintiff filed a motion "to reflect amended petition on the record, to amend the petition." The written motion sought to delete plaintiff's prayer for an accounting and to add a prayer for a declaration that the plaintiff was free from liability to the defendants as partners. On April 20, 1987, the trial court granted the motion and permitted an amendment to the petition to be filed, "effective as of August 21, 1986," the date trial began. We note that plaintiff's filed motion does not accurately reflect plaintiff's oral motion made during the trial itself, because the oral motion did not seek to delete plaintiff's prayer for an accounting. Although plaintiff stresses his withdrawal of his request for an accounting, we do not see any controlling issue in that regard. The relief sought by plaintiff required a balancing of the liabilities among the partners in any event.

On June 23, 1987, the trial court entered an order overruling renewed objections to the appointment of the receiver and objections to the receiver's report. In that order, the court entered judgment against plaintiff and in favor of the partnership in the amount of $9,286.96, "terminated" the partnership, and set over "the assets and further liabilities of the partnership" to the six defendants-appellees and Wolfe. The order further provided that any party could object to the receiver's computation within 10 days. On July 2, 1987, plaintiff filed a motion for a new trial and an objection to the receiver's computations. Plaintiff's objections were apparently not ruled on, but on October 1, 1987, plaintiff's motion for new trial was overruled.

The plaintiff appeals and in his brief assigns eight errors to the actions of the trial court. The plaintiff's assignments of error, as summarized, allege that the trial court erred (1) in overruling the plaintiff's demurrer to each of the individual counterclaims for the reason that such counterclaims failed to state a cause of action, and several causes of action were misjoined; (2) in failing to declare plaintiff free from any liability with respect to the partners and the partnership; (3) in providing an accounting; (4) in appointing a receiver and in charging plaintiff for a proportionate share of the receiver's bill; (5) in finding the evidence sufficient to support judgment against plaintiff for $9,286.96; and (6) in entering judgment in favor of the partnership, which did not request affirmative relief.

For the reasons set out below, we reverse and remand the cause for further proceedings.

The facts in the record before us show the following. The Southwood partnership was formed in 1980 by a group of 12 real estate agents who worked together selling residential real estate for Gateway Realty of North Platte, Inc. The partnership agreement stated a general purpose of buying and selling real estate, without reference to any particular undertaking or term of existence. The partnership agreement also provided that each partner would contribute an equal share of additional capital to the partnership as needed for its operation. Before the signing of the partnership agreement, the partners determined

that the partnership would purchase a particular tract of land. The partners planned to subdivide the land and to earn commissions on the sale of the lots and on the sale of the homes that were built on the lots. The partners purchased an 8.87-acre parcel of land, consisting of two tracts. The first tract was 2.5 acres, which included a house and some other buildings. The second tract was 6.37 acres of unimproved real estate. The purchase agreement shows that the parcel was purchased for $96,000, to be paid in the following manner: $1,000 down; $6,500 at closing; assumption of mortgage to First Federal Savings and Loan Association of North Platte (now American Charter), with a balance of $18,800; payment of the land contract balance of $12,712.31; and a note to the sellers for the balance of approximately $57,000. The note to the sellers was to be paid in semiannual installments of $600 with a balloon payment on or before July 1, 1985.

The 12 initial partners each put up $900, and the partners and partnership made a note of approximately $14,000 to the North Platte State Bank to pay off the balance due at closing. The partnership's debt was serviced from rental income from the property, from additional equal capital contributions, or from additional borrowed funds. At times the property was rented for $550 per month. In May of 1986, the 2.5-acre tract was sold for an amount not in evidence. As part of this sale, the remaining 6.37 acres were rented to the buyers for a term of 3 years beginning May 2, 1986, at $75 per month. As part of the same transaction, the partnership loaned the buyers $2,597.61 and took a mortgage on a different property apparently owned by the buyers. The buyers also had an option to buy the additional leased land.

In a letter dated February 23, 1984, the attorney for the partnership informed the partners that North Platte State Bank was making demand for the payment of a June 24, 1983, note, in the principal amount of $31,360.86, due December 21, 1983, and that the partnership was unable to obtain alternative financing. The letter requested that each partner contribute $4,024.55 plus interest.

In response to this bank demand, each of the defendants-appellees paid the bank his or her respective share

plus interest. After these six payments, the bank note principal as of April 30, 1984, was reduced to $7,840.20. Plaintiff and Wolfe did not pay. Plaintiff's response to the request for payment of his share of the bank debt was a letter to the partners dated April 7, 1984. The letter set out in part:

> It is my decision at this date to terminate all of my partnership interests in the Southwood Partnership.
>
> It is with much regret and lots of serious thought that I am taking this action. Since I am no longer an active wage earner and because of my age, these two things have been the determining factor in my decision.

In December of 1984, under threat of foreclosure, defendants-appellees each paid a share of the April 30, 1984, balance on the note which resulted from plaintiff's and Wolfe's failure to pay. Each payment was $1,306.70, plus interest based on the date each partner paid the bank. As of December 17, 1984, the bank note was paid in full.

In the interim, the attorney for the partnership told the plaintiff that he could not get out of the partnership unless he went into competition with Gateway or died. The attorney's statement, although far from an accurate characterization of the plaintiff's right to sever his relationship with the partnership, was an apparent reference to paragraph 9 of the partnership agreement. Paragraph 9 provided, in part, that if a partner left Gateway and "remain[ed] active in the sale of real estate," the partnership was required to purchase and the partner was required to sell his or her partnership interest at a price based upon the partner's share of the adjusted cost basis of the partnership's real estate. In letters dated April 11, 1984, the plaintiff resigned from Gateway Realty and stated that he was now in competition with Gateway. The plaintiff transferred his real estate license to another real estate company and maintained listings there.

Receiving no response from the partners or partnership, the plaintiff's attorney, in letters dated May 8 and 11, 1984, made an offer of retirement to the partnership and sent the partnership a check in the amount of $728, which the plaintiff believed was the negative balance of his partnership account, based on a partnership statement at the end of 1983. The

partnership did not accept the check and did not respond to the offer of retirement.

In addition to the payment of the bank note as described above, defendants-appellees each contributed an additional $6,500 to the partnership over the period from July 1984 to May 1986. These contributions apparently retired the remaining debt of the partnership to third parties, other than the tax liens and other assessments on the partnership property. Those amounts had not been paid at the time of trial.

In the plaintiff's first summarized assignment of error, he contends that the trial court erred in failing to sustain his demurrer to the counterclaims. Plaintiff argues that on the morning of the trial, the trial court informally overruled his demurrer and that plaintiff then answered the counterclaims by stating on the record a denial of all the allegations in the counterclaims, other than the identities of the parties. Plaintiff, in his brief, contends that he preserved his demurrer. Plaintiff acknowledges that the trial court's ruling on the demurrer and plaintiff's answer to the counterclaims are not set out in the record before us.

As the court stated in *Buckingham v. Wray*, 219 Neb. 807, 809, 366 N.W.2d 753, 756 (1985):

> In the absence of extraordinary circumstances, an appellate court will not consider or review a ruling of a trial court when the questioned ruling is not a part of the trial record. We will not speculate about proceedings in a trial court but must rely upon the record presented for review. [Citation omitted.]

If the plaintiff believed that the bill of exceptions contained prejudicial errors, he had the responsibility and the opportunity to amend the bill of exceptions. See Neb. Ct. R. of Prac. 5E (rev. 1989). We stated in *Campbell v. City of Ogallala*, 183 Neb. 238, 240, 159 N.W.2d 574, 576 (1968), "[T]he record of the trial tribunal in all appellate proceedings imports absolute verity. If such record is incomplete or incorrect, the remedy shall be by appropriate proceeding to secure correction thereof in the trial court."

Where there is no ruling on a demurrer in the record and there has been a trial on the merits, the demurrer will be

considered waived. *State ex rel. League of Municipalities v. Loup River P. P. Dist.*, 158 Neb. 160, 62 N.W.2d 682 (1954). Plaintiff's first assignment of error is without merit.

With reference to the second summarized assignment of error, the plaintiff contends the court erred in failing to adjudge plaintiff free of all liability to defendants-appellees and to the partnership. This assignment has no merit.

The plaintiff did not present the trial court with any possible basis for finding him free of liability to the partnership or to the individual partners upon final settlement. Under Neb. Rev. Stat. § 67-315(b) (Reissue 1986), the plaintiff was jointly liable for the debts of the partnership in this case. Absent any agreement among the partners and partnership creditors of the types specified in Neb. Rev. Stat. § 67-336 (Reissue 1986), the plaintiff's liability was unaffected by the dissolution. There was no such agreement in this case. The evidence at trial indicated that the partnership was insolvent and that the plaintiff will be liable for contribution upon final settlement. The plaintiff's assignment of error in this regard is without merit.

With further regard to plaintiff's second summarized assignment of error, it appears that plaintiff contends the trial court erred in not finding that plaintiff terminated his interest under paragraph 9 of the partnership agreement. Paragraph 9 provides generally for the purchase of the interest of a partner by the remaining partners in the event of death or severance of employment with Gateway. It provided two potential methods of termination of a partner's interest upon severance from Gateway. Paragraph 9(a) provided, in part, that in the event a partner ceased "to actually sell real estate in Lincoln County, Nebraska, said partner may offer to sell said real estate back to the partnership," using the provisions of the agreement applicable in the event of death to determine the value of such interest and provide for settlement of such interest. The record before us does not contain any evidence that plaintiff offered to sell the real estate back to the partnership under the formula referred to in paragraph 9(a).

We also find that plaintiff did not terminate his interest under paragraph 9(b) of the agreement, which provides that the partnership must purchase a partner's partnership property

"[i]n the event the terminating partner shall remain in Lincoln County, Nebraska, and remain active in the sale of real estate . . . ." The trial court found generally that plaintiff's actions did not trigger any specific form of termination under the partnership agreement, but that plaintiff's actions dissolved the partnership under the Uniform Partnership Act. We agree with those findings and, in our de novo review, find that the plaintiff did not remain active in the sale of real estate as contemplated in the partnership agreement, and thus plaintiff did not satisfy the conditions of paragraph 9(b) of the agreement. The trial court was correct in not applying paragraph 9(a) or 9(b) to any purported termination by plaintiff. Plaintiff's contentions to the contrary in this regard are without merit.

The third summarized assignment of error is directed at the propriety of the accounting in the trial court. Plaintiff's apparent contention is that the trial court should not have provided an accounting because the plaintiff had deleted his prayer for an accounting and the defendants-appellees' counterclaims were impermissible actions at law and not requests for an accounting. Even if plaintiff's late amendment was proper, it did not change the nature of his action. After the amendment the petition still requested relief which required an accounting of liabilities among the parties.

With respect to defendants-appellees' counterclaims, actions at law between partners are generally not allowed, in order to avoid piecemeal litigation. In *Younglove v. Liebhardt*, 13 Neb. 557, 14 N.W. 526 (1882), we held an action by a partner against a partner for work and labor performed for the partnership could not be maintained. However, in reversing the judgment in favor of the plaintiff partner in the *Younglove* case, we remanded the cause with leave to the plaintiff "to amend his petition and ask for an accounting." *Id.* at 558, 14 N.W. at 527.

In this case, the counterclaims were in conjunction with plaintiff's petition, which indicated that the partnership was dissolved and which initially requested an accounting. All parties requested relief in the nature of an accounting and such relief as the court deemed equitable. The following circumstances support the trial court's decision to provide for an accounting and to order the winding up of the partnership:

(1) The partnership was dissolved by the plaintiff's letter of termination; (2) prior to dissolution, the plaintiff failed to meet his obligation under the partnership agreement to contribute capital on an equal basis as needed for the operation of the partnership; (3) the defendant partners contributed capital beyond the amount required under the partnership agreement to prevent foreclosure on partnership assets; (4) there was evidence that the partnership was insolvent; (5) defendants-appellees refused to acknowledge dissolution and failed to account to the plaintiff; and (6) the partnership agreement did not provide otherwise. The accounting and final winding up were necessary to provide both the plaintiff and the defendants-appellees the relief they sought. The trial court did not err in providing an accounting and ordering the winding up of the partnership. Plaintiff's third assignment of error is without merit.

Plaintiff's fourth summarized assignment of error concerns the receiver appointed by the trial court. The appointment of a receiver may be treated as a final order. Neb. Rev. Stat. § 25-1090 (Reissue 1985). The plaintiff chose not to appeal within 30 days after the receiver was appointed. See Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 1988). Since the cause must be remanded in any event, the plaintiff's assignment of error in this regard will not be addressed. The costs of the receiver will be shared equally by each of the eight partners remaining at the time of trial. Whether a receiver may be appointed on remand remains an issue to be determined at that time.

The fifth summarized assignment of error relates to the trial court's finding, based upon the receiver's report, that the plaintiff is indebted to the partnership in the amount of $9,286.96. It may well be that the court's order achieved rough justice among the parties to this lawsuit, but on presentation of the precise issue it becomes apparent that the accounting was not properly done and the amount of the judgment was not properly calculated according to statutory principles. We agree with the plaintiff that the judgment of the trial court is not supported by the evidence.

The receiver's report stated that the assets of the partnership included a checking account with a balance of $1,614.02 as of

March 13, 1987; a promissory note to the partnership with a principal balance of $1,506.36 as of March 16, 1987 (with $50 due per month); and 6.37 acres of real estate subject to a 3-year lease that began on May 2, 1986, with rent of $75 per month and subject to an option. The real property is subject to an unspecified amount of taxes and assessments. The receiver's report contained an unsubstantiated statement that the value of the real estate "may not [sic] be exceeded by the taxes and assessments against it."

The receiver's report also stated that the sole remaining liability of the partnership, apparently other than unpaid taxes and assessments against partnership property, was a debt of $253.55 owed to a former partner, to be paid in installments of $6.23 each month.

The receiver's report went on to find that the six defendants-appellees had contributed a total of $74,295.67 to the partnership between December 1983 and May 1986, the time period during which the plaintiff refused to contribute. The receiver divided that amount by 8, the number of partners in the partnership during that period, to determine the plaintiff's share of $9,286.96.

The rules for determining accounts among partners after dissolution are found in Neb. Rev. Stat. § 67-340 (Reissue 1986). The receiver's report in this case failed to account for the assets of the partnership as required by § 67-340(a)(I) and (c). The plaintiff was entitled under § 67-340(c) to have the assets of the partnership applied against the liabilities of the partnership before calculating his share of additional contribution. In determining plaintiff's contribution, the trial court failed to account for the $1,614.02 in the checking account; a note owing to the partnership for the amount of $1,506.36; and the value, if any, of the 6.37 acres of real estate owned by the partnership. Such matters must be corrected on a proper windup of the partnership.

Although the plaintiff did not argue any issue in this respect, the accounting approved by the trial court also failed to consider the nature and propriety of partnership expenditures subsequent to the dissolution and whether contributions by the partners were loans to the partnership, bearing interest under

Neb. Rev. Stat. § 67-318(c) (Reissue 1986), or whether the contributions were capital in nature. Loans by the partners to the partnership are accounted for under § 67-340(b)(II), and capital contributions are accounted for under § 67-340(b)(III). The fifth assignment of error has merit and is a further basis for remand as stated above.

In connection with the plaintiff's sixth summarized assignment of error, any judgment based upon the accounting should be in favor of the defendants-appellees on their counterclaims and not in favor of the partnership. In remanding the cause, we note that this partnership was dissolved April 7, 1984, and its affairs have not been properly wound up and the partnership has not been properly terminated. The cause is remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

ROSE MARIE REIFSCHNEIDER, APPELLANT AND CROSS-APPELLEE, V. NEBRASKA METHODIST HOSPITAL, APPELLEE AND CROSS-APPELLANT.

447 N.W.2d 622

Filed November 3, 1989. No. 87-1069.

1. **Estoppel: Fraud: Limitations of Actions.** The equitable doctrine of estoppel in pais may, in a proper case, be applied to prevent a fraudulent or inequitable resort to a statute of limitations, and a defendant may by his representations, promises, or conduct be so estopped, where the other elements of estoppel are present.
2. **Estoppel.** Equitable estoppels rest largely on the facts and circumstances of the particular case.
3. **Limitations of Actions: Estoppel.** Generally, if a plaintiff has ample time to institute an action after the inducement of delay has ceased to operate, he or she cannot excuse the failure to act within the statutory time on the ground of estoppel.
4. **Estoppel.** The 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; (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.

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

Michael G. Goodman, of Matthews & Cannon, P.C., for appellant.

Robert M. Slovek, of Sodoro, Daly & Sodoro, for appellee.

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

BOSLAUGH, J.

The plaintiff, Rose Marie Reifschneider, commenced this action on May 1, 1980, to recover damages for the injuries she sustained on April 4, 1977, which she alleged were caused by the negligence of the defendant, Nebraska Methodist Hospital (Methodist). In *Reifschneider v. Nebraska Methodist Hosp.*, 222 Neb. 782, 387 N.W.2d 486 (1986), this court reversed the order of the district court sustaining Methodist's motion for summary judgment and remanded the cause for further proceedings.

The plaintiff's third amended petition, filed April 7, 1987, alleged that she had been injured on April 4, 1977, as the result of the malpractice and negligence of Methodist's employees; that in order to induce plaintiff to forgo filing suit for malpractice and negligence, Methodist's agent agreed to pay all of the expenses which plaintiff might incur as a result of the April 4 accident; that plaintiff relied on this promise and "forewent the filing of such suit"; that Methodist paid all expenses from April 1977 through July 1978, but referred plaintiff to Methodist's insurance carrier at that time; that during subsequent settlement negotiations with Methodist and its insurer, plaintiff's father was assured that plaintiff's medical

bills would be paid as agreed; that because of the conduct of Methodist and its agents, plaintiff and her father "were lulled into a sense of security and belief that plaintiff's expenses would always be taken care of, and that it was appropriate for her, therefore, to trust the defendant and forego the filing of suit for malpractice as she had agreed"; and that "defendant's failure to comply with its promise after the defendant had changed its position to her detriment estops it from claiming the running of the statute of limitations in this case."

In its answer, Methodist affirmatively alleged the statute of limitations as a defense and disputed the facts of any estoppel claimed by the plaintiff. Methodist also affirmatively alleged that neither it nor its agents were negligent.

On the defendant's motion, the trial was bifurcated pursuant to Neb. Rev. Stat. § 25-221 (Reissue 1985) to determine the issues related to Methodist's statute of limitations affirmative defense. Apparently, the parties are in agreement that the applicable statute of limitations is Neb. Rev. Stat. § 44-2828 (Reissue 1988), which provides that any action to recover damages based on malpractice or professional negligence shall be commenced within 2 years next after the act or omission providing the basis for such action.

The plaintiff's request for a jury trial on the statute of limitations issue was denied. After a trial to the court without a jury, the court found the statute of limitations ran on April 4, 1979, and dismissed the plaintiff's third amended petition. The plaintiff has appealed, contending the court erred in finding she was not entitled to a jury trial on the statute of limitations issue. Methodist has cross-appealed, claiming the district court erred in failing to sustain its motion for a directed verdict.

The record shows that the plaintiff was injured when she fell from an unattended hospital cart in the emergency room at Methodist on April 4, 1977. The plaintiff's father, Jacob Reifschneider, was a member of the hospital board of trustees on the date in question and acted as plaintiff's agent throughout the attempted resolution of the matter. Jacob Reifschneider was also a trustee for the Eppley Foundation, which had provided grants to Methodist.

The plaintiff concluded that Methodist was responsible for

her injuries and considered filing suit against Methodist as early as April 1977. On April 8, Jacob Reifschneider contacted an attorney who, in turn, referred him to attorney Richard Fellman, who agreed to handle the case. Fellman's letter of April 15, 1977, to John Estabrook, the president of Methodist, made claim for the plaintiff's injuries and damages and advised Estabrook that he had instructions to proceed, if necessary, with litigation.

Jacob Reifschneider met with Estabrook on April 16, 1977. During this meeting Jacob Reifschneider and Estabrook agreed that Methodist would pay the plaintiff's medical expenses arising from the April 4 accident. Estabrook testified that he agreed to pay the expenses for a short period of time and advised Jacob Reifschneider to file a claim with Methodist's insurance company. Although there was no dollar limit on the agreement, Estabrook testified that he and Reifschneider believed the matter would be cleared up within 6 months. Jacob Reifschneider testified by deposition that there was no time limit on the agreement. Jacob Reifschneider and Estabrook did agree during the April 16 meeting that a lawsuit against Methodist would not be filed if Methodist would pay the plaintiff's medical expenses. Fellman was discharged on April 18, 1977.

Pursuant to the agreement, Methodist absorbed its own costs for the plaintiff's treatment and paid the plaintiff's doctor bills. Methodist also paid all expenses associated with four trips which the plaintiff made to the Mayo Clinic in July, August, and October 1977, and May 1978.

In July 1978, Methodist stopped paying the doctor bills and began billing the plaintiff directly for her hospital expenses. Estabrook testified that in July 1978 he advised Reifschneider to contact Methodist's insurance agent, Harry Koch, and file a claim with Methodist's insurance company.

On September 20, 1978, the plaintiff and her father met with Dennis Donner, a claims representative for The St. Paul Fire and Marine Insurance Company (St. Paul), Methodist's insurer, to discuss the merits of the plaintiff's claim and the statute of limitations issue. Donner investigated the claim and on September 28, 1978, wrote a memorandum to the plaintiff

advising her that the statute of limitations was 2 years under the Nebraska Hospital-Medical Liability Act. The plaintiff was represented by attorney Ray Simon on this date.

During the fall of 1978, the plaintiff, her father, and attorneys Ray Simon and John Miller met to discuss investigating a malpractice claim against Methodist. The plaintiff testified that she retained Miller in October 1978. On October 27, 1978, the plaintiff signed an authorization for Simon and Miller to examine her medical records. The purpose of the authorization was to assist her attorneys in preparing a case against Methodist "if . . . need be." The plaintiff testified that at the time she hired Miller, she personally believed that Methodist would not settle the claim and that she probably would have to sue Methodist to get satisfaction.

Jacob Reifschneider continued to negotiate with St. Paul's agent Koch and Estabrook regarding settlement of the claim. He met with Koch and Estabrook on January 31, 1979, to discuss a $250,000 settlement. Jacob Reifschneider's notes of this meeting indicate that Simon urged the plaintiff to proceed with litigation. Jacob Reifschneider, however, did not want to litigate.

On February 28, 1979, Donner wrote a letter to the plaintiff stating, "It is our conclusion that there is no liability on the part of [Methodist] and I will be unable to offer settlement." Donner was willing to offer $5,000 to close St. Paul's file and avoid litigation. The plaintiff testified she understood Donner's letter to mean that St. Paul would not settle and that St. Paul was Methodist's insurance carrier. She was represented by Miller on this date.

Notwithstanding St. Paul's denial of liability, settlement negotiations continued because of Reifschneider's longstanding relationship with Methodist and his position with the Eppley Foundation. Koch advised Jacob Reifschneider on March 5, 1979, that St. Paul would not settle, but on March 28, Koch proposed that St. Paul and Methodist establish a $25,000 escrow fund to pay the plaintiff's expenses for a 10-year period. Koch testified, however, that he never recommended to plaintiff that she should not file suit.

Even though no lawsuit had been filed by April 4, 1979,

Koch and Estabrook continued to discuss settlement options with Jacob Reifschneider. On April 28, 1979, Jacob Reifschneider declined the $25,000 settlement offer. Apparently, the offer remained open, but on June 20, 1979, plaintiff herself returned a $12,500 check to Estabrook and demanded $250,000. As of August 8, 1979, the $25,000 offer still remained open. Present counsel were retained in August 1979. This action was filed on May 1, 1980.

The sole issue on the appeal is whether equitable estoppel, or estoppel in pais, applies in this case.

"[T]he equitable doctrine of estoppel in pais may, in a proper case, be applied to prevent a fraudulent or inequitable resort to a statute of limitations and a defendant may, by his representations, promises, or conduct be so estopped where the other elements of estoppel are present." *State Farm Mut. Auto. Ins. Co. v. Budd*, 185 Neb. 343, 346, 175 N.W.2d 621, 623-24 (1970); *Luther v. Sohl*, 186 Neb. 119, 181 N.W.2d 268 (1970). Equitable estoppels rest largely on the facts and circumstances of the particular case. *Luther v. Sohl, supra*; *Muller v. Thaut*, 230 Neb. 244, 430 N.W.2d 884 (1988). Generally, if a plaintiff has ample time to institute an action after the inducement of delay has ceased to operate, he or she cannot excuse the failure to act within the statutory time on the ground of estoppel. *Luther v. Sohl, supra*; *MacMillen v. A. H. Robins Co.*, 217 Neb. 338, 348 N.W.2d 869 (1984); *Seagren v. Peterson*, 225 Neb. 747, 407 N.W.2d 790 (1987).

In *Luther v. Sohl, supra*, the plaintiff was injured on December 14, 1964, while assisting the defendant in repairing a roof. Both the plaintiff and defendant were insured by Farm Bureau Insurance Company. Plaintiff was aware on the date of his injury that the statute of limitations was 4 years and that it would run on December 14, 1968. In January 1967, the plaintiff contacted Farm Bureau in an attempt to settle his claim. A Farm Bureau agent visited the plaintiff at his home on November 1, 1967, to obtain medical releases. On June 13, 1968, the plaintiff expressed concern to the Farm Bureau agent about the statute of limitations. The agent told the plaintiff that as long as they were still negotiating he need not worry. The agent then made a specific settlement offer which was refused.

On July 10, 1968, the Farm Bureau agent reiterated the offer of June 13 and advised the plaintiff and his wife that it was the final amount the company would offer. Plaintiff again refused the offer, and the agent stated that he would attempt to get more. On July 18, 1968, the agent notified the plaintiff that Farm Bureau would not offer a higher settlement. The plaintiff had no further negotiations with Farm Bureau after July 18, 1968. Both the plaintiff and his wife testified that they believed Farm Bureau ceased negotiating in July 1968. Under these circumstances, we held that the defendant was not estopped from raising the statute of limitations as a defense in the plaintiff's action for personal injuries.

> [T]he evidence is clear that the only possible inducement for delay was a representation that as long as they were negotiating the plaintiff need not worry about the statute of limitations. That representation was made June 13, 1968. It is also clear that the last negotiations were on July 18, 1968, and plaintiff at that time "supposed" the insurance company had ceased negotiating. Almost 5 months went by after that before the bar of the statute finally fell.

Id. at 122, 181 N.W.2d at 270.

In *Seagren v. Peterson, supra*, the plaintiff was damaged because of the defendant attorney's failure to file an estate tax return on May 1, 1980. The default was not discovered until June 1983, and the plaintiff had until June 1984 to file an action, pursuant to Neb. Rev. Stat. § 25-222 (Reissue 1985). The lawsuit was not filed until January 28, 1985, and the defendant's motion for summary judgment was sustained because the action was barred by the statute of limitations. On appeal, the plaintiff claimed that his failure to comply with the statute of limitations should be excused on the ground of estoppel because the defendant assured him several times that he would take care of any interest and penalties resulting from the failure to file the tax return. This court determined that estoppel did not apply to the facts of the case:

> [I]t became quite apparent by the time [defendant] withdrew from the case in June of 1983 and plaintiff had engaged other counsel that [defendant] was not going to

> make good on his promise. Seven more months went by before the estate tax return was filed, in the latter part of January 1984, and the amount of tax was determined and presumably paid. Plaintiff therefore had approximately an additional 5 months within which to file his action under the 1-year extended limitation.

225 Neb. at 750, 407 N.W.2d at 792-93.

The plaintiff relies on *State Farm Mut. Auto. Ins. Co. v. Budd*, 185 Neb. 343, 175 N.W.2d 621 (1970), in which we held that the defendant was estopped from raising the statute of limitations as a defense to the plaintiff's personal injury claim. In that case, State Farm's insured, Sam Garafalo, was involved in an automobile accident with defendant William Budd on December 26, 1961. State Farm paid Garafalo the amount of the damages to his automobile and was subrogated to his claim against Budd in the sum of $1,650. Budd was insured by Aetna Casualty & Surety Company.

State Farm notified Aetna of its subrogation claim. On March 31, 1962, Aetna replied that the subrogation claim would be considered upon conclusion of the personal injury claim arising out of the accident. On 14 separate occasions between April 16, 1962, and October 21, 1965, Aetna informed State Farm that its file was still open and that it would consider the subrogation claim after the bodily injury claim was settled. On February 8, 1966, Aetna notified State Farm that the statute of limitations had run and rejected the subrogation claim.

Under those circumstances, the court stated:

> "One cannot justly or equitably lull his adversary into a false sense of security, and thereby cause him to subject his claim to the bar of the statute of limitations, and then be permitted to plead the very delay caused by his conduct as a defense to the action when brought." [Citations omitted.]
>
> In the present case, defendant's insurer on three occasions assured plaintiff it would "honor" plaintiff's claim and concedes it was liable for the full amount of the claim. Having convinced plaintiff that its claim would be honored or paid, it was not difficult to secure multiple extensions of time until the statute of limitations had run

> against the claim. In reliance on Aetna's assurances, plaintiff forbore suit. Now defendant seeks to take advantage of his insurer's trickery and dishonesty to defeat plaintiff's just claim. To permit him to do so would be contrary to equity, morality, justice, and good conscience. We find that defendant should be held to the position previously assumed by his insurer and should be required to "honor" plaintiff's claim.

Id. at 347-48, 175 N.W.2d at 624.

In the present case, it is uncontroverted that the plaintiff did not file suit until more than 3 years after she was injured. The plaintiff does not claim that the 2-year statute of limitations set forth in § 44-2828 is inapplicable to her claim or that her cause of action falls within the discovery exception to that statute. The only issue with respect to the statute of limitations is whether the defendant was estopped from pleading the statute of limitations because of its alleged representations to the plaintiff. On this issue, the plaintiff alleged that she and her father "were lulled into a sense of security and belief that plaintiff's expenses would always be taken care of" during settlement negotiations with the defendant.

The 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; (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. [Citations omitted.]

Jennings v. Dunning, 232 Neb. 366, 371, 440 N.W.2d 671, 675 (1989). See, also, *Sevier v. School Dist. HC 1, ante* p. 293, 444

N.W.2d 897 (1989).

The plaintiff testified that she believed that the defendant was responsible for her injuries dating from April 1977. She considered filing suit in April 1977, but agreed not to do so based on Methodist's promise that it would pay her medical expenses associated with the April 4, 1977, accident. In July 1978, however, her father was notified that Methodist would no longer pay these expenses and was advised to file an insurance claim. Methodist made no payments after July 1978. In September 1978, Methodist's insurer advised plaintiff that the statute of limitations on the claim was 2 years. In October 1978, approximately 6 months before the statute of limitations ran, the plaintiff determined that she would sue Methodist if she did not get satisfaction and believed that she would not get a satisfactory settlement from Methodist unless she filed suit. Plaintiff was represented by counsel when she was informed by the insurance company that the statute of limitations was 2 years, and when her insurance claim was denied on February 28, 1979.

The plaintiff herself testified that she was not induced to forgo filing suit by Methodist's alleged agreement to pay her medical bills:

> Q. Did any representative of the hospital or the insurance company tell you that in exchange for your cooperation that a settlement would be guaranteed for you?
>
> A. No.
>
> Q. Did they even tell you that it was possible, likely?
>
> A. No. They were just reviewing for the hospital.
>
> Q. So as you understood it there were no guarantees of settlement?
>
> A. There was never any guarantee to my knowledge or stated to me.

The facts that the plaintiff knew of the applicable statute of limitations, was represented by attorneys prior to the statute's running, and believed that she would not receive satisfaction on her claim short of litigation, all were uncontroverted at trial. In order to prevail, the plaintiff was required to demonstrate reliance, in good faith, upon conduct or statements of the

defendant or its agents. The record shows as a matter of law that there were no statements or conduct such as was alleged by the plaintiff or reliance on such by the plaintiff. The evidence was insufficient to create a question of fact on the issue of estoppel.

In the absence of a fact question, we need not decide whether the trial court erred in failing to grant the plaintiff's request for a jury trial. It is unnecessary to consider the cross-appeal.

The judgment of the district court is affirmed.

AFFIRMED.

PATRICIA J. WICKER, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JACK CALVIN WICKER, DECEASED, APPELLANT, V. CITY OF ORD, A NEBRASKA POLITICAL SUBDIVISION, ET AL., APPELLEES.

447 N.W.2d 628

Filed November 3, 1989. No. 88-105.

1. **Actions: Torts: Negligence: Principal and Agent: Liability: Releases.** The valid release of an agent in a tort action based exclusively on the alleged negligence of that agent also releases the principal from liability, even though the release specifically reserves all claims against the principal.
2. **Principal and Agent: Liability: Immunity.** The immunity Neb. Rev. Stat. § 71-5111 (Reissue 1986) grants to certified ambulance attendants shields their principals from liability to the same extent as it shields the agent-attendants.
3. **Summary Judgment.** Summary judgment is properly granted 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 which may be drawn from the material facts and the moving party is entitled to judgment as a matter of law.
4. **Summary Judgment: Appeal and Error.** In reviewing an order granting a summary judgment, the Nebraska Supreme 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.
5. **Negligence: Intent: Proof: Words and Phrases.** In order for an action to be willful or wanton, the evidence must prove that a defendant had actual knowledge that a danger existed and that the defendant intentionally failed to act to prevent harm which was reasonably likely to result.

6. **Negligence: Intent: Words and Phrases.** To constitute willful negligence, the act done or omitted must be intended or must involve such reckless disregard of security and right as to imply bad faith.
7. _____: _____: _____. Wanton negligence is the doing of or failing to do an act with reckless indifference to the consequences and with consciousness that the act or omission would probably cause serious injury.
8. **Negligence: Words and Phrases.** Gross negligence means great and excessive negligence, that is, negligence in a very high degree. It indicates the absence of slight care in the performance of a duty.
9. **Negligence.** Whether gross negligence exists must be ascertained from the facts and circumstances of each particular case and not from any fixed definition or rule.

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

Peter B. Beekman, of Weaver, Beekman & Merz, for appellant.

John R. Brownell, of Lauritsen, Baker, Brownell & Brostrom, for appellees.

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

CAPORALE, J.

Plaintiff-appellant, Patricia J. Wicker, individually and as the personal representative of the estate of her deceased husband, Jack Calvin Wicker, sued the defendants-appellees, City of Ord, Nebraska, and Rural Fire Protection District #2 of Valley County, Nebraska, under the provisions of the Political Subdivisions Tort Claims Act for her husband's loss of his chance for survival. Plaintiff appeals from the trial court's sustainment of defendants' joint motion for summary judgment, assigning six errors, which merge to claim that the court below erroneously (1) determined that Neb. Rev. Stat. § 71-5111 (Reissue 1986) shields defendants from liability; (2) found that defendants' personnel did not act in a willful, wanton, or grossly negligent manner; and (3) failed to find, as a matter of law, that defendants' personnel did act in a willful, wanton, or grossly negligent manner. We affirm.

Before reviewing the facts, it is appropriate that we set forth the language of § 71-5111:

> No certified ambulance attendant who provides public emergency care or rescue service shall be liable in any civil action to respond in damages as a result of his acts of commission or omission arising out of and in the course of his rendering in good faith any such service. Nothing in this section shall be deemed to grant any such immunity for liability arising out of the operation of any motor vehicle in connection with such service, nor shall immunity apply to any person causing damage or injury by his willful, wanton, or grossly negligent act of commission or omission.

For purposes of the foregoing section, Neb. Rev. Stat. § 71-5102(2) (Reissue 1986) defines "ambulance attendant" as one "trained or qualified to provide for, or any other individual who provides for, the care of patients while such patients are being transported in an ambulance."

The record establishes that the city contracted to provide emergency rescue services to the aforenamed fire protection district through the city's volunteer fire department, known as Ord 99. Plaintiff pled, and defendants admitted, that Ord 99 acted throughout the event we are about to describe as the agent of the city. The deposition testimony and other exhibits received in evidence fail to establish that the rural fire protection district was negligent in entering into the contract with the city or that the district did anything other than receive the services for which it contracted. Thus, the record fails to establish any basis for imposing liability on the fire protection district, see *Dabelstein v. City of Omaha*, 132 Neb. 710, 273 N.W. 43 (1937), and, thus, the judgment of the trial court as to that defendant must be, and is hereby, affirmed.

The remainder of this opinion concerns itself with the issues plaintiff's summarized assignments of error raise with respect to the City of Ord. In that regard, the record shows that the decedent was working as a concrete form carpenter at a construction site in rural Valley County, apparently within the jurisdiction of the fire protection district, when, at approximately 4 p.m., he collapsed from an unknown cause. After falling to the ground, the stricken victim began convulsing, vomited, and apparently voided himself. As his

coworkers gathered around him, one of them, Steve Anderson, began to administer cardiopulmonary resuscitation and was later joined by Joseph Ambrose. While those two continued resuscitation efforts, a foreman at the construction site summoned an ambulance to the scene.

The Ord Police Department dispatcher's log shows that the alarm summoning volunteer rescue workers from Ord 99 was sounded at 4:20 p.m. It was necessary for the ambulance to travel over rough terrain in order to reach the construction site, which was located approximately 10.5 miles from Ord, and, as a result, the Ord 99 rescue workers arrived at the scene approximately 20 to 25 minutes after the alarm was sounded. The record further shows that a total of 14 volunteers responded to the alarm, 8 of whom were volunteer emergency medical technicians who had received only the most basic level of training.

When the rescue workers arrived, they found members of the construction crew gathered around the stricken victim, with one crewmember, Anderson, administering resuscitation. Frank Smedra was apparently the first volunteer to reach the victim. Smedra asked Anderson to discontinue resuscitation efforts so that he (Smedra) could check the stricken victim's vital signs. After Smedra and at least one other volunteer had examined the victim, the volunteers concluded that death had occurred, and did not resume resuscitation efforts. A deputy sheriff was then called to the scene to pronounce the victim dead, after which decedent was transported to a mortuary.

The record includes evidence that the volunteers acted improperly by failing to continue or resume resuscitation efforts upon the stricken victim. According to applicable standards promulgated by the American Heart Association and the American Medical Association, such efforts should have been resumed immediately after Smedra had checked the vital signs, and the decedent should have been transported to a hospital, with resuscitation efforts continued during transportation.

The deposition of Stephen W. Carveth, M.D., a cardiovascular and thoracic surgeon, provides evidence that a stricken person's chance of survival is "up to . . . 50 percent" if

cardiopulmonary resuscitation is administered within 3 minutes. However, the deposition of Dale L. Kemmerer, M.D., provides evidence that decedent's chance of survival may have been considerably less than 50 percent even if such efforts had been continued in this case.

Eight of the responding volunteers, including Smedra and Wayne D. Brown, the two deposed by plaintiff, had received their initial emergency medical technician training, consisting of approximately 82 hours of instruction, 12 to 14 years prior to the subject incident. Both Brown and Smedra have had some limited additional followup training.

When deposed, Smedra was asked if he recalled the procedure for terminating resuscitation efforts after they had been initiated. He replied, "It would be — one-man would be until somebody qualified who would come up and take over or if somebody would take over for you or a physician to take over for you, or if you would just be exhausted to the point that you couldn't." The record does not indicate whether Smedra was aware of or remembered the proper guidelines for terminating resuscitation efforts at the time he went to decedent's aid.

In giving his deposition, Brown indicated that Ord 99 had no procedure for discontinuing resuscitation efforts after they had been initiated. Brown did not recall what had been taught in his emergency medical technician training course with respect to the proper termination of such efforts.

In view of the errors assigned and the resolution we reach, we assume, as the trial court apparently did, but do not decide, that plaintiff has pled a theory on which she might, under appropriate circumstances, recover under our law.

We begin our analysis of the question presented by the first summarized assignment of error, whether the immunity § 71-5111 grants to certified ambulance attendants also applies to their principals, by reviewing *Pullen v. Novak*, 169 Neb. 211, 99 N.W.2d 16 (1959). In that case a young child was injured when struck by an automobile. He named his father and his father's employer as defendants in the case on the theory that the father's negligence was within the scope of his employment and caused the accident. The petition was dismissed as to the father on the ground that an unemancipated minor could not

sue for the negligent tort of a parent. In affirming the summary judgment entered in favor of the father's employer, this court stated:

> It should be remembered that [the employer's] liability, if any, is not that of a joint tort feasor but derivative solely from the liability of [the father], if any. . . .
>
> . . . .
>
> In Emerson v. Western Seed & Irr. Co., [116 Neb. 180, 216 N.W. 297 (1927)], we held a married woman could not sue her husband to recover damages for injuries to her person and consequently she could not sue her husband's employer for damages caused by the husband's negligence, stating as the reason for so holding that: "It would seem that to permit a recovery against the employer results simply in countenancing an encircling movement where a frontal attack upon the husband is inhibited." . . . " 'The primary liability to answer for such an act, therefore, rests, upon the employee, and when the employer is compelled to answer in damages therefor he can recover over against the employee.' " . . .
>
> . . . .
>
> Having come to the conclusion that even if [the father] could be said to be guilty of the specific charges of negligence made against him, a question which we assumed in favor of appellant but factually did not decide, such guilt would not support a verdict in favor of appellant against [the employer] because, as we said, appellant could not maintain an action therefor against [the father].

169 Neb. at 224-26, 99 N.W.2d at 25-26.

While the law concerning interspousal immunity has changed, *Imig v. March*, 203 Neb. 537, 279 N.W.2d 382 (1979), our attention has been called to nothing, nor did our independent research efforts reveal anything, which suggests that the law of agency applied in *Pullen* has changed.

It is also a well-established rule in this state that " '[i]n a tort action based exclusively on the alleged negligence of an employee or agent, a valid release of that employee-agent releases the employer or prinicpal [sic] from liability, even

though the release specifically reserves all claims against the employer-principal.' " *Pioneer Animal Clinic v. Garry*, 231 Neb. 349, 354, 436 N.W.2d 184, 188 (1989), quoting *Dickey v. Meier*, 188 Neb. 420, 197 N.W.2d 385 (1972). *Mallette v. Taylor & Martin, Inc.*, 225 Neb. 385, 406 N.W.2d 107 (1987), and *Ericksen v. Pearson*, 211 Neb. 466, 319 N.W.2d 76 (1982), are in accord.

Moreover, when a public employee has been found to be immune from liability, this court has generally held that such immunity extends to the political subdivision. For example, in *Allen v. County of Lancaster*, 218 Neb. 163, 352 N.W.2d 883 (1984), a county health officer's discretionary immunity also immunized the county from liability. And in *Koepf v. County of York*, 198 Neb. 67, 251 N.W.2d 866 (1977), a sheriff's quasi-judicial immunity for ministerial acts also immunized the county from liability.

Applying the foregoing principles of agency to the question at hand, we conclude that the immunity § 71-5111 grants to the attendants who responded to the call in this case shields Ord 99 as their principal from liability to the same extent as it shields the agent-attendants.

That determination makes it necessary that we address the remaining two summarized assignments of error, which concern the degree of the negligence proved. As they are the converse of each other, they will be treated together.

In undertaking that analysis, it is well to begin by reminding ourselves that summary judgment is properly granted 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 which may be drawn from the material facts and the moving party is entitled to judgment as a matter of law. Moreover, 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. *Nichols v. Ach, ante* p. 634, 447 N.W.2d 220 (1989); *Graphic Resources, Inc. v. Thiebauth, ante* p. 592, 447 N.W.2d 28 (1989); *Bank of Burwell v. Kelley, ante* p. 396, 445 N.W.2d

871 (1989); *First Security Sav. v. Aetna Cas. & Surety Co., ante* p. 335, 445 N.W.2d 596 (1989); *State Farm Fire & Cas. Co. v. Victor,* 232 Neb. 942, 442 N.W.2d 880 (1989).

Since the immunity granted by § 71-5111 does not extend to willful, wanton, or gross negligence, the question we must ask is whether it can be said as a matter of law that the city's personnel were not so negligent.

Addressing first the standard applicable to willful or wanton conduct, we look to *Guenther v. Allgire*, 228 Neb. 425, 428-29, 422 N.W.2d 782, 785 (1988), in which this court stated:

> In order for an action to be willful or wanton, the evidence must prove that a defendant had *actual* knowledge that a danger existed and that the defendant *intentionally* failed to act to prevent harm which was reasonably likely to result. The term imparts knowledge and consciousness that injury is likely to result from the act done or the omission to act, and a constructive intention as to the consequences. *Gallagher v. Omaha Public Power Dist.*, 225 Neb. 354, 405 N.W.2d 571 (1987).
>
> To constitute willful negligence the act done or omitted must be intended or must involve such reckless disregard of security and right as to imply bad faith. Wanton negligence has been said to be doing or failing to do an act with reckless indifference to the consequences and with consciousness that the act or omission would probably cause serious injury. *Id.*, quoting from *Garreans v. City of Omaha*, 216 Neb. 487, 345 N.W.2d 309 (1984).

(Emphasis in original.)

In *Gallagher v. Omaha Public Power Dist.*, 225 Neb. 354, 405 N.W.2d 571 (1987), cited in *Guenther, supra*, suit was brought against Omaha Public Power District for injuries a boy sustained while sledding on property owned by the district and made available to the public for recreational purposes. Consequently, the land was subject to the Recreation Liability Act; therefore, the district could be held liable only for willful or malicious failure to guard or warn against a dangerous condition on the land. The accident occurred when the boy's sled struck a metal object which was embedded in the snow. The suit alleged that the district's failure to warn of the dangerous

condition of the lot donated for recreational purposes constituted a willful and malicious act on the part of the district. In resolving the issue, this court stated:

> We have further examined the record in its entirety and find no evidence to support a claim that the District had *actual knowledge* that a danger existed, and, therefore, the District could not be found to have willfully or maliciously failed to guard or warn against such dangerous condition or structure as required by § 37-1005....
>
> ....
>
> In view of the fact that the evidence fails to disclose that the defendant willfully or maliciously failed to guard or warn against the dangerous conditions or structure, the District was relieved of liability as a matter of law.

(Emphasis supplied.) *Gallagher, supra* at 359, 405 N.W.2d at 575.

While plaintiff argues that the volunteer attendants intentionally discontinued efforts to revive the victim through cardiopulmonary resuscitation and that they knew that proper procedures required them to continue resuscitation efforts and transport the victim to a hospital, it nonetheless cannot be said that the volunteers acted in a willful or wanton manner. First, while Smedra apparently knew the proper termination procedures at the time he was deposed, nothing in the record indicates that he remembered them at the time he went to the victim's aid. Even if Smedra or any of the other attendants responding to the call did remember that according to recognized standards resuscitation efforts should have been continued, the danger which was to be avoided here, according to plaintiff's theory, was the possibility that the victim would lose his chance of survival, and not the danger that recognized procedures for termination of resuscitation efforts would not be followed. Because the attendants were convinced that the victim was dead, they had no knowledge of the danger that the discontinuance of resuscitation efforts could result in the loss of the victim's chance of survival. Because the attendants were not aware of that danger, they did not have the requisite actual knowledge required under *Gallagher* to enable them to

extinguish the victim's chance of survival through a willful or wanton act.

The next question, then, is whether the attendants acted in a manner which was grossly negligent. *Jones v. Foutch*, 203 Neb. 246, 252, 278 N.W.2d 572, 576 (1979), provides the standard for determining the existence of such negligence: " ' "Gross negligence means great and excessive negligence; that is, negligence in a very high degree. It indicates the absence of slight care in the performance of a duty." ' "

> "[W]hether gross negligence exists must be ascertained from the facts and circumstances of each particular case and not from any fixed definition or rule. [Citation omitted.] In case of doubt or where reasonable minds might differ the evidence must be resolved in favor of the existence of gross negligence, in which case it is a question for the jury."

Id. at 254, 278 N.W.2d at 577.

Smedra, employed as a lineman for the Loup Valley Rural Electrification Association and the first attendant onto the scene, and seven other volunteer certified ambulance attendants responded to the alarm summoning them to the aid of the victim. When they arrived at the scene, they examined the victim in the manner in which they had been trained and concluded that he had died. While the attendants may have been negligent in failing to remember recognized protocol for terminating cardiopulmonary resuscitation, or in failing to follow the proper procedure if they did remember it (perhaps even negligent as a matter of law), no reasonable person could conclude that the volunteer attendants acted without slight care.

We thus conclude that as to the city there exists no genuine issue concerning any fact or as to the inferences to be drawn therefrom and that it is likewise entitled to judgment as a matter of law and was properly granted summary judgment.

AFFIRMED.

WHITE and FAHRNBRUCH, JJ., concur in the result.

STATE OF NEBRASKA, APPELLEE, V. SCOTT A. REICHSTEIN, APPELLANT.

447 N.W.2d 635

Filed November 3, 1989. No. 88-943.

1. **Criminal Law: Statutes.** A penal statute is strictly construed and nothing will be recognized, presumed, or inferred that is not expressed, unless necessarily or unmistakably implied in order to give effect to the statute.
2. **Motor Vehicles: Licenses and Permits: Proof.** Revocation for 15 years is not an element of the offense of driving with a revoked license under Neb. Rev. Stat. § 39-669.07(c) (Supp. 1987).
3. **Indictments and Informations.** To charge a statutory offense, the information or complaint must contain a distinct allegation of each essential element of the crime as defined by the law creating it, either in the language of the statute or its equivalent.
4. **Jury Instructions.** It is the duty of the trial court to instruct the jury on the correct law.
5. **Jury Instructions: Appeal and Error.** It is not error for the trial court to omit inapplicable portions of a statute in a jury instruction.
6. _____: _____. Failure to give a jury instruction only constitutes reversible error if there is prejudice to the defendant.

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

Calvin D. Hansen for appellant.

Robert M. Spire, Attorney General, and Terri M. Weeks for appellee.

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

GRANT, J.

This is an appeal from the defendant-appellant's conviction under Neb. Rev. Stat. § 39-669.07(c) (Supp. 1987) of driving while his license was revoked pursuant to multiple convictions of driving while under the influence of alcohol.

On May 29, 1986, the defendant pled guilty to an information in the county court for Red Willow County charging him with his third offense of driving while intoxicated under § 39-669.07 (Cum. Supp. 1986). Section 39-669.07(3) (Cum. Supp. 1986) was applicable to the defendant because of his multiple convictions. That subsection, so far as is applicable

here, appears at § 39-669.07(c) (Supp. 1987), and states:

> If such person (i) has had two or more convictions under this subsection since July 17, 1982 . . . such person shall be guilty of a Class W misdemeanor, and the court shall . . . order such person not to drive any motor vehicle . . . for a period of fifteen years from the date of his or her conviction and shall order that the operator's license of such person be revoked for a like period.

On July 10, 1986, the county court for Red Willow County sentenced defendant as follows:

> IT IS THEREFORE ORDERED that the defendant be sentenced to pay a fine of $250 plus court costs of $51; be sentenced to serve 90 days in jail . . . and it is further ordered that the defendant not drive any motor vehicle in the State of Nebraska for any purpose for a period of five years and that his operator's license be revoked for a like period.

It is apparent that the sentence was erroneous and resulted in defendant's receiving a lesser sentence than required by the statute. First, Neb. Rev. Stat. § 28-106(1) (Cum. Supp. 1986) provides that the minimum fine for a third offense Class W misdemeanor is $500, and second, § 39-669.07(c) provides that the period of revocation shall be 15 years. The defendant's sentence for his third driving while intoxicated conviction included a revocation of his operator's license for 5 years, rather than for the 15 years mandated by the statute. If either the State or defendant had timely appealed from the erroneous sentence of July 10, 1986, the matter could have been corrected. See, *State v. Ulrich*, 217 Neb. 817, 351 N.W.2d 417 (1984); *State v. Gaston*, 191 Neb. 121, 214 N.W.2d 376 (1974). The sentence may not be corrected at this time, and the case must be decided on the facts before us.

On October 4, 1987, in Lancaster County, defendant was stopped by a police officer who saw that the pickup defendant was driving did not have a rear license plate. Upon investigation, the officer ticketed the defendant for driving under a suspended license. An information was filed alleging that defendant, "being a person whose Nebraska driver's license has been revoked pursuant to subdivision (c) of

subsection 4 of Neb. Rev. Stat. Section Number 39-669.07, [did] operate a motor vehicle on the street or highways of this state."

Defendant was convicted by a jury of violating § 39-669.07(c), which states in relevant part, "Any person operating a motor vehicle on the highways or streets of this state while his or her operator's license has been revoked pursuant to subdivision (c) of this section shall be guilty of a Class IV felony."

As set out above, defendant was charged with operating a motor vehicle while his driver's license had been revoked under "subdivision (c) of subsection 4 of Neb. Rev. Stat. Section Number 39-669.07 . . . ." The jury was instructed in the same manner, and defendant requested instructions in the same language. We note that the statute's numbering system is not logically set out. "Subdivision (c)" is not a subdivision of "subsection 4," but subsections (a), (b), and (c), in addition to subsections (1), (2), (3), and (4), are subsections of § 39-669.07. The peculiar numbering does not mean that subsections (a), (b), and (c) refer only to subsection (4). The statutory references, in future cases, should be correctly stated. We recognize that this court has made similar improper references in past cases. There is no prejudice in this case from the numbering of the statute, because both the State and the defendant fully understood the charge and both used the identical improper reference.

The defendant's assignments of error allege that the trial court erred (1) in overruling the defendant's motion to quash the information, (2) in refusing to give defendant's requested jury instructions, and (3) in overruling defendant's motion for a directed verdict based on the insufficiency of the evidence.

Defendant's assignments of error are based upon the language in § 39-669.07(c) which directs the trial court to revoke the operator's license of a multiple offender for 15 years. Defendant argues that the offense of driving with a revoked license under § 39-669.07(c) requires proof not only of prior revocation of the defendant's license pursuant to that section, but also requires proof that the revocation was for 15 years as set out in the statute. We disagree and affirm the judgment of the trial court.

As set out above, the defendant was convicted of violating § 39-669.07(c), which proscribes a person from driving "while his or her operator's license has been revoked pursuant to subdivision (c) of this section . . . ." The statute makes reference to the fact of revocation pursuant to the statute, and not to the length of revocation pursuant to the statute. As we stated in *Hancock v. State ex rel. Real Estate Comm.*, 213 Neb. 807, 811, 331 N.W.2d 526, 529 (1983), "A penal statute is strictly construed, [and] nothing will be recognized, presumed, or inferred that is not expressed, unless necessarily or unmistakably implied in order to give effect to the statute." (Citations omitted.) The durational requirement argued for by the defendant is not necessary to give effect to the statute. It appears that the Legislature wished to punish persons who drive while their license is revoked pursuant to multiple drunken driving convictions, regardless of the duration of the revocation. The purpose of revocation is to keep those guilty of repeated drunk driving from operating a motor vehicle on Nebraska roadways. The purpose of the subsection under which defendant is charged is to deter people from ignoring the revocation. The section was intended to keep people like the defendant from driving, and not to restrict the trial courts in sentencing. The defendant argues only that the language of the statute refers to revocation and not conviction, and presents no rationale for including a durational element. We hold that revocation for 15 years is not an element of the offense of driving with a revoked license under § 39-669.07(c).

Defendant's reliance on *State v. Blankenfeld*, 229 Neb. 411, 427 N.W.2d 65 (1988), is misplaced. That case interpreted the language of § 39-669.07 as it existed in 1984. At that time the statute referred specifically to one operating a vehicle "while his or her operator's license has been permanently revoked . . . ." Section 39-669.07 was amended in 1986, and the reference to the duration of the revocation was removed from that sentence. *Blankenfeld* is distinguishable from this case.

In his first assignment, defendant contends that the trial court erred in not sustaining his motion to quash the information because the information failed to give the defendant notice of the essential elements of the offense

charged. As we stated in *State v. Golgert*, 223 Neb. 950, 953, 395 N.W.2d 520, 522-23 (1986), " ' "To charge a statutory offense, the information or complaint must contain a distinct allegation of each essential element of the crime as defined by the law creating it, either in the language of the statute or its equivalent." ' [Citations omitted.]" We also stated, " '[F]or an information to be sufficient it must "inform the accused, with reasonable certainty, of the charge being made against him in order that he may prepare his defense thereto and also be able to plead the judgment rendered thereon as a bar to a later prosecution of the same offense." ' [Citations omitted.]" *Id.* at 953, 395 N.W.2d at 523. There is no question that the information upheld by the trial court in this case used language equivalent to the statute and informed the accused with reasonable certainty of the charge being made against him. As discussed above, there was no need for the information to charge that the revocation pursuant to the driving while intoxicated statute was for 15 years, because it is not an element of the offense. Defendant's first assignment is without merit.

Defendant's second assignment of error pertains to the trial court's refusal to give two jury instructions requested by defendant. As we stated in *State v. Redding*, 213 Neb. 887, 891, 331 N.W.2d 811, 813 (1983), "[I]t is the duty of the trial court to instruct the jury on the correct law . . . ." The first jury instruction requested by the defendant and refused by the trial court contained the statement that the State was required to prove a 15-year revocation of defendant's operator's license. As discussed above, this was an incorrect statement of the law, and the instruction was rightfully refused by the trial court.

The second jury instruction requested by the defendant and refused by the trial court was a quote of § 39-669.07. The trial court gave the identical instruction, except the trial court deleted irrelevant subsections. The trial court's instruction contained all relevant portions of the statute. It is not error for the trial court to omit inapplicable portions of a statute in a jury instruction. *State v. Poulson*, 194 Neb. 601, 234 N.W.2d 214 (1975). The defendant incorrectly cites to the court a proposition of law that refusal by a trial court to give a requested instruction that correctly states the law is reversible

error. Failure to give a jury instruction only constitutes reversible error if there is prejudice to the defendant. See *Redding, supra*. There was no prejudice in this case, and the trial court correctly refused the defendant's instruction.

In his third assignment of error the defendant argues that there was insufficient evidence to support the defendant's conviction. This assignment is also based upon defendant's argument that revocation for 15 years is an element of the offense charged. The State was not required to prove that the revocation pursuant to § 39-669.07(c) was 15 years in duration. The defendant's third assignment of error is without merit.

The judgment and sentence of the district court are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GERALD DEAN RING, APPELLANT.

447 N.W.2d 908

Filed November 9, 1989. No. 88-880.

1. **Statutes.** In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning.
2. **Criminal Law: Statutes.** Although a penal statute must be strictly construed, such statute should be given a sensible construction with its general terms limited in construction and application to prevent injustice, oppression, or an absurd consequence.
3. _____: _____. While 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.
4. **Criminal Law: Words and Phrases.** The language "to commit any felony," as it is used in Neb. Rev. Stat. § 28-1205 (Reissue 1985), is synonymous with "for the purpose of committing any felony."
5. **Homicide: Motor Vehicles: Drunk Driving: Proof: Proximate Cause.** In order to find an accused committed felony motor vehicle homicide in violation of Neb. Rev. Stat. § 28-306 (Reissue 1985) by driving while intoxicated, the State must prove that the accused's intoxication was the proximate cause of the accident and resulting death.
6. **Jury Instructions.** A trial court retains discretion in the wording of jury instructions.
7. **Jury Instructions: Appeal and Error.** Jury instructions must be read together,

and if the instructions taken as a whole correctly state the law, there is no prejudicial error.

8. **Homicide: Motor Vehicles: Negligence.** Contributory negligence is not a defense to the charge of motor vehicle homicide.

Appeal from the District Court for Dakota County: ROBERT E. OTTE, Judge. Affirmed in part, and in part reversed and vacated.

Timothy W. Shuminsky, of Shuminsky, Shuminsky & Molstad, for appellant.

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

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

PER CURIAM.

Defendant, Gerald Dean Ring, appeals convictions entered pursuant to verdicts of felony motor vehicle homicide, in violation of Neb. Rev. Stat. § 28-306 (Reissue 1985), and of using a motor vehicle as a deadly weapon in the commission of the homicide, in violation of Neb. Rev. Stat. § 28-1205 (Reissue 1985). His five assignments of error may be summarized as challenging (1) the district court's failure to dismiss the use of a deadly weapon complaint and (2) the district court's charge to the jury. We affirm the motor vehicle homicide conviction, but reverse and vacate the use of a deadly weapon conviction.

The facts of the case are uncontroverted. Ring stipulated that the subject accident occurred, that he was driving the vehicle which collided with the automobile driven by Darlene Sergott, that Sergott died as a result of the accident, and that he pled guilty to a charge of driving while under the influence of alcoholic beverages at the time of the accident. (No issue being raised as to the effect, if any, of that plea on the prosecution of either of the crimes charged in this case, we do not concern ourselves with that matter.)

Although it was very cold on the day of the accident, the road surface was dry, visibility was unrestricted, and driving conditions were generally good. Possibly because of merging traffic, the Sergott automobile was either stopped or moving at

a very low rate of speed when the Ring vehicle, which was moving at a much higher rate of speed, collided with the rear of the Sergott automobile. Ring applied the brakes on his vehicle in an unsuccessful effort to stop before the collision.

The State presented evidence that Ring was intoxicated at the time of the accident and that the consumption of alcohol impairs one's coordination, reaction time, and ability to operate a motor vehicle.

In connection with the first summarized challenge to his convictions, Ring argues that it was not the intent of the Legislature to provide cumulative punishment under § 28-1205 for violations of § 28-306.

Section 28-306 states:

> (1) A person who causes the death of another unintentionally while engaged in the operation of a motor vehicle in violation of the law of the State of Nebraska or in violation of any city or village ordinance commits motor vehicle homicide.
>
> (2) Except as provided in subsection (3) of this section, motor vehicle homicide is a Class I misdemeanor.
>
> (3) If the proximate cause of the death of another is the operation of a motor vehicle in violation of section 39-669.01, 39-669.03, or 39-669.07, motor vehicle homicide is a Class IV felony.

With respect to the sections referenced by § 28-306(3), Neb. Rev. Stat. § 39-669.01 (Reissue 1988) deals with reckless driving, Neb. Rev. Stat. § 39-669.03 (Reissue 1988) deals with willful reckless driving, and Neb. Rev. Stat. § 39-669.07 (Reissue 1988) deals with driving while under the influence of alcohol.

In addition, § 28-1205 states:

> (1) Any person who uses a firearm, knife, brass or iron knuckles, or any other deadly weapon to commit any felony which may be prosecuted in a court of this state, or any person who unlawfully possesses a firearm, knife, brass or iron knuckles, or any other deadly weapon during the commission of any felony which may be prosecuted in a court of this state commits the offense of using firearms to commit a felony.

(2) Use of firearms to commit a felony is a Class III felony.

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

Neb. Rev. Stat. § 28-109(7) (Reissue 1985) defines deadly weapon as "any firearm, knife, bludgeon, or other device, instrument, material, or substance, whether animate or inanimate, which in the manner it is used or intended to be used is capable of producing death or serious bodily injury." It is therefore apparent that a vehicle can, under appropriate circumstances, be deemed to be a deadly weapon. See, *State v. Sianouthai*, 225 Neb. 62, 402 N.W.2d 316 (1987); *State v. Hatwan*, 208 Neb. 450, 303 N.W.2d 779 (1981). See, also, *State v. Williams*, 218 Neb. 57, 352 N.W.2d 576 (1984).

In determining what conduct is proscribed by § 28-1205, we must closely examine the statutory language which reads that "[a]ny person who uses a . . . deadly weapon to commit any felony . . . commits the offense . . . ." Assuming that Ring's vehicle did constitute a deadly weapon in this case, there can be no question that Ring was using his vehicle when he collided with the Sergott automobile. But was he using the vehicle "to commit a felony"? The answer to this critical question depends upon the definition of the word "to" as it is used in the statute. Within the context of § 28-1205, "to" could be interpreted to mean "for the purpose of" or "with the result of." See, Webster's Third New International Dictionary, Unabridged 2401 (1981); 18 The Oxford English Dictionary 163-64 (2d ed. 1989).

The question, then, is whether Ring can be convicted of the deadly weapon charge if he merely used his vehicle *with the result of* committing motor vehicle homicide, or must he have instead used his vehicle *for the purpose of* committing felony motor vehicle homicide. The question is obviously one of statutory interpretation.

In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary

meaning. *In re Interest of Richter*, 226 Neb. 874, 415 N.W.2d 476 (1987). Although a penal statute must be strictly construed, such statute should be given a sensible construction with its general terms limited in construction and application to prevent injustice, oppression, or an absurd consequence. *Wounded Shield v. Gunter*, 225 Neb. 327, 405 N.W.2d 9 (1987); *State v. Valencia*, 205 Neb. 719, 290 N.W.2d 181 (1980). Furthermore, while 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 re Interest of Richter, supra*; *State v. Burke*, 225 Neb. 625, 408 N.W.2d 239 (1987).

The apparent purposes behind § 28-1205 are to discourage individuals from employing deadly weapons in order to facilitate or effectuate the commission of felonies and to discourage persons from carrying deadly weapons while they commit felonies. The statute is designed to regulate the manner in which felonies are committed, i.e., with the use or possession of deadly weapons. See Floor Debate, L.B. 38, Judiciary Committee, 85th Leg., 1st Sess. 2679-80, 2682 (Apr. 13, 1977). It cannot reasonably be said that § 28-1205 will dissuade a person from using a deadly weapon to commit an unintentional felony; the two concepts are logically inconsistent. Thus, in order to interpret § 28-1205 in a manner which is consistent with its objective, we hold that the language "to commit any felony," as it is used in that section, is synonymous with "for the purpose of committing any felony."

Our requirement that a conviction under § 28-1205 requires proof that the defendant used a deadly weapon for the purpose of committing a felony comports with our recent analysis in *State v. Pettit, ante* p. 436, 447, 445 N.W.2d 890, 897 (1989), wherein we stated: " 'Strict liability offenses are the exception rather than the rule and will only be found where there is a clear legislative intent not to require any degree of mens rea . . . .' "

> In determining whether criminal intent is an element of manslaughter "upon a sudden quarrel," we bear in mind the general rule that "criminal statutes are interpreted as requiring criminal intent, and this is particularly true in situations in which the offense involved is a felony."

United States v. O'Brien, 686 F.2d 850, 853 (10th Cir. 1982). As the U.S. Supreme Court has observed:

> "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory 'But I didn't mean to,' and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution."

Id. at 445-46, 445 N.W.2d at 897.

Thus, in order to convict Ring of the deadly weapon charge in this case, the State was required to prove beyond a reasonable doubt that Ring used his vehicle *for the purpose of* committing a felony. Clearly, the State did not meet this burden of proof. The felony which served as the basis of the deadly weapon charge, felony motor vehicle homicide, is, by definition, a felony which is committed unintentionally. In addition, while Ring may have negligently collided with the Sergott vehicle, nothing in the record indicates that Ring sought or intended to commit the felony motor vehicle homicide. In fact, it is apparent that Ring attempted to avoid the accident which precipitated his felony motor vehicle homicide conviction by applying the brakes of his vehicle. Because Ring did not use his vehicle for the purpose of committing felony motor vehicle homicide, the court erred in failing to dismiss the deadly weapon charge. Consequently, the district court's judgment in that regard must be reversed, and Ring's conviction on that charge must be vacated.

Ring next argues that the district court erred by refusing to instruct the jury that in order to find an accused committed felony motor vehicle homicide in violation of § 28-306 by driving while intoxicated, the State must prove that the accused's intoxication was the proximate cause of the accident and resulting death.

Although Ring's statement of the law is correct, it is difficult to understand the basis for his claim of error. The district court's charge included the very instructions which Ring alleges to have been refused. The charge to the jury included an instruction on the elements of the crime of motor vehicle homicide as follows:

> The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict [Ring] of the crime of motor vehicle homicide are:
>
> 1. That [Ring] caused the death of Darlene P. Sergott.
>
> 2. That [Ring] did so unintentionally while engaged in the unlawful operation of a motor vehicle.
>
> 3. That [Ring's] unlawful operation of a motor vehicle consisted of:
>
> a. Driving his motor vehicle while under the influence of alcoholic liquor, or
>
> b. Reckless driving.
>
> 4. That [Ring's] unlawful operation of a motor vehicle was the proximate cause of the death of Darlene P. Sergott.

Another instruction clearly defined the meaning of proximate cause.

As this court has stated, a trial court retains discretion in the wording of jury instructions. All the instructions must be read together, and if the instructions taken as a whole correctly state the law, there is no prejudicial error. *State v. Donhauser*, 231 Neb. 114, 435 N.W.2d 186 (1989); *State v. Hankins*, 232 Neb. 608, 441 N.W.2d 854 (1989).

Finally, Ring claims the district court erred in its charge to the jury by refusing to instruct that "no person shall operate a motor vehicle at such a slow rate of speed as to impede the normal and reasonable flow of traffic." Ring argues that the failure to give this instruction prevented him from arguing that the victim's own conduct, rather than his intoxication or reckless driving, proximately caused the victim's death. The fact is, however, that the instructions given permitted Ring to argue to the jury that his conduct was not the proximate cause of Sergott's death.

What Ring in effect urges here is that his conduct was

excused by Sergott's own contributory negligence. However, this court has consistently held that contributory negligence is not a defense to the charge of motor vehicle homicide. *State v. William*, 231 Neb. 84, 435 N.W.2d 174 (1989). In *William*, the defendant was charged with felony motor vehicle homicide after a collision occurred while he was attempting to elude a pursuing police officer. At trial, William sought to introduce evidence relating to the possible contributory negligence of both the police officer and the driver of another vehicle which was involved in the accident. A portion of the evidence which William sought to introduce related to police procedures regarding vehicle pursuits. In upholding the trial court's exclusion of the evidence, this court stated:

> " 'In criminal cases prosecuted under the motor vehicle homicide act, the negligence or unlawful acts of another driver which proximately contributed to the death, as distinguished from an independent intervening cause thereof, [are] not a defense if the evidence is sufficient to sustain a conclusion beyond a reasonable doubt that the defendant's negligence or unlawful acts were also a proximate cause of the death of another.' "

Id. at 89, 435 N.W.2d at 178, quoting *State v. Rotella*, 196 Neb. 741, 246 N.W.2d 74 (1976). The court continued by more specifically addressing the trial court's exclusion of evidence relating to police procedures for vehicle pursuits:

> Regardless of whether the officer violated police policy or was negligent in his decision to pursue the defendant at high speeds, the defendant's actions were still a proximate cause of the death. The defendant's flight from the officer, his high rate of speed, and his failure to stop at the final stop sign all made up " 'the cause without which the death would not have occurred . . . .' " *State v. Dixon*, 222 Neb. 787, 797, 387 N.W.2d 682, 688 (1986). Under these facts, the officer's actions, even if incorrect, did not serve to negate the conclusion that it was the defendant's conduct which was " 'the efficient cause, the one that necessarily [set] in operation the factors that accomplish[ed] the death. . . .' " *State v. Lytle*, 194 Neb. 353, 358, 231 N.W.2d 681, 685 (1975). "The fact that some other agency

> combined with the act of the defendant to cause the death is not a defense unless the other agency is an efficient intervening cause." *State v. Meints*, 212 Neb. 410, 414, 322 N.W.2d 809, 812 (1982).

231 Neb. at 90, 435 N.W.2d at 178.

Thus, we reverse the district court's judgment with respect to the use of a deadly weapon charge and vacate that conviction, but affirm the judgment of the district court with respect to the felony motor vehicle homicide conviction.

AFFIRMED IN PART, AND IN PART REVERSED AND VACATED.

WHITE, J., dissenting in part.

I agree that the motor vehicle homicide conviction and sentence should be affirmed.

The majority agrees that a motor vehicle can be a deadly weapon, citing *State v. Sianouthai*, 225 Neb. 62, 402 N.W.2d 316 (1987). A deadly weapon is an instrument or device "which in the manner *it is used* or intended to be used is capable of producing death or serious bodily injury." (Emphasis supplied.) Neb. Rev. Stat. § 28-109(7) (Reissue 1985).

That the jury believed the appellant used a motor vehicle in the commission of felony motor vehicle homicide is obvious. The simple conclusion would be, then, that a deadly weapon (the vehicle) was the device *used* that resulted in the death of another and that unless otherwise prohibited, the appellant could be charged with, convicted of, and punished for use of a weapon to commit a felony.

The majority determines otherwise by concluding that the modest word "to" requires that the actor intend to use the weapon to accomplish the commission of the felony. I submit that the word "to," in the context of § 28-109, more appropriately means the method or instrument by which the thing prohibited is done, and nothing more. I can read no requirement of a subjective intent in either § 28-109 or Neb. Rev. Stat. § 28-1205 (Reissue 1985), save and except as the underlying felony in a § 28-1205 prosecution may require a specific intent.

As the offenses of felony motor vehicle homicide and the use of a weapon to commit a felony are not lesser-included offenses

of one another, and as the Legislature has provided an enhanced penalty, I would affirm both convictions.

FAHRNBRUCH, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. DARWIN J. ROBINSON, APPELLANT.

448 N.W.2d 386

Filed November 17, 1989. No. 82-028.

1. **Criminal Law: Trial: Evidence.** In order to preserve a question as to the admissibility of evidence not ordered suppressed, a criminal defendant must object to that evidence at trial.
2. **Motions to Suppress.** On a motion to suppress evidence, the trial court, as the trier of fact, is the sole judge of the credibility of witnesses and the weight to be given their testimony and other evidence.
3. **Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress, 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.
4. **Due Process: Identification Procedures.** A claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it.
5. **Trial: Identification Procedures.** Evidence of an extrajudicial identification is admissible when made under circumstances precluding the suspicion of unfairness or unreliability and where the person making the out-of-court identification is present at the trial and subject to cross-examination.
6. _____: _____. The factors to be considered in determining the likelihood of misidentification in an extrajudicial identification are the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.
7. **Police Officers and Sheriffs: Arrests: Probable Cause.** Pursuant to Neb. Rev. Stat. § 29-404.02(1) (Reissue 1985), a peace officer may arrest a person without a warrant if the officer has reasonable cause to believe that such person has committed a felony.
8. _____: _____: _____. When a law enforcement officer has knowledge, based on information reasonably trustworthy under the circumstances, which justifies a prudent belief that a suspect has committed a felony, the officer has probable cause to arrest without a warrant.
9. **Search and Seizure: Arrests.** When a lawful arrest is made, it is entirely

reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction.

10. **Constitutional Law: Right to Counsel: Confessions.** Once an accused's sixth amendment right to counsel has attached, the government may not, in the absence of accused's counsel, deliberately elicit incriminating statements from the accused through the use of third persons.
11. **Constitutional Law: Right to Counsel.** An accused's sixth amendment right to counsel attaches at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.
12. **Records: Presumptions: Appeal and Error.** An affirmative showing in the bill of exceptions that a statement in a journal entry contained in the transcript is false overcomes the presumption of truthfulness a journal entry otherwise carries.

Appeal from the District Court for Douglas County: SAMUEL P. CANIGLIA, Judge. Affirmed.

Thom K. Cope, of Bailey, Polsky, Cada, Cope & Wood, for appellant.

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

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

CAPORALE, J.

I. INTRODUCTION

In this reinstated appeal, defendant, Darwin J. Robinson, challenges his convictions pursuant to verdicts on charges of robbery, in violation of Neb. Rev. Stat. § 28-324 (Reissue 1985), and the use of firearms to commit a felony, in violation of Neb. Rev. Stat. § 28-1205(1) (Reissue 1985), and of being a habitual criminal as defined in Neb. Rev. Stat. § 29-2221 (Reissue 1985). His seven assignments of error combine to urge that the trial court erred (1) in declining to suppress certain evidence and (2) in submitting the robbery and firearms charges to the jury and finding the evidence sufficient to support all the charges. We affirm.

II. SUPPRESSION TESTIMONY

At the hearing on Robinson's suppression motions, Marvin Pfeifer, the assistant manager of an Omaha Kwik Shop

convenience store, testified that on January 31, 1981, he was on duty between midnight and 7 o'clock that morning. Robinson entered the store around 6:30 a.m., stood by the magazine rack for some time, and engaged Pfeifer in a "four to five" minute conversation about the weather. According to Pfeifer, "Somebody was getting gas, and I was watching . . . . And when I turned around, he had a knife in my back." Pfeifer turned slightly and was able to see both the knife and that Robinson was the person holding it. Pfeifer complied with Robinson's instruction to "[o]pen the register" and, at Robinson's further order, took all the money from the cash register and placed it in Robinson's hand, whereupon Robinson walked out of the store. As he was leaving the store, employee Michael Klaumann was entering. Pfeifer immediately informed Klaumann that Robinson had robbed the store, and subsequently summoned the police.

Pfeifer described the lighting in the store as "excellent" on the morning in question. Thus, he had ample opportunity to see Robinson's face during the half hour or so Robinson was in the store prior to the robbery, and there was no question in his mind but that Robinson was the man who had robbed him. We note Pfeifer's additional testimony that he had never been shown any photographs by the police, had never seen Robinson in any lineup, and, in fact, had not been called upon to identify the robber until the preliminary hearing in this prosecution.

As Klaumann tells it, he arrived for work at the Kwik Shop at about 6:55 that morning, and as he "was pulling into the parking lot . . . saw that there was a man standing behind Marvin behind the counter — the cash register." Klaumann got out of his automobile, and "the man who was behind the counter" walked out of the door as Klaumann was walking in. Klaumann testified that the area was well lit and that he observed the individual well enough to recognize him again; according to Klaumann, "He had been in the store before."

After Pfeifer told him, "[T]hat's the man that robbed me," Klaumann immediately left and followed Robinson. Using his own vehicle, Klaumann followed a white automobile from the Kwik Shop to a parking lot. Klaumann then located a police patrol vehicle, reported what he had seen, and identified the

automobile for police officers. Klaumann admitted that he had not seen the robber get into the white automobile, nor had he seen the driver exit that vehicle. In any event, Klaumann returned to the Kwik Shop. Sometime later the same day, a police officer approached him there and showed him a photograph, which Klaumann identified as depicting the robber. This was the only time police officers showed any photographs to Klaumann; he participated in no other photographic showup.

However, at "around 10 or 11 in the morning," police officers brought Robinson himself to the Kwik Shop in a patrol vehicle. The officers presented Robinson to Klaumann in the store, and Klaumann told the officers that Robinson was the robber. At the suppression hearing, Klaumann again identified Robinson as the man he had seen walking out of the store as he walked in.

Police Officer James Patterson and Sgt. Don Crinklaw were on duty during the early morning hours of January 31, 1981. About 8:20 a.m., Patterson received a report of a stolen automobile. He also learned from police sources that the vehicle had allegedly been involved in a robbery and had been towed away by police. When Patterson and Crinklaw arrived at the location from which the stolen automobile report had originated, a young woman identifying herself as "Shirley Robinson" told them that her automobile had been stolen. Crinklaw asked for a photograph of Robinson, which the young woman gave him. He left for the Kwik Shop with the photograph before learning the young woman's true identity as that of Edna Lyncook, a fact she admitted when later informed by Patterson that the automobile she had reported stolen was suspected of having been used in a robbery and had been towed by police. Lyncook also told Patterson that Robinson was at her residence, an apartment some flights above Robinson's, and that she had left the door unlocked. Officers then went to the Lyncook apartment and arrested Robinson.

Officers also went to Robinson's apartment and awakened the genuine Mrs. Robinson, who apparently had been sleeping in the Robinson apartment, and, according to Patterson, received permission from her to search the apartment for items

of clothing worn by the Kwik Shop robber. Mrs. Robinson, however, denied having given the police permission to search. As a result of the search, police located a blue windbreaker-type jacket, which Klaumann identified as the jacket worn by the robber.

Robinson was then transported to the police station, where he was searched. Fifty dollars in paper money was found in his back pocket in the following denominations: two $10 bills, one $5 bill, and twenty-five $1 bills.

Robinson's first trial ended in a mistrial. A few days later, the district court took up the State's motion to endorse Robert Koppock as a new witness for use at retrial. Robinson objected "as to the relevancy and as to constitutional issues that were raised by this procedure." The district court then conducted a proceeding in the nature of a suppression hearing to determine the admissibility of Koppock's testimony. At the conclusion of that hearing the district court ruled that "that part of the testimony in which [Robinson] described the place that he robbed and admits [the robbery] will be received."

Koppock's testimony establishes that he was himself arrested on unrelated charges, and as a result, the two men met for the first time in the Douglas County Correctional Center. At the time of his arrest and detention, Koppock was working as an informant for the Nebraska State Patrol, primarily in connection with drug-related activities, and was paid a salary of $100 per week. The State Patrol neither planted Koppock at the jail nor assigned Koppock to work on Robinson's case.

Koppock further testified that he shared the same cellblock with Robinson and that Koppock initiated conversation with Robinson by asking him why he was in prison. On this occasion Robinson indicated the matter was none of Koppock's business. Later, Robinson asked Koppock if he could help Robinson raise bail money. Koppock replied, "Well, I might know some people."

The next day, Robinson initiated a conversation "about this place that he held up," giving the location of the robbed store. Robinson also proposed some kind of "deal" with Koppock whereby each would "snuff" the other's witnesses. Koppock made no "real sure commitment" to the proposal but "just

listened," so that Robinson "took it for granted" that Koppock would participate.

In another conversation, which apparently occurred the same day as the one last mentioned while the two were playing basketball, Robinson talked "about how he . . . held up the Quik [sic] Shop," revealing that as Robinson was leaving the robbed premises, "somebody came in . . . and followed him home." Robinson also related that "he went up to the [designated] Quik [sic] Shop . . . with a butcher knife." At the time of the foregoing conversations, Koppock had made no contact with any law enforcement agency concerning the information Robinson had disclosed.

The State Patrol did, however, become involved a couple of days later when it placed a transmitter on Koppock in order to listen to any conversation Koppock might have with Robinson. That same day, Robinson again talked with Koppock about the robbery. During this conversation, Robinson once more described where the robbery occurred and, apparently for the first time, named Pfeifer as the person from whom he took the money.

III. TRIAL EVIDENCE

Pfeifer and Klaumann were the first witnesses called at the trial which resulted in Robinson's convictions. Their testimony essentially duplicated their suppression hearing testimony. Both men positively identified Robinson in court as the man who had committed the robbery. Several police officers were also called; their testimony, too, essentially repeated that adduced at the suppression hearing. Patterson further testified that the door to Lyncook's apartment was unlocked and that when he and another officer entered the apartment, they found Robinson seated in a chair. Lyncook testified that she had accompanied police officers from Robinson's apartment to her own and that she was present when Robinson was placed under arrest.

Although Lyncook testified that police officers removed Robinson's photograph from his apartment without her permission and after she had admitted to them that she was not the real Mrs. Robinson, Crinklaw testified as he had at the suppression hearing that while laboring under the impression

that Lyncook was Mrs. Robinson, he received permission from her to take Robinson's photograph from the apartment. According to Crinklaw, he left Robinson's apartment with the photograph before learning that the woman who had allowed him to take it was not Robinson's wife.

The State also called Koppock as a trial witness, and he testified substantially as he had in the earlier hearing regarding the statements Robinson made while both were in jail, including Robinson's identification of Pfeifer by name. While Robinson made no objection to Koppock's trial testimony, or indeed to any of the identification testimony adduced at trial, it must be borne in mind that although the law now is that in order to preserve a question as to the admissibility of evidence not ordered suppressed, a criminal defendant must object to that evidence at trial, *State v. Pointer*, 224 Neb. 892, 402 N.W.2d 268 (1987), such objection was not required at the November 1981 trial which resulted in Robinson's conviction, *State v. Van Ackeren*, 200 Neb. 812, 265 N.W.2d 675 (1978).

In the course of the trial the State offered, and the district court received into evidence, over Robinson's objections, the photograph and windbreaker jacket described earlier, as well as the money removed from Robinson's person at the time of arrest.

IV. ANALYSIS

1. Nonsuppression of Evidence

We begin our analysis of the first summarized assignment of error by recalling that on a motion to suppress evidence, the trial court, as the trier of fact, is the sole judge of the credibility of witnesses and the weight to be given their testimony and other evidence. In reviewing a trial 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. One 1987 Toyota Pickup, ante* p. 670, 447 N.W.2d 243 (1989); *State v. Marcotte, ante* p. 533, 446 N.W.2d 228 (1989); *State v. Bowen,* 232 Neb. 725, 442 N.W.2d 209 (1989); *State v. Andersen,* 232 Neb. 187, 440 N.W.2d 203 (1989); *State v. Martin,* 232 Neb. 385, 440 N.W.2d 676 (1989).

a. Eyewitness Testimony

Robinson first argues, in sum, that Klaumann's in-court identifications were impermissibly tainted because the police used but one photograph and but one person in showups on the day of the robbery. In effect, Robinson argues that Klaumann identified not the robber in court, but, rather, the person depicted in the one-photograph and the one-person showups, both of which showups were of the allegedly innocent Robinson. Robinson's contentions in this connection are clearly without merit.

This court has recently had occasion to consider the circumstances under which eyewitness identifications may be admissible despite alleged extraneous influences such as those complained of here. *State v. Sardeson*, 231 Neb. 586, 437 N.W.2d 473 (1989); *State v. Trevino*, 230 Neb. 494, 432 N.W.2d 503 (1988). In *Trevino*, this court noted:

> A claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it. . . . [E]vidence of an extrajudicial identification is admissible when made under circumstances precluding the suspicion of unfairness or unreliability and where the person making the out-of-court identification is present at the trial and subject to cross-examination.
>
> The factors to be considered in determining the likelihood of misidentification . . . are the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

230 Neb. at 510, 432 N.W.2d at 516. See, also, *State v. Sardeson, supra*; *State v. Wickline*, 232 Neb. 329, 440 N.W.2d 249 (1989).

Applying these criteria to the facts of the case presently before us, we note that Klaumann testified that he got a good, clear look at Robinson as their paths crossed in the Kwik Shop doorway on the morning of the robbery and that he recognized

Robinson at that time as one whom he had seen in the store before. Not more than 5 hours passed between this time and the moment police officers presented Robinson's photograph and, later, Robinson himself to Klaumann for identification, a period not so long as to raise a significant likelihood that Klaumann might have forgotten important details or become confused about whom he had seen. These are sufficient indicia of reliability to satisfy foundational requirements for Klaumann's testimony and to present to the jury as a question of fact the weight to be accorded that testimony.

Robinson's apparent argument that Pfeifer made no conclusive identification of Robinson as the robber is simply not supported by the record. The fact of the matter is that Pfeifer, who was never shown a photograph of Robinson, positively identified him as the robber both at the suppression hearing and at the subsequent trial.

b. Physical Evidence

Regarding use by the State of the items seized in the course of Robinson's arrest, Robinson argues that the photograph and the jacket were illegally seized without benefit of a search warrant and should therefore have been suppressed.

Concerning the jacket, although not without contradiction, there is testimony that Robinson's real wife and coresident with him in their apartment gave police officers permission to search the apartment, in the course of which consensual search the jacket was located and seized. A warrantless search of a house may be justified when the police have obtained consent to the search from a party who possesses common authority over, or other sufficient relationship to, the premises sought to be inspected. *State v. Bowen*, 232 Neb. 725, 442 N.W.2d 209 (1989). Robinson's contention regarding the jacket is without merit.

Concerning the photograph, the record indicates that Lyncook represented herself to be Robinson's wife at Robinson's request, and there is evidence that while in that guise, she permitted police officers to remove the photograph from Robinson's apartment. Insofar as Lyncook was acting at Robinson's request, we have no difficulty holding that when she

permitted police officers to remove the photograph from Robinson's apartment, she was acting within the scope of an "other sufficient relationship to . . . the premises sought to be inspected," *State v. Bowen, supra* at 733, 442 N.W.2d at 214, to render the police officers' act of taking the photograph not constitutionally infirm. Robinson's argument in this connection is also without merit.

Although no complaint appears to be made about the money received in evidence, we nonetheless observe that Neb. Rev. Stat. § 29-404.02(1) (Reissue 1985) provides, among other things, that a peace officer may arrest a person without a warrant if the officer has reasonable cause to believe that such person has committed a felony. We have accordingly held that when a law enforcement officer has knowledge, based on information reasonably trustworthy under the circumstances, which justifies a prudent belief that a suspect has committed a felony, the officer has probable cause to arrest without a warrant. *State v. Wickline, supra*; *State v. Marco*, 230 Neb. 355, 432 N.W.2d 1 (1988). We have also held that when a lawful arrest is made, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. *State v. Marco, supra*, citing *Chimel v. California*, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969); *State v. Weible*, 211 Neb. 174, 317 N.W.2d 920 (1982).

There was sufficient evidence to support a finding that the police had permission to enter the apartment in which Robinson was found and had probable cause to arrest him without a warrant. Robinson's arrest being lawful, the seizure of money from his person was likewise lawful and therefore properly received in evidence.

c. Testimony of Informant

Relying on the holdings of the U.S. Supreme Court in *Massiah v. United States*, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964), and *United States v. Henry*, 447 U.S. 264, 100 S. Ct. 2183, 65 L. Ed. 2d 115 (1980), Robinson contends that the admission of Koppock's testimony at his trial violated his right to counsel under the sixth amendment to the U.S.

Constitution. This sixth amendment right is not to be confused with the right to be informed of the right to counsel which under certain circumstances arises as an incident of the fifth amendment right against self-incrimination. As said in *State v. Saylor*, 223 Neb. 694, 701-02, 392 N.W.2d 789, 794-95 (1986), *cert. denied* 481 U.S. 1038, 107 S. Ct. 1975, 95 L. Ed. 2d 815 (1987), quoting *Kirby v. Illinois*, 406 U.S. 682, 92 S. Ct. 1877, 32 L. Ed. 2d 411 (1972): " '[I]t has been firmly established that a person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the . . . initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.' " See, also, *Maine v. Moulton*, 474 U.S. 159, 106 S. Ct. 477, 88 L. Ed. 2d 481 (1985); *Brewer v. Williams*, 430 U.S. 387, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977), *reh'g denied* 431 U.S. 925, 97 S. Ct. 2200, 53 L. Ed. 2d 240. The sixth amendment right attaches at that time because

> after the initiation of adversary criminal proceedings, " 'the government has committed itself to prosecute, and . . . the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.' "

Maine v. Moulton, supra at 170.

In *Massiah v. United States, supra*, Massiah and another man, one Colson, were indicted for violating narcotics laws and were released on bail. Colson then agreed to cooperate with government agents in their investigation of the activities and allowed a government agent to install a radio transmitter in his automobile. While the agent listened over the radio, Massiah had a lengthy conversation with Colson, during which Massiah made several incriminating statements which were then received in evidence at Massiah's trial.

The U.S. Supreme Court reversed Massiah's conviction on the ground that his sixth amendment right to counsel was violated in that "there was used against [Massiah] at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted

and in the absence of his counsel." *Id.* at 206.

In *United States v. Henry, supra*, the defendant Henry had been indicted for armed robbery and imprisoned. Government agents then contacted Nichols, another inmate at the same facility at which Henry was being housed and who had been engaged for some time as a paid informant for the Federal Bureau of Investigation. After Nichols informed an agent that he shared a cellblock with Henry, the agent told him to be alert to any statements Henry made but not to initiate any conversation with Henry or question him about the robbery. Thereafter, Nichols informed the agent that Henry had made incriminating statements, and Nichols was paid for furnishing the information. Henry's statements to Nichols were then introduced at Henry's trial.

The *Henry* Court determined that under *Massiah v. United States*, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964), the question was whether "a Government agent 'deliberately elicited' incriminating statements from Henry . . . ." *United States v. Henry*, 447 U.S. 264, 270, 100 S. Ct. 2183, 65 L. Ed. 2d 115 (1980). In concluding that the agents had done so, the Court focused on three factors: "First, Nichols was acting under instructions as a paid informant for the Government; second, Nichols was ostensibly no more than a fellow inmate of Henry; and third, Henry was in custody and under indictment at the time he was engaged in conversation by Nichols." *Id.* The Court further noted that the government agent "was aware that Nichols had access to Henry and would be able to engage him in conversations without arousing Henry's suspicion." *Id.* "Even if the agent's statement that he did not intend that Nichols would take affirmative steps to secure incriminating information is accepted, he must have known that such propinquity likely would lead to that result." *Id.* at 271. The Court held that "[b]y intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel, the Government violated Henry's Sixth Amendment right to counsel." *Id.* at 274.

The U.S. Supreme Court next applied the *Massiah* standard in *Maine v. Moulton*, 474 U.S. 159, 106 S. Ct. 477, 88 L. Ed. 2d 481 (1985). There, after having been indicted, Moulton had

made incriminating statements in a meeting with his accomplice, Colson, who in cooperation with the police wore a wire transmitter to record the conversation. Although police instructed Colson not to question Moulton but simply to "be himself" in conversation, Colson pretended poor memory of the details of the crimes and "reminisced" about events surrounding the crimes in order to cause Moulton to make several incriminating statements. *Maine v. Moulton, supra* at 165-66.

The State of Maine contended that under *Massiah* and *Henry*, the sixth amendment is violated only when the police set up the conversation with the accused or take some equivalent intentional step, and, thus, because Moulton initiated the meeting, his sixth amendment rights were not violated. The *Moulton* Court answered:

> The Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a "medium" between him and the State. As noted above, this guarantee includes the State's affirmative obligation not to act in a manner that circumvents the protections accorded the accused by invoking this right. The determination whether particular action by state agents violates the accused's right to the assistance of counsel must be made in light of this obligation. Thus, the Sixth Amendment is not violated whenever—by luck or happenstance—the State obtains incriminating statements from the accused after the right to counsel has attached. [Citation omitted.] However, knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity. Accordingly, the Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent.

Id. at 176.

Applying the above principle to the facts of *Moulton*, the

Court determined it to be clear that

> the State violated Moulton's Sixth Amendment right when it arranged to record conversations between Moulton and its undercover informant . . . . The police thus knew that Moulton would make statements that he had a constitutional right not to make to their agent prior to consulting with counsel. As in *Henry*, the fact that the police were "fortunate enough to have an undercover informant already in close proximity to the accused" does not excuse their conduct under these circumstances. . . . By concealing the fact that Colson was an agent of the State, the police denied Moulton the opportunity to consult with counsel and thus denied him the assistance of counsel guaranteed by the Sixth Amendment.

Maine v. Moulton, supra at 176-77.

The most recent examination of the issue by the U.S. Supreme Court appears to be found in *Kuhlmann v. Wilson*, 477 U.S. 436, 106 S. Ct. 2616, 91 L. Ed. 2d 364 (1986). Therein, after having been arraigned on charges related to a robbery and murder, the defendant Wilson was placed in a cell with another inmate, Lee, who previously had agreed with police to act as an informant. The police instructed Lee not to ask Wilson any questions, but simply to " 'keep his ears open' " for the names of other perpetrators in the crimes. *Id.* at 439. Lee reported to the police certain incriminating statements that Wilson had made, and such statements were adduced at his trial.

In upholding Wilson's conviction, the Court held:

> Since "the Sixth Amendment is not violated whenever—by luck or happenstance—the State obtains incriminating statements from the accused after the right to counsel has attached," [citation omitted], a defendant does not make out a violation of [the sixth amendment right to counsel] simply by showing that an informant, either through prior arrangement or voluntarily, reported his incriminating statements to the police. Rather, the defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks.

Id. at 459. Because Lee was instructed only to listen to Wilson for the purpose of identifying the other participants in the crimes and Lee did not ask Wilson any questions but " 'only listened' " to Wilson's " 'spontaneous' " and " 'unsolicited' " statements, the Court held there was no sixth amendment violation. *Id.* at 460.

The *Kuhlmann* Court explained that the sixth amendment violations in *United States v. Henry*, 447 U.S. 264, 100 S. Ct. 2183, 65 L. Ed. 2d 115 (1980), and *Maine v. Moulton*, 474 U.S. 159, 106 S. Ct. 477, 88 L. Ed. 2d 481 (1985), arose because the informants developed relationships of trust and confidence with the defendants and stimulated conversations with the defendants in order to elicit incriminating statements. The actions of the informants in those cases, said the Court, amounted to secret interrogation. Although in *Kuhlmann*, Lee at one point suggested to Wilson that his first version of his participation in the crimes " 'didn't sound too good,' " 477 U.S. at 460, the Court determined that such was not enough to amount to secret and deliberate interrogation.

Finally, the *Kuhlmann* Court emphasized, "As our recent examination of this Sixth Amendment issue in *Moulton* makes clear, the primary concern of the *Massiah* line of decisions is secret interrogation by investigatory techniques that are the equivalent of direct police interrogation." *Kuhlmann, supra* at 459.

To return to the case at hand, the conversations between Robinson and Koppock occurred several months after the initiation of formal charges against Robinson and, thus, after Robinson's sixth amendment right to counsel had attached. Thus, the question resolves itself into whether Koppock's conversations with Robinson were such as to be the equivalent of direct police interrogation.

Robinson in effect argues that because Koppock was an informant paid to find crime wherever it existed, all conversations with him constituted secret and deliberate interrogation by the State. *Kuhlmann*, however, makes clear that such is not the case. That case teaches that in order to show the sixth amendment right to counsel has been violated, an accused must establish more than the mere fact the informant

had a preexisting arrangement with the State. The accused must show that there was interrogation which was deliberately designed to elicit incriminating remarks. The evidence in this case falls far short of establishing that Koppock so interrogated Robinson. The only direct question Koppock posed to Robinson was why Robinson was in prison. Given the setting in which the question was asked, it amounted to nothing more than a greeting. So far as the record reveals, the incriminating statements Robinson later made were volunteered on his part. Even those made after Koppock was equipped with a transmitter by the State Patrol are not shown to have been made as the result of questioning by Koppock. All the record shows is that Koppock initially, and later Koppock and the State Patrol, listened while Robinson volunteered information about the crimes in question. Under that state of the record, it cannot be said the district judge was clearly wrong in concluding that Koppock's testimony was relevant and that there existed no constitutional objection to its admission in evidence.

2. Submission of Charges and Sufficiency of Evidence

a. Procedural Challenge

With respect to the second summarized assignment of error, Robinson first claims the trial judge erred in submitting the use of firearms charge to the jury, because he had previously sustained Robinson's motions to dismiss that charge.

This claim rests on the following exchange, which took place at the close of the State's case:

> [Defense trial counsel]: . . . Comes now the defendant . . . and moves the Court to—for a dismissal of the complaint of robbery for the reason that the State has failed to prove a prima facie case.
>
> THE COURT: I think I am going to sustain part of that as to [the use of firearms count].

Later, at the close of Robinson's case, the following brief exchange occurred: "THE COURT: Does the Defendant renew his motions? [Defense trial counsel]: Yes, your Honor. THE COURT: Same ruling."

However, the journal entry relating to Robinson's motion at

the close of the State's evidence reads: "Defendant moves for a dismissal as to both counts, motion for dismissal argued and overruled." As to the fate of Robinson's motion at the close of all the evidence, the journal entry reads: "Defendant renews motion of dismissal and same is overruled." We have said that an affirmative showing in the bill of exceptions that a statement in a journal entry contained in the transcript is false overcomes the presumption of truthfulness a journal entry otherwise carries. *State v. Painter*, 223 Neb. 808, 394 N.W.2d 292 (1986). The trial judge's equivocal statement that he thought he would sustain Robinson's motion with respect to the firearms charge and dismiss that charge is not sufficient to overcome the presumption of the truthfulness of the journal entry in this case. The reasonable conclusion to be reached on the record presented is that on further reflection the trial judge changed his mind and ruled other than as he first thought he would.

b. Substantive Challenge

Robinson further claims, with respect to the second summarized assignment of error, that the trial judge should have directed verdicts in his favor and that the evidence was insufficient to support the jury's verdicts. Our analysis necessarily begins with the rule that on a defendant's motion to dismiss for insufficient evidence of the crime charged, 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. Hankins*, 232 Neb. 608, 441 N.W.2d 854 (1989). Similarly, in determining the sufficiency of the evidence to sustain a criminal conviction, it is not the province of the Supreme Court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence; such matters are for the finder of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Broadstone, ante* p. 595, 447 N.W.2d 30 (1989); *State v. Swigart, ante* p. 517, 446 N.W.2d 216 (1989); *State v. Wokoma, ante* p. 351, 445 N.W.2d 608 (1989).

Section 28-324 provides in part, as it did at all times relevant

to this case, that "[a] person commits robbery if, with 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." Section 28-1205(1) provides, as it did at all relevant times, that "[a]ny person who uses a . . . knife . . . to commit any felony which may be prosecuted in a court of this state . . . commits the offense of using firearms to commit a felony." With respect to the robbery and firearms charges, the record discloses that at the close of the State's case, evidence, including the testimony of two eyewitnesses, had been adduced which positively identified Robinson as the individual who had taken cash from convenience store clerk Pfeifer at knife point during the early morning hours of the day in question. Nothing in Robinson's case undermined the State's case, and the district court was correct so to rule in connection with Robinson's various motions to the contrary made at the close of the State's case, at the close of all the evidence, and following conviction.

With respect to the habitual criminal charge, evidence was adduced which establishes that Robinson was sentenced and committed to prison in this state for terms of not less than 1 year on prior separate counseled convictions, to wit, 4 years on a robbery charge and two consecutive 3-year terms on charges of robbery and the use of firearms arising out of another event. Section 29-2221 provides in relevant part, as it did at all times relevant to this case, that "[w]hoever has been twice convicted of crime, sentenced and committed to prison, in this or any other state . . . for terms of not less than one year each, shall, upon conviction of a felony committed in this state, be deemed to be an habitual criminal . . . ." There is thus no question but that the trial judge correctly determined Robinson to be a habitual criminal.

V. DECISION

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

AFFIRMED.

SHANAHAN, J., dissenting.

The majority correctly reiterates the current appellate

standard for review of a suppression hearing, namely, the trial court's findings for a suppression order will be upheld unless "the trial court's findings of fact . . . are clearly wrong." The majority then moves in seven-league boots to the conclusion that "it cannot be said the district judge was clearly wrong in concluding . . . that there existed no constitutional objection" to admission of the questioned testimony from Koppock, the informer.

At the suppression hearing, defense counsel emphasized that Koppock was a "paid agent of the State Patrol," but the district judge surmised that Koppock's status as the State Patrol's paid informant would "go to the credibility and amount of consideration that the Jury [would] give" to Koppock's testimony. Additionally, the district judge remarked and ruled:

> Well, that part of the testimony in which he [Robinson] described the place that he robbed and admits robbing will be received. It's not protected by Miranda at all. It's a voluntary statement made to a private citizen.
>
> . . . .
>
> . . . They are statements made to a private citizen at the time and they are voluntary statements. The Miranda [sic] absolutely does not cover. Those statements will be received.

Inasmuch as *Kuhlmann v. Wilson,* 477 U.S. 436, 106 S. Ct. 2616, 91 L. Ed. 2d 364 (1986), and *Maine v. Moulton,* 474 U.S. 159, 106 S. Ct. 477, 88 L. Ed. 2d 481 (1985), had not been decided in 1981 when the suppression hearing occurred in Robinson's case, the colloquy between court and counsel at the suppression hearing clearly dispels any notion of prescience or clairvoyance in the eventual constitutional pronouncements concerning an accused's sixth amendment right to counsel, subsequently expressed in *Kuhlmann* and *Moulton.*

Rather, at the suppression hearing the district judge focused on *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), which dealt "with the protection which must be given to the privilege against self-incrimination when the individual is first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any significant way." 384 U.S. at 477. Thus, *Miranda*

concerned procedural safeguards to protect the privilege against self-incrimination during custodial interrogation by law enforcement personnel.

In *Sims v. Georgia*, 385 U.S. 538, 87 S. Ct. 639, 17 L. Ed. 2d 593 (1967), which involved voluntariness of a confession, the court addressed specificity in a suppression order and stated: "Although the judge need not make formal findings of fact or write an opinion, his conclusion that the confession is voluntary must appear from the record with unmistakable clarity." 385 U.S. at 544.

In a similar vein, the eighth circuit, in *Evans v. United States*, 375 F.2d 355 (8th Cir. 1967), examined a suppression hearing wherein the trial court, having considered voluntariness and the *Miranda* admonition for admissibility of Evans' custodial statements to police, failed to make any express finding that Evans' confession was voluntary or obtained in conformity with *Miranda*. In reversing Evans' conviction based on evidence which included Evans' custodial statements, the eighth circuit held that the district court was required to make a finding on the record with "unmistakable clarity" that the *Miranda* admonition had been administered and that the defendant had voluntarily, knowingly, and intelligently waived the right to counsel in connection with a voluntary confession or statement used as evidence against the defendant. 375 F.2d at 360.

In view of *Sims* and *Evans*, a finding concerning a sixth amendment right in relation to a suppression hearing should also appear in the record with "unmistakable clarity."

All of which brings us to the suppression hearing in Robinson's case. The record substantiates a series of contacts between Koppock and Robinson. In an initial contact and inquiry, Robinson asked Koppock about assistance in obtaining bail, a conversation which was then followed by a later discussion about the gravity of the offense charged against Robinson, namely, armed robbery. After Robinson and Koppock had engaged in still another and subsequent conversation regarding some of the occurrences in the Kwik Shop robbery, the State Patrol "wired" Koppock for a return encounter with Robinson, during which Robinson identified

the location and victim of the robbery. Beyond any doubt, the State Patrol orchestrated and choreographed the scene between Koppock and Robinson. Putting aside the district court's obviously incorrect conclusion that Koppock, a paid informer, was a "private citizen," the district court's finding concerning incriminating information in reference to Robinson's fifth amendment rights (*Miranda*) is distinctly unrelated to Robinson's sixth amendment rights (*Massiah*, *Henry*, *Moulton* and *Kuhlmann*), which supply the premise for the majority's conclusion in Robinson's appeal. The fifth amendment has yet to become the sixth amendment, either in the U.S. Constitution or in the district court's findings for the suppression order under examination.

To conclude that the district court was correct, or at least "not clearly wrong," regarding a determination about Robinson's sixth amendment right is this court's approbatory conclusion regarding correctness in something which never occurred. Consequently, if the sixth amendment is the keystone in the suppression question, as the majority believes, there should be a hearing to determine the sixth amendment issues regarding Robinson's statements. Otherwise, this court has adopted a de novo standard of review for the suppression hearing and has abandoned the standard of "clearly wrong" which has subsisted until Robinson's case.

PRODUCTION CREDIT ASSOCIATION OF THE MIDLANDS, SUCCESSOR IN INTEREST TO NORFOLK PRODUCTION CREDIT ASSOCIATION, APPELLEE, V. PHILIP G. SCHMER, APPELLEE, AND DORIS M. SCHMER, APPELLANT.

448 N.W.2d 123

Filed November 17, 1989. No. 87-1002.

1. **Foreclosure: Equity: Appeal and Error.** A foreclosure action is 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 court heard and observed the witnesses and accepted one version of the facts rather than another.

2. **Contracts: Guaranty: Liability.** Nebraska adheres to the rule of strict construction of guaranty contracts. When the meaning of the contract is ascertained, or its terms are clearly defined, the liability of the guarantor is controlled absolutely by such meaning and limited to the precise terms.
3. **Contracts: Guaranty: Debtors and Creditors: Words and Phrases.** An absolute guaranty is a contract by which the guarantor has promised that if the debtor does not perform his obligation or obligations, the guarantor will perform some act for the benefit of the creditor.
4. **Guaranty: Notice.** An absolute guaranty of payment is enforceable at any time without demand and notice of default.
5. **Contracts: Guaranty: Limitations of Actions.** The statute of limitations begins to run against a contract of guaranty the moment a cause of action first accrues.
6. **Guaranty: Liability: Debtors and Creditors.** A guarantor's liability arises when the principal debtor defaults.
7. **Contracts: Abandonment: Words and Phrases.** Abandonment of a contract occurs where one party acts in a manner inconsistent with the existence of the contract and the other party acquiesces in that behavior.
8. **Laches.** The defense of laches is not favored in Nebraska. It will be sustained only if the litigant has been guilty of inexcusable neglect in enforcing a right to the prejudice of his adversary.
9. **Debtors and Creditors: Principal and Surety: Security Interests: Waiver.** Where the creditor has security from the principal and knows of the surety's obligation, the surety's obligation is reduced pro tanto if the creditor (1) surrenders or releases the security, (2) willfully or negligently harms it, or (3) fails to take reasonable action to preserve its value at a time when the surety does not have an opportunity to take such action.

Appeal from the District Court for Madison County: RICHARD P. GARDEN, Judge. Affirmed.

Marion F. Pruss for appellant.

James T. Gleason, of Stalnaker, Becker, Buresh & Gleason, P.C., for appellee Production Credit Association.

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

FAHRNBRUCH, J.

The appellant, Doris M. Schmer, complains that in an action to foreclose her ex-husband's farm and to enforce her guaranty, the trial court erred in finding that a mortgage she gave in 1974 was valid and superior to her lien for alimony, child support,

and property settlement.

The appellant also complains that the Madison County District Court erred in holding that her 1975 guaranty for the payment of her husband's debts had continuing validity and in holding that the mortgage and guaranty were cumulative liabilities. We affirm.

A foreclosure action is 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 court heard and observed the witnesses and accepted one version of the facts rather than another. *Mid-America Maintenance v. Bill Morris Ford*, 232 Neb. 920, 442 N.W.2d 869 (1989).

Doris and Philip G. Schmer, then husband and wife, were indebted on a note in the sum of $83,825, payable September 5, 1975, to the Norfolk Production Credit Association (NPCA), predecessor in interest to Production Credit Association of the Midlands (PCA) (both associations oftentimes collectively referred to as PCA). The loan financed the Schmers' cattle operation. On September 3, 1974, as security for their $83,825 indebtedness, the Schmers executed and delivered to NPCA a "Collateral Agreement" and a payable-on-demand $75,000 collateral note, which was secured by a $75,000 demand mortgage on two parcels of their farmland (hereinafter called parcel 1 and parcel 2).

The agreement collaterally secured

> any renewal or extension of the indebtedness evidenced by the notes last described [the $83,825 note] *or any other indebtedness now owed by the undersigned to said association or hereafter incurred by said undersigned with said association either jointly or severally* or on the faith or credit of their community or separate estates or either of said estates. It is the express agreement of the parties that the consideration for this pledge is the granting of a loan by the association evidenced by the obligations last above mentioned.
>
> Further, *this is a continuing agreement and all rights,*

> *powers, and remedies hereunder shall apply to all past, present, and future indebtedness of the undersigned to the association* notwithstanding the death, dissolution, incapacity, or insolvency of the undersigned, and shall continue in full force until all indebtedness shall have been paid in full.

(Emphasis supplied.)

Instead of executing and delivering renewal notes, Doris Schmer, on October 13, 1975, executed a $125,000 "Continuing Guarantee." She thereby guaranteed to NPCA and its successors

> "the payment at maturity of any or all indebtedness evidenced by any notes, security agreements, mortgages, negotiable instruments, or other evidences of indebtedness of Philip G. Schmer, to [NPCA], whether now in existence or hereinafter incurred by Philip G. Schmer, for any purpose and in any amount whatsoever."

By this document, Doris Schmer bound her separate existing and future-acquired property.

On March 11, 1981, a decree was entered dissolving the Schmers' marriage. Doris Schmer was awarded alimony, child support, and a monetary property settlement.

Thereafter, on April 22, 1981, Philip Schmer executed and delivered to NPCA an operating note and open end real estate mortgage in the amount of $260,000. The pledged real estate consisted of three parcels of land (parcels 1 and 2 and a parcel 3), which included the farmland previously pledged to NPCA in the 1974 real estate mortgage. The unpaid balance of the April 22 note was renewed on May 13, 1982, in the amount of $228,000.

In December 1982, Philip Schmer filed for relief under chapter 11 of the U.S. Bankruptcy Code. That action was dismissed on July 23, 1985, on NPCA's motion. On December 9, 1985, NPCA obtained a judgment on the May 13, 1982, renewal note. NPCA executed on Philip Schmer's equipment, sold it, and applied the proceeds to the debt. In an attempt to satisfy the remainder of the debt, PCA, as successor in interest to NPCA, instituted a foreclosure proceeding on the parcels of farmland pledged in the 1974 and 1981 mortgages. PCA also

asked the court to enforce the personal guaranty of Doris Schmer.

In its foreclosure decree, the trial court concluded that Philip Schmer was indebted to appellant by reason of the 1981 divorce decree in the sum of $288,604.51, including interest, and was indebted to PCA in the sum of $390,482.65. With respect to the three parcels of property, the trial court concluded that PCA had a first lien on parcels 1 and 2 in the amount of $75,000 by reason of the original 1974 real estate mortgage; Doris Schmer had a second lien on parcels 1 and 2 in the amount of $288,604.51 by reason of the dissolution decree; and PCA had a third lien on parcels 1 and 2 in the amount of $315,482.65, the total sum owed PCA being offset by the $75,000 first lien. With respect to parcel 3, the trial court concluded that Doris Schmer had a first lien in the amount of $288,604.51, and PCA had a second lien in the amount of $315,482.65.

The trial court further concluded that the $125,000 guaranty given by appellant had not been revoked and was in full force and effect.

In her assignments of error, the appellant specifically claims that the trial court erred in holding (1) "the 1974 PCA mortgage to be a valid lien superior to the lien of Doris Schmer," (2) "the guaranty executed by Doris Schmer in 1975 to have continuing validity," and (3) "the guaranty and the mortgage were cumulative liabilities."

In an effort to refute PCA's first lien on parcels 1 and 2, appellant claims that the 1974 collateral note and mortgage were discharged by payment in accordance with the principle applied in *Diesel Service, Inc. v. Accessory Sales, Inc.*, 205 Neb. 381, 288 N.W.2d 258 (1980). *Diesel* held that where payments are made on an open account, and no appropriation has been made by either party concerning the payments, the law will apply them in discharge of the earliest items. Under that principle, and based on the payments made to NPCA, appellant asks this court to hold as a matter of law that the 1974 mortgage had been paid "either on August 9, 1975, when Philip Schmer made a $77,373.98 payment on his account or, at the latest, on July 2, 1979, when the account reflected a zero balance." Brief for appellant at 21. Appellant's reliance on

Diesel is misplaced. The $75,000 collateral note, as previously stated, was given solely as collateral. No payments were ever made on this collateral note. Rather, all payments resulted in decreasing the debtors' obligation as reflected in NPCA's and PCA's loan transaction records.

Appellant further contends that the 1974 real estate mortgage is void because it fails to state that it is intended to secure future advances in accordance with Neb. Rev. Stat. § 76-238.01 (Reissue 1986). Section 76-238.01 provides that optional future advances made after written notice of a lien or claim against the real estate shall be junior to the lien or claim even when a mortgage validly securing future advances is of record. However, since the 1974 mortgage secured only a collateral note and not future advances, this contention fails.

Because the 1974 mortgage pledging parcels 1 and 2 is valid and the execution and delivery of the collateral note, collateral agreement, and 1974 mortgage predate appellant's rights arising under her divorce decree, the trial court correctly concluded that PCA's $75,000 lien had first priority on parcels 1 and 2.

Doris Schmer's second assignment of error contests the trial court's holding that the $125,000 guaranty she executed in 1975 continued to be valid and enforceable. Appellant claims that by the time of the foreclosure, PCA had lost its rights under the guaranty for each of the following reasons: (1) Doris Schmer signed only in her capacity as a married woman, and once her marriage was dissolved, the underlying consideration for the guaranty no longer existed; (2) PCA failed to notify her of subsequent transactions between itself and Philip Schmer; (3) the statute of limitations barred enforcement; (4) the guaranty became void as a result of abandonment or, in the alternative, laches; and (5) PCA was negligent in failing to attain possession of the collateral.

Appellant first argues that once her marriage was dissolved on March 11, 1981, any advances made by PCA to Philip Schmer were not entitled to protection of the guaranty. Appellant cites no case law to support this proposition. Rather, she asserts that the law of strict construction of contracts supports this proposition.

The paragraph of the guaranty appellant relies on states: "I, Doris M. Schmer, *a married woman,* do execute this Guarantee with reference to my individual estate on the faith and credit thereof and with the intent to charge my separate property for its payment, binding that property which I now own and that which I may hereafter acquire." (Emphasis supplied.) The language "a married woman" in this provision is nothing more than a term of description. PCA was not a party to the Schmers' dissolution action. Its rights under the guaranty could not be affected by any actions in the dissolution proceedings.

Secondly, appellant contends that PCA's failure to give her notice of its subsequent transactions with Philip Schmer discharged her liability as guarantor. The "Continuing Guarantee" states that appellant guarantees "the payment at maturity of any or all indebtedness evidenced by any notes . . . of Philip G. Schmer . . . whether now in existence or hereinafter incurred" and that the guaranty "shall extend to any renewals or extensions of the . . . obligations."

Nebraska adheres to the rule of strict construction of guaranty contracts. *Federal Deposit Ins. Corp. v. Heyne*, 227 Neb. 291, 417 N.W.2d 162 (1987). " 'When the meaning of the contract is ascertained, or its terms are clearly defined, the liability of the guarantor is controlled absolutely by such meaning and limited to the precise terms.' " *Id.* at 293, 417 N.W.2d at 163 (quoting *Hunter v. Huffman*, 108 Neb. 729, 189 N.W. 166 (1922)). The language of Doris Schmer's guaranty is clear and unambiguous. There is no provision in the guaranty requiring PCA or its predecessor to give notice to appellant of its transactions with Philip Schmer. Such a notice requirement cannot be read into the contract.

Furthermore, Doris Schmer's guaranty is absolute. An absolute guaranty is a contract by which the guarantor has promised that if the debtor does not perform his obligation or obligations, the guarantor will perform some act for the benefit of the creditor. *Home Savings Bank v. Shallenberger*, 95 Neb. 593, 146 N.W. 993 (1914). An absolute guaranty of payment is enforceable at any time without demand and notice of default. *First West Side Bank v. Herzog*, 204 Neb. 356, 282 N.W.2d 38 (1979). While this court has stated that bad-faith failure to give

notice of default may operate to discharge a guarantor in a case where such neglect is unreasonable and unconscionable, *Furst v. Kruger*, 132 Neb. 54, 271 N.W. 156 (1937), there is no evidence in this case that PCA acted in bad faith or unreasonably.

Thirdly, PCA's effort to enforce the guaranty is not barred by the statute of limitations. The statute of limitations begins to run against a contract of guaranty the moment a cause of action first accrues. *Lake v. Piper, Jaffray & Hopwood Inc.*, 219 Neb. 731, 365 N.W.2d 838 (1985); *Cummins v. Tibbetts*, 58 Neb. 318, 78 N.W. 617 (1899). A guarantor's liability arises when the principal debtor defaults. *Murphy v. Stuart Fertilizer Co.*, 221 Neb. 767, 380 N.W.2d 631 (1986). In this case, Philip Schmer defaulted in 1982. This action was brought April 16, 1986, against Doris Schmer on her guaranty, well within the 5-year statute of limitations in Neb. Rev. Stat. § 25-205 (Reissue 1985).

Fourthly, there is no evidence that PCA abandoned Doris Schmer's guaranty. Abandonment of a contract occurs where one party acts in a manner inconsistent with the existence of the contract and the other party acquiesces in that behavior. *Reifschneider v. Nebraska Methodist Hospital*, 212 Neb. 91, 321 N.W.2d 445 (1982). Appellant fails to demonstrate how PCA abandoned the guaranty. She points to the deletion of her name from PCA's transaction records in March of 1981 as evidence of the abandonment. Such an act by PCA may very well reflect PCA's view as to appellant's responsibility on the principal obligation. However, it would hardly affect her liability on a separate obligation evidenced by a separate document, the guaranty.

Appellant also points to the testimony of former loan officer and past president of NPCA Eldon Peters as evidence of abandonment. Peters testified that he could not say whether PCA relied on the guaranty without looking to see if the guaranty was carried forward as collateral after the divorce. This testimony does not prove that PCA abandoned the guaranty. Without more, it cannot be concluded that PCA abandoned the guaranty.

PCA is not barred from enforcing the guaranty because of

laches. The defense of laches is not favored in Nebraska. "[I]t will be sustained only if the litigant has been guilty of inexcusable neglect in enforcing a right to the prejudice of his adversary." *Beaver Lake Assn. v. Sorensen*, 231 Neb. 75, 78, 434 N.W.2d 703, 706 (1989). The evidence clearly shows that PCA sought to collect the indebtedness, on which appellant was collaterally liable, from Philip Schmer as early as 1981. Further attempts at collection from Philip Schmer were stayed by his filing of bankruptcy. Following dismissal of the bankruptcy proceedings, PCA once again sought to collect the debt from Philip Schmer. PCA eventually obtained a judgment on the 1982 renewal note and exhausted Philip Schmer's personal property in partial satisfaction of the debt. It cannot be said that PCA acted negligently in enforcing its rights to the detriment of appellant.

Appellant contends that PCA's negligence is evidenced by the fact that from the time of Philip Schmer's default in 1982 until the time PCA obtained judgment in 1985, the collateral supporting Philip Schmer's obligation to PCA continued to decrease in value. Appellant relies upon *Custom Leasing, Inc. v. Carlson Stapler & Shippers Supply, Inc.*, 195 Neb 292, 237 N.W.2d 645 (1976), which cited the Restatement of Security § 132 (1941):

> "Where the creditor has security from the principal and knows of the surety's obligation, the surety's obligation is reduced pro tanto if the creditor (a) surrenders or releases the security, or (b) wilfully or negligently harms it, or (c) *fails to take reasonable action to preserve its value at a time when the surety does not have an opportunity to take such action.*"

(Emphasis supplied.) *Custom Leasing* at 298, 237 N.W.2d at 649.

As previously stated, neither NPCA nor its successor, PCA, acted unreasonably in enforcing its rights. It is not within the province of the court to attach blame for the mere precipitous decline in the value of real estate.

Appellant's third assignment of error, claiming the trial court erred in holding that the guaranty and the mortgage were cumulative liabilities, is equally without merit. These liabilities

are evidenced by two separate instruments, executed at separate points in time. They were drafted without any reference to each other. They are independent liabilities.

Accordingly, based upon the narrow issues that this court was called upon to address, we affirm.

AFFIRMED.

LARRY B. MEYERSON, APPELLANT, V. COOPERS & LYBRAND, A PARTNERSHIP, APPELLEE.

JUAN ROQUE, APPELLANT, V. COOPERS & LYBRAND, A PARTNERSHIP, APPELLEE.

MALCOLM BALLINGER, APPELLANT, V. COOPERS & LYBRAND, A PARTNERSHIP, APPELLEE.

448 N.W.2d 129

Filed November 17, 1989. Nos. 87-1138, 87-1139, 87-1140.

1. **Demurrer: Pleadings: Appeal and Error.** In reviewing an order sustaining a demurrer, this court accepts the truth of facts well pled and the factual and legal inferences which reasonably may be deduced from such facts, but does not accept conclusions of the pleader.
2. **Demurrer: Pleadings.** In ruling on a demurrer, the petition is to be liberally construed; if as so construed the petition states a cause of action, the demurrer is to be overruled.
3. **Demurrer.** When a demurrer is interposed stating several grounds, the court should, when sustaining the demurrer, specify the grounds upon which it is sustained.
4. **Corporations: Actions: Parties.** As a general rule a shareholder may not bring an action in his or her own name to recover for wrongs done to the corporation or its property. Such a cause of action is in the corporation and not the shareholders. The right of a shareholder to sue is derivative in nature and normally can be brought only in a representative capacity for the corporation.
5. **Corporations: Actions: Parties: Proof.** There is a well-recognized exception to the general rule relating to actions by shareholders: If the shareholder properly establishes an individual cause of action because the harm to the corporation also damaged the shareholder in his or her individual capacity, rather than as a shareholder, such individual action may be maintained. To come within this exception, the shareholder must show that his or her loss is separate and distinct from that of other shareholders of the corporation or that there is a special duty owed by a wrongdoer to a shareholder.

6. **Corporations: Actions: Parties.** It is only where the injury to a shareholder's stock is peculiar to him or her alone, such as in an action based on a contract in which the shareholder is a party, on a right belonging to him or her, or on a fraud affecting him or her directly, and does not fall alike upon other shareholders, that the shareholder may recover as an individual.
7. **Corporations: Actions: Parties: Restitution.** When an injury is to the collective rights of shareholders and the corporate property has been augmented by restitution, the shareholders will be fully indemnified. If a shareholder is permitted to bring an action personally to recover his or her proportionate share of the damages suffered by the corporation, a subsequent recovery by or for the corporation would be equivalent to a double recovery for him or her.
8. **Corporations: Actions: Parties: Proof.** To state a claim for a separate and distinct injury, the shareholder must allege and prove injury separate and distinct from injury suffered by other shareholders, not injury separate and distinct from injury suffered by the corporation.
9. **Corporations: Stock.** As a general rule, diminution in the value of stock is a direct injury to the corporation and only an indirect or incidental injury to an individual shareholder.
10. **Corporations: Actions: Parties.** Even though all shares of stock of a corporation may be owned by a small number of shareholders or by one shareholder alone, generally a shareholder cannot sue individually concerning rights which belong to the corporation.
11. _____: _____: _____. If an injury to a shareholder resulted from the violation of some special duty owed by the wrongdoer to the shareholder, then the shareholder may bring an individual action.

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

Michael L. Schleich and Amy S. Bones, of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellants.

Maureen E. McGrath and Jeff A. Anderson, of Kutak Rock & Campbell, for appellee.

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

HASTINGS, C.J.

The plaintiffs, shareholders of World Radio Laboratories, Inc., have appealed from orders of the district court which dismissed their amended petitions following the sustaining of defendant's demurrers. Plaintiffs' actions were based on the alleged negligence of the defendant in its capacity as a firm of certified public accountants in rendering improper and

inaccurate examinations of various financial statements issued by World Radio. They sought the recovery of damages to them, as shareholders, allegedly separate and distinct from those damages suffered by the corporation itself. The three cases have been consolidated for briefing and argument.

In reviewing an order sustaining a demurrer, this court accepts the truth of facts well pled and the factual and legal inferences which reasonably may be deduced from such facts, but does not accept conclusions of the pleader. *S.I.D. No. 272 v. Marquardt, ante* p. 39, 443 N.W.2d 877 (1989); *Security Inv. Co. v. State*, 231 Neb. 536, 437 N.W.2d 439 (1989); *Peterson v. Cisper*, 231 Neb. 450, 436 N.W.2d 533 (1989).

In ruling on a demurrer, the petition is to be liberally construed; if as so construed the petition states a cause of action, the demurrer is to be overruled. *S.I.D. No. 272 v. Marquardt, supra.*

The plaintiffs' assignments of error are that the trial court was incorrect in failing to find that the plaintiffs, as shareholders, possessed a cause of action for their own particular injuries separate and distinct from those of the corporation and that if the demurrers were sustained on the basis of the statute of limitations, such actions were improper because the allegations of the amended petitions relate back to the time of the filing of the original petitions.

Plaintiffs' original petitions alleged the collective ownership of something in excess of 90 percent of the capital stock of World Radio; that World Radio for all fiscal years since 1970 had annually engaged the defendant, Coopers & Lybrand, to examine the financial statements of World Radio and to study and evaluate World Radio's system of internal accounting controls; that Coopers did perform such examinations and rendered such opinions to World Radio for each fiscal year up to and including the one ending June 2, 1984; that such reports certified that the financial statements examined presented fairly the consolidated financial position of World Radio; and that Coopers failed to properly perform and performed negligently its obligations with respect to all annual examinations. The petitions further alleged that as a result of such negligence, World Radio is unable to obtain or raise equity

capital for expansion purposes, is unable to expand existing credit lines, has lost revenues, and has incurred expenses it would not otherwise have had; that World Radio's stockholders' equity and the value of World Radio's business is less than it would otherwise have been; and that World Radio has inadequate capital to operate. The petitions also alleged that as a natural consequence of Coopers' negligence, the equity of plaintiffs' stock has been reduced, the value of their stock has been reduced, and the plaintiffs have been unable to sell their World Radio stock in a public equity offering or to obtain stock in another entity as a result of a merger or consolidation.

Coopers demurred on the grounds that the facts did not state a cause of action, the plaintiffs had no legal capacity to sue, and there was a defect in parties plaintiff. The demurrers were sustained, and plaintiffs filed amended petitions.

The amended petitions alleged the same facts except that added to those petitions were allegations that the written opinions were furnished to World Radio and plaintiffs, that the written opinions furnished by Coopers were certified to plaintiffs, that the written opinions were delivered by Coopers to World Radio and plaintiffs, and that Coopers knew that plaintiffs were relying on the written opinions to offer the stock they owned in World Radio for sale in a public equity offering and, further, that Coopers knew and advised plaintiffs that plaintiffs would be able to sell their World Radio stock for a price in excess of its actual book value.

The amended petitions concluded with allegations that the equity of plaintiffs' stock has been reduced, the value of such stock has been reduced, plaintiffs "have been unable to sell their World Radio stock in a public equity offering" or to obtain stock in another entity as a result of a merger and have thus been prevented from realizing any amount in excess of the actual book value of the stock, and plaintiffs have lost the opportunity to receive dividends from World Radio.

Coopers again demurred on the same grounds as before and on the additional ground that the causes of action stated, if any, are barred by the statute of limitations.

The trial court gave no reason for its acts of sustaining the

demurrers. This makes it somewhat difficult to identify and analyze the question presented. This court, in *Clyde v. Buchfinck*, 198 Neb. 586, 594, 254 N.W.2d 393, 397-98 (1977) (citing with approval *In re Linford's Estate, Linford v. Linford et al.*, 116 Utah 21, 207 P.2d 1033 (1949)), stated: " 'When a demurrer is interposed stating several grounds, the court should, when sustaining the demurrer, specify the grounds upon which it is sustained; otherwise, this court is not informed in regards wherein the complaint was deficient. . . .' "

The apparent ground upon which the demurrers were sustained, and the question argued most strenuously by the parties, is the claimed derivative nature of the action.

As a general rule a shareholder may not bring an action in his or her own name to recover for wrongs done to the corporation or its property. Such a cause of action is in the corporation and not the shareholders. The right of a shareholder to sue is derivative in nature and normally can be brought only in a representative capacity for the corporation. See, *Wells Fargo Ag Credit Corp. v. Batterman*, 229 Neb. 15, 424 N.W.2d 870 (1988); *Henderson v. Joplin*, 191 Neb. 827, 217 N.W.2d 920 (1974); *E. K. Buck Retail Stores v. Harkert*, 157 Neb. 867, 62 N.W.2d 288 (1954).

There is a well-recognized exception to the general rule: If the shareholder properly establishes an individual cause of action because the harm to the corporation also damaged the shareholder in his or her individual capacity, rather than as a shareholder, such individual action may be maintained. See, *Cunningham v. Kartridg Pak Co.*, 332 N.W.2d 881 (Iowa 1983); *W. Clay Jackson Enterprises v. Greyhound Leasing*, 463 F. Supp. 666 (D.P.R. 1979); 12B W. Fletcher, Cyclopedia of the Law of Private Corporations § 5911 (rev. perm. ed. 1984); 19 Am. Jur. 2d *Corporations* § 2249 (1986).

The courts generally are in agreement that to come within this exception, the shareholder must demonstrate that there is a special duty, such as a contractual duty, between the wrongdoer and the shareholder or that the shareholder suffered an injury separate and distinct from that suffered by other shareholders. See 12B W. Fletcher, *supra*; *Cunningham v. Kartridg Pak Co.*, *supra*; *W. Clay Jackson Enterprises v. Greyhound Leasing*,

supra (separate injury); *E. K. Buck Retail Stores v. Harkert, supra* (separate and distinct injury); 19 Am. Jur. 2d, *supra* (special duty).

This exception is now recognized in Nebraska. In *Wells Fargo Ag Credit Corp. v. Batterman, supra* at 20, 424 N.W.2d at 874, this court said:

> There are exceptions to the rule precluding actions by shareholders, as individuals, where the cause of action belongs to the corporation, such as a situation where a shareholder's loss is separate and distinct from that of other shareholders of the corporation or where there may be a special duty owed by a wrongdoer to a shareholder.

Plaintiffs argue that the actions are not derivative but, rather, are individual claims seeking redress for direct injury. According to plaintiffs, they satisfy both of the exceptions to the general rule prohibiting suit by a shareholder for injury to the corporation and thus may bring individual actions.

SEPARATE AND DISTINCT INJURY

It is only where the injury to the plaintiff's stock is peculiar to him or her alone, such as in an action based on a contract to which the shareholder is a party, on a right belonging to him or her, or on a fraud affecting him or her directly, and does not fall alike upon other shareholders, that the shareholder may recover as an individual. See 12B W. Fletcher, *supra*, §§ 5911 and 5913.

This court, in *E. K. Buck Retail Stores v. Harkert, supra*, made it clear that a shareholder may sue personally when he or she has sustained a loss separate and distinct from that of other shareholders. When a shareholder fails to assert a claim peculiarly his or her own as distinguished from other shareholders, to allow the shareholder to sue personally would authorize a suit by each shareholder and result in a multiplicity of suits. As explained by the court:

> When the injury is to the collective rights of stockholders and the corporate property has been augmented by restitution, the plaintiffs, who have suffered as one of these, will be fully indemnified. If a stockholder is permitted to bring an action personally to recover his

> proportionate share of the damages suffered by the corporation, a subsequent recovery by or for the corporation would be equivalent to a double recovery for him.

Id. at 900, 62 N.W.2d at 307.

Plaintiffs argue that they did suffer injury separate and distinct from that suffered by World Radio as a corporate entity. However, to state claims entitling them to bring individual actions, plaintiffs must allege injury separate and distinct from injury suffered by other shareholders, not injury separate and distinct from injury suffered by the corporation. A review of the allegations of the amended petitions reveals that the injuries are not separate and distinct from injuries suffered by the corporation or other shareholders.

It is alleged that plaintiffs were damaged in the following particulars: (1) The equity of their stock has been reduced; (2) the value of their stock has been reduced; (3) they have been unable to sell their stock in a public equity offering or to obtain stock in another entity through merger or consolidation and have thus been prevented from realizing any amount in excess of the actual book value of their stock; and (4) they lost the opportunity to receive dividends from World Radio.

The allegation of damage to the equity of plaintiffs' stock is essentially the same as one of their allegations of damage to World Radio, i.e., "World Radio's stockholders' equity . . . is less than it would otherwise have been."

As for plaintiffs' allegation that the value of their stock has been reduced, diminution in the value of the stock is a direct injury to the corporation and only an indirect or incidental injury to an individual shareholder. See, *W. Clay Jackson Enterprises v. Greyhound Leasing*, 463 F. Supp. 666 (D.P.R. 1979); *Brictson v. Woodrough*, 164 F.2d 107 (8th Cir. 1947), *cert. denied* 334 U.S. 849, 68 S. Ct. 1500, 92 L. Ed. 1772 (1948); 12B W. Fletcher, Cyclopedia of the Law of Private Corporations § 5913 (rev. perm. ed. 1984); 19 Am. Jur. 2d *Corporations* § 2246 (1986). As noted by the court in *W. Clay Jackson Enterprises v. Greyhound Leasing, supra* at 671:

> The diminution in value of a stockholder's investment is a concomitant of the corporate injuries resulting in lost

> profits. *A fortiori*, any redress obtained by the corporations would run to the benefit of their stockholders, and to permit the latter to proceed with those claims would permit a double recovery.

Plaintiffs allege that they were damaged in that they "have been unable to sell their . . . stock in a public equity offering" and thus "have been prevented from realizing any amount in excess of the actual book value of said stock." Plaintiffs argue that they are not seeking redress for misappropriation of corporate assets or property or for any injury to the corporation but, rather, are seeking individual damages because, as a result of defendant's alleged negligence, they were unable to consummate their plan to sell their stock in a public equity offering. This reasoning is impossible to follow given that a public equity offering is an offering by the corporation of newly issued stock in exchange for new capital invested in the corporation. A public equity offering is not a sale of existing and already issued stock in the possession of shareholders.

The final allegation of damage is the lost opportunity to receive dividends from World Radio. Such injury would not be peculiar to plaintiffs, but would be suffered by all shareholders of the corporation.

Even though all shares of stock of a corporation may be owned by a small number of shareholders or by one shareholder alone, a shareholder cannot sue individually concerning rights which belong to the corporation. *Wells Fargo Ag Credit Corp. v. Batterman*, 229 Neb. 15, 424 N.W.2d 870 (1988); 12B W. Fletcher, *supra*, § 5910. All of plaintiffs' alleged damages are derivative from the alleged corporate injury and, by their very nature, would necessarily have been sustained by all of the shareholders of World Radio. Plaintiffs have no separate and distinct injury upon which to base individual actions.

SPECIAL DUTY

If the injury to the shareholder resulted from the violation of some special duty owed by the wrongdoer to the shareholder, then the shareholder may bring an individual action. *Wells Fargo Ag Credit Corp. v. Batterman, supra*; *Cunningham v. Kartridg Pak Co.*, 332 N.W.2d 881 (Iowa 1983); 12B W.

Fletcher, *supra*, § 5911; 19 Am. Jur. 2d, *supra*, § 2249.

Plaintiffs contend that Coopers owed them a duty to see that the World Radio financial statements fairly represented the consolidated financial conditions of World Radio. In support of their contention, plaintiffs cite *Rosenblum v. Adler*, 93 N.J. 324, 461 A.2d 138 (1983), as authority for a special duty certified public accountants owe shareholders, which duty is separate from any duty the accountant might owe the corporation being audited. Plaintiffs simply misinterpret the gist of their extensive citation from the case. The point of the court's indepth analysis of the function of an accountant is that an accountant auditing a corporation owes an obligation of fairness not only to management but to the shareholders as well. This obligation, however, does not rise to the level of a special duty owed directly to the shareholders, the breach of which would allow each shareholder to sue as an individual. To go that far would allow the multiplicity of suits the rule against individual suits by shareholders seeks to avoid.

Nevertheless, plaintiffs allege that Coopers was rendering advice to World Radio and plaintiffs with respect to a public equity offering and in relation thereto advised plaintiffs that they would be able to sell their stock at a price in excess of its actual book value. Construing the amended petitions liberally and taking this fact as true for the purpose of demurrer, we will assume that plaintiffs have alleged conduct on the part of Coopers outside the scope of the auditing contracts, for which conduct Coopers owed plaintiffs a direct duty of care.

Based on that assumption, Coopers owed plaintiffs a special duty separate from the duty Coopers owed to the corporation. However, plaintiffs failed to allege sufficient facts to state individual causes of action against Coopers; i.e., plaintiffs neglected to allege any facts establishing that they acted affirmatively in reliance on Coopers' advice and were thereby damaged. Rather, their allegations amounted to mere conclusions.

Plaintiffs in their amended petitions made no allegations that any public offering was actually made or that any actual agreement for merger or consolidation fell through as a result of any negligent advice rendered to plaintiffs or as a result of the

alleged inaccuracies in World Radio's financial statements. Without an allegation of any affirmative acts taken in reliance on the audited financial statements or Coopers' advice, plaintiffs have stated only that the value of their stock has been reduced and they have lost the opportunity to receive dividends, which, as stated, are no more than derivative claims.

Since the amended petitions fail to establish injury to the plaintiffs separate and distinct from that suffered by other shareholders or a special duty owed directly to plaintiffs by Coopers, the trial court did not err in sustaining the demurrers because plaintiffs failed to state causes of actions.

It is unnecessary for us to consider any alleged error regarding the statute of limitations. The judgments of the district court are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. STEVEN W. NEARHOOD, APPELLANT.

448 N.W.2d 399

Filed November 17, 1989. No. 88-874.

1. **Postconviction.** An evidential hearing may be denied a movant for postconviction relief when the records and files in the case affirmatively establish that the movant is not entitled to relief.
2. _____. One moving for postconviction relief must allege facts which, if proved, constitute a denial or violation of his or her rights under the Nebraska or federal Constitution, causing the judgment against the movant to be void or voidable.
3. _____. A court is not required to grant an evidential hearing on a motion for postconviction relief which alleges only conclusions of law or fact; nor is an evidential hearing required when (1) the motion does not contain sufficient factual allegations concerning a denial or violation of constitutional rights affecting the judgment against the movant, or (2) notwithstanding proper pleading of facts in a motion for postconviction relief, the files and records in the movant's case do not show a denial or violation of the movant's constitutional rights causing the judgment against the movant to be void or voidable.

4. **Postconviction: Proof.** One seeking postconviction relief has the burden of establishing a basis for such relief.
5. **Postconviction.** A movant is not entitled to postconviction relief merely on his or her own bald assertions or because he or she believes that he or she did not enjoy a perfect trial.
6. _____. A conviction will not be set aside in the absence of a showing of actual prejudice.
7. **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.
8. **Postconviction: Effectiveness of Counsel: Proof.** When a postconviction movant alleges a violation of his or her 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 movant, performed at least as well as a lawyer with ordinary training and skill in the criminal law in the area; further, the movant must make a showing of how he or she was prejudiced in the defense of the case as a result of his or her attorney's actions or inactions.
9. **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 or article I, § 11, of the Nebraska 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.
10. **Convictions: Right to Counsel: Appeal and Error.** Absent a showing of prejudice in the trial court's appointment of counsel on the defendant's behalf, a criminal conviction will not be reversed.
11. **Sentences: Evidence: Appeal and Error.** The mere fact that a defendant's sentence differs from those which have been imposed on coperpetrators in the same court does not, in and of itself, make the defendant's sentence an abuse of discretion; each defendant's life, character, and previous conduct may be considered in determining the propriety of the sentence.
12. **Criminal Law: Constitutional Law: Trial.** A defendant is not constitutionally entitled to receive a perfect trial, only a fair and constitutional trial.

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

Lance C. Antonson, of Hines & Hines Lawyers, for appellant.

Robert M. Spire, Attorney General, and Melanie J. Whittamore for appellee.

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

CAPORALE, J.

Defendant, Steven W. Nearhood, appeals from the denial of his motion for relief pursuant to the Nebraska Postconviction Act, Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1985). He asserts, in summary, that the postconviction court erred in (1) failing to grant him an evidential hearing on those allegations within his motion which do not relate to his claimed ineffectiveness of counsel and (2) overruling his motion for postconviction relief. We affirm.

On June 10, 1985, Nearhood, pursuant to a plea agreement, pled guilty to conspiracy to commit escape. He later moved to withdraw his plea, but the trial court, after hearing, denied the motion. Nearhood was then sentenced to imprisonment for a period of 5 to 10 years. In his direct appeal to this court, Nearhood asserted that the trial court erred in not allowing him to withdraw his guilty plea and that the sentence imposed was excessive. This court affirmed the trial court's judgment. *State v. Nearhood*, 223 Neb. 768, 393 N.W.2d 530 (1986) (*Nearhood I*).

On September 16, 1987, Nearhood filed the motion which is now before us. He alleges therein that (1) the bill of exceptions is inaccurate, thereby depriving him of the right to appeal guaranteed by article I, § 23, of the Nebraska Constitution; (2) the presentence report received by the trial court was biased and contained uncorrected errors, by reason of which he was denied the due process guaranteed by article I, § 3, of the Nebraska Constitution and the 5th, 6th, and 14th amendments to the U.S. Constitution; (3) the omission from the bill of exceptions of counsels' closing remarks and the trial court's statements in imposing sentencing violates article I, §§ 3 and 11, of the Nebraska Constitution and the 5th, 6th, and 14th amendments; and (4) he did not receive effective assistance of counsel at the trial level in violation of article I, § 11, of the Nebraska Constitution (guaranteeing an accused the right to defend by counsel) and the 6th amendment to the U.S. Constitution as made applicable to the several states by the 14th amendment.

The postconviction court ordered an evidential hearing with respect to Nearhood's allegation that he had not been provided effective assistance of counsel, but denied Nearhood a hearing

on the first, second, and third allegations set forth above.

The record establishes that the information charging Nearhood with conspiracy to escape was irregular in that the heading of the information indicated that Nearhood had been charged with a "Class III Felony," but the body of the information described a Class IV felony. At Nearhood's arraignment, the trial court suggested that the county attorney amend the information by interlineation so that the body of the information would conform with the heading and reflect the true situation, that a Class III felony was being charged. Nearhood's then trial attorney, hereinafter referred to as Nearhood's initial attorney, did not object to this amendment. According to the initial attorney, the amendment to the information was consistent with the plea agreement contemplated by the parties. However, according to Nearhood, the amendment was not consistent with such plea agreement.

Nearhood subsequently sought to withdraw his guilty plea, and his initial attorney withdrew from representing him. The trial court then appointed a second attorney, who represented Nearhood during the hearing on Nearhood's motion to withdraw his guilty plea, the sentencing hearing, and the subsequent direct appeal to this court which is the subject of *Nearhood I*.

We begin our analysis by recalling certain well-established applicable principles. The first among these is that an evidential hearing may be denied a movant for postconviction relief when the records and files in the case affirmatively establish that the movant is not entitled to relief. *State v. Kern*, 232 Neb. 799, 442 N.W.2d 381 (1989); *State v. Luna*, 230 Neb. 966, 434 N.W.2d 526 (1989); *State v. Reddick*, 230 Neb. 218, 430 N.W.2d 542 (1988).

Furthermore, in a proceeding under the act the movant must allege facts which, if proved, constitute a denial or violation of his or her rights under the Nebraska or federal Constitution, causing the judgment against the movant to be void or voidable. *State v. Start*, 229 Neb. 575, 427 N.W.2d 800 (1988). A court is not required to grant an evidential hearing on a motion which alleges only conclusions of law or fact; nor is an evidential hearing required under the Nebraska Postconviction

Act when (1) the motion does not contain sufficient factual allegations concerning a denial or violation of constitutional rights affecting the judgment against the movant, or (2) notwithstanding proper pleading of facts in a motion for postconviction relief, the files and records in the movant's case do not show a denial or violation of the movant's constitutional rights, causing the judgment against the movant to be void or voidable. *Id.*

One seeking postconviction relief has the burden of establishing a basis for such relief. *State v. Kern, supra*; *State v. Luna, supra*; *State v. Cole*, 224 Neb. 10, 395 N.W.2d 532 (1986); *State v. Landers*, 212 Neb. 48, 321 N.W.2d 418 (1982). A movant is not entitled to postconviction relief merely on his or her own bald assertions or because he or she believes that he or she did not enjoy a perfect trial. *State v. Landers, supra.* Thus, a conviction will not be set aside in the absence of a showing of actual prejudice. *State v. Cole, supra.*

The short and dispositive answer to Nearhood's first summarized assignment of error, which, as noted earlier, challenges the postconviction court's denial of an evidential hearing on his first, second, and third alleged grounds for relief, is that those grounds present issues which could have been raised in the direct appeal to this court. 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. Kern, supra*; *State v. Ferrell*, 230 Neb. 958, 434 N.W.2d 331 (1989). See, also, *State v. Bostwick, ante* p. 57, 443 N.W.2d 885 (1989).

In any event, as the discussion which follows demonstrates, the grounds on which postconviction relief is claimed are without merit. Nearhood's first ground for postconviction relief asserts that the bill of exceptions from the original proceeding is inaccurate in that lines 1 through 8 of the first page "are from a previous proceeding" and that "certain testimony has been deleted." However, Nearhood does not indicate what testimony may have been deleted, nor does he tell us how the alleged inaccuracy may have affected his conviction. The eight lines he claims are from a different proceeding

basically consist of the trial court's asking the attorneys if they were ready to proceed; any alleged inaccuracy within this portion of the bill of exceptions obviously had no bearing on Nearhood's conviction.

In setting forth his second ground for relief, Nearhood contends that "it was prejudicial error . . . to allow the entry into evidence of the defendant's pre-sentence investigation containing, as it did, all the mistakes, error and bias, and especially when they were not corrected." However, Nearhood had the opportunity, at his sentencing hearing, to testify in detail about the presentence report, and even more importantly, the sentence imposed by the trial court is amply supported by the record, even if those portions of the presentence report to which Nearhood objects are excluded from consideration. The nonexcessiveness of his sentences is a matter specifically ruled upon in *Nearhood I.*

Nearhood argues as his third ground for postconviction relief that his constitutional rights were violated as the result of omitting from the bill of exceptions counsels' closing arguments and the trial court's statements during sentencing. While it is true that these portions of the trial and sentencing hearing were omitted from the bill of exceptions, apparently because no record was made, there is no showing the omissions prejudiced Nearhood in such a way that would render his conviction void or voidable.

The postconviction court was therefore entirely correct in denying Nearhood an evidential hearing on his first, second, and third asserted grounds for relief. The first summarized assignment of error is therefore without merit.

Remaining for consideration, then, is the second summarized assignment of error, which challenges the representation afforded him by both his initial and second attorneys. In that connection we point out that inasmuch as his second attorney had been appointed before *Nearhood I* was filed, the alleged ineffectiveness of his initial attorney is an issue which could have been raised in that direct appeal. Thus, in order for us to reach the issue of the initial attorney's ineffectiveness, we construe Nearhood's claim to be that his second attorney was ineffective in failing to raise this issue on

direct appeal.

When a postconviction movant alleges a violation of his or her 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 movant, performed at least as well as a lawyer with ordinary training and skill in the criminal law in the area. Further, the movant must make a showing of how he or she was prejudiced in the defense of the case as a result of his or her attorney's actions or inactions. *State v. Ditter*, 232 Neb. 600, 441 N.W.2d 622 (1989); *State v. Gagliano*, 231 Neb. 911, 438 N.W.2d 783 (1989).

To sustain a claim of ineffective assistance of counsel as a violation of the sixth amendment to the U.S. Constitution and thereby obtain reversal of a defendant's conviction, the defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense, that is, a demonstration of reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *State v. Grell, ante* p. 314, 444 N.W.2d 911 (1989); *State v. Bostwick, ante* p. 57, 443 N.W.2d 885 (1989); *State v. Kern*, 232 Neb. 799, 442 N.W.2d 381 (1989); *State v. Ditter, supra*; *State v. Gagliano, supra*. We find nothing in article I, § 11, of the Nebraska Constitution which requires more.

With respect to the alleged ineffectiveness of his initial attorney, Nearhood charges that the attorney failed to (1) adequately consult with him, (2) advise him of the nature and consequences of his plea, and (3) investigate possible defenses available to Nearhood. However, while these allegations may be supported to some extent by Nearhood's deposition testimony, they are contradicted by the initial attorney's testimony at the postconviction hearing. Furthermore, at his arraignment, Nearhood discussed the factual basis of the amended charge against him, and the trial court explained the consequences of the guilty plea. Nearhood then stated he understood the charge and the penalties associated with it.

Nearhood also alleges that his initial attorney failed to turn over his entire case file to the second attorney. Assuming, but not deciding, the truth of this allegation, the fact remains that

Nearhood fails to show a reasonable probability that he may have been prejudiced by this failure.

Although the issue is not specified as a ground for relief in Nearhood's motion for postconviction relief, he also argues that his initial attorney's representation was ineffective in that he permitted the county attorney to amend the information by interlineation. Nearhood testified, and argues in his brief, that he thought he was pleading guilty to a Class IV rather than a Class III felony. Thus, Nearhood contends that his initial attorney should have objected to the court's allowing the information to be amended. However, that attorney's testimony from the postconviction hearing, along with a review of the record of the arraignment, refutes the contention that Nearhood believed he was pleading to a Class IV rather than a Class III felony.

In addition, Nearhood complains that his initial attorney failed to object to proceeding on the amended information immediately after the amendment was made. It is true that Neb. Rev. Stat. § 29-1604 (Reissue 1985) makes the provisions of Neb. Rev. Stat. § 29-1802 (Reissue 1985), dealing with indictments, applicable to informations. Section 29-1802 provides in relevant part that no one "shall be, without his assent, arraigned or called on to answer to any indictment until one day shall have elapsed, after receiving in person or by counsel, or having an opportunity to receive a copy" of the indictment. It is also true that said time requirement applies to informations which have been amended. *McKay v. State*, 91 Neb. 281, 135 N.W. 1024 (1912), *modifying* 90 Neb. 63, 132 N.W. 741 (1911). However, not only does Nearhood not tell us how he was prejudiced by this failure, but the right is merely a statutory one, not one of the constitutional magnitude required for postconviction relief.

With respect to his second attorney's representation, Nearhood first argues that that attorney did not adequately consult with him prior to the motion to withdraw his guilty plea and that, thus, the second attorney was not adequately prepared to proceed on this motion. This contention is refuted by the second attorney's testimony at the postconviction hearing; moreover, the record does not support a claim that

Nearhood was in any way prejudiced by any alleged lack of preparation by appellate counsel.

Nearhood next argues that the second attorney was ineffective in failing to "bring out, in its entirety, defendant's reasons for his change of plea, i. e., coersion [sic] and both mental and physical harassment inflicted by the sheriff and by the chief deputy, prior to the defendant's entry of his plea of guilty . . . ." However, this court specifically addressed and decided this issue adversely to him in *Nearhood I*.

Nearhood also argues that his second attorney failed to raise on direct appeal "all viable issues which were a proper subject for appeal . . . ." Particularly, Nearhood first contends that the second attorney should have assigned as error the trial court's decision to appoint second counsel as opposed to allowing Nearhood to proceed pro se. However, Nearhood fails to provide any indication of how he was prejudiced by the appointment of counsel on his behalf. This court has held that absent a showing of such prejudice, a criminal conviction will not be reversed. (See *State v. Kirby*, 198 Neb. 646, 254 N.W.2d 424 (1977), in which this court determined that the defendant was not prejudiced either by being represented by counsel or by the trial court's denial of self-representation.) Furthermore, except for Nearhood's deposition testimony, the record fails to show that Nearhood ever objected to the person appointed as his second attorney. In fact, the record reveals that Nearhood attempted to contact his second attorney regarding his case immediately after he learned that the attorney had been appointed as his counsel. Thus, it cannot be said that the second attorney was ineffective in not raising this issue on appeal.

Nearhood further complains that his second attorney was ineffective in failing to raise on direct appeal the issue of the disparity between the sentences imposed on him and the coperpetrator in the case. However, the mere fact that a defendant's sentence differs from those which have been imposed on coperpetrators in the same court does not, in and of itself, make the defendant's sentence an abuse of discretion; each defendant's life, character, and previous conduct may be considered in determining the propriety of the sentence. *State v. Spotted Elk*, 227 Neb. 869, 420 N.W.2d 707 (1988). Thus, this

was not a viable issue on appeal.

Finally, Nearhood argues that the second attorney was ineffective in failing to address on direct appeal the purported errors and bias in the presentence report. This is the same issue raised by Nearhood's second stated ground for postconviction relief, an issue on which the postconviction court refused to grant an evidential hearing. As previously discussed, this issue does not provide a basis for finding reversible error. Consequently, the second attorney's failure to raise this issue on direct appeal does not represent a sound basis for finding that Nearhood did not receive effective assistance of counsel.

It must be remembered that "[a] defendant is not constitutionally entitled to receive a 'perfect trial,' only a fair and constitutional trial." *State v. Hochstein*, 216 Neb. 515, 519, 344 N.W.2d 469, 472 (1984), *cert. denied* 469 U.S. 873, 105 S. Ct. 226, 83 L. Ed. 2d 156. The postconviction court held an evidential hearing with respect to Nearhood's claim of ineffective assistance of counsel and determined that Nearhood was not entitled to postconviction relief. It cannot be said that this determination was clearly erroneous.

There being no merit to Nearhood's summarized assignments of error, the judgment of the postconviction court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. PAUL L. BATTS, APPELLANT.

448 N.W.2d 136

Filed November 17, 1989. No. 88-875.

1. **Drunk Driving: Words and Phrases.** As used in Neb. Rev. Stat. § 39-669.07 (Reissue 1988), the phrase "under the influence of alcoholic liquor" means after the ingestion of alcohol in an amount sufficient to impair to any appreciable degree the ability to operate a motor vehicle in a prudent and cautious manner.
2. **Verdicts: Appeal and Error.** A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict.

3. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to sustain a criminal conviction, it is not the province of the Nebraska 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.
4. **Police Officers and Sheriffs: Drunk Driving: Proof.** A police officer's opinion testimony, based on personal observations of the defendant, is sufficient to sustain a finding that the defendant operated a motor vehicle when the defendant was under the influence of alcohol.
5. **Convictions: Circumstantial Evidence.** Circumstantial evidence is sufficient to support a conviction if such evidence and the reasonable inferences that may be drawn therefrom establish guilt beyond a reasonable doubt.
6. **Circumstantial Evidence.** In a criminal case established by circumstantial evidence, the State is not required to disprove every hypothesis but that of guilt.

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

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

After a bench trial, the defendant-appellant, Paul L. Batts, was adjudged guilty of motor vehicle homicide by driving while intoxicated in violation of Neb. Rev. Stat. § 28-306 (Reissue 1985). Batts urges that the evidence is insufficient to sustain his conviction. We affirm.

The charge against Batts resulted from a collision between an automobile he was driving and in which the decedent, John A. Hurst, was riding and an automobile driven by April Dickert-Heisch. The collision took place at 4:17 during the afternoon of February 10, 1988, on Ridgewood Avenue, near the point at which it branches into a Y intersection with 84th Street in Omaha, Nebraska, as more fully described later in this opinion. Although it had snowed the night before the collision, the lanes of travel on Ridgewood Avenue were clear and dry; however, there was snow along the curbs and in the middle of the street. There was also testimony that Ridgewood Avenue

was wet and icy in spots and that the street was snowpacked at the intersection.

Earlier that day, Batts had borrowed the automobile he was driving from its owner, Michelle Shipman. Shipman had informed Batts that the automobile had mechanical problems, specifically that it unpredictably "kind of stalled out a little bit once in a while . . . ." She told him to accelerate when the automobile began to hesitate in order to prevent it from stalling.

Later during the day, Batts and two friends, Brian Caccavari and Paul Anderson, went to Caccavari's house after school. While there, Caccavari got a bottle of whiskey and one of rum from his bedroom. The evidence concerning the amount of alcohol Batts consumed and when he did so is in conflict.

According to Caccavari, Batts first drank one or two "glugs" directly from each of the bottles at about 3:15 p.m. Then Batts and Anderson went to a convenience store to get some Dr. Pepper to mix with the liquor. After they returned to Caccavari's house at about 3:20 or 3:25 p.m., Batts consumed a mixed drink from a 12-ounce paper Coca-Cola cup. To mix the drink, Batts filled the cup half full with liquor and then added Dr. Pepper. Batts then made another mixed drink of similar proportions, which he drank while the three returned to their school. Before leaving the school grounds, Batts had made another mixed drink, again containing, according to Caccavari, half alcohol and half Dr. Pepper, which Batts drank as he drove.

According to Anderson, at about 3:25 p.m. Batts drank two "slam dunks," consisting of mostly whiskey and some Dr. Pepper, from a paper Coca-Cola cup, and then drank a third drink of half whiskey and half Dr. Pepper.

According to Batts' testimony at trial, he drank no alcohol until after he returned to Caccavari's house from the convenience store and after having eaten a hoagie sandwich at about 2:45 p.m. He testified that he took his first drink of the day at 3:45 p.m., at which time he drank two 1-ounce shots of the 80-proof alcohol Caccavari had produced. He then drank two "slam dunks," one at 3:50 p.m. and one at 3:55 p.m., each consisting of 1 ounce of alcohol and 1 ounce of Dr. Pepper. Just before returning to the school building, he mixed another drink

containing 2 ounces of whiskey to take with him. He finished that drink at the school grounds at around 4:05 p.m. and then made another, again containing 2 ounces of whiskey, which he had with him at the time of the collision and from which he took two sips. Batts testified that as a result of the collision, the drink he had between his legs spilled "all over" his clothing.

In contrast with his above testimony, after Batts was arrested, he told police during a taped statement that he began drinking before going to the convenience store. He stated that after the schoolday, Caccavari said, "[L]et's go to my house and drink a little bit before we go. I said, alright. We went to his house, did about two shots, probably at the most . . . two shots . . . and [Anderson] wanted me to take him up to the store to get him a 2 liter Dr. Pepper."

According to Caccavari, somewhere between 3:40 and 3:55 p.m., Batts drove him and Anderson to the school in Shipman's automobile in order to pick up another friend, the decedent. They took both bottles of alcohol and several paper Coca-Cola cups with them. After finding the decedent in the school building, the four returned to Shipman's automobile and left, with Batts driving.

Caccavari was in the front passenger seat, and Anderson and the decedent were sitting in the back seat. Eventually, Batts made a left turn onto Ridgewood Avenue and began traveling north. The speed limit for northbound traffic on Ridgewood Avenue is 30 miles per hour. According to Batts, the automobile was proceeding at 30 miles per hour as he traveled on Ridgewood Avenue.

From the point at which Batts entered Ridgewood Avenue, the street proceeds north for about two blocks, then curves to the northwest for about a block, and then progresses northwesterly for about two blocks until reaching a Y intersection, where the street divides into two branches. One branch continues to the northwest and becomes 84th Street; the other branch retains the name Ridgewood Avenue and proceeds northeast.

As the automobile in which the four rode approached the location of the collision near the Y intersection, Caccavari asked Batts if "he could drive good when he was drunk," to

which Batts responded affirmatively. Anderson testified that as they approached the Y intersection, he saw Batts push on the accelerator and was pushed back against the seat from the impact of the automobile going forward. He told Batts, "[D]on't do that." According to Caccavari, just as they approached the Y intersection, the automobile accelerated suddenly and began fishtailing. "We were going down the street and we fishtailed towards this way, and we missed the first car that was coming, we fishtailed back that way and then we fishtailed that way again, and that's when we got smashed on the driver's side."

Dickert-Heisch, who was traveling south on 84th Street, testified that she "saw a car coming north on 84th and it was swerving, fishtailing into — it looked like it was going into my lane of traffic, and the car immediately preceding mine had just barely missed that car . . . ." Although Dickert-Heisch slowed down, there was nowhere for her to turn off the street, and the side of the fishtailing automobile struck the front end of her automobile.

A police officer for the city of Omaha, an expert in reconstructing accidents, concluded, based on the "skid marks," "yaw marks," "rotation marks," the debris located at the collision scene, the damage to the vehicles, and interviews with witnesses to the collision, that the northbound automobile driven by Batts left its lane of traffic, collided with Dickert-Heisch's southbound automobile, pushed it backward several feet, and then "rotated," during which "there was a second collision to the rear of [Dickert-Heisch's automobile] . . . ."

After the collision, Caccavari hid the two bottles of alcohol behind some bushes close to the site of the collision. Police found the bottles behind the bushes after the accident and also found lying on the floorboard of the driver's side of the automobile Batts had been driving a paper Coca-Cola cup which contained a liquid smelling like alcohol.

Batts denied at trial that he was drunk at the time of the collision. However, an Omaha police officer who investigated the scene of the accident detected the odor of alcohol on Batts' breath and noticed that Batts' eyes were red and bloodshot.

After Batts had been taken to the emergency room, another officer noticed that Batts smelled of alcohol, was talkative, and had bloodshot eyes. Based on those circumstances and Batts' demeanor, the second officer concluded that Batts had been driving while under the influence of alcohol and placed him under arrest. At one point in his interviews with the police, Batts admitted that he felt "sort of light-headed" while driving.

A sample of Batts' blood taken at 5:25 p.m. revealed Batts had a concentration of .13 grams of alcohol per hundred milliliters of blood. Considering the standard deviation, according to the chemist who testified for the State, Batts' blood-alcohol level could range from .117 to .143 grams of alcohol per hundred milliliters of blood.

A pathologist called by Batts testified that a reasonably small amount of alcohol will be absorbed into the blood in about 1 hour, that half the alcohol consumed at any time will be absorbed in about 15 to 20 minutes, and that food, especially that with a high fat content, "definitely delays absorption." He opined that if Batts drank nothing before 3:45, had eaten a hoagie sandwich earlier, then at 3:45 drank 4 ounces of 80-proof whiskey, at 3:50 drank another 2 ounces of 80-proof whiskey, between 3:55 and 4:05 drank another 2 ounces of 80-proof whiskey, and finally, at 4:05 mixed another drink with 2 ounces of whiskey, from which he took two swallows, Batts would have approximately an .08 blood-alcohol content at 4:15. However, on cross-examination, the pathologist testified that if it were assumed Batts started drinking at 3:15 rather than 3:45, his blood-alcohol content would be closer to .10 at 4:15.

En route to the hospital, Batts told a paramedic: "I was going too fast, I was showing off, I lost it in the curve, and, boy, I was just being stupid." Later, in the emergency room before being placed under arrest, Batts declared that he "drove the car too fast around the curve and he lost control of the car" and that he "had perfect control of the vehicle until he went around the corner and that he lost control of the vehicle and he was showing off."

During his taped statement to the police, Batts stated, "I was coming around a slow corner, kind of like when the street just curves, the car started to cut off, so I gave it a little gas, the rear

end went into a spin and that's all I can remember." At trial, Batts' explanation of the collision coincided with this taped statement. Batts believed that the collision was caused when the automobile he was driving hesitated, causing him to accelerate and lose control of it.

Both the State and Batts introduced testimony from mechanics who had examined the automobile Batts had been driving at the time of the collision. The State's mechanic opined that from a stopped position to low speeds the automobile was capable of "stumbling," hesitating between the time when the accelerator is depressed and the time when the automobile actually accelerates. The mechanic who testified for Batts opined that as a result of several mechanical problems the automobile had, there was a possibility that the automobile could hesitate at speeds of 0 to 30 miles per hour. Neither the State's nor Batts' expert mechanics discovered a defect which would cause the automobile to accelerate by itself, both agreeing that the acceleration pedal would have to be physically depressed for the vehicle to accelerate.

The parties stipulated that decedent's death was the result of head and internal injuries he suffered as a result of the collision.

Section 28-306 provides:

> (1) A person who causes the death of another unintentionally while engaged in the operation of a motor vehicle in violation of the law of the State of Nebraska or in violation of any city or village ordinance commits motor vehicle homicide.
>
> . . . .
>
> (3) If the proximate cause of the death of another is the operation of a motor vehicle in violation of section 39-669.01, 39-669.03, or 39-669.07, motor vehicle homicide is a Class IV felony.

Neb. Rev. Stat. § 39-669.07 (Reissue 1988) provides in pertinent part:

> It shall be unlawful for any person to operate or be in the actual physical control of any motor vehicle:
>
> (1) While under the influence of alcoholic liquor or of any drug;
>
> (2) When such person has a concentration of

ten-hundredths of one gram or more by weight of alcohol per one hundred milliliters of his or her blood.

As used in § 39-669.07, the phrase "under the influence of alcoholic liquor" means after the ingestion of alcohol in an amount sufficient to impair to any appreciable degree the ability to operate a motor vehicle in a prudent and cautious manner. *State v. Thomte*, 226 Neb. 659, 413 N.W.2d 916 (1987); *State v. Burling*, 224 Neb. 725, 400 N.W.2d 872 (1987).

In order to convict Batts of felony motor vehicle homicide, the State was required to prove that Batts' driving in violation of § 39-669.07 proximately caused the death of the victim. See *State v. Ring, ante* p. 720, 447 N.W.2d 908 (1989).

To begin our discussion of Batts' assignment of error, we note that a verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict. *State v. Johns, ante* p. 477, 445 N.W.2d 914 (1989). In determining the sufficiency of the evidence to sustain a criminal conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence; such matters are for the finder of fact. *State v. Boham, ante* p. 679, 447 N.W.2d 485 (1989).

The record contains evidence sufficient to support the district court's judgment. A police officer concluded, based on Batts' demeanor and the fact that Batts was talkative, his breath smelled of alcohol, and he had bloodshot eyes, that Batts had been driving while under the influence of alcohol. A police officer's opinion testimony, based on personal observations of the defendant, is sufficient to sustain a finding that the defendant operated a motor vehicle when the defendant was under the influence of alcohol. *State v. Thomte, supra.*

Furthermore, the blood test revealed that at 5:25 p.m., just over an hour after the collision, Batts had a concentration of .13 grams of alcohol per hundred milliliters of blood. Although Batts' expert pathologist opined that assuming Batts drank the amounts and at the times he testified to, he would have had only a concentration of .08 grams of alcohol per hundred milliliters of blood at the time of the collision, the pathologist also

testified that if Batts had begun his drinking at 3:15 rather than 3:45, his blood-alcohol content would be closer to .10 at 4:15. Caccavari testified that Batts began drinking at 3:15, and in his taped statement Batts stated that he drank about two shots of liquor before going to the convenience store. Additionally, the pathologist's opinion assumes that Batts drank the amount he had testified to drinking. From Caccavari's testimony it can reasonably be concluded that Batts drank twice the amount he admitted in his testimony.

Finally, Batts stated that he felt lightheaded and that as he drove around the curve along Ridgewood Avenue, he was traveling too fast and was showing off and as a result lost control of his automobile. Both Caccavari and Anderson testified that Batts accelerated immediately prior to the collision and then began fishtailing out of control until colliding with Dickert-Heisch's automobile. Although there was evidence that the automobile Batts was driving was malfunctioning and that the street surface was slippery, the district court could have reasonably concluded that Batts lost control of his automobile as the result of being under the influence of alcohol and thus proximately caused decedent's death. Circumstantial evidence is sufficient to support a conviction if such evidence and the reasonable inferences that may be drawn therefrom establish guilt beyond a reasonable doubt. See *State v. Blue Bird*, 232 Neb. 336, 440 N.W.2d 474 (1989); *State v. Salas*, 231 Neb. 471, 436 N.W.2d 547 (1989). In a criminal case established by circumstantial evidence, the State is not required to disprove every hypothesis but that of guilt. See *State v. Blue Bird, supra*; *State v. Salas, supra*.

The record failing to sustain Batts' assignment of error, we affirm the judgment of the district court.

AFFIRMED.

PRODUCTION CREDIT ASSOCIATION OF THE MIDLANDS, SUCCESSOR IN INTEREST TO NORFOLK PRODUCTION CREDIT ASSOCIATION, APPELLEE, V. PHILIP G. SCHMER, APPELLANT, AND DORIS M. SCHMER, APPELLEE.

448 N.W.2d 141

Filed November 17, 1989. No. 88-995.

1. **Foreclosure: Appeal and Error.** When a defendant requests a stay of sale pursuant to Neb. Rev. Stat. § 25-1506 (Reissue 1985), that request precludes that defendant from appealing from the foreclosure decree.
2. **Foreclosure: Waiver: Appeal and Error.** A request for a stay of sale is a waiver of any *prior* error in the proceedings.
3. **Jurisdiction.** The question of subject matter jurisdiction can be raised at any time in the proceedings.
4. **Supersedeas Bonds: Judgments: Final Orders: Appeal and Error.** An appeal to the Supreme Court does not operate as a stay of proceedings unless an appellant supersedes the judgment or final order in the manner provided by law.
5. _____: _____: _____: _____. In the absence of a supersedeas, a judgment or final order retains its vitality and is capable of being executed during the pendency of the appeal.
6. **Foreclosure: Supersedeas Bonds: Appeal and Error.** Where a decree orders the sale of land, the law in Nebraska explicitly requires that a supersedeas be set out as stated in Neb. Rev. Stat. § 25-1916(3) (Reissue 1985).
7. **Supersedeas Bonds.** A supersedeas is a statutory remedy. It is only obtained by a strict compliance with all the required conditions, none of which can be dispensed with.

Appeal from the District Court for Madison County: RICHARD P. GARDEN, Judge. Affirmed.

Richard E. Mueting, of Mueting & Stoffer, for appellant.

James T. Gleason, of Stalnaker, Becker, Buresh, Gleason & Farnham, P.C., for appellee Production Credit Association.

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

FAHRNBRUCH, J.

Contending the Madison County District Court lacked jurisdiction to issue an order of sale and to confirm the sale of his foreclosed farmland, defendant-appellant, Philip G. Schmer, asks this court to set aside the sale and order that the property be resold. We affirm.

On October 16, 1987, on the petition of Production Credit

Association of the Midlands (PCA), successor in interest to Norfolk Production Credit Association, the trial court entered a decree foreclosing appellant's farm and ordered it to be sold if the amounts found due were not paid within 20 days. Appellant did not appeal the foreclosure. Instead, he requested and was granted a 9-month stay of sale pursuant to Neb. Rev. Stat. § 25-1506 (Reissue 1985). When a defendant requests a stay of sale pursuant to § 25-1506, that request precludes that defendant from appealing from the foreclosure decree. Neb. Rev. Stat. § 25-1509 (Reissue 1985). See, also, *Federal Farm Mtg. Corporation v. Ganser*, 145 Neb. 589, 17 N.W.2d 613 (1945); *Ohio Nat. Life Ins. Co. v. Baxter*, 139 Neb. 648, 298 N.W. 530 (1941); *Carley v. Morgan*, 123 Neb. 498, 243 N.W. 631 (1932).

Questioning only the trial court's decree as to the priority of competing liens, the validity of a mortgage, and the vitality of her guaranty, Doris M. Schmer, a named defendant and appellant's ex-wife, perfected a separate appeal to this court. She filed a bond which her ex-husband claims was a supersedeas bond. Doris Schmer's appeal was decided adversely to her by this court in *Production Credit Assn. of the Midlands v. Schmer, ante* p. 749, 448 N.W.2d 123 (1989).

On September 12, 1988, on the motion of PCA, the clerk of the trial court issued an order of sale on the foreclosed property which Philip Schmer, claiming lack of jurisdiction of the trial court, moved to quash. In his ruling, the trial judge held that "because the defendant Philip Schmer has taken advantage of the stay provision of the statutes, has not superseded, [and] has not appealed . . . there is no basis to sustain the Motion to Quash the order of sale." We reject the trial court's reasoning, but not its denial of the motion to quash. As stated in *Ohio Nat. Life Ins. Co., supra*, a request for a stay is a waiver of any *prior* error in the proceedings. It is clear, however, that the question of subject matter jurisdiction can be raised at any time in the proceedings. *Gomez v. State ex rel. Larez*, 157 Neb. 738, 61 N.W.2d 345 (1953).

On October 19, 1988, appellant's farmland was sold at a sheriff's sale to PCA. At a hearing on PCA's motion to confirm the sale, Philip Schmer objected, again citing the trial court's

lack of jurisdiction. In overruling the appellant's objection, the trial court once more based its ruling on the fact that the appellant had elected to exercise his right to stay the sale for 9 months. On November 4, 1988, an order confirming the sale of the farm to PCA was entered. Appellant questioned the legality of the sale only on jurisdictional grounds. He did not contest either the procedural validity of the sale or the price for which the farmland sold.

On appeal to this court, Philip Schmer assigns three errors, which, when consolidated, claim that the foreclosure decree had been superseded by his ex-wife's filing of a bond in her appeal to this court. Consequently, the appellant reasons, the trial court was divested of jurisdiction to issue an order of sale of his farm and to confirm the sale.

An appeal to the Supreme Court does not operate as a stay of proceedings unless an appellant supersedes the judgment or final order in the manner provided by law. *Hall v. Hall*, 176 Neb. 555, 126 N.W.2d 839 (1964). In the absence of a supersedeas, a judgment or final order retains its vitality and is capable of being executed during the pendency of the appeal. *Marksbury & Washington v. Board of Education*, 199 Neb. 283, 258 N.W.2d 242 (1977).

The pivotal issue here is whether the bond appellant's ex-wife filed did in fact constitute a supersedeas. That bond states that Doris Schmer "will pay all costs adjudged against her in the Supreme Court of the State of Nebraska and shall prosecute her appeal without delay." PCA contends that her bond, although labeled a "Supersedeas Deposit," is ineffective as a supersedeas because it fails to comply with Neb. Rev. Stat. § 25-1916(3) (Reissue 1985). Section 25-1916(3) provides:

> (3) *When the judgment, decree, or order directs the sale or delivery of possession of real estate*, the bond or cash deposit shall be in such sum as the court, or judge thereof in vacation, shall prescribe, conditioned that the appellant or appellants will prosecute such appeal without delay and *will not during the pendency of such appeal commit, or suffer to be committed, any waste upon such real estate, and pay all costs, and all rents or damages to such real estate which may accrue during the pendency of such*

appeal and until the appellee is legally restored thereto.
(Emphasis supplied.)

Where a decree orders the sale of land, the law in Nebraska explicitly requires that a supersedeas be set out as stated in § 25-1916(3). *The Exchange Bank v. Mid-Nebraska Computer Services, Inc.*, 188 Neb. 673, 199 N.W.2d 5 (1972). *State v. Thiele*, 19 Neb. 220, 27 N.W. 109 (1886), also supports this rule. In *Thiele*, there was a failure to include in the bond a condition that "the appellant 'will prosecute such appeal without delay, and will not during such appeal commit or suffer to be committed any waste upon such real estate.' " *Id.* at 222, 27 N.W. at 109. The court held that the bond filed in *Thiele* did not constitute a supersedeas. It reasoned that the purpose of such a condition was to prevent the value of the real estate from being diminished by waste after the foreclosure decree and during the pendency of the appeal. The court observed:

> There is no doubt but that the bond might be amended so as to conform to the requirements of the law at any time, but the fact still remains that the bond is not in conformity to the law, and it is the duty of the clerk to issue the order [of sale] unless such bond is filed.

Id. at 222, 27 N.W. at 110.

In *State v. Laflin*, 40 Neb. 441, 444, 58 N.W. 936, 937 (1894), we held: " 'A supersedeas is a statutory remedy. It is only obtained by a strict compliance with all the required conditions, none of which can be dispensed with.' " (Quoting *Sage et al. v. Central R.R. Co. et al.*, 93 U.S. 412, 23 L. Ed. 933 (1876).)

Doris Schmer appealed from a decree foreclosing a mortgage and ordering the sale of real estate. The record before this court fails to reveal that the trial court approved any bond for that appeal. Her bond does not contain a condition that during her appeal Doris Schmer would not commit or suffer to be committed any waste upon the farmland under foreclosure or that she would pay all rents or damages to the real estate which might accrue during the pendency of her appeal. Thus, her bond did not constitute a supersedeas.

At oral argument, appellant contended that Doris Schmer's bond was sufficient to supersede the execution of a conveyance in accordance with § 25-1916(2). A decree that orders the sale

of real estate must comply with § 25-1916(3). *The Exchange Bank v. Mid-Nebraska Computer Services, Inc., supra.* Any bond intended to fall within the provisions of § 25-1916(2) would be ineffective as a supersedeas where the sale of real estate has been ordered.

In *Collins v. Brown*, 64 Neb. 173, 89 N.W. 754 (1902), while a foreclosure action was pending in the Supreme Court, the defendants filed a supersedeas bond of $500 which was approved by the district court. The foreclosure decree was executed by sale of the property. Defendants resisted confirmation of the sale, claiming the decree had been superseded. This court affirmed confirmation of the sale, finding that the supersedeas did not contain a condition that the defendants or their surety would pay " 'the value of the use and occupation of the property' affected by the decree" as required by statute. *Id.* at 174, 89 N.W. at 755. Since the undertaking did not comply with the statute, this court held that the undertaking did not operate as a supersedeas.

In reviewing the bond filed by Doris Schmer, we note that she only pledged to pay all costs adjudged against her in this court and to prosecute her appeal without delay. On its face, this pledge comports with the language of only a cost bond. Neb. Rev. Stat. § 25-1914 (Reissue 1985). In *State v. Laflin, supra*, we held that a bond that omitted a condition required by statute was merely a cost bond.

The bond filed by Doris Schmer fails as a supersedeas under § 25-1916(3) because it omits a condition that during her appeal she would not commit or suffer to be committed any waste upon the farmland under foreclosure. Nor does the bond contain a condition that Doris Schmer would pay all rents or damages to the farmland which might accrue during the pendency of her appeal. Consequently, the trial court had jurisdiction to order the sale of Philip Schmer's farmland and to confirm the sale in PCA, and the judgment is affirmed.

AFFIRMED.

DAVID SPANGLER, SR., APPELLANT, V. STATE OF NEBRASKA, NEBRASKA STATE PATROL, APPELLEE.

448 N.W.2d 145

Filed November 17, 1989. No. 89-337.

1. **Workers' Compensation: Appeal and Error.** The findings of fact made by the Workers' Compensation Court have the same force and effect as a verdict in a civil case and will not be set aside unless clearly wrong.
2. **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, the evidence must be considered in the light most favorable to the successful party.
3. **Workers' Compensation.** A workers' compensation claimant may recover where an injury, arising out of and in the course of employment, combines with a preexisting condition to produce disability, notwithstanding that absent the preexisting condition no disability would have resulted.
4. **Workers' Compensation: Proof.** To sustain an award in a workers' compensation case involving a preexisting disease or condition, it is sufficient to show that the injury resulting from an accident arising out of and in the course of employment and the preexisting disease or condition combined to produce disability, or that the employment injury aggravated, accelerated, or inflamed the preexisting condition.
5. **Workers' Compensation.** An injury, disability, or death that is the result of the normal progression of any preexisting condition or that is due to natural causes, although occurring while the employee is at work, is not compensable under the Workers' Compensation Act.
6. **Workers' Compensation: Proof.** Where there is a preexisting condition, the burden of proof is upon a workers' compensation claimant to show by a preponderance of the evidence that the disability sustained was caused by an accident arising out of and in the course of employment and was not the result of the normal progression of claimant's preexisting condition.
7. _____: _____. The presence of a preexisting condition enhances the degree of proof required to establish that the injury arose out of and in the course of employment, in the sense that the claimant must persuade the Workers' Compensation Court as the trier of fact that the disability sustained was not the result of the normal progression of the claimant's preexisting condition.
8. _____: _____. If it is asserted that an accidental injury developed over a period of time because of employment exertion, a workers' compensation claimant, in order to establish that the injury arose out of the employment, must show that the employment exertion contributed to the cause of the injury in some material and substantial degree.
9. _____: _____. In heart disease cases a workers' compensation claimant has the burden of establishing by a preponderance of the evidence that exertion or stress in his employment contributed in some material and substantial degree to cause the heart injury.
10. _____:_____. An exertion- or stress-caused heart injury to which a workers'

compensation claimant's preexisting heart disease or condition contributes is compensable only if the claimant establishes that the exertion or stress experienced during employment is greater than that experienced during the ordinary nonemployment life of the employee or any other person.

11. **Workers' Compensation: Trial.** In workers' compensation cases, issues with regard to the cause of injury and disability are matters of fact to be determined by the Workers' Compensation Court, which sits as the finder of fact.
12. **Workers' Compensation: Expert Witnesses.** As the finder of fact the Workers' Compensation Court is not required to take the opinion of an expert in regard to the causal connection between the alleged accident or exertion and the resulting disability as binding upon it.
13. **Statutes: Courts.** It is not within the province of the Supreme Court, the Workers' Compensation Court, or any other tribunal to read a meaning into a statute which is not warranted by its language.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

J. Murry Shaeffer, P.C., for appellant.

Robert M. Spire, Attorney General, and William J. Orester for appellee.

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

CAPORALE, J.

The employee plaintiff-appellant, David Spangler, Sr., challenges the denial of workers' compensation benefits from his former employer, defendant-appellee State of Nebraska. His assignments of error merge to claim that the Nebraska Workers' Compensation Court erred in concluding that (1) he failed to sustain his burden of proving that his employment exertion or stress contributed in some material and substantial degree to cause the disability he suffers as the consequence of heart disease, and (2) Neb. Rev. Stat. § 18-1723 (Reissue 1987), which raises a rebuttable presumption that there is an "in the line of duty" cause of heart disease in certain police officers, does not apply to workers' compensation cases. We affirm.

Spangler filed a petition alleging that between approximately January 3 and 19, 1986, he sustained personal injury in an accident arising out of and in the course of his employment when he, while working for the Nebraska State Patrol as a sergeant, developed heart disease resulting from the "exertion"

of his employment. In denying liability the State answered that Spangler's condition "was the result of the natural progression of a preexisting condition unrelated to employment."

Spangler began work for the patrol in 1971 as a traffic officer. In 1979, he was promoted and assigned to supervise several other officers who, having been passed over for promotion in the past, resented him. According to Spangler, their resentment made his supervisory duties "extremely" difficult. In 1981, Spangler was again promoted, conditioned on his transfer to another city. Spangler viewed the anticipated move as stressful because he was unable to sell his house.

In any event, Spangler was not transferred because he suffered an inferior myocardial infarction. As he describes it, "in February of 1981 . . . I was suffering chest pains and went to the emergency room at the hospital . . . and was admitted for . . . a minor heart attack," and then the following Wednesday, "I suffered a major heart attack." Spangler, then 32 years of age, was diagnosed as suffering from ischemic heart disease.

After recovering, Spangler was assigned in a supervisory capacity to the Governor's mansion security detail. Eventually, he became the then Governor's travel coordinator. As a consequence, Spangler's duties and working hours increased, and according to Spangler, the work involved "a lot more stress."

Spangler suffered another acute inferior myocardial infarction in May 1984 and in June experienced angina and underwent coronary artery bypass graft surgery. There was some evidence that the 1984 angina was precipitated by the receipt of an undescribed bill which upset him.

Pursuant to authorization by his treating physician, Spangler returned to work at the Governor's mansion in July 1984 with no duty limitations. He was still working between 46 and 50 hours per week and frequently suffered chest pain while driving at high speeds through heavy traffic when the Governor was behind schedule.

Spangler was again hospitalized in January 1986 with severe chest pain and was diagnosed as having progressive unstable angina pectoris, which is a symptom of underlying coronary artery disease. After the 1986 hospitalization, Spangler's family

physician and his cardiologist determined that Spangler should not return to work because he was endangering himself, the Governor, and fellow officers. Spangler was deemed medically disabled and placed on medical retirement from the patrol on July 21, 1986.

According to Spangler, the angina he experienced was provoked by driving at high speeds to deliver the Governor to the airport the day before he was hospitalized. Spangler testified that he did not experience chest pains at home except during physical exertion on hot, humid days and when receiving telephone calls related to work.

Dr. Sabyasachi Mahapatra testified that the stresses Spangler confronted at work contributed to or aggravated his angina pectoris. In Mahapatra's opinion, Spangler's symptoms were related to driving at high speeds, and, thus, Spangler should discontinue his work for the patrol to prevent aggravation or precipitation of the symptoms of his heart disease. Mahapatra further testified that in January 1988 there was no indication that Spangler's heart disease had worsened since his retiring from the patrol and otherwise limiting his physical activity.

Dr. Joseph Jarzobski testified that Spangler should not continue his work for the patrol, that his physical activity is significantly restricted, and that his heart disease is a permanent condition. However, Jarzobski also testified that Spangler suffered some degree of physical impairment from the coronary heart disease before he was hospitalized in 1986 for angina pectoris. Jarzobski could not be sure whether the angina pectoris Spangler suffered in 1986 increased his level of permanent physical impairment beyond what it had been before the 1986 hospitalization, stating:

> It's hard to be sure if that time frame where the symptoms occurred that you referred to really made things tremendously worse. It's part of the whole disease process. And it's a progressive process. At this moment I don't recall that he actually had a heart attack during that time frame. So the angina is short of a heart attack, and theoretically, is controllable with medicine and limiting activity. But whether that time frame made things worse or not, it's hard to be positive.

However, although Jarzobski could not "say with certainty" that Spangler's employment caused his heart disease, he did "feel that it definitely contributed to and aggravated the heart disease."

Spangler's family has a history of heart disease. His mother died of a heart attack, and two brothers suffer from heart disease. At the time of his hospitalization in 1986, Spangler smoked excessively, suffered from hypertension, was overweight, had an elevated cholesterol level, and was of a deadline-setting, pushing, and driving personality. Both Mahapatra and Jarzobski testified that these conditions are significant risk factors associated with the development and aggravation of coronary artery disease. Although Jarzobski believed that Spangler's work stress combined with these risk factors to aggravate Spangler's heart disease in 1986, Jarzobski was unable to allocate the amount of aggravation to Spangler's heart condition which was attributable to Spangler's work stress and to each of the risk factors. Jarzobski also testified that the angina Spangler suffered in 1986 was the result of the natural progression of his coronary artery disease and that Spangler occasionally experienced angina when at rest.

Spangler elicited testimony from an assistant professor of criminal justice, who testified that based on the "consistent findings" of increased heart and cancer problems, mortality and suicide rates, and marital difficulties, "it's fairly clear that police officers experience higher levels of stress than either members of the general population or than persons associated with other occupations." According to this witness, the findings of increased stress were uniform among all law enforcement officers, regardless of the size, location, or function of the department in which the officers were employed.

We begin our analysis of Spangler's first summarized assignment of error, which questions the compensation court's conclusion that he failed to sustain his burden of proof, by noting that the findings of fact made by the Workers' Compensation Court have the same force and effect as a verdict in a civil case and will not be set aside unless clearly wrong. *Schlotfeld v. Mel's Heating & Air Conditioning, ante* p. 488, 445 N.W.2d 918 (1989); *Alley v. Titterington, ante* p. 71, 443

N.W.2d 615 (1989). 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. *Id.*

It is undisputed that at the time of his hospitalization in 1986, Spangler had a preexisting heart condition. Thus, in order to resolve Spangler's contentions, it is necessary to understand the legal principles involved where the claimant has such a preexisting condition.

We have said that a workers' compensation claimant may recover where an injury, arising out of and in the course of employment, combines with a preexisting condition to produce disability, notwithstanding that absent the preexisting condition no disability would have resulted. *Benson v. Barnes & Barnes Trucking*, 217 Neb. 865, 354 N.W.2d 127 (1984). To sustain an award in a workers' compensation case involving a preexisting disease or condition, it is sufficient to show that the injury resulting from an accident arising out of and in the course of employment and the preexisting disease or condition combined to produce disability, *Kingslan v. Jensen Tire Co.*, 227 Neb. 294, 417 N.W.2d 164 (1987), or that the employment injury aggravated, accelerated, or inflamed the preexisting condition, *Engel v. Nebraska Methodist Hospital*, 209 Neb. 878, 312 N.W.2d 281 (1981), and *Keith v. School Dist. No. 1*, 205 Neb. 631, 289 N.W.2d 196 (1980). However, an injury, disability, or death that is the result of the normal progression of any preexisting condition or that is due to natural causes, although occurring while the employee is at work, is not compensable under the Workers' Compensation Act. *Gilbert v. Sioux City Foundry*, 228 Neb. 379, 422 N.W.2d 367 (1988); *Sellens v. Allen Products Co., Inc.*, 206 Neb. 506, 293 N.W.2d 415 (1980); *Newbanks v. Foursome Package & Bar, Inc.*, 201 Neb. 818, 272 N.W.2d 372 (1978); Neb. Rev. Stat. § 48-151(4) (Reissue 1988).

The burden of proof is upon the claimant to show by a preponderance of the evidence that the disability sustained was caused by an accident arising out of and in the course of employment. *Elliott v. Midlands Animal Products*, 229 Neb. 823, 428 N.W.2d 920 (1988); § 48-151(2). The presence of a preexisting condition enhances the degree of proof required to

establish that the injury arose out of and in the course of employment, *Fees v. Rivett Lumber Co.*, 228 Neb. 617, 423 N.W.2d 483 (1988), and *Gilbert v. Sioux City Foundry, supra*, in the sense that the claimant must show that the disability sustained was not the result of the normal progression of the claimant's preexisting condition, *Elliott v. Midlands Animal Products, supra*, *Wilson v. City of North Platte*, 221 Neb. 90, 375 N.W.2d 134 (1985), *Benson v. Barnes & Barnes Trucking, supra*, and *Engel v. Nebraska Methodist Hospital, supra* (claimant not required to prove that natural progression of disease or condition will not result in disability sometime in the future).

We have long discarded the view that an accidental injury must be caused by a single traumatic event to be compensable under the Workers' Compensation Act. *Crosby v. American Stores*, 207 Neb. 251, 298 N.W.2d 157 (1980); *Brokaw v. Robinson*, 183 Neb. 760, 164 N.W.2d 461 (1969). However, if it is asserted that the injury developed over a period of time because of employment exertion, the claimant, in order to establish that the injury arose out of the employment, must show that the employment exertion contributed to the cause of the injury in some material and substantial degree. *Hayes v. A.M. Cohron, Inc.*, 224 Neb. 579, 400 N.W.2d 244 (1987). This rule has particular application in cases involving heart conditions. We have held that in such cases the claimant has the burden of establishing by a preponderance of the evidence that exertion or stress in his employment contributed in some material and substantial degree to cause the heart injury. *Mann v. City of Omaha*, 211 Neb. 583, 319 N.W.2d 454 (1982); *Sellens v. Allen Products Co., Inc., supra*; *Newbanks v. Foursome Package & Bar, Inc., supra*.

Accordingly, an exertion- or stress-caused heart injury to which the claimant's preexisting heart disease or condition contributes is compensable only if the claimant shows that the exertion or stress experienced during employment is greater than that experienced during the ordinary nonemployment life of the employee or any other person. *Mann v. City of Omaha, supra*; *Sellens v. Allen Products Co., Inc., supra*; *Newbanks v. Foursome Package & Bar, Inc., supra*. This requirement flows

from the application of the increased burden imposed in preexisting condition cases to the unique problem of proving the cause of a myocardial infarction. See, *Smith v. Fremont Contract Carriers*, 218 Neb. 652, 358 N.W.2d 211 (1984); *Engel v. Nebraska Methodist Hospital, supra*.

Although many of the circumstances in *Mann* are similar to those now before us, *Mann* is different in a crucial respect. In *Mann*, the employee police officer sued to recover benefits from his employer as the result of a second heart attack he suffered on October 2, 1980. He had been working as a police officer for 19 years and had suffered a previous heart attack in 1978. After the first heart attack, he returned to work as completely recovered, with no disabilities or limitations on his duties. For 1½ years before his second attack, the officer had been assigned to a district which abutted a high-risk district where he was frequently summoned. A witness testified that police officers, especially those serving in densely populated urban areas, suffer significantly more stress than the population generally.

Like Spangler, Mann had several personal risk factors associated with a higher-than-average incidence of coronary artery disease. He had a family history of early myocardial infarctions, was a heavy smoker, and was mildly overweight. Nevertheless, expert testimony established that Mann's second heart attack was the result of employment stress. At the time of the first heart attack, Mann's right coronary artery was free of obstruction, but by the time of the second heart attack, that artery was completely obstructed. According to Mann's treating physician, the relatively rapid obstruction was unusual. The physician was of the opinion that Mann's personal risk factors could not have accelerated the obstruction to that extent, saying: " 'I find it inconceivable that [Mann's personal risk factors] were significant contributors to the heart attack in 1980. . . .' " *Mann* at 589, 319 N.W.2d at 457. Instead, Mann's physician was of the opinion that the rapid obstruction was the result of abrupt rises in blood pressure related to Mann's police work.

In reversing the compensation court's conclusion that there was insufficient evidence for the court to single out stress as the

primary or leading causal agent in Mann's disease, we said:

> In this case there was a sufficient showing that the appellant experienced greater stress in his employment life than in his nonemployment life. It has often been stated by this court that the opinions of experts are not binding on the trier of fact. . . . However, where the medical testimony is uncontroverted, unimpeached, and is given in matters of medical diagnosis which are peculiarly within the range of the knowledge of the expert, the compensation court is not free to substitute its own diagnosis. It is not true that in every case the uncontested opinion of an expert is binding on the trier of fact, but where, as here, the testimony is based on firsthand knowledge, is credible, and has no demonstrable weaknesses or failure of foundation, such testimony cannot be ignored.

Mann at 592-93, 319 N.W.2d at 459.

Nonetheless, it must be remembered that in workers' compensation cases, issues with regard to the cause of injury and disability are matters of fact to be determined by the Workers' Compensation Court, which sits as the finder of fact. *Tatara v. Northern States Beef Co.*, 230 Neb. 230, 430 N.W.2d 547 (1988). As the finder of fact the compensation court is not required to take the opinion of an expert in regard to the causal connection between the alleged accident or exertion and the resulting disability as binding upon it. See *Randall v. Safeway Stores*, 215 Neb. 877, 341 N.W.2d 345 (1983). See, also, *Tatara v. Northern States Beef Co., supra.*

Although both Mahapatra and Jarzobski testified that the stresses of Spangler's employment contributed to and aggravated the angina for which Spangler was hospitalized in 1986, Jarzobski was unable to testify as to whether the angina pectoris Spangler suffered in 1986 increased his level of permanent physical impairment beyond what it had been before the 1986 hospitalization. In addition, it is clear that Spangler has many of the personal risk factors associated with coronary artery disease. Unlike the situation in *Mann*, where the physician found it "inconceivable" that the personal risk factors were significant contributors to Mann's heart attack and instead opined unequivocally that the heart attack was

caused by work-related rises in blood pressure, Jarzobski was unable to determine the amount of aggravation to Spangler's heart condition which was attributable to his work stress and that which was attributable to the personal risk factors.

Thus, there was sufficient evidence for the compensation court to determine that Spangler's work-related stress did not contribute in a material and substantial degree to cause his heart disease and that instead Spangler's 1986 angina was merely the regrettable result of the normal progression of his condition.

Spangler further asserts, in his second summarized assignment of error, that contrary to the compensation court's conclusion, § 18-1723 applies to workers' compensation cases. Spangler introduced into evidence a copy of § 18-1723 as it existed before the 1985 legislative session. However, in 1985, before Spangler suffered the injury for which he seeks compensation benefits, the Legislature made modifications to § 18-1723, which now provides in relevant part:

> Whenever . . . any police officer of any city or village . . . shall suffer death or disability as a result of hypertension or heart or respiratory defect or disease, there shall be a rebuttable presumption that such death or disability resulted from accident or other cause while in the line of duty for all purposes of Chapter 15, article 10, sections 16-1001 to 16-1042, and any . . . police officer's pension plan established pursuant to any home rule charter, the Legislature specifically finding the subject of this section to be a matter of general statewide concern.

Chapter 15, article 10, and Neb. Rev. Stat. §§ 16-1001 to 16-1042 (Reissue 1987) concern retirement systems for certain police officers and firefighters. Thus, even if the statute applies to members of the patrol, a matter we do not decide, the clear import of the language of § 18-1723 is that the rebuttable presumption it creates applies only for purposes of the designated pension plans and retirement systems. It is not within the province of the Supreme Court, the Workers' Compensation Court, or any other tribunal to read a meaning into a statute which is not warranted by its language. See *Commerce Sav. Scottsbluff v. F.H. Schafer Elev.*, 231 Neb.

288, 436 N.W.2d 151 (1989).

For the foregoing reasons, the compensation court's order of dismissal is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. SHAWN J. STATEN, APPELLEE.
448 N.W.2d 152

Filed November 17, 1989. No. 89-691.

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

Ronald L. Staskiewicz, Douglas County Attorney, and Robert C. Sigler for appellant.

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

SHANAHAN, J.

In its information, the State charged Shawn J. Staten with unlawful possession with intent to distribute a controlled substance (cocaine). See Neb. Rev. Stat. § 28-416(1)(a) (Cum. Supp. 1988). Staten filed a motion to suppress the physical evidence (cocaine), see Neb. Rev. Stat. § 29-822 (Reissue 1985), and her custodial statements, see Neb. Rev. Stat. § 29-115 (Reissue 1985). Because the district court for Douglas County sustained Staten's suppression motions, the State appeals and seeks review by a judge of this court, pursuant to Neb. Rev. Stat. §§ 29-824 and 29-116 (Reissue 1985).

On the morning of March 29, 1989, in the Kansas City International Airport, Agent Carl Hicks of the Federal Drug Enforcement Agency was routinely observing arrival of flights from Los Angeles, California, and noticed a man and a woman, later identified as Tracy Wood and Staten, whom he described as "suspicious" inasmuch as the couple fit the drug courier profile. When Hicks approached the pair and asked

them for identification, Wood and Staten said they had none. However, Staten later produced some identification and also displayed their plane tickets. Hicks noted that Wood and Staten had paid cash for their plane tickets and that they were flying to Omaha on Braniff Airline flight 1490, which was scheduled to arrive in Omaha at 8:30 that morning. Since no drug detection dog was available at Kansas City and because the couple's luggage was already on board the Omaha flight scheduled for departure in the next few minutes, Hicks terminated the interview with Wood and Staten, who boarded Braniff flight 1490 to Omaha.

Hicks telephoned Sgt. James Cisar of the Omaha Police Division and related Hicks' observations at the Kansas City International Airport. Cisar immediately called Sgt. William Agnew of the Omaha Police Division's narcotics unit. Agnew assembled a team of FBI agents and Omaha police officers, who went to Eppley Airfield to meet Braniff flight 1490. Agnew also contacted Steve Sanchelli, an Omaha police officer who handles "Bush," a dog used for drug detection by the Omaha Police Division, and asked Sanchelli to bring Bush to the airport. On arrival at the airport, the officers and the FBI agents went to gate 21, where flight 1490 was to arrive, and set up surveillance. When flight 1490 arrived at 8:30 a.m., the officers observed Wood and Staten disembark from the plane and walk to the baggage claim area. Staten made a phone call, after which she and Wood retrieved three pieces of luggage and began to walk toward the airport's main terminal area. Agnew approached Wood and Staten, identified himself as a police officer conducting a "narcotics investigation," and asked them to produce their plane tickets. Staten said she had discarded her ticket on the plane. When Agnew asked for some identification, Staten showed Agnew a copy of a birth certificate and her Social Security card. Agnew told Wood and Staten that a drug detection dog was en route to the airport and asked whether they would consent to having the dog "sniff" their luggage for the possible presence of controlled substances. Staten agreed to let the dog sniff her luggage.

Wood and Staten accompanied the officers to the airport security area, where Agnew asked Staten about the reason for

her presence in Omaha. Staten responded that she was visiting her brother, Harry Harris. Agnew knew that Harry Harris, an alias for Dan Staten, was in custody. Harris was a member of a Los Angeles gang and was "involved in narcotics activity" in Omaha. Also, Agnew had personally arrested Staten's sister, Mowesha Staten, in an Omaha motel for possession of a controlled substance.

Approximately 15 minutes after Staten had arrived in Omaha, Officer Sanchelli arrived at the airport with Bush, the drug detection dog. Bush had been specially trained in locating cocaine, heroin, and other controlled substances and was used to "alert" officers to the presence of a controlled substance within luggage. The "alert" consists of Bush's sniffing luggage and then biting or scratching luggage which contains a controlled substance. Bush had positively verified controlled substances in luggage on 18 occasions before Staten encountered the officers at the Omaha airport. Luggage with Staten's name was placed in the airport hallway for Bush's "off-leash" sniffing. Bush sniffed three pieces of luggage and "alerted" to one piece of luggage, indicating that there was a controlled substance in the baggage item in Staten's name. Staten told Agnew that he could search her luggage but not search her. As far as the record discloses, there was no female officer at the airport to conduct a search of Staten's person. According to Agnew: "At that point I informed [Staten] that she was under arrest for suspicion of possession of a controlled substance and she would be taken to central police headquarters and we were going to apply for a search warrant for her luggage and her person." No one questions that Staten was arrested for possession of a controlled substance at the airport. The officers then transported Staten to police headquarters.

At police headquarters, Staten was taken to an interview room where, shortly after 10 a.m., Officer James Haiar presented her with a *Miranda* "rights advisory form." Although Staten refused to make a statement, a few minutes later she indicated to officers that she would be willing to make a statement. Meanwhile, Agnew prepared an application for a search warrant. The county court for Douglas County issued a

search warrant at 1:25 p.m. In the presence of a female police officer, the warrant, which authorized a search of Staten's person and her luggage, was immediately served on Staten. After Staten had read the warrant, which she understood, she removed a plastic bag, containing 6 ounces of cocaine, from her bra. The police presented a second "advisory form" regarding the *Miranda* admonition. Staten indicated that she understood her rights, made statements to the police, and was booked for possession of a controlled substance (cocaine).

Staten filed a motion to suppress the cocaine, claiming that the evidence was obtained through an unreasonable search of her person. See, Neb. Const. art. I, § 7; U.S. Const. amend. IV. In a companion motion, Staten requested suppression of her custodial statements to the police, contending that her statements were the product of an illegal search and unlawful arrest.

In granting the suppression motions, the district court concluded:

> When the dog alerted to the defendant's luggage the officer had sufficient facts to show the county judge probable cause for the issuance of a search warrant to search the luggage. There was as yet no probable cause to include the person of the defendant in the affidavit for the search warrant nor the search warrant itself. The warrant was overreaching in its scope and unreasonably subjected the defendant to a potential strip search based primarily on the trained dog's alert to her luggage. If upon a search of the luggage contraband had been found, the defendant would be subject to immediate arrest and search incident to the arrest. The arrest of the defendant after the dog alerted to the luggage was an unlawful arrest. The execution of the search warrant upon the person of the defendant several hours later was without probable cause that a crime had been committed by her and all fruits of the search of the defendant must be excluded from her trial in this case.
>
> Similarily [sic], any statements given by the defendant were a product of the unlawful arrest and improper search and the statement is likewise excluded from use by the

State against the defendant at the trial herein.

The State contends that the police had probable cause to arrest Staten, that the search warrant for Staten's luggage and her person was valid, that the search was reasonable and not in violation of Staten's constitutional rights, and that Staten's statements to police were not the product of a constitutionally invalid search.

STANDARD OF REVIEW

The issue is whether the contraband and statements were obtained in violation of the protection afforded by the state and federal Constitutions against an unreasonable search and seizure.

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

"In determining whether a trial court's findings on a motion to suppress are clearly erroneous, the Supreme Court recognizes the trial court as the 'trier of fact' and takes into consideration that the trial court has observed witnesses testifying regarding such motion to suppress." *State v. Dixon*, 222 Neb. 787, 795, 387 N.W.2d 682, 687 (1986).

PROBABLE CAUSE TO ARREST

The State contends that because the police believed that Staten had controlled substances in her luggage as a result of Bush's "alert" to the luggage, probable cause existed for Staten's arrest. The question is, therefore, whether a drug detection dog's "alert" to luggage, indicating the presence of a controlled substance, constitutes probable cause to arrest.

Under *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), police can stop and briefly detain a person for investigative purposes if the police have a reasonable suspicion, supported by articulable facts, that criminal activity exists, even if probable cause is lacking under the fourth amendment. See, also, *State v. Thomte*, 226 Neb. 659, 413 N.W.2d 916 (1987). Reasonable suspicion entails some minimal level of objective justification for the detention, something more than

an inchoate and unparticularized suspicion or "hunch," but less than the level of suspicion required for probable cause. *United States v. Sokolow*, ____ U.S. ____, 109 S. Ct. 1581, 104 L. Ed. 2d 1 (1989).

The U.S. Supreme Court has held that persons whose appearance and activities fit the so-called drug courier profile may be briefly detained by law enforcement officers under *Terry v. Ohio*. See, *United States v. Place*, 462 U.S. 696, 103 S. Ct. 2637, 77 L. Ed. 2d 110 (1983); *Florida v. Royer*, 460 U.S. 491, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983); *United States v. Sokolow, supra*. The drug courier profile is a compilation of characteristics found to be typical for persons transporting illegal drugs, such as trips to and from cities which are major sources of drugs, with short stays in the cities; cash payment for tickets; use of aliases; unchecked luggage and little or no identification on luggage; attire; and nervousness. See *United States v. Sokolow, supra*. Neither the State nor Staten disputes the district court's finding that police did not violate Staten's constitutional rights in detaining her at the airport.

In *Florida v. Royer, supra*, the U.S. Supreme Court held that police had no probable cause to arrest the defendant based upon the facts that he was traveling from Miami to New York City under an assumed name; that he was carrying two suitcases that appeared to be heavy; that he was young, was casually dressed, and appeared to be pale and nervous; and that he had paid for his ticket in cash with a large number of bills. The fact that defendant fit the so-called drug courier profile constituted adequate grounds for suspecting the defendant of carrying drugs and justified an investigatory stop by police officers. *Id.* However, when the police officers took the defendant to a small room for further interrogation, retrieved his checked luggage from the airline, took his airplane ticket and identification, and never informed defendant that he was free to leave at any time nor that he need not consent to the search of his luggage, the Supreme Court held that the investigatory stop exceeded the constitutional limitation of a *Terry* stop. See *Terry v. Ohio, supra*. The *Royer* Court found that the means employed by the police officers were too intrusive to effectuate an investigative detention and that restraint of the defendant was unjustified,

and then concluded that there were less intrusive means which the officers could have employed:

> The courts are not strangers to the use of trained dogs to detect the presence of controlled substances in luggage. There is no indication here that this means was not feasible and available. If it had been used, Royer and his luggage could have been momentarily detained while this investigative procedure was carried out. Indeed, it may be that no detention at all would have been necessary. A negative result would have freed [the defendant] in short order; *a positive result would have resulted in his justifiable arrest on probable cause.*

(Emphasis supplied.) 460 U.S. at 505-06.

At least three federal appellate courts have held that an "alert" by a trained drug detection dog constitutes probable cause for arrest. See, *U.S. v. Massac*, 867 F.2d 174 (3d Cir. 1989); *United States v. Waltzer*, 682 F.2d 370 (2d Cir. 1982); *United States v. Williams*, 726 F.2d 661 (10th Cir. 1984). Appellate courts in three state jurisdictions have also expressly held the same. See, *State v. Bullock*, 460 So. 2d 517 (Fla. App. 1984); *State v. Foster*, 390 So. 2d 469 (Fla. App. 1980); *People v. Campbell*, 67 Ill. 2d 308, 367 N.E.2d 949 (1977); *Morrow v. State*, 757 S.W.2d 484 (Tex. App. 1988) (even in the absence of consent to search, a drug detection dog's "alert" to the presence of narcotics in defendant's luggage justified the arrest of appellant).

The use of trained dogs to detect the presence of controlled substances in luggage has been held to be a feasible and expeditious way to detain a suspect for the shortest period of time in which to confirm or dispel suspicions. See *Florida v. Royer, supra*. See, also, *United States v. Place, supra* (canine sniff discloses only the presence or absence of narcotics, and such limited disclosure ensures against the embarrassment and inconvenience of the owner that is possible with other, more intrusive means of investigation). This conclusion is based on the fact that dogs trained especially for the purpose of detecting a controlled substance can detect the presence of concealed narcotics with almost unerring accuracy. When Bush "alerted" to Staten's luggage, this fact, combined with the other

circumstances known to the police, supplied probable cause to arrest Staten.

VALIDITY OF SEARCH WARRANT

In *United States v. Robinson*, 414 U.S. 218, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973), the Supreme Court held that if there is a lawful arrest, police have authority, without a search warrant, to conduct a full search of the person arrested and that such search is reasonable under the fourth amendment to the U.S. Constitution. Further, a police officer's search is not limited to searching the arrested person for weapons only; the officer may search for and seize any evidence on the arrestee's person, even if such evidence is unrelated to the crime for which the arrest was made, in order to prevent concealment or destruction of evidence. *Chimel v. California*, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969). A search incident to arrest need not be made immediately on arrest. "[S]earches and seizures that could be made on the spot at the time of arrest may legally be conducted later when the accused arrives at the place of detention." *United States v. Edwards*, 415 U.S. 800, 803, 94 S. Ct. 1234, 39 L. Ed. 2d 771 (1974). See, also, *Abel v. United States*, 362 U.S. 217, 80 S. Ct. 683, 4 L. Ed. 2d 668 (1960). See, further, *State v. Weible*, 211 Neb. 174, 317 N.W.2d 920 (1982) (arresting officers may search person of arrestee to discover and remove weapons and to seize evidence to prevent its concealment or destruction, as well as search the area within the arrestee's immediate control); *State v. McElroy*, 189 Neb. 376, 202 N.W.2d 752 (1972) (arrest of defendant and later search of defendant's person at police station held lawful).

As noted, the district court found that while there was probable cause for the warrant to search Staten's luggage, there was no probable cause for issuance of a warrant to search Staten's *person*. However, as previously indicated, Bush's alert to the luggage constituted sufficient probable cause to arrest Staten. Thus, a warrant was unnecessary for a search of Staten's person because the police were entitled to search Staten as an incident of her lawful arrest.

The search of Staten's person, an incident of her lawful arrest, is not unreasonable and, therefore, does not violate the

constitutional protection against an unreasonable search and seizure. A search warrant was unnecessary. Consequently, whether a warrant authorizing the search of Staten's person is valid need not be reviewed. Cf. *State v. Andersen*, 232 Neb. 187, 440 N.W.2d 203 (1989) (doctrine of "inevitable discovery" in reference to an allegedly unconstitutional search and seizure).

The cocaine, as physical evidence obtained from Staten's person, is constitutionally admissible. Staten's custodial statements are not "fruits of the poisonous tree" and, therefore, are admissible. See *State v. Abdouch*, 230 Neb. 929, 434 N.W.2d 317 (1989).

Under the circumstances, the district court's findings that the physical evidence and statements from Staten were products of an unreasonable search and seizure are clearly erroneous. For that reason, the district court's judgment suppressing the evidence obtained from Staten's person and suppressing her custodial statements is reversed.

REVERSED.

NI INDUSTRIES, INC., APPELLEE AND CROSS-APPELLANT, V. HUSKER-HAWKEYE DISTRIBUTING, INC., APPELLANT AND CROSS-APPELLEE, AND KEITH B. EDQUIST, APPELLEE AND CROSS-APPELLEE.

448 N.W.2d 157

Filed November 22, 1989. No. 86-869.

1. **Appeal and Error.** In an action at law tried to the court without a jury, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. It is not within the province of the Supreme Court to resolve conflicts in or reweigh evidence.
2. **Evidence: Trial: Rules of the Supreme Court.** Any matter admitted under Neb. Ct. R. of Disc. 36(b) (rev. 1989) is conclusively established unless the court on motion permits withdrawal or amendment of the admission.
3. **Interest: Contracts.** Where the parties have a contract for the payment of a particular lawful rate of interest to be paid after the maturity of the debt and on default in payment, such contract controls, and the rate thus fixed is recoverable provided the rate is not unconscionable.

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

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

John D. Hartigan, Jr., of Kennedy, Holland, DeLacy & Svoboda, for appellee NI Industries.

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

BROWER, D.J.

Husker-Hawkeye Distributing, Inc., appeals an order of the district court for Douglas County entering judgment against it in the amount of $15,599.41, plus interest from June 7, 1984, on an amended petition brought by NI Industries, Inc., to recover an unpaid account. NI Industries cross-appeals the dismissal of defendant Keith B. Edquist and the allowance of a setoff in favor of Husker-Hawkeye for merchandise authorized for return.

In an action at law tried to the court without a jury, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. *Preisendorf v. Mettenbrink*, 232 Neb. 558, 441 N.W.2d 203 (1989). It is not within the province of the Supreme Court to resolve conflicts in or reweigh evidence. *Bruning Seeding Co. v. McArdle Grading Co.*, 232 Neb. 181, 439 N.W.2d 789 (1989); *Kracl v. Aetna Cas. & Surety Co.*, 220 Neb. 869, 374 N.W.2d 40 (1985).

In 1982, Husker-Hawkeye began distributing products for Thermador/Waste King, a division of NI Industries. Husker-Hawkeye received inventory from the previous distributor through NI Industries and paid NI Industries for the products.[1] On March 24, 1983, Edquist, president of Husker-Hawkeye, signed a distributorship agreement between Husker-Hawkeye and NI Industries. The contract was signed by the vice president of sales and marketing of Thermador/Waste King on behalf of NI Industries on April 6, 1983. The contract allowed either party to terminate the agreement upon 60 days' written notice. The contract also provided:

> In the event of the termination of this Agreement by either party for any reason, the Company may at its option repurchase from Distributor F.O.B. the Company's dock at Vernon, California, any Products and any spare parts thereof on hand in the Distributor's place of business or in the possession of the Distributor at the net price paid by the Distributor to the Company, less actual freight on the shipment thereof to return the Products and spare parts to the Company. On demand the tender of the repurchase price, the Distributor shall be obligated to deliver such Products and spare parts to the Company forthwith. The Company reserves the right, however, to reject any Product or spare parts [sic] not in first class condition or which has been removed from its carton, or which is not a current model.

In January 1984, Edquist informed James Roach, regional sales manager for Thermador/Waste King in charge of Minnesota, Iowa, Nebraska, North Dakota, South Dakota, and Montana, that Husker-Hawkeye was not satisfied with its performance with the Thermador/Waste King product line and wished to cease distributing the products. Roach informed E. Toby Bowen, area sales manager, of Husker-Hawkeye's intentions to terminate in a memorandum dated January 24, 1984.

Husker-Hawkeye agreed to continue as a distributor until a replacement distributor could be found. According to Edquist, this agreement was in exchange for an agreement by NI Industries, through Roach, to repurchase all inventory Husker-Hawkeye had on hand when the new distributor took over. The actual notice of termination was dated March 25, 1984, although Edquist testified it was not sent until the latter part of May 1984. Husker-Hawkeye continued to order and purchase stock from NI Industries.

On June 6, 1984, Roach and Bowen went to Husker-Hawkeye to begin making arrangements for the transfer of inventory to the new distributor. Edquist gave them a list of the inventory on hand. At this time Bowen told Edquist that NI Industries would transfer only current inventory still in the original carton.

After the meeting, Roach and Bowen finalized arrangements for the transfer of most of the inventory to either the new distributor or to a distributor in St. Louis who agreed to take the merchandise which was in the process of being eliminated from NI Industries' product line.

On June 7, 1984, Roach and Bowen returned to Husker-Hawkeye. At that time they were prepared to begin the process of transferring the inventory. They reiterated the fact that the only inventory to be transferred was inventory which was undamaged, current, and still in the original carton. Edquist told Roach and Bowen that unless NI Industries repurchased all the inventory in Husker-Hawkeye's possession, it could not repurchase any of the inventory. Roach and Bowen then left Husker-Hawkeye, apparently having decided to exercise NI Industries' option under the contract not to repurchase the inventory.

NI Industries brought suit against Husker-Hawkeye and Edquist to recover $16,844.81 for purchases made by Husker-Hawkeye between March and May of 1984. Defendant Husker-Hawkeye, in its answer, admitted the existence of the distributorship agreement, but alleged that the agreement expired on December 31, 1983, and that the parties agreed NI Industries would take back all undistributed inventory in Husker-Hawkeye's possession at the time Husker-Hawkeye ceased distribution of NI Industries' products. Further, Husker-Hawkeye alleged it had tendered possession of the inventory to NI Industries. Husker-Hawkeye, by way of a counterclaim, sought an order directing NI Industries to give Husker-Hawkeye full credit for the value of the inventory, to remove the inventory at its expense, to pay a fair and reasonable amount for storage, and to pay $1,500 for cooperative advertising allowance. (Prior to trial, Husker-Hawkeye received the credit for the advertising allowance.) Defendant Edquist filed a general denial.

Following trial, the court found Husker-Hawkeye purchased inventory pursuant to a distributorship agreement in the amount of $16,844.41, which amount remained unpaid. The court found there was a bona fide dispute as to the amount due until June 7, 1984; therefore, no prejudgment interest was

awarded prior to that date. The court gave Husker-Hawkeye credit for $1,245 for merchandise which the court found Husker-Hawkeye was authorized to return. The court also found Edquist's only involvement in the transaction was as president of Husker-Hawkeye and dismissed the action against Edquist. Pursuant to its findings, the court entered judgment against Husker-Hawkeye in the amount of $15,599.41, plus interest from June 7, 1984.

Husker-Hawkeye appeals, claiming the trial court erred in not ordering NI Industries to credit its account for the full value of the inventory and in awarding prejudgment interest. NI Industries cross-appeals, claiming the trial court erred in dismissing its amended petition against Edquist and in allowing the setoff.

Husker-Hawkeye's first assignment of error claims the trial court erred in not giving it credit for the full value of the inventory in its possession. This argument is based on the contract as Husker-Hawkeye contends it existed; that is, NI Industries agreed to repurchase all inventory in Husker-Hawkeye's possession in return for Husker-Hawkeye's continuing as a distributor until a replacement could be found.

The trial court found the distributorship contract continued in existence until Husker-Hawkeye formally terminated the agreement by the letter sent in May 1984. The court based its finding on Husker-Hawkeye's answers to requests for admissions. In its answers, Husker-Hawkeye, through Edquist as president, admitted, among other things: (1) It executed the distributorship agreement; (2) it ordered and received appliances and parts pursuant to the agreement, which were sold and shipped to it by NI Industries from March 1984 through May 30, 1984, in the amount of $16,844.41, which amount remained unpaid; and (3) the distributorship agreement was not terminated until NI Industries received the letter from Husker-Hawkeye dated March 25, 1984, on May 26, 1984. The court concluded, based on Neb. Ct. R. of Disc. 36(b) (rev. 1989), that the evidence "conclusively established the distributorship agreement was in full force and effect, that the goods appearing on Exhibit 6 [the inventory list] were ordered pursuant to that agreement and unpaid for."

Rule 36(b) states in part: "Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission." Husker-Hawkeye never sought to amend or withdraw its admissions; therefore, Husker-Hawkeye's answers to requests for admissions establish that the distributorship agreement did not terminate on December 31, 1983, as Husker-Hawkeye claims, and continued in effect through May 1984.

Even without such admissions, there is sufficient evidence to support a finding that the distributorship agreement continued in effect as written until it was terminated in May. Both Roach and Bowen testified there was no agreement as alleged by Husker-Hawkeye. Further, Bowen stated neither he nor Roach, the person who allegedly made the agreement with Husker-Hawkeye, had the authority to make such an agreement.

For the foregoing reasons, Husker-Hawkeye's first assignment of error is without merit.

Husker-Hawkeye's second assignment of error claims the trial court erred in awarding prejudgment interest, since there was a dispute as to whether Husker-Hawkeye owed the money and whether Husker-Hawkeye was entitled to any setoff.

The distributorship agreement states: "Any amounts overdue and owing by the Distributor to the Company shall bear interest at the lesser of two (2) percent over the prime rate of interest charged by the main office of the Crocker National Bank, Los Angeles, California, or the maximum rate allowed by law." The parties stipulated to the applicable interest rates from May 30, 1984, until the date of trial.

Prejudgment interest is interest due prior to the rendition of a judgment, pursuant to a statute. Where interest is assessed by reason of an agreement between the parties, the general rules regarding prejudgment interest have no application. *First Nat. Bank v. Bolzer*, 221 Neb. 415, 377 N.W.2d 533 (1985).

> "Where the parties have contracted for the payment of a particular lawful rate of interest, to be paid after the maturity of the debt and on default in payment, such contract controls and the rate thus fixed is recoverable, provided the rate is not unconscionable. Thus, if the

> contract provides for a certain rate of interest until the principal sum is paid . . . the contract governs until the payment of the principal or until the contract is merged in a judgment."

Prudential Ins. Co. v. Greco, 211 Neb. 342, 347-48, 318 N.W.2d 724, 728 (1982), quoting 47 C.J.S. *Interest & Usury* § 40 (1982).

In *First Nat. Bank v. Bolzer, supra*, the trial court granted plaintiff's "Motion to Include Prejudgment Interest" after a jury returned a verdict in favor of plaintiff on a guaranty signed by defendant. The two notes underlying the guaranty bore interest at the rates of 14 percent and 16 percent. In holding the bank was entitled to interest prior to the rendition of judgment, the Supreme Court stated:

> It would be a strange anomaly if, by merely disputing the validity of a note, one was relieved of paying the interest agreed to in the note on the theory that the claim was now unliquidated. Just as the principal was due once the jury believed that Bolzer signed the note, so, too, was due the interest provided for by the note. It is unfortunate that the parties have referred to this as "prejudgment interest" when in fact it is simply the interest contracted for by the parties and agreed to be paid in addition to the principal.

Id. at 422, 377 N.W.2d at 538.

The distributorship agreement between NI Industries and Husker-Hawkeye, which the trial court found remained in effect until May 1984, called for interest at 2 percent above the prime rate charged by Crocker National Bank in California. The interest awarded by the trial court is interest on the contract, rather than "prejudgment" interest as characterized by the court. As such, the court did not err in awarding the interest.

On its cross-appeal, NI Industries first claims the trial court erred in dismissing Edquist as a defendant. The argument in support of this claim rests upon the following requests for admissions:

> 2. On or about March 28, 1983, the plaintiff and defendant Edquist entered into a Distributorship Agreement, *a copy of which is attached to the plaintiff's*

Amended Petition and marked Exhibit "2."

. . . .

4. Pursuant to the said Distributorship Agreement . . . Edquist ordered . . . certain appliances and parts, which were delivered to Edquist.

. . . .

6. That the agreed purchase price of the appliances and parts sold by the plaintiff to Edquist, disregarding any defenses or offsets Edquist may have, which is unpaid amounts to $16,844.41.

. . . .

8. That the unpaid appliances and parts in the amount of $16,844.41 were sold and shipped by the plaintiff to Edquist during a period commencing March, 1984 and ending on or before May 30, 1984.

. . . .

10. That the appliances and parts for which payment has not been made, as referred to in Request Nos. 4 and 6 were received and accepted by Edquist.

. . . .

12. That the plaintiff has made demand on Edquist for the payment of the said sale $16,844.41.

. . . .

14. Edquist has refused to make payment of the said $16,844.41.

(Emphasis supplied.)

NI Industries argues that the answers to these requests for admissions were signed by Edquist in his individual capacity and not as president of Husker-Hawkeye, and, therefore, he is personally liable. It cites in support of this contention the following language from *Modern Plumbing & Heating, Inc. v. Journey West Campground, Inc.*, 193 Neb. 781, 784, 229 N.W.2d 192, 194 (1975): " 'Unequivocal judicial admissions are generally conclusive on the party . . . .' [They are] 'a substitute for evidence, thereby waiving or dispensing with the production of evidence by conceding for the purpose of litigation that the proposition of fact alleged by the opponent is true.' "

We have no quarrel with this rule of law. However, NI

Industries overlooks the very important word "unequivocal" in that citation and also ignores critical factual discrepancies in the record.

In the first place, the seven cited requests for admissions answered by Edquist are identical with requests numbered 1, 3, 5, 7, 9, 11, and 13 propounded to and answered by Husker-Hawkeye. Furthermore, the distributorship agreement which Edquist's answer No. 2 states was entered into between him and NI Industries does not exist. The amended petition refers in its body only to exhibit 1, and attached to that pleading is only one distributorship agreement. That agreement indicates on the title page that it is a distributorship agreement between NI Industries and Husker-Hawkeye. Furthermore, that agreement is signed by Keith B. Edquist as president of Husker-Hawkeye.

The only conclusion we can reach from the foregoing portion of the record is that exhibit 2, which it is claimed Edquist signed in his personal capacity, simply does not exist. We believe that no better case could be made for a claim of equivocalness.

Furthermore, portions of Edquist's testimony support a finding of equivocal admissions. We refer to the following interrogation:

> Q. Mr. Edquist, how long have you been chief executive officer of Husker-Hawkeye?
>
> A. Nine years.
>
> Q. And during that period of — you were chief executive, did you have occasion to become distributor for Thermador/Waste King?
>
> A. Yes, I did.
>
> . . . .
>
> Q. . . . Who owns the inventory right now?
>
> A. I do.
>
> Q. Who does?
>
> A. Husker-Hawkeye Distributing.
>
> . . . .
>
> Q. Over the years, do you have any idea how many major lines you have distributed or Husker-Hawkeye has distributed?

A. A total of four and we presently still distribute three.

. . . .

Q. . . . Mr. Edquist, have you ever denied that Husker-Hawkeye purchased items from NI Industries during March, April and May of 1984 which were not paid for? . . .

A. No, I have never.

Finally, there are 22 separate invoices which NI Industries includes within its requests for admissions. Each of those invoices of NI Industries indicates that the goods were sold to Husker-Hawkeye and were shipped to Husker-Hawkeye.

Under the facts in this case, the rule regarding judicial admissions simply is not applicable, and the trial court was correct in refusing judgment against Edquist personally.

NI Industries' final assignment of error claims the trial court erred in awarding $2,290 as setoff against the amount due from Husker-Hawkeye. It should be noted that the court actually awarded a setoff in the amount of $1,245 for items Husker-Hawkeye was entitled to return under a "Customer Services Authorization to Return Material" (AR).

At trial, Husker-Hawkeye introduced into evidence two ARs, each for one model No. MCM 255. Attached to the first AR, dated February 22, 1983, is a shipping memorandum showing the merchandise was returned to Thermador/Waste King on July 22, 1983, almost a year before Husker-Hawkeye ceased distributing NI Industries' products. There is nothing in the record to indicate Husker-Hawkeye has not received credit for this return. The second AR is dated December 15, 1983. There is no indication the merchandise listed on the second AR was ever returned.

The inventory list shows one unit of model No. MCM 255 with the notation "missing micro" behind the entry on the page covering damaged merchandise. The price of this particular unit is $1,195.

Taken together, it is clear there is only one item which is entitled to be returned under an AR. There is no indication this merchandise had been returned prior to trial. Edquist stated on cross-examination that Husker-Hawkeye would not be entitled to credit for the AR unless the merchandise had been returned.

The trial court erred in granting setoff in the amount of $1,245 for either AR. The award of the trial court is thus increased by that amount.

For the foregoing reasons the judgment of the trial court is affirmed as modified concerning the setoff for damaged merchandise.

AFFIRMED AS MODIFIED.

JOHN DEERE COMPANY, APPELLEE, V. BOELUS STATE BANK, APPELLANT.

448 N.W.2d 163

Filed November 22, 1989. No. 88-083.

1. **Uniform Commercial Code: Actions: Negotiable Instruments.** A suit on a cashier's check is an action at law.
2. **Actions: Appeal and Error.** The factual findings by the trial court in an action at law have the effect of a jury verdict and will not be set aside unless they are clearly wrong.
3. **Actions: Judgments: Appeal and Error.** In reviewing the judgment in an action at law, the Nebraska Supreme Court does not reweigh the evidence but, instead, considers the judgment in the light most favorable to the successful party, who is entitled to the benefit of every inference which can reasonably be deduced from the evidence.
4. **Uniform Commercial Code: Negotiable Instruments: Words and Phrases.** A cashier's check is a draft drawn by a bank upon itself.
5. **Uniform Commercial Code: Promissory Notes: Words and Phrases.** A draft drawn on the drawer is effective as a promissory note.
6. **Uniform Commercial Code: Negotiable Instruments.** Unless he has the rights of a holder in due course, any person takes the instrument subject to the defense that he or a person through whom he holds the instrument acquired it by theft. Neb. U.C.C. § 3-306(d) (Reissue 1980).
7. **Uniform Commercial Code: Negotiable Instruments: Words and Phrases.** A holder is a person who is in possession of an instrument drawn, issued, or endorsed to him or to his order or to bearer or in blank. Neb. U.C.C. § 1-201(20) (Reissue 1980).
8. _____: _____: _____. A holder in due course is a holder who takes the instrument (1) for value, (2) in good faith, and (3) without notice that it is

overdue or has been dishonored or of any defense against or claim to it on the part of any person. Neb. U.C.C. § 3-302(1) (Reissue 1980).

9. _____: _____: _____. The payee of an instrument may be a holder in due course.

10. **Uniform Commercial Code: Negotiable Instruments.** A holder takes an instrument for value when he takes the instrument in payment of an antecedent claim against any person.

11. _____: _____. Subsequent knowledge of an alleged infirmity does not impair the status of a holder in due course.

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

Galen E. Stehlik for appellant.

Lynn A. Mitchell, of Gross, Welch, Vinardi, Kauffman & Day, P.C., for appellee.

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

BOSLAUGH, J.

This is a suit by the plaintiff, John Deere Company, against the Boelus State Bank on a cashier's check issued by the defendant bank and payable to the plaintiff. The trial court found that the plaintiff was a holder in due course and entitled to recover $8,455.85. The defendant has appealed and contends that the trial court erred in finding for the plaintiff because there was evidence of an affirmative defense under Neb. U.C.C. § 3-305(2) (Reissue 1980), and in finding that the plaintiff was a holder in due course because the instrument in question was never "issued" within the meaning of the Nebraska Uniform Commercial Code.

Since a suit on a cashier's check is an action at law, the factual findings by the trial court have the effect of a jury verdict and will not be set aside unless they are clearly wrong. *Heese Produce Co. v. Lueders, ante* p. 12, 443 N.W.2d 278 (1989). In reviewing the judgment, we do not reweigh the evidence but, instead, consider the judgment in the light most favorable to the successful party, who is entitled to the benefit of every inference which can reasonably be deduced from the evidence. *Corman v. Musselman*, 232 Neb. 159, 439 N.W.2d 781 (1989).

Taking the view of the evidence most favorable to the

plaintiff, the record shows that on October 8, 1982, Walter Duester entered into a "variable rate loan contract security agreement" in connection with the purchase of a John Deere combine and grain platform from St. Paul Equipment, Inc. (St. Paul). John Deere was the lender and secured party under the agreement, and the combine was pledged as collateral. When Duester failed to pay the balance of his contract ($8,455.84) by January 1986, the manager of St. Paul was instructed to repossess the combine.

On January 14, 1986, Randy Hansen, an employee of St. Paul, went to Duester's farm to repossess the combine. Duester told Hansen that he had received some payments for custom combining and would purchase a cashier's check and pay the debt to John Deere. Hansen followed Duester to the defendant bank at about 11 a.m. and waited outside for Duester to return.

Five or ten minutes later, Duester came out of the bank and gave Hansen a cashier's check in the amount of $8,455.84. The check was drawn on defendant Boelus State Bank, payable to the order of John Deere Company, and was signed by an authorized bank employee, Judy Jensen.

Hansen returned to St. Paul without repossessing the combine and delivered the cashier's check to the comptroller for St. Paul. About 1 hour later, Russell Jensen, the bank president, telephoned St. Paul and stated that the bank might not honor the check.

On or about January 22, 1986, John Deere presented the cashier's check for payment, but payment was refused.

A cashier's check is a draft drawn by a bank upon itself. *Pulaski Chase v. Kellogg-Citizens Bank*, 130 Wis. 2d 200, 386 N.W.2d 510 (1986). Neb. U.C.C. § 3-118(a) (Reissue 1980) provides that a draft drawn on the drawer is effective as a note. See, also, *Thompson Poultry, Inc. v. First Nat. Bank of York*, 199 Neb. 8, 255 N.W.2d 856 (1977) (a bank money order is essentially the same as a cashier's check and is equivalent to a negotiable promissory note of the bank); *TPO Incorporated v. Federal Deposit Insurance Corp.*, 487 F.2d 131 (3d Cir. 1973).

As the court in *Banco Ganadero y Agricola, Etc. v. Soc. Nat. Bk., Cleve.*, 418 F. Supp. 520, 524 (N.D. Ohio 1976), observed:

> Treating a cashier's check as the bank's promissory

> note, the question becomes not whether the bank may stop payment thereon—for stopping payment only makes sense as a concept where a drawer wishes to prevent the drawee, another party, from paying the instrument—but rather whether the bank, as maker of the instrument, is liable thereon. Therefore, it is concluded that a cashier's check drawn by a bank on itself is more accurately treated as a note than as an "accepted" check.

See, also, *Pulaski Chase v. Kellogg-Citizens Bank, supra*; 1 J. White & R. Summers, Uniform Commercial Code § 14-10 at 736 (3d ed. 1988).

Neb. U.C.C. § 3-413(1) (Reissue 1980) provides that the maker of a note "engages that he will pay the instrument according to its tenor at the time of his engagement . . . ." See, also, *Grand Island Prod. Credit Assn. v. Humphrey*, 223 Neb. 135, 388 N.W.2d 807 (1986).

Neb. U.C.C. § 3-307 (Reissue 1980) provides:

> (1) Unless specifically denied in the pleadings each signature on an instrument is admitted. . . .
>
> . . . .
>
> (2) When signatures are admitted or established, production of the instrument entitles a holder to recover on it unless the defendant establishes a defense.
>
> (3) After it is shown that a defense exists a person claiming the rights of a holder in due course has the burden of establishing that he or some person under whom he claims is in all respects a holder in due course.

In *Center Bank v. Mid-Continent Meats, Inc.*, 194 Neb. 665, 666-67, 234 N.W.2d 902, 903 (1975), this court stated:

> The answer does not specifically deny the signatures. Under such circumstances the signatures are admitted and the holder of the notes is entitled to recover on them unless the defendants establish a defense. [Citations omitted.] The burden is upon the defendants to plead and prove such defense.

See, also, *Blaha GMC-Jeep, Inc. v. Frerichs*, 211 Neb. 103, 317 N.W.2d 894 (1982); *Newman Grove Creamery Co. v. Deaver*, 208 Neb. 178, 302 N.W.2d 697 (1981).

In its answer, the bank generally denied the allegations of the

petition and made the following allegations concerning affirmative defenses:

> 4. That on or about December 30, 1985, the Directors of the Boelus State Bank resolved that two signatures would be required on all Cashier's Checks issued by the Boelus State Bank. . . .
>
> 5. That on or about January 14, 1986, the Boelus State Bank was requested to issue a Cashier's Check payable to the order of John Deere Company in the amount of $8,455.85 [sic] by Melvin [sic] Deuster [sic].
>
> 6. That the teller who was waiting on Mr. Deuster [sic] stated that she would need a second signature on the check and excused herself to request a loan officer to come to the front counter to sign the check.
>
> 7. That when the teller returned with the loan officer, the check as well as Mr. Deuster [sic] had left the bank.
>
> 8. That immediately the loan officers, Russell Jensen and Andrew Jensen, personally contacted Mr. Deuster [sic] to inform him that the Cashier's Check was invalid because it did not have two signatures. Mr. Deuster [sic] stated he had already given the check to John Deere Company.
>
> 9. Loan officer, Russell Jensen, immediately thereafter contacted John Deere Company informing them that the check was invalid because it did not have two signatures.
>
> 10. That the above stated Cashier's Check was never officially issued, and therefore it could not be honored upon presentation by John Deere Company.

Since the bank did not specifically deny that the signature on the check was valid, see § 3-307, comment 1, the signature was admitted, and the plaintiff was entitled to recover unless the bank established a defense. If the bank established a defense, then the plaintiff had the burden of proving that it was a holder in due course. See *Bank of Valley v. Mattson*, 215 Neb. 596, 339 N.W.2d 923 (1983).

Neb. U.C.C. § 3-306 (Reissue 1980) provides:

> Unless he has the rights of a holder in due course any person takes the instrument subject to
>
> . . . .

(c) the defenses of want or failure of consideration, nonperformance of any condition precedent, nondelivery, or delivery for a special purpose . . . and

(d) the defense that he or a person through whom he holds the instrument acquired it by theft . . . .

Section 3-305 provides:

To the extent that a holder is a holder in due course he takes the instrument free from

. . . .

(2) all defenses of any party to the instrument with whom the holder has not dealt except

. . . .

(b) such other incapacity, or duress, or illegality of the transaction, as renders the obligation of the party a nullity

. . . .

Although the bank alleged that Duester had acquired the cashier's check by theft and that the check had not been delivered, if the plaintiff was a holder in due course it is unnecessary to consider the defenses alleged by the bank.

"A holder in due course is a holder who takes the instrument (a) for value; and (b) in good faith; and (c) without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person." Neb. U.C.C. § 3-302(1) (Reissue 1980). In this case the check had been drawn payable to the order of the plaintiff, John Deere. A holder is defined as a "person who is in possession of . . . an instrument . . . *drawn*, issued or indorsed to him or to his order or to bearer or in blank." (Emphasis supplied.) Neb. U.C.C. § 1-201(20) (Reissue 1980).

The payee of an instrument may be a holder in due course if he meets the requirements of § 3-302. Section 3-302 and comment 2 thereto. A holder takes an instrument for value when he takes the instrument in payment of an antecedent claim against any person. Neb. U.C.C. § 3-303(b) (Reissue 1980).

The record shows that John Deere was in possession of the cashier's check drawn on the defendant bank and which was payable to the order of John Deere. In obtaining the cashier's check, John Deere did not deal with the bank, and took the instrument in payment of the debt due it from Duester. There

was no defect apparent on the face of the instrument. Duester did not tell Hansen what had happened while he was in the bank, did not tell Hansen that there might be a problem with the cashier's check, and did not discuss the subject of his bank loan with anyone from St. Paul. The record supports the trial court's conclusion that John Deere's agent, Hansen, had no knowledge of any defense against the instrument when he received the cashier's check in payment of Duester's debt to St. Paul. Although John Deere subsequently was informed that the bank intended to dishonor the check, subsequent knowledge of an alleged infirmity does not impair its holder in due course status. *Schranz v. I. L. Grossman, Inc.*, 90 Ill. App. 3d 507, 412 N.E.2d 1378 (1980); *Lynnwood Sand & Gravel v. Bank of Everett*, 29 Wash. App. 686, 630 P.2d 489 (1981). The trial court's finding that John Deere was a holder in due course was not clearly wrong.

Since the plaintiff was a holder in due course, it is unnecessary to discuss the evidence relating to the bank's claim that the check had been stolen by Duester. Under § 3-306, a holder in due course takes the instrument not subject to "the defense that he or a person through whom he holds the instrument acquired it by theft . . . ."

In § 3-306, comment 5, it is stated: "The exception made in the case of theft is based on the policy which refuses to aid a proved thief to recover, and refuses to aid him indirectly by permitting his transferee to recover *unless the transferee is a holder in due course*." (Emphasis supplied.) See, also, *O.P. Ganjo, Inc. v. Tri-Urban Realty Co., Inc.*, 108 N.J. Super. 517, 261 A.2d 722 (1969).

The judgment is affirmed.

AFFIRMED.

IN RE GUARDIANSHIP AND CONSERVATORSHIP OF MAUDE CLEVENGER SIM.
MAUDE CLEVENGER SIM ET AL., APPELLANTS, V. EDITH WRIGHT AND OPAL C. COMISKEY, APPELLEES.

448 N.W.2d 406

Filed November 22, 1989. No. 88-216.

Courts: Motions for New Trial: Judgments: Time: Appeal and Error. A motion for new trial or rehearing is not authorized when the district court sits as an appellate court reviewing the judgment of the county court, and such motion therefore does not toll the time for appealing to the Nebraska Supreme Court; the time for such appeal begins to run from the date the district court rules on the judgment of the county court.

Appeal from the District Court for Otoe County, RAYMOND J. CASE, Judge, on appeal thereto from the County Court for Otoe County, ALBERT C. WALSH, Judge. Appeal dismissed.

Harvey A. Neumeister and Kent J. Neumeister, and J. Patrick Green for appellants.

Alan M. Wood, of Bailey, Polsky, Cada, Todd & Cope, guardian and conservator.

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

PER CURIAM.

In accordance with *In re Guardianship and Conservatorship of Sim*, 225 Neb. 181, 403 N.W.2d 721 (1987), the county court appointed attorney Alan M. Wood as guardian and conservator of Maude Clevenger Sim, with limited powers. Sim appealed that appointment to the district court, which, on December 8, 1987, affirmed the judgment of the county court and assessed costs against the attorneys representing Sim for acting in bad faith. On December 18, 1987, Sim alone filed a motion for "new trial or rehearing," which the district court overruled on February 3, 1988. On March 3, 1988, Sim and her attorneys filed their joint purported notice of appeal to this court. If Sim's motion for new trial or rehearing was inappropriate, the notice of appeal was clearly filed out of time with respect to all rulings of the district court. Neb. Rev. Stat. § 25-1912 (Cum.

Supp. 1988) provides that in the absence of a motion for new trial, the notice of appeal to this court must be filed within 30 days from the district court's ruling on the judgment of the county court.

We have held that a motion for new trial is proper only in a trial court. Accordingly, such motion is not properly presented to the district court where it sits as an intermediate appellate court and merely reviews the county court judgment. *Collection Bureau of Lincoln v. Loos, ante* p. 30, 443 N.W.2d 605 (1989). Neither is there authorization for a motion for rehearing in such circumstances. Therefore, a motion for new trial or rehearing is not authorized when the district court sits as an appellate court reviewing the judgment of the county court, and such motion therefore does not toll the time for appealing to this court; the time for such appeal begins to run from the date the district court rules on the judgment of the county court.

Accordingly, this purported appeal is dismissed for want of jurisdiction.

APPEAL DISMISSED.

GENE L. BABB, APPELLANT AND CROSS-APPELLEE, V. UNITED FOOD AND COMMERCIAL WORKERS DISTRICT UNION, LOCAL 271, APPELLEE AND CROSS-APPELLANT.

448 N.W.2d 168

Filed November 22, 1989. No. 88-272.

1. **Summary Judgment: Appeal and Error.** In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
2. **Contracts: Arbitration and Award: Public Policy.** Arbitration agreements entered into before a dispute arises which purport to deny the parties the right to resort to the courts nonetheless oust the courts of their jurisdiction and are thus against public policy and therefore void and unenforceable.
3. **Employer and Employee: Wages.** The Nebraska Wage Payment and Collection Act, Neb. Rev. Stat. §§ 48-1228 et seq. (Reissue 1984), does not apply to

severance payment which becomes due upon termination of employment.

4. **Arbitration and Award: Proof.** An arbitration award, whether under the statute or common law, is, in the absence of fraud or mistake, prima facie binding on the parties thereto, and the burden of alleging and proving its invalidity rests upon the party seeking to set aside the decision.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed in part, and in part reversed and remanded with directions.

Soren S. Jensen and J Russell Derr, of Erickson & Sederstrom, P.C., for appellant.

Thomas F. Dowd for appellee.

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

WHITE, J.

This is an appeal from an order of the district court for Douglas County granting the motion for summary judgment of defendant, United Food and Commercial Workers District Union, Local 271, on plaintiff Gene L. Babb's petition for severance pay in the first cause of action and damages for breach of contract in the second cause of action.

Babb's claims are based on a contract of merger between United Food and Commercial Workers Union, Retail Clerks Local 1015 (Local 1015) and United Food and Commercial Workers Union, District Union Local 271 (Local 271), and on the Nebraska Wage Payment and Collection Act, Neb. Rev. Stat. §§ 48-1228 et seq. (Reissue 1984).

On February 29, 1988, the district court found that Babb's claims under state law were preempted by federal law, § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185 (1982) (hereafter LMRA § 301). The court held that pursuant to LMRA § 301, Babb had failed to exhaust the required remedy of arbitration under the merger agreement regarding his first cause of action, and with regard to his second cause of action, Babb exercised his remedy of arbitration but received an adverse decision which is final and binding on the merits. Babb's three assignments of error may be summarized in his allegation that the trial court erred in sustaining defendant's

motion for summary judgment and determining that Babb's state law claim is preempted by federal law, specifically LMRA § 301.

The record shows that pursuant to a merger agreement executed on August 12, 1983, Local 1015 and Local 271 merged to become one local union operating under the name "United Food and Commercial Workers District Union, Local 271" (hereafter successor union). The merger became effective September 1, 1983.

Babb, as president of Local 1015 at the time of the merger, executed the agreement on behalf of Local 1015. Upon commencement of the merger, Babb was installed as secretary-treasurer of the successor union pursuant to the merger agreement, and he also had organizing duties as a business agent for the successor union. Babb's salary as president of Local 1015 was $628 per week at the time of the merger, and then he received $620 plus a $20 officer allowance per week from the successor union after the merger. The parties dispute whether the postmerger salary is for compensation as secretary-treasurer or as business agent.

Babb continued in this dual capacity until he was notified in a letter dated February 22, 1985, from the successor union president, Robert Parker, that his employment would be terminated effective March 15. Babb then looked to the merger agreement for redress. Paragraph XI(A) of the agreement states:

> In the event of any dispute or controversy arising out of or under this Merger Agreement, such dispute or controversy shall be submitted to the UFCW International Executive Committee. The decision of the International Executive Committee on the disputed matter shall be final and conclusive on all parties and may be enforced in any court of competent jurisdiction.

In a letter dated March 19, 1985, to the international union president, William H. Wynn, Babb invoked the arbitration procedure of the merger agreement regarding the termination of his employment. Babb received an adverse ruling in a letter from the international union dated January 15, 1986. In upholding the termination, the arbitrators found that Babb was

salaried as an appointed business agent of the successor union, and not by virtue of holding the office of secretary-treasurer. They further found that Babb's employment was not guaranteed in any other way.

Babb retained the nonsalaried office of secretary-treasurer until December 31, 1985, which was the expiration of his term, as stated in the merger agreement.

Babb then sent an August 4, 1986, letter to President Parker requesting severance pay in the amount of 2 weeks' pay for each year of employment. Babb's union employment totaled 19 years. Babb based this request on the adoption of a severance pay policy for officers by the executive board of Local 1015 at an April 13, 1983, board meeting. The request was further based on the alleged assumption of this obligation by the successor union under sections V and VIII of the merger agreement. These sections, in pertinent part, state:

> V. Employees
>
> (A) On the effective date of the merger, the employees of Locals 271 and 1015 shall become employees of the Merged Organization without interruption of their employment status.
>
> . . . .
>
> VIII. Rights, Property and Obligations of Merged Organization
>
> (A) . . . The Merged Organization shall, on and after the effective date of the merger, assume and be responsible for all the debts, liabilities, contract obligations, and other obligations of District Union Local No. 271 and UFCW Local No. 1015. Such debts, liabilities, contract obligations, and other obligations shall from that time forth attach to the Merged Organization to the same extent as if the said debts, liabilities, contract obligations, and other obligations were incurred or otherwise contracted by it.

President Parker stated in a reply dated August 11, 1986, that it was his opinion that Babb had no severance pay due him from the successor union, but Parker said that he had referred the matter to the international union for review. This letter is the last correspondence in the record concerning the severance

pay issue.

Babb then filed this suit in the district court for Douglas County on November 18, 1986.

SCOPE OF REVIEW

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. *Landon v. Pettijohn*, 231 Neb. 837, 438 N.W.2d 757 (1989).

LMRA § 301 PREEMPTION

LMRA § 301(a) states:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

§ 185(a).

The court below presumably applied federal law because Babb based his claim on a contract "between any such labor organizations." However, a review of decisions involving application of LMRA § 301 reveals that federal law does not necessarily apply simply because there is a contract between labor organizations.

It has been held that a constitution of a labor union is not a "contract" within the purview of the statute conferring federal jurisdiction over suits for violation of contracts between labor organizations representing employees in industry affecting commerce in an intraunion dispute unrelated to a collective bargaining agreement or to union affairs having no connection with industrial and economic peace. *1199 DC, Nat. U. of H. & H. C. E. v. National U. of H. & H. C. E.*, 394 F. Supp. 189 (D.D.C. 1975), *aff'd in part and in part rev'd* 533 F.2d 1205 (D.C. Cir. 1976). See, also, *Keck v. Employees Independent Association*, 387 F. Supp. 241 (E.D. Pa. 1974).

The clear gist of the decisions is that LMRA § 301 applies

only in the interpretation of a collective bargaining agreement, where the contract deals with employee representation, or where the dispute has some connection with industrial and economic peace between labor and management.

For example, in *Fredericks v. Pa. Soc. Serv. Union, Local 668*, 410 F. Supp. 1063 (W.D. Pa. 1976), an individual nonmember of a union sued the union for breach of an alleged oral agreement to employ him as executive director of the union, and the union removed the action from state court to federal district court. In granting a motion to remand the case to state court, the federal court cited the aforementioned proposition that the dispute have some connection with industrial and economic peace, and further stated:

> It is obvious that, here, no connection is constructible. There is no collective bargaining agreement here; neither is the plaintiff claiming that the defendant Union is not representing his rights before an employer. What is before me now is an individual dispute between two parties as to the validity of an alleged oral employment agreement between them. Certainly members of the defendant Union will not be adversely affected in the realm of employer-employee relations by the result of an adjudication here, or elsewhere.

Fredericks, supra at 1065. See, also, *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 108 S. Ct. 1877, 100 L. Ed. 2d 410 (1988) (LMRA § 301 held not to apply in this action for wrongful termination).

As in *Fredericks*, it appears to us, there is no connection in the instant case with industrial or economic peace. The merger agreement upon which Babb bases his claim is obviously not a collective bargaining agreement, and this case has nothing to do with the successor union's representing Babb. At the heart of this matter is an action against an employer for breach of an alleged guarantee of employment, and an action for breach of a provision of the merger agreement. That two labor unions were parties to the agreement which is alleged to have been breached merely clouded the basic issues.

In following the U.S. Supreme Court's holding in *Lingle, supra*, that an application of state law is preempted by LMRA

§ 301 only if such application requires the interpretation of a collective bargaining agreement, we hold that LMRA § 301 does not preempt the decision of this case under state law. The order of the trial court granting summary judgment is therefore vacated.

FIRST CAUSE OF ACTION

Babb's first cause of action claims that the successor union is in violation of the Nebraska Wage Payment and Collection Act, §§ 48-1228 et seq., in withholding the severance pay that is allegedly due him by virtue of the merger agreement. The successor union asserts that Babb is required by the agreement to submit this claim to binding arbitration and cannot bring this action in our courts.

Arbitration agreements entered into before a dispute arises which purport to deny the parties the right to resort to the courts nonetheless oust the courts of their jurisdiction and are thus against public policy and therefore void and unenforceable. *Rawlings v. Amco Ins. Co.*, 231 Neb. 874, 438 N.W.2d 769 (1989); *Overland Constructors v. Millard School Dist.*, 220 Neb. 220, 369 N.W.2d 69 (1985). The arbitration provision in the merger agreement is just such an unenforceable agreement, and Babb cannot be excluded from the courts by virtue of it.

We have also held that the Nebraska Wage Payment and Collection Act applies only to actions to recover wages due the employee for labor or services performed for the employer. The act does not apply to severance payment which becomes due upon termination of employment. *Heimbouch v. Victorio Ins. Serv., Inc.*, 220 Neb. 279, 369 N.W.2d 620 (1985).

Although the act is inapplicable to this claim, Babb may still have a common-law cause of action for breach of contract. The record shows that issues exist regarding the adoption and rescission of the severance pay policy by Local 1015, and whether a contractual obligation for the successor union to pay Babb severance pay arose under the merger agreement.

SECOND CAUSE OF ACTION

Although an agreement to arbitrate future disputes is unenforceable, the agreement between Babb and the successor

union to submit the termination issue to arbitration was voluntary and arose after the dispute.

Babb voluntarily requested and invoked the arbitration procedure of the merger agreement in his March 19, 1985, letter to the international union. He was not forced to arbitrate by the successor union. The successor union acquiesced in Babb's invocation of the arbitration process.

An award, whether under the statute or common law, is, in the absence of fraud or mistake, prima facie binding on the parties thereto, and the burden of alleging and proving its invalidity rests upon the party seeking to set aside the decision. The general policy of the courts is that an arbitration award should not be set aside as inequitable unless it is grossly excessive and shocks the conscience of the court. *Simpson v. Simpson*, 194 Neb. 453, 232 N.W.2d 132 (1975).

The petition does not allege either fraud or mistake in the arbitration process, and the record does not demonstrate any issue of fact as to fraud or mistake.

The district court was correct in its determination that the arbitration decision is final and binding; however, the court erred in applying federal law to arrive at its determination. State law is properly applied to Babb's second cause of action, and pursuant thereto, we find that the arbitrator's decision is binding on the parties.

CONCLUSION

The successor union's cross-appeal for an attorney fee pursuant to the Nebraska Wage Payment and Collection Act is rendered moot, as the act is not applicable to this case. The order of the district court granting summary judgment is reversed as to Babb's first cause of action, and the cause is remanded for trial on that issue.

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

STATE OF NEBRASKA, APPELLEE, V. CHRISTOPHER F. VAN EGMOND, APPELLANT.

448 N.W.2d 569

Filed November 22, 1989. Nos. 88-1077, 88-1078.

1. **Criminal Law: Entrapment: Words and Phrases.** Entrapment is the governmental inducement of one to commit a crime not contemplated by the individual, in order to prosecute that individual for commission of a criminal offense.
2. **Criminal Law: Entrapment.** Entrapment occurs when the criminal intent or design originates with governmental officials, who implant in the mind of an innocent person the disposition to commit a criminal offense and induce criminal conduct in order to prosecute the criminal offense so induced.
3. _____: _____. When a person has no previous intent or purpose to violate the law, but does so only because he is induced to commit the act by law enforcement officers or agents, he is entitled to the defense of entrapment.
4. **Criminal Law: Entrapment: Intent.** Nebraska has adopted the "origin of intent" test for entrapment. Under this test, a defendant has been entrapped if (1) an agent of the State has induced the defendant to commit the offense charged, and (2) the defendant's predisposition to commit the criminal act was such that the defendant was not otherwise ready and willing to commit the offense on any propitious opportunity.
5. **Entrapment: Proof.** The State has the burden of proving beyond a reasonable doubt that the defendant was not entrapped.
6. **Criminal Law: Entrapment: Police Officers and Sheriffs.** Law enforcement officers are not precluded from utilizing artifice and stratagem, such as the use of decoys or undercover agents, to apprehend a person engaged in a criminal enterprise, provided that they merely afford opportunities or facilities for the commission of an offense by one already predisposed or ready to commit it.

Appeal from the District Court for Dakota County: ROBERT E. OTTE, Judge. Affirmed.

S.J. Albracht for appellant.

Robert M. Spire, Attorney General, and Kenneth W. Payne for appellee.

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

BOSLAUGH, J.

The defendant, Christopher F. Van Egmond, was charged in separate informations with conspiracy to distribute methamphetamine and possession of methamphetamine with

intent to distribute. The cases were consolidated for trial, and the jury returned a verdict of guilty on both counts. The defendant was sentenced to imprisonment for 3 to 5 years on each count, the sentences to run concurrently.

The defendant has appealed and contends that the trial court erred in failing to sustain his motion for a directed verdict of acquittal because the evidence sustained the defense of entrapment as a matter of law. The defendant stipulated that he had engaged in a conspiracy to distribute a controlled substance and that he had delivered methamphetamine on July 10, 1986, in Dakota County, Nebraska.

Entrapment is the governmental inducement of one to commit a crime not contemplated by the individual, in order to prosecute that individual for commission of a criminal offense. *State v. Byrd*, 231 Neb. 231, 435 N.W.2d 898 (1989); *State v. Jones*, 231 Neb. 47, 435 N.W.2d 167 (1989). It occurs when the criminal intent or design originates with governmental officials, who implant in the mind of an innocent person the disposition to commit a criminal offense and induce criminal conduct in order to prosecute the criminal offense so induced. *Byrd, supra*; *State v. Swenson*, 217 Neb. 820, 352 N.W.2d 149 (1984). When a person has no previous intent or purpose to violate the law, but does so only because he is induced to commit the act by law enforcement officers or agents, he is entitled to the defense of entrapment. *State v. Lampone*, 205 Neb. 325, 287 N.W.2d 442 (1980).

Nebraska has adopted the "origin of intent" test for entrapment. Under this test, a defendant has been entrapped if (1) an agent of the State has induced the defendant to commit the offense charged, and (2) the defendant's predisposition to commit the criminal act was such that the defendant was not otherwise ready and willing to commit the offense on any propitious opportunity. *Byrd, supra*; *Jones, supra*; *Swenson, supra*. The State has the burden of proving beyond a reasonable doubt that the defendant was not entrapped. *Jones, supra*.

The record shows that on July 10, 1986, the defendant conspired to deliver and did deliver methamphetamine to Allen Keck, a confidential informant for the Nebraska State Patrol, in Dakota County, Nebraska.

The defendant and Keck first met in March 1986, while they were patients at the Valley Hope drug treatment center in O'Neill, Nebraska. They became acquainted during group therapy sessions and exchanged addresses and telephone numbers at Valley Hope. Keck had been addicted to methamphetamine and was a patient at Valley Hope because he was trying to reach a plea agreement with federal prosecutors regarding his indictment for approximately seven drug- and weapons-related offenses. In December 1985, Keck pled guilty to two counts of felony conspiracy, pursuant to the plea agreement, and wanted to do anything he could to lessen his potential sentences for the federal convictions.

Keck was a contractor and also was active in racing horses. After Keck left Valley Hope, he tried to renew his racing license in Nebraska, but failed to mention on the renewal application that he was under federal indictment. Accordingly, the Nebraska State Racing Commission decided to revoke Keck's license. Facing the loss of his license, Keck met with State Patrol Officer Bill Schlachter in Grand Island during May 1986 and offered to help the State Patrol investigate the sale of drugs at Nebraska racetracks.

Keck testified that Schlachter agreed to intervene regarding Keck's racing license if Keck would "go ahead and help them clean up some of that mess up there as far as the drugs on the race track." Keck was directed to meet with the State Patrol in Omaha.

Keck met with State Patrol officers and a member of the racing commission in Omaha in mid-June 1986. The purpose of the meeting was to determine whether Keck would work with the State Patrol and whether he would be valuable as an informant. Keck signed an informant's agreement on June 19, 1986, and was assigned to work with State Patrol Investigator Robert Shelbourn, a drug investigator.

Shelbourn testified that there was no ongoing investigation of the defendant when Keck signed the informant's agreement and that the State Patrol intended to use Keck as an informant on and around racetracks in Dakota County and Columbus. No promises were made to Keck on June 19, except that the State Patrol would notify the U.S. Attorney's office and the

federal court of Keck's cooperation. Keck was not paid a salary and began working as an informant only after signing the agreement on June 19.

Approximately 1 week later, Keck and Shelbourn had a casual conversation during which Shelbourn said that he was from Plainview, Nebraska. Keck stated that he knew someone from Plainview (the defendant) and that he had gone through drug treatment with the defendant. Shelbourn asked Keck if he thought he could buy any drugs from the defendant. Keck believed he could because during treatment the defendant had told Keck that he had access to methamphetamine. Keck also knew that the defendant was in "pretty poor" financial shape and did not think he would have any problems buying drugs from the defendant.

On July 1, 1986, Keck telephoned the defendant and went to the defendant's home near Plainview that afternoon. This was the first time Keck had seen the defendant since treatment at Valley Hope. During a conversation in the defendant's living room, Keck asked if the defendant could get any methamphetamine, or "crank." The defendant and Keck went outside to a machine shed, where Keck again asked the defendant if he could get any crank. The defendant said yes, produced a small bag of crank, snorted some, and asked Keck if he wanted any. Keck said he was not going to "do it," but wanted to sell it. The defendant told Keck that he would obtain a quarter ounce and that he would return around 7 or 8 p.m.

Keck notified Shelbourn of his arrangement with the defendant. Keck returned to the defendant's residence on the evening of July 1. He and the defendant went to the shed. The defendant gave Keck a quarter ounce of methamphetamine and told Keck it would cost $500. Keck then gave the defendant $500, and the two men walked to Keck's truck.

Keck told the defendant that he would "get rid of this" crank and would call the defendant when he needed more. They agreed that the defendant would obtain a quarter ounce of methamphetamine if Keck telephoned and said he was "working on a one horse trailer and couldn't get away."

A few days later, Keck telephoned the defendant from South Sioux City and mentioned the "one horse trailer." During this

conversation, the defendant indicated that he was coming to South Sioux City to take his wife to the hospital for back surgery and would deliver a quarter ounce of methamphetamine to Keck at Keck's home.

The defendant arrived at Keck's residence on the afternoon of July 10. Keck asked him if he had the crank. The defendant said that he did and that he had brought a half ounce because the supply was running low. The defendant left the residence and returned with a white envelope containing a quarter ounce of crank. Keck paid the defendant $500 for the methamphetamine and $50 for travel expenses.

The July 1 and July 10 transactions were monitored by the Nebraska State Patrol. On both occasions, the defendant informed Keck of the price of the drug. Keck testified that he did not threaten the defendant in any way and that the defendant did not resist or seem reluctant to sell the methamphetamine to Keck.

The defendant called no witnesses and did not testify at the trial.

Although the defendant argues that his motion to dismiss should have been sustained because there was "not a scintilla of evidence that the Defendant had any predisposition to violate the law by the delivery of Methamphetamines," the record supports the jury's finding that the State Patrol did not induce the defendant to sell methamphetamine. Rather, the informant merely inquired of the defendant as to whether the informant could purchase the drug. This inquiry was met with an immediate positive response on two occasions. On the second occasion, the defendant even offered to supply Keck with twice as much methamphetamine as had been agreed to.

Furthermore, by agreeing to sell the drug upon the simple request of an informant, the defendant demonstrated that he was willing to commit the offense on any propitious opportunity. The jury resolved the issue of entrapment against the defendant, and the verdicts are supported by the evidence.

Although the defendant appears to argue that the State Patrol's use of an informant was unfair, especially because the informant had participated in a drug treatment program with the defendant, we have stated that

> law enforcement officers are not precluded from utilizing artifice and stratagem, such as the use of decoys or undercover agents, to apprehend a person engaged in a criminal enterprise, provided that they merely afford opportunities or facilities for the commission of an offense by one already predisposed or ready to commit it.

State v. Lampone, 205 Neb. 325, 328, 287 N.W.2d 442, 444 (1980). The defendant's assignments of error are without merit.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RANDY C. PORTSCHE, APPELLANT.
448 N.W.2d 173

Filed November 22, 1989. No. 89-154.

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

James H. Hoppe, of Watkins, Scott, Hoppe, for appellant.

Robert M. Spire, Attorney General, and Alfonza Whitaker for appellee.

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

WHITE, J.

This is an appeal from an order denying postconviction relief by the district court for Lancaster County.

A single ground was urged in the district court and is again asserted in this court, i.e., the appellant was denied effective assistance of counsel when retained counsel failed to timely file a notice of appeal to the Supreme Court after the district court imposed a sentence on August 22, 1988. The trial court, after a hearing, denied any relief. We affirm.

Appellant pled guilty to a violation of Neb. Rev. Stat. § 39-669.07 (Reissue 1988), operation of a motor vehicle while

the operator's license was suspended for 15 years, a Class IV felony. As part of a plea bargain a number of misdemeanor charges were dismissed, the record indicating at least three. The court sentenced appellant to a term of from 12 to 18 months in the penal complex, with credit for 9 days' jail time.

No complaint was made in the district court or this court about any deficiency in the performance of counsel. The appellant, however, asserts that he was "shocked" by the sentence.

At the postconviction hearing, appellant asserted that retained counsel promised to timely file a notice of appeal, but did not do so. However, he conceded that at a later meeting retained counsel stated that an appeal would be frivolous and that he would not represent appellant on appeal.

Trial counsel also testified that he informed appellant that he would not represent him on appeal, that in his opinion an appeal was frivolous, and that he was never instructed, nor did he promise, to file an appeal. He further instructed appellant, should he determine to appeal, how to address the court for appointment of counsel on appeal, proceeding in forma pauperis, and about the necessity of filing the notice of appeal within 30 days of the date of sentence.

The trial court resolved the factual dispute against the appellant, and this alone requires an affirmance, as we are bound by the factual findings in a postconviction proceeding having support in the record. *State v. Wiley*, 232 Neb. 642, 441 N.W.2d 629 (1989). It should also be noted that a sentence within the bounds of the statute will not be disturbed on appeal absent an abuse of discretion. *State v. Kitt*, 232 Neb. 237, 440 N.W.2d 234 (1989).

As the only error that could have been raised on appeal was the alleged excessiveness of the sentence, and considering the extensive history of driving offenses (at least 28 contacts), it is obvious that appellant cannot demonstrate that any prejudice was suffered by any alleged claim of incompetent counsel. See *State v. Broomhall*, 227 Neb. 341, 417 N.W.2d 349 (1988).

The trial court correctly denied the appellant's claim for postconviction relief.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ERNEST HARPER, APPELLANT.
448 N.W.2d 407

Filed November 22, 1989. No. 89-235.

Postconviction. The Nebraska Postconviction Act, Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1985), requires that a prisoner seeking relief under the act must be in actual custody in Nebraska under a Nebraska sentence.

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

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

Ernest Harper, pro se.

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

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

GRANT, J.

The defendant, Ernest Harper, has appealed from an order of the district court which denied him an evidentiary hearing and denied defendant's postconviction motion filed December 22, 1988. In 1982, in the district court for Douglas County, Nebraska, defendant was convicted of robbery, use of a firearm in the commission of a felony, and two counts of first degree sexual assault. His convictions of those crimes were affirmed in *State v. Harper*, 215 Neb. 686, 340 N.W.2d 391 (1983). Thereafter, defendant filed two unsuccessful petitions for postconviction relief. Denial of such relief was affirmed in *State v. Harper*, 218 Neb. 870, 359 N.W.2d 806 (1984), and *State v. Harper*, 225 Neb. 300, 404 N.W.2d 436 (1987).

On December 22, 1988, defendant filed a "Motion for Stay and Direct Review of Extradition Agreement and Judgment and Plimanary Injuncation [sic]" in the Douglas County District Court. In his motion, defendant alleges that "[u]nder the Iowa State Extradition Compact, the demanding State of Nebraska had no legal authorization to transpotate [sic] defendant from the asylum state." Defendant then sets out in

his motion various sections of Iowa statutes concerning extradition. He does not refer to the Agreement on Detainers, as reflected in Neb. Rev. Stat. § 29-759 (Reissue 1985), but generally alleges that that interstate compact violates the Nebraska, Iowa, and U.S. Constitutions. On March 9, 1989, the district court denied defendant's motion.

On March 10, 1989, defendant filed an "Amendment to Motion to Vacate" in the district court. The trial court, on March 15, determined that defendant's March 10 amendment was untimely, since the original motion had been denied. The trial court, however, "in an effort to avoid further pleadings," treated the amendment as a motion to vacate and thus a postconviction motion, and denied it as being without merit, since all the alleged grounds could have been raised on direct appeal. The trial court, in effect, denied all of defendant's efforts seeking postconviction relief.

We agree with the court's resolution of defendant's motions, but on a different ground. Our examination of the record shows that at all times while any of the motions in the case before us were filed, defendant was incarcerated in the State of Iowa. Defendant's affidavit attached to his first motion establishes beyond a doubt that defendant is so incarcerated. Postconviction proceedings in Nebraska are set out in Neb. Rev. Stat. §§ 29-3001 to 29-3004 (Reissue 1985). Section 29-3001 provides, in part:

> A prisoner in custody under sentence and claiming a right to be released on the ground that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States, may file a verified motion at any time in the court which imposed such sentence, stating the ground relied upon, and asking the court to vacate or set aside the sentence.

The underlying facts of this appeal require an answer to the question as to what constitutes "in custody under sentence." It is undisputed that the defendant filed this motion for postconviction relief while incarcerated in an Iowa prison. While § 29-3001 does not expressly state that a postconviction

attack on a sentence is limited to prisoners incarcerated in the State of Nebraska, we hold that the phrase "in custody under sentence," as used in the Nebraska Postconviction Act, §§ 29-3001 et seq., requires that a prisoner seeking relief under the act must be in actual custody in Nebraska under a Nebraska sentence.

This holding is harmonious with article V(g) of the Agreement on Detainers, § 29-759, which provides: "For all purposes other than that for which temporary custody as provided in this agreement is exercised, the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending state . . . ."

Defendant remains subject to the jurisdiction of the sending state, which in this case is the State of Iowa. Nebraska had only temporary custody of the defendant, and that custody terminated when the defendant was delivered back to Iowa. Defendant is now in the actual custody of the State of Iowa. The State of Nebraska can do nothing about that custody. Since, at this time, defendant is not in actual custody in Nebraska, he may not mount a statutory postconviction attack against his Nebraska convictions.

The district court did not have jurisdiction to entertain defendant's motions for postconviction relief, and his motions should have been dismissed on that ground. Defendant's appeal is dismissed.

APPEAL DISMISSED.

STATE OF NEBRASKA, APPELLEE, V. BRYAN L. MENTZER, APPELLANT.

448 N.W.2d 409

Filed November 22, 1989. No. 89-772.

1. **Sentences: Probation and Parole: Appeal and Error.** An order denying probation and imposing a sentence within statutorily prescribed limits will not be disturbed on appeal absent an abuse of discretion.
2. **Criminal Law: Pleas: Restitution.** The failure to inform a defendant of the

possibility of restitution renders the entry of a plea of guilty involuntary and unintelligent in that regard and consequently prevents the imposition of an order of restitution.

3. **Pleas: Proof.** While in order for a defendant to enter a voluntary and intelligent plea of guilty, he or she must know the penalty for the crime to which he or she is pleading, and although it is preferable that such knowledge be imparted by the judge accepting the plea, it is nonetheless possible to prove the defendant's knowledge by other means.
4. **Sentences: Appeal and Error.** The Nebraska Supreme Court has the power on direct appeal to remand a cause for the imposition of a lawful sentence where an erroneous one has been pronounced.

Appeal from the District Court for York County: BRYCE BARTU, Judge. Affirmed in part, and in part vacated and remanded for resentencing.

James H. Truell, York County Public Defender, for appellant.

Robert M. Spire, Attorney General, and Kenneth W. Payne for appellee.

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

CAPORALE, J.

As the result of a plea bargain whereunder plaintiff-appellee State dismissed six other charges, the defendant-appellant, Bryan L. Mentzer, pled nolo contendere to having possession of a controlled substance, methamphetamine, in violation of Neb. Rev. Stat. § 28-416 (Cum. Supp. 1988), and to second offense driving while intoxicated, in violation of Neb. Rev. Stat. § 39-669.07 (Reissue 1988). He was thereafter adjudged guilty of those charges. On the possession conviction, Mentzer was sentenced to imprisonment for a period of not less than 20 months nor more than 5 years. On the driving while intoxicated conviction, he was sentenced to a consecutive term of imprisonment for a period of 1 month and to revocation of his operator's license for a period of 1 year, and was ordered to make restitution in the sum of $300. Mentzer assigns as error only the claim that the district court erred by imposing excessive sentences. We affirm in part and in part vacate and remand for resentencing.

The possession conviction is a Class IV felony. § 28-416; Neb. Rev. Stat. § 28-405 [Schedule II(c)(3)] (Cum. Supp. 1988). As such, it is punishable by imprisonment for a period of zero to 5 years, a $10,000 fine, or both such imprisonment and fine. Neb. Rev. Stat. § 28-105 (Reissue 1985). The driving while intoxicated conviction is a Class W misdemeanor, for which the mandatory punishment is imprisonment for a period of 30 days, a $500 fine, and revocation of the convict's operator's license for a period of a year. Neb. Rev. Stat. § 28-106 (Cum. Supp. 1988); § 39-669.07. In addition, the district court was authorized to require Mentzer to make restitution for the damage he caused by driving while intoxicated. Neb. Rev. Stat. § 29-2280 (Cum. Supp. 1988).

The rule controlling disposition of Mentzer's assignment of error is that an order denying probation and imposing a sentence within statutorily prescribed limits will not be disturbed on appeal absent an abuse of discretion. *State v. Jenson*, 232 Neb. 403, 440 N.W.2d 686 (1989). Nonetheless, Mentzer urges he should have been placed on probation because he has kept himself relatively free of encounters with police authorities since his release from prison in 1976. However, this argument overlooks that this is the second time since 1983 that Mentzer has been convicted for driving while intoxicated and that his earlier period of imprisonment, for burglary and robbery, has obviously not yet taught him to refrain from the criminal activity of possessing controlled substances. It therefore cannot be said that the district court abused its discretion in not placing Mentzer on probation.

Although not assigned as error, Mentzer nevertheless argues that his plea was not voluntarily and intelligently entered because the district court erred in failing to advise him that one of the consequences of his plea was that he might be called upon to make restitution for the damage he caused by striking another vehicle. It is true, we have held that the failure to inform a defendant of the possibility of restitution renders the entry of a plea of guilty involuntary and unintelligent in that regard and consequently prevents the imposition of an order of restitution. *State v. War Bonnett*, 229 Neb. 681, 428 N.W.2d 508 (1988). However, we have also held that while in order for a

defendant to enter a voluntary and intelligent plea of guilty, he or she must know the penalty for the crime to which he or she is pleading, and although it is preferable that such knowledge be imparted by the judge accepting the plea, it is nonetheless possible to prove the defendant's knowledge by other means. *State v. Fischer*, 220 Neb. 664, 371 N.W.2d 316 (1985). In this instance, in an effort to persuade the district court to place him on probation, Mentzer, through his attorney, advised that he was "willing to make any restitution that would be ordered proper and necessary in this case to the damage to the vehicle that was parked . . . ." Thus, even if Mentzer had assigned the district court's failure in this regard as error, it would have availed him nothing.

Yet, the driving while intoxicated sentence must be vacated, for, as the State points out as plain error, it is erroneous, first, because it fails to impose the mandatory $500 fine and, second, because the authorized period of imprisonment is 30 days, not 1 month.

Inasmuch as this court has the power on direct appeal to remand a cause for the imposition of a lawful sentence where an erroneous one has been pronounced, *State v. Ferrell*, 218 Neb. 463, 356 N.W.2d 868 (1984), we vacate the sentence imposed for the driving while intoxicated conviction and remand the cause for imposition of the sentence required by law. There being no error or abuse of discretion in the sentence for the possession conviction, that sentence is affirmed.

AFFIRMED IN PART, AND IN PART VACATED AND REMANDED FOR RESENTENCING.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. JOHN J. FITZGERALD, RESPONDENT.

448 N.W.2d 572

Filed December 1, 1989. No. 87-206.

Original action. Judgment of disbarment.

No appearance for relator.

John H. Kellogg, Jr., for respondent.

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

PER CURIAM.

Pursuant to Neb. Ct. R. of Discipline 15 (rev. 1989), the respondent, John J. Fitzgerald, filed a voluntary surrender of license with this court.

A disciplinary complaint was filed against Fitzgerald with the Counsel for Discipline of the Nebraska State Bar Association. The respondent voluntarily and knowingly admits that he has violated his oath of office as an attorney and that he has violated Canon I, DR 1-102(A)(1), (3), (4), and (6) of the Code of Professional Responsibility. He also voluntarily and knowingly consents to an order of disbarment and waives any right to notice, appearance, or hearing prior to entry of the order.

Accordingly, the respondent is hereby disbarred from the practice of law in the State of Nebraska.

JUDGMENT OF DISBARMENT.

WHITE, J., not participating.

JOHN VANEK, PERSONAL REPRESENTATIVE OF THE ESTATE OF TONI MARIE VANEK, DECEASED, APPELLANT, V. PAUL P. PROHASKA, APPELLEE.

JOHN VANEK, APPELLANT, V. PAUL P. PROHASKA, APPELLEE.

448 N.W.2d 573

Filed December 1, 1989. Nos. 87-1048, 87-1056.

1. **Verdicts: Appeal and Error.** In determining the sufficiency of the evidence to sustain a verdict in a civil case, the Supreme Court considers the evidence most favorably to the successful party, who is entitled to every reasonable inference deducible from the evidence.
2. **Negligence.** The defense of assumption of risk presupposes that the injured party had some actual knowledge of the danger, that he understood and appreciated the risk therefrom, and that he voluntarily exposed himself to such risk.
3. **Negligence: Evidence.** A violation of a statute is not negligence per se, but is merely evidence of negligence.
4. **Negligence.** One does not assume the risk of an unknown or hidden danger.
5. **Negligence: Pleadings: Proof: Trial.** When a defendant pleads assumption of risk as an affirmative defense in a negligence action, the defendant has the burden to establish the element of assumption of risk before that defense, as a question of fact, may be submitted to the jury.
6. **Negligence: Evidence: Trial.** Before the defense of assumption of risk is submissible to a jury, evidence must show that the injured party (1) knew of the danger, (2) understood the danger, and (3) voluntarily exposed himself or herself to the danger which proximately caused the plaintiff's damage.

Appeal from the District Court for Saunders County: WILLIAM H. NORTON, Judge. Reversed and remanded for a new trial.

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

Ray C. Simmons, of Simmons & Schneider, P.C., for appellee.

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

WHITE, J.

Plaintiff, John Vanek, appeals from judgments on jury verdicts in favor of the defendant-appellee, Paul P. Prohaska, on both of appellant's causes of action which arose out of the death of Toni Marie Vanek, appellant's daughter, when she was

struck by appellee's vehicle. One action was by appellant as personal representative of the estate of the decedent for the pecuniary loss suffered by the heirs at law; the other action was by appellant for medical and funeral expenses. The cases are consolidated on appeal, as they were at trial.

The appellant's three assignments of error merge to allege that (1) the trial court erred in instructing the jury on the issue of assumption of risk and that (2) the verdicts are contrary to the evidence, to the unvarying and established principles of physics, and to the undisputed physical facts.

In determining the sufficiency of the evidence to sustain a verdict in a civil case, this court considers the evidence most favorably to the successful party and resolves evidential conflicts in favor of such party, who is entitled to every reasonable inference deducible from the evidence. *Fisher Corp. v. Consolidated Freightways*, 230 Neb. 832, 434 N.W.2d 17 (1989). Viewing the evidence in favor of the appellee, the record shows the following facts.

On August 16, 1985, Toni Marie Vanek, age 14, took her usual evening run, which consisted of jogging south some 800 or 900 feet along a county road in Saunders County, from her driveway down to the Houfek family driveway, and then back home. The Vanek driveway is on the west side of the road, while the Houfek driveway is on the east side. Toni Marie used this route approximately four times a week.

On the same evening, Paul Prohaska left his home in Prague, Nebraska, at about 8:15 to go to a neighbor's house to watch television. Accompanying Prohaska in his 1980 Ford pickup were his girlfriend, Rita Pospisil, and his brother, Curtis Prohaska. Paul Prohaska drove out of Prague and subsequently onto the road where Toni Marie was jogging. Prohaska was traveling south along the road at about 45 to 50 m.p.h., with his headlights on, when Curtis said he saw something on the side of the road. Prohaska estimated that this statement occurred approximately one-half mile from the accident site and testified that he looked but could not see anything at that point.

Prohaska then testified that he saw something on the right side of the road about one-fourth mile away, but could not tell

what it was. He thought that it might be cattle, as Rudy Houfek always had cattle out on the road. He then began to move over to the left side of the road. When Prohaska reached the Vanek driveway, he "let off" the accelerator, slowing down about 5 m.p.h., and moved all the way over to the left (east) edge of the road.

Prohaska testified that he was two or three car lengths away from the object on the roadside when he realized that it was a person. He stated that the person was moving south on the west side of the road and that as the pickup was going across the Houfek driveway, "she darted out and ran into the side of my pickup." The pickup then went into a ditch on the east side of the road past the Houfek driveway, went up a bank, hit three fenceposts, then went down the bank, and came to a stop in the ditch.

Toni Marie was found lying on the west edge of the road, approximately 30 feet south of the south edge of the Houfek driveway. A rescue unit was called, and a member of the rescue unit radioed the "life flight" helicopter from Omaha. Toni Marie had a large laceration on the back of her upper left thigh, had lacerations on her head and left elbow, and was unresponsive to painful stimuli. She was taken to the University of Nebraska Medical Center, where emergency measures to resuscitate her failed.

ASSUMPTION OF RISK

The first assignment of error on appeal is that the district court erred in instructing the jury on the issue of the decedent's assumption of risk.

The defense of assumption of risk presupposes that the decedent had some actual knowledge of the danger, that she understood and appreciated the risk therefrom, and that she voluntarily exposed herself to such risk. *Hurlbut v. Landgren*, 200 Neb. 413, 264 N.W.2d 174 (1978).

The appellee's evidence of decedent's assumption of risk consisted of testimony by the decedent's mother and father that the decedent, through several conversations with her mother and father on this subject, knew that it was dangerous to walk or jog on the right side of the road. Appellee also claims in his

brief that violation of Neb. Rev. Stat. § 39-646(3) (Reissue 1988) is further evidence of decedent's assumption of risk. Section 39-646(3) provides that "[w]here neither a sidewalk nor a shoulder is available, any pedestrian who walks along and upon a highway shall walk as near as practicable to the edge of the roadway and, if on a two-way roadway, shall walk only on the left side of such roadway."

A violation of a statute is not negligence per se, but is merely evidence of negligence. *Hurlbut, supra.*

We will not extend a violation of § 39-646 to show an assumption of risk. As we stated in *Hurlbut*, "We do not conclude that the mere act of walking along a roadway or on a roadway is of itself an assumption of risk of an accident involving severe personal injuries." *Id.* at 418, 264 N.W.2d at 177.

In the *Hurlbut* case, the plaintiff was approximately 315 feet north of her driveway, walking south along the right side of a shouldered highway at night. She was struck from behind by defendant's vehicle, which was also traveling south. This court upheld the trial court's decision not to submit the defendant's tendered instruction concerning the plaintiff's assumption of risk, regardless of whether she was walking on the shoulder or on the traveled portion of the road.

There was no discussion in *Hurlbut* of whether the plaintiff knew that the defendant's vehicle was approaching. Likewise, there is no evidence in the instant case to suggest whether the decedent had knowledge of the appellee's approaching pickup.

As expressed in Prosser and Keeton on the Law of Torts, *Negligence: Defenses* § 68 at 487 (5th ed. 1984):

> "Knowledge of the risk is the watchword of assumption of risk." Under ordinary circumstances the plaintiff will not be taken to assume any risk of either activities or conditions of which he has no knowledge. Moreover, he must not only know of the facts which create the danger, but he must comprehend and appreciate the nature of the danger he confronts. . . . Knowledge of the general danger may not be enough, and some courts require knowledge of the specific risk that caused the plaintiff's harm. The standard to be applied is, in theory at least, a subjective

> one, geared to the particular plaintiff and his situation, rather than that of the reasonable person of ordinary prudence who appears in contributory negligence. . . . His failure to exercise ordinary care to discover the danger is not properly a matter of assumption of risk, but of the defense of contributory negligence.

One does not assume the risk of an unknown or hidden danger. *Mandery v. Chronicle Broadcasting Co.*, 228 Neb. 391, 423 N.W.2d 115 (1988). In *Hickman v. Parks Construction Co.*, 162 Neb. 461, 474, 76 N.W.2d 403, 411 (1956), we stated that the doctrine of assumption of risk "applies to *known dangers* and not to those things from which, in possibility, danger may flow." (Emphasis in original.)

Clearly, as *Hurlbut* indicates, walking on the right side of a road is, of itself, merely something from which, in possibility, danger may flow. Further, there is no evidence in the record to suggest that decedent had any knowledge that appellee's pickup was approaching from behind her. At most, appellee's testimony that decedent darted out and into the side of his truck would seem to imply that decedent did not know of the truck's presence. The evidence shows that the decedent knew only that it was generally more dangerous to walk on the right side of the road than on the left side.

When a defendant pleads assumption of risk as an affirmative defense in a negligence action, the defendant has the burden to establish the elements of assumption of risk before that defense, as a question of fact, may be submitted to the jury. *Mandery, supra.* Before the defense of assumption of risk was submissible to the jury, evidence must have shown that the decedent (1) *knew* of the danger, (2) understood the danger, and (3) voluntarily exposed herself to the *danger which proximately caused* the plaintiff's damage. *Mandery, supra.* The appellee has failed to meet his burden.

Submitting the defense of assumption of risk was therefore prejudicial to the appellant's substantial right to a fair trial and constituted reversible error, as the evidence was insufficient to sustain an affirmative finding on the assumption of risk issue. See *Mandery, supra.*

Accordingly, the judgments of the district court are reversed,

and the causes are remanded for a new trial. We need not reach appellant's second assignment of error.

REVERSED AND REMANDED FOR A NEW TRIAL.

FRANCIS FLETCHER, PERSONAL REPRESENTATIVE OF THE ESTATE OF BLANCHE FLETCHER PETERSEN, DECEASED, APPELLEE AND CROSS-APPELLANT, V. PAUL MATHEW, APPELLANT AND CROSS-APPELLEE, FIRST NATIONAL BANK AND TRUST CO. OF KEARNEY ET AL., APPELLEES.

448 N.W.2d 576

Filed December 1, 1989. No. 87-1116.

1. **Equity: Appeal and Error.** In an appeal of an equity action, this court tries the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where 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.
2. **Principal and Agent: Words and Phrases.** A power of attorney is defined as an instrument in writing authorizing another to act as one's agent.
3. _____: _____. A confidential relationship exists between two persons if one has gained the confidence of the other and purports to act or advise with the other's interest in mind.
4. **Fraud: Presumptions: Proof.** Fraud is never presumed and must be proven by clear and convincing evidence.
5. **Fraud.** What constitutes fraud is a question of fact in each case.
6. **Principal and Agent: Fraud: Proof.** A confidential or fiduciary relationship does not shift the burden of proving all elements of the fraud alleged, but nevertheless may be sufficient to allow fraud to be found to have existed when in the absence of such a status it could not be so found, and thus to have the effect of placing the burden of going forward with the evidence upon the party charged with fraud.
7. **Circumstantial Evidence: Fraud: Proof.** Circumstantial evidence alone is not sufficient to sustain a finding of fraud unless the circumstances are of such a nature and so related to each other that the conclusion reached is the only one that can fairly and reasonably be drawn therefrom.
8. **Principal and Agent: Proof.** The fiduciary bears the burden of proving the fairness of the transaction.
9. **Principal and Agent.** Generally, an agent is required to act solely for the benefit of his or her principal in all matters connected with the agency and adhere

faithfully to the instructions of the principal.

10. _____. An agent and principal are in a fiduciary relationship such that the agent has an obligation to refrain from doing any harmful act to the principal.
11. **Agency: Principal and Agent.** An agent is prohibited from profiting from the agency relationship to the detriment of the principal or having a personal stake that conflicts with the principal's interest in a transaction in which the agent represents the principal.
12. **Principal and Agent: Gifts: Intent.** As a general rule, gifts procured by agents from their principals should be scrutinized with a close and vigilant suspicion. In order to avoid fraud and abuse, no gift is permitted by an attorney in fact to himself or herself or a third party absent clear intent on the part of the principal to the contrary.
13. **Prejudgment Interest: Claims.** Prejudgment interest may be recovered on claims which are liquidated.
14. **Prejudgment Interest: Claims: Words and Phrases.** A claim is liquidated if the evidence furnishes data which, if believed, make it possible to compute the amount with exactness, without reliance upon opinion or discretion.
15. **Prejudgment Interest: Debtors and Creditors.** When damages are liquidated and no reasonable controversy exists, a creditor is entitled to prejudgment interest as a matter of law.

Appeal from the District Court for Buffalo County: ROBERT R. MORAN, Judge. Affirmed as modified.

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

Terri S. Harder, of Jacobsen, Orr, Nelson & Wright, P.C., for appellee Fletcher.

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

HASTINGS, C.J.

The defendant Paul Mathew has appealed a judgment of $590,165.04 in favor of Francis Fletcher, personal representative of the estate of Blanche Fletcher Petersen, deceased. This judgment was entered by the district court on plaintiff's petition alleging fraud and undue influence and praying for an accounting.

The gist of plaintiff's action is that Mathew began manipulating Petersen's financial affairs in the early part of 1981. As a result, it is alleged, by creating certificates of deposit (CD's) in the names of Mathew and Petersen and by various cash transfers accomplished by means of a power of attorney

granted defendant by Petersen, Mathew was able to acquire in his own name approximately $500,000 of Petersen's money.

In an appeal of an equity action, this court tries the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where 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. *State ex rel. Spire v. Northwestern Bell Tel. Co., ante* p. 262, 445 N.W.2d 284 (1989).

Defendant's assignments of error may be consolidated into two: (1) The plaintiff failed to establish by clear and convincing evidence the elements of fraud, and (2) the court erred in awarding prejudgment interest. In his cross-appeal, plaintiff alleges that the trial court erred by failing to find that defendant's acquisition of Petersen's money was the result of undue influence. We would note at the outset that the trial court's judgment was based on a general finding in favor of the plaintiff. No reference was made in the journal entry as to whether the decision was based on fraud or undue influence. Therefore, because we review this matter de novo on the record, we will affirm if the record supports either theory of recovery.

Mathew was an attorney who had practiced law in Loup City, Nebraska, for over 45 years. He had known the decedent, Petersen, since he was a child.

About 1974, Mathew began to assist Petersen in her daily affairs. At this time, his assistance involved bringing her the mail, social visits, and occasionally driving her to various places.

After suffering a stroke about 10 years before her death, Petersen was hospitalized at the Loup City hospital. From that time until her death on March 21, 1985, she resided at the hospital.

Petersen was 96 years of age at the time of her death. She had no close relatives. Other than Mathew, no one visited her on a regular basis.

According to Mathew's testimony, he began to handle Petersen's financial affairs about 6 months before her stroke. On March 27, 1981, Petersen signed a power of attorney

designating Mathew as her attorney in fact. At that time, Petersen was 92 years of age. During the last several years of Petersen's life, Mathew engaged in numerous activities involving Petersen's money, other property, and personal affairs.

These services included management of Petersen's real estate properties in Nebraska and Kansas (which appear to number six and would produce total annual income of approximately $18,000); personal care such as daily visits, taking her on drives, overseeing her medical attention, and providing flowers and gifts to Petersen and others on special occasions, with her money; and business details such as bookkeeping, correspondence, receipt of income, payment of bills, and, in particular, the depositing of moneys in CD's in the names of both Petersen and Mathew.

Mathew also represented Petersen as her attorney, for which he was paid, in recent years at least, $20,000 by checks drawn on her account written and signed by Mathew.

There was testimony by Mathew and his secretary that Mathew devoted an average of 6 hours per day and his office staff an average of 4 to 5 hours per day in the handling of Petersen's personal and business affairs. However, the supporting evidence to those conclusions was woefully weak.

In the beginning, Mathew would take CD's which were in Petersen's name alone and which were paying only 4 to 7 percent interest and would borrow against them at what he said was 2 percent interest. He would then invest those funds in new CD's paying up to 15 percent which would be placed in both his and Petersen's names. Additional joint CD's were purchased from funds which, according to Mathew, represented the profits, i.e., the money left over each year from Petersen's income after paying her expenses. These CD's, which Mathew transferred to his own account upon Petersen's death, totaled $333,018.17. Additionally, there was a total of $154,676.77 belonging to Petersen which was transferred to Mathew or to Hart of Nebraska, a corporation of which Mathew claimed to be president.

Mathew's explanations of how he came into this money varied. He claimed that it was a gift, that it was for legal fees,

that it was for financial advice, that it was the neighborly thing to do, or that it was just the result of a whim of Petersen's.

According to Mathew's testimony:

> It [the money] piled up fast, boy; it was making money. In those good years, I said, Blanche, what are you going to do with all of this? She said, I might take it with me. I said, that wouldn't be very nice. Why don't we buy some more money markets. If you outlive me, you get it all, and if I outlive you, I get just a small part of it.

At another point in his testimony, Mathew stated with regard to the oral agreement he claimed he made with Petersen:

> The agreement was — I said, Blanche, it's taking a lot of time. I can't afford to spend my time with you, but I will go ahead and see to it that you stay in the hospital, and that we will keep our balances down. But I want my name with your name on all of the profit CDs.

Mathew also told Petersen that either his name was going to be on the CD's or he was not going to represent her anymore. This agreement which Mathew contends he made with Petersen was explained by him in court on about 16 different occasions. Most of the time he said the agreement to place all of those CD's in both of their names was in satisfaction of his services to her. However, he also stated that they were gifts to him. In a separate action seeking fees, his petition alleged that the agreement was that for the management of her assets, he was to receive *one-half* of the profits. When asked about exhibit 2, which indicates that after Petersen's death Mathew received $333,018.17 from CD's in the names of both Petersen and Mathew, he said that was for the work which he did. Specifically, he said, "Well, we agreed that she would pay $460,000 for all of our work." Mathew also admitted that there were no time records kept; he was to be paid for the profits that were made. The record indicates that the agreement was that "whoever lived the longest would get that money." Mathew also testified that at the time the agreement came about, Petersen had told him that she wanted to give him

> the whole works . . . the land, all the buildings, and all the money and everything she owned. . . . She wanted me to move into her house. She would give me the house. But I

> was afraid if she did, she'd walk over to that house from the hospital. It's only a block away. She didn't belong living in a house.

At another point in his testimony, Mathew said, "She wanted — she wanted me to have the whole estate. I said, Blanche, I don't need it, but I would — I do think that I should be entitled to the profits, and she agreed with me on it." Mathew also stated in answer to another question about the agreement: "If I died before she did, I got nothing out of it. But if she died before I did, then I was going to get the $40,000 CDs and there was a lot of them." Finally, when asked if the CD's were to repay Mathew for everything he had done for Petersen, he said, "Well, it wasn't a question of pay. It was a question of being neighborly and honest and fair all the way around."

A power of attorney has been defined as "an instrument in writing authorizing another to act as one's agent." *In re Estate of Lienemann*, 222 Neb. 169, 178, 382 N.W.2d 595, 602 (1986).

> Because the power of attorney creates an agency relationship, the authority and duties of an attorney in fact are governed by the principles of the law of agency [citation omitted], including the prohibitions against an agent's profiting . . . or having a personal stake that conflicts with the principal's interest in a transaction in which the agent represents the principal, see *Johnson v. First Nat. Bank*, 253 Ga. 233, 319 S.E.2d 440 (1984).

In re Estate of Lienemann at 178, 382 N.W.2d at 602.

An agency is a fiduciary relationship resulting from one person's manifested consent that another may act on behalf and subject to the control of the person manifesting such consent, and further, resulting from another's consent to so act. *Oddo v. Speedway Scaffold Co.*, *ante* p. 1, 443 N.W.2d 596 (1989).

" '[A confidential] relation exists between two persons if one has gained the confidence of the other and purports to act or advise with the other's interest in mind.' " *Schaneman v. Schaneman*, 206 Neb. 113, 125-26, 291 N.W.2d 412, 420 (1980).

The question for determination is whether Mathew, through the instrument of fraud, deprived the estate of Blanche Fletcher Petersen of property to which it was entitled. The general rule applicable is that fraud is never presumed and must be proven

by clear and convincing evidence. *ServiceMaster Indus. v. J.R.L. Enterprises*, 223 Neb. 39, 388 N.W.2d 83 (1986). However, this court has also stated:

> "To prove fraud direct evidence is not always essential. Inferences or presumptions of fraud may be drawn from facts and circumstances. However, such inferences or presumptions must not be guess work or conjecture but must be rational and logical deductions from the facts and circumstances from which they are inferred.
>
> "What constitutes fraud is a matter of fact in each case.
>
> . . .
>
> "In an action in which relief is sought on account of alleged fraud, the existence of a confidential or fiduciary relationship, or status of unequal footing, when shown, does not shift the position of the burden of proving all elements of the fraud alleged, but nevertheless may be sufficient to allow fraud to be found to have existed when in the absence of such a status it could not be so found, and thus to have the effect of placing the burden of going forward with the evidence upon the party charged with fraud. . . ."

Workman v. Workman, 174 Neb. 471, 497, 118 N.W.2d 764, 780 (1962).

ServiceMaster Indus., supra, also adds, quoting *Rettinger v. Pierpont*, 145 Neb. 161, 15 N.W.2d 393 (1944), "Circumstantial evidence alone is not sufficient to sustain a finding of fraud unless the circumstances ' "are of such a nature and so related to each other that the conclusion reached is the only one that can fairly and reasonably be drawn therefrom." ' " 223 Neb. at 44, 388 N.W.2d at 86.

Rettinger also held that the fiduciary bears the burden of proving the fairness of the transaction.

In defending against the fraud charge, Mathew advances the six-point test contained in *English v. Bruin Engineering, Inc.*, 201 Neb. 791, 272 N.W.2d 753 (1978); i.e., that a material representation was made, it was false and known to be false, it was made with the intention that it should be acted upon by another, and it was so acted upon, causing injury or damage to the other. See, also, *Henderson v. Forman*, 231 Neb. 440, 436

N.W.2d 526 (1989). However, that test relates to fraudulent misrepresentations. Fraud in the present instance may be based on agency.

Generally, an agent is required to act solely for the benefit of his or her principal in all matters connected with the agency and adhere faithfully to the instructions of the principal. *Walker Land & Cattle Co. v. Daub*, 223 Neb. 343, 389 N.W.2d 560 (1986). An agent and principal are in a fiduciary relationship such that the agent has an obligation to refrain from doing any harmful act to the principal. *Grone v. Lincoln Mut. Life Ins. Co.*, 230 Neb. 144, 430 N.W.2d 507 (1988).

This court, in *In re Estate of Lienemann*, 222 Neb. 169, 382 N.W.2d 595 (1986), citing *Matter of Estate of Mehus*, 278 N.W.2d 625 (N.D. 1979), and *Johnson v. First Nat. Bank*, 253 Ga. 233, 319 S.E.2d 440 (1984), found that an agent is prohibited from profiting from the agency relationship to the detriment of the principal or having a personal stake that conflicts with the principal's interest in a transaction in which the agent represents the principal.

Johnson, supra, involved joint CD's purchased by an attorney in fact and the issue of a right of survivorship. The court there held that the acquisition of survivorship rights by the attorney in fact constituted a profit derived by the agent to the detriment of her principal, that detriment being the removal of funds from the principal's testamentary control. The court also held that the attorney in fact failed to sustain the burden of proving that the principal had ratified the agent's action.

The Supreme Court of South Carolina, in *Fender v. Fender*, 285 S.C. 260, 329 S.E.2d 430 (1985), in discussing an agent's claim that the principal orally authorized transfers to the benefit of the agent and to the detriment of his principal, adopted the following rule to discourage fraud and abuse:

> Effectively, absent express intention, an agent may not utilize his position for his or a third party's personal benefit in a substantially gratuitous transfer. . . .
>
> Appellant seeks to remove himself from the operation of the general rule. He contends that Mr. Fender orally authorized the transfers. Notwithstanding such a claim, we hold today that any purported oral authorization was

> ineffective. The power to make any gift must be expressly granted in the instrument itself.
>
> "It is for the common security of mankind . . . 'that gifts procured by agents . . . from their principals, should be scrutinized with a close and vigilant suspicion.' " *Harrison v. Harrison*, 214 Ga. 393, 105 S.E.2d 214, 218 (1958). Therefore, in order to avoid fraud and abuse, we adopt a rule barring a gift by an attorney in fact to himself or a third party absent clear intent to the contrary . . . .

Fender at 262, 329 S.E.2d at 431.

We recognize the wisdom of such a rule and hereby adopt it to govern the relationship between attorney in fact and principal. Powers of attorney are by necessity strictly construed, and broad encompassing grants of power are to be discounted. 3 Am. Jur. 2d *Agency* §§ 31 and 32 (1986).

Applying these precepts to the facts at hand, we note that Mathew, by converting the joint accounts into his own accounts, has profited and Petersen has suffered a detriment in the removal of those funds from her testamentary control.

The power of attorney granted Mathew the following powers:

> Know all men by these presents, that I, the undersigned, Blanche Petersen, of Loup City, in the County of Sherman, State of Nebraska, have made, constituted and appointed, and by these presents, do make, constitute and appoint Paul Mathew, of Loup City, in the County of Sherman, State of Nebraska, my true and lawful attorney in fact, for me and in my name and stead, and to my use, to Endorse Checks and Deposit Proceeds, to Change my C.D. Funds to Cash or to Money Fund Certificates, to Collect Debts and Recover Debts in Another State, to Receive a Legacy, to Make Partition of and Recover an Estate, to Sale [sic] and Conveyance [sic] of Real Estate, also the Power to Sell and Convey Real Estate, the Power to Sell Lands in Another State, the Granting Power to Mortgage, to Lease Premises and to Manage my Investments, hereby giving unto my said attorney in fact, full authority and power to do everything whatsoever requisite or necessary to be done in the premises, as fully

> as I could or might do if personally present, with full power of substitution and revocation, hereby confirming and ratifying all that my said attorney in fact shall lawfully do or cause to be done, hereunder.

There is no language in the foregoing instrument that empowered Mathew to convert funds to his own use or to make gifts to himself from Petersen's funds. He had used his position to influence Petersen to allow such gifts to be made if in fact she did allow it. He admitted that if he did not visit Petersen she would not eat. He told her that his name would have to be on the CD's or he would not represent her anymore.

In terms of fairness and credibility, the age difference between Mathew and Petersen in light of the survivorship arrangement, Petersen's health, her apparent dependency on Mathew, and the comparison of her 11th grade education with his training and status as a lawyer, as well as Mathew's claim that the records were simply lost, his rather weak explanations of other facets of his relationship with Petersen, and his equivocal and changing explanations of the financial arrangements, are all factors which must be considered by the court.

Plaintiff has made out a prima facie case of fraud. In light of the fiduciary relationship, the burden of going forward with the evidence fell upon the shoulders of Mathew. The trial court did not believe that he had met that burden and neither do we.

Regarding the issue of prejudgment interest, the rule is adequately set forth in *Hill v. City of Lincoln*, 221 Neb. 719, 723, 380 N.W.2d 296, 299 (1986), where this court said: "Prejudgment interest may be recovered on claims which are liquidated. A claim is liquidated if the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance upon opinion or discretion."

Mathew stipulated prior to trial that he had acquired $333,018.17 from the jointly titled CD's belonging to Petersen and him. An additional $154,676.77 included within the court's judgment was for items identified precisely and without question by the computations of the accountant, which in turn were based on records of CD's and canceled checks.

Since the damages were liquidated and no reasonable

controversy existed, the plaintiff was entitled to prejudgment interest as a matter of law. *First Data Resources, Inc. v. Omaha Steaks Int., Inc.*, 209 Neb. 327, 307 N.W.2d 790 (1981). This amounted to $104,995.68 from the date of Petersen's death to the date of the judgment at the rate of 7.64 percent, as provided by Neb. Rev. Stat. § 45-103 (Reissue 1988). This action predated the rule in *Knox v. Cook, ante* p. 387, 446 N.W.2d 1 (1989).

The judgment, therefore, should be modified to provide a total recovery of $592,690.62, and as modified it is affirmed.

AFFIRMED AS MODIFIED.

NUCOR STEEL, A DIVISION OF NUCOR CORPORATION, A DELAWARE CORPORATION, APPELLANT, V. DONALD S. LEUENBERGER, TAX COMMISSIONER OF THE STATE OF NEBRASKA, ET AL., APPELLEES.

448 N.W.2d 909

Filed December 1, 1989. No. 88-225.

1. **Administrative Law.** Agency regulations, properly adopted and filed with the Secretary of State of Nebraska, have the effect of statutory law.
2. **Taxation.** Neb. Rev. Stat. § 77-2702(11)(a) and (20) (Reissue 1986) provides an exemption from the Nebraska sales and use tax.
3. **Statutes: Taxation: Proof.** Since a statute conferring an exemption from taxation is strictly construed, one claiming an exemption from taxation of the claimant or the claimant's property must establish entitlement to the exemption.
4. **Taxation.** Material which only accidentally or incidentally becomes incorporated into a finished product and which is not an essential ingredient of the finished product is subject to sales and use tax because such material is not an ingredient or component part of tangible personal property manufactured, processed, or fabricated for ultimate sale at retail.
5. _____. So long as a material entered into and is an essential ingredient or component part of a product manufactured, processed, or fabricated for ultimate sale at retail, the material is excluded from the Nebraska sales and use tax, notwithstanding that the material may be used for more than one purpose in manufacturing, processing, or fabricating the product.

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

R. Murray Ogborn and Tim O'Neill, of Nelson & Harding, for appellant.

Robert M. Spire, Attorney General, and L. Jay Bartel for appellees.

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

SHANAHAN, J.

Nucor Steel filed two claims with the Tax Commissioner of the State of Nebraska for refunds of sales and use taxes paid for August through December 1983 and for the period from January 1984 to August 1986 regarding Nucor's purchase and use of refractory materials in connection with Nucor's manufacture of steel. The commissioner denied both claims, and on March 13 and Agusut 26, 1987, Nucor appealed to the district court for Lancaster County, which consolidated the appeals and affirmed the Tax Commissioner's decisions. In its appeal to this court, Nucor seeks reversal of the district court's judgment.

STANDARD OF REVIEW

An appeal from a decision by the Tax Commissioner of the State of Nebraska is governed by the Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 et seq. (Reissue 1987). *American Stores Packing Co. v. Peters*, 203 Neb. 76, 277 N.W.2d 544 (1979).

> In an appeal pursuant to the Administrative Procedure Act, 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.

Department of Health v. Omaha Associates, 232 Neb. 516, 517, 441 N.W.2d 579, 580-81 (1989). See, also, *Heithoff v. Nebraska State Bd. of Ed.*, 230 Neb. 209, 430 N.W.2d 681 (1988); *Haeffner v. State*, 220 Neb. 560, 371 N.W.2d 658 (1985). See,

further, § 84-918 (Supreme Court's de novo review under Administrative Procedure Act).

APPLICABLE TAX STATUTES

"Retail sale or sale at retail shall mean: (a) A sale for any purpose other than for resale in the regular course of business of tangible personal property . . . ." Neb. Rev. Stat. § 77-2702(10) (Reissue 1986).

"Retail sale or sale at retail shall not include the sale of: (a) Tangible personal property which will enter into and become an ingredient or component part of tangible personal property manufactured, processed, or fabricated for ultimate sale at retail . . . ." § 77-2702(11).

A sale for resale

> shall mean a sale of tangible personal property to any purchaser who is purchasing such tangible personal property for the purpose of reselling it in the normal course of his or her business, either in the form or condition in which it is purchased or as an attachment to or integral part of other tangible personal property.

§ 77-2702(14).

> Use . . . does not include the sale of that tangible personal property in the regular course of business or the exercise of any right or power over tangible personal property which will enter into or become an ingredient or component part of tangible personal property manufactured, processed, or fabricated for ultimate sale at retail.

§ 77-2702(20).

A sales tax is imposed "upon the gross receipts from all sales of tangible personal property sold at retail in this state . . . ." Neb. Rev. Stat. § 77-2703(1) (Reissue 1986). A use tax is imposed "on the storage, use, or other consumption in this state of tangible personal property purchased, leased, or rented from any retailer . . . for storage, use, or other consumption in this state . . . ." § 77-2703(2).

BURDEN OF PROOF

The tax statutes involved in Nucor's appeal contain definitions which exclude or except personal property from the Nebraska sales and use tax. See § 77-2702(11)(a) and (20).

Nucor contends that the statutory definitions which relate to exclusion or exception from the sales and use tax should be liberally construed.

However, in addition to the specific tax statutes which we have mentioned as applicable to Nucor's appeal, we note provisions of the Nebraska "Sales and Use Tax Regulations," promulgated by the Nebraska Tax Commissioner, namely, 316 Neb. Admin. Code § 1-012 (1984), which provides:

> 012.02 There are *exempted* from the computation of the amount of sales and use taxes the gross receipts from the sale, lease, or rental of and the storage, use, or other consumption in this state of the following:
>
> . . . .
>
> 012.02D Transactions given *exempt* status due to the purchaser's intended use of the property purchased, leased, or rented. Included in this group are sales of:
>
> . . . .
>
> 012.02D(2) Property which will be incorporated as an ingredient or component part of tangible personal property manufactured, processed, or fabricated for ultimate sale at retail . . . .

(Emphasis supplied.)

Agency regulations, properly adopted and filed with the Secretary of State of Nebraska, have the effect of statutory law. See, *Douglas County Welfare Administration v. Parks*, 204 Neb. 570, 284 N.W.2d 10 (1979); *Kansas Gas & Elec. v. Com'n on Civ. Rights*, 242 Kan. 763, 750 P.2d 1055 (1988); *State v. Jenkins*, 469 So. 2d 733 (Fla. 1985); *Eastman Kodak Co. v. Fair Emp. Prac. Com.*, 86 Ill. 2d 60, 526 N.E.2d 877 (1981). See, also, § 84-902.

As a result of our examination of the language in § 77-2702(11)(a) and (20), coupled with our reading of the sales and use tax regulations, we conclude that § 77-2702(11)(a) and (20) provides an exemption from the Nebraska sales and use tax. Our construction that § 77-2702(11)(a) and (20) affords an exemption from a sales and use tax is consistent with the decisions of several other courts which have construed exclusionary language substantially similar to that found in § 77-2702(11)(a) and (20); for example, see, *North Star Steel v.*

Iowa Dept. of Revenue, 380 N.W.2d 677, 680 (Iowa 1986) (" ' "use" . . . shall not include processing, or the sale of . . . property in the regular course of business,' " expressed in the Iowa use tax statute, "creat[ed] an exemption from tax"); *Hospital Utilization Project v. Com.*, 507 Pa. 1, 487 A.2d 1306 (1985) (sales and use tax statute which excluded manufacturers involved in certain types of research provided an exemption from sales and use tax); *Chicago, B. & Q. R. Co. v. State Tax Comm.*, 259 Iowa 178, 142 N.W.2d 407 (1966); *Borroughs Corp. v. State Bd. of Equalization*, 153 Cal. App. 3d 1152, 200 Cal. Rptr. 816 (1984) (statutory language, use "does not include the sale of . . . property in the regular course of business," constitutes a resale exemption); *Federated v. Kosydar*, 45 Ohio St. 2d 1, 340 N.E.2d 840 (1976) (statutory exceptions from sales and use taxation pertain to a right to an exception (exemption)); *Matter of Shanty Hollow Corp. v New York State Tax Commn.*, 111 A.D.2d 968, 490 N.Y.S.2d 67 (1985) (sales tax law excepting charges to a patron for admission to use of facilities for sporting activities provided an exemption from taxation); *Timken Co. v. Lindley*, 29 Ohio App. 3d 181, 504 N.E.2d 455 (1985) (sales and use tax statute which contains certain exceptions allowed exemptions from such tax).

Since a statute conferring an exemption from taxation is strictly construed, one claiming an exemption from taxation of the claimant or the claimant's property must establish entitlement to the exemption. *Vulcraft v. Karnes*, 229 Neb. 676, 428 N.W.2d 505 (1988); *Bethphage Com. Servs. v. County Board*, 221 Neb. 886, 381 N.W.2d 166 (1986).

Thus, to prevail on its refund claim, Nucor must establish that it is entitled to exemption from the Nebraska sales and use tax.

BACKGROUND

Nucor Steel is engaged in manufacturing steel at its plant in Norfolk, Nebraska. Nucor's steelmaking process begins with its smelter operations of melting scrap metal in an electric arc furnace and subsequent refining of the molten mass through addition of lime to remove impurities in the metal. After refinement under an appropriately high temperature, the

molten steel is poured from the furnace into a ladle for additional lime. The ladle transports the molten steel to the tundish, from which the molten metal is poured into molds which form steel billets.

Throughout smelting, Nucor must keep the steel in a molten state until the metal is poured into the billet molds. The furnace, ladle, tundish, and other manufacturing equipment used to melt metal and transfer molten steel are also made of steel. To protect the furnace and other manufacturing equipment from damage by exposure to the extremely high temperatures necessary for manufacturing steel, Nucor utilizes refractories, an insulating and protective barrier for the equipment exposed to the molten steel and its high temperature.

Due to their high melting point and ability to resist heat, refractories do not melt from the heat generated to make molten steel. In view of the high cost of refractories, Nucor tries to buy long-life refractories and takes great efforts to prolong the life of refractory material, including special care in loading scrap metal into the furnace to avoid damaging the refractories. Also, to protect refractories while molten metals are being refined, Nucor adds lime, but the lime is not intended to affect the quality of various forms of waste or byproducts—slag, scale, or bag dust—which occur in the steelmaking process. Notwithstanding efforts to conserve refractories utilized in Nucor's steelmaking process, refractories wear away and deteriorate, so that Nucor has to purchase new refractory material to replace that which has dislodged during smelting or which has become exhausted as an effective insulator. Nucor does not select refractory material on the basis of a refractory's contribution to slag, scale, or bag dust. Although some refractories are composed primarily of and all have minimal traces of other compounds, most refractories are primarily composed of silica and alumina.

Refining molten scrap metal in the steelmaking process causes the formation of slag, a substance composed of lime and other impurities extracted during refining. Slag floats atop molten metal, is eventually removed, and, after cooling, is then placed in a slag pile. Refractories become involved with slag when the refractories wear away from the walls of the

steel-manufacturing equipment and fall into the slag floating on the molten metal or when the refractories deteriorate to the point of inadequacy as an insulator and are, therefore, removed and placed in the slag pile. Approximately 95 percent of the utilized refractories enter into the composition of slag. Slag, then, as it exists after the steelmaking and refining process, is composed of lime, impurities from scrap metal, and refractory material. After iron is removed from the slag pile, Nucor sometimes sells slag, which is used as a substitute for gravel. Apart from whatever may be a technical explanation for and description of slag, "slag" means

> the dross of a metal; *specif*: a product of smelting containing mostly as silicates the substances not sought to be produced as matte or metal and having a lower specific gravity than the latter . . . a similar substance that floats on molten impure steel during refining, protects the metal from oxidation, and removes unwanted substances chemically . . . worthless matter.

Webster's Third New International Dictionary, Unabridged 2137 (1981). Further, "dross" means

> the solid scum that forms on the surface of a metal . . . when molten or melting largely as a result of oxidation but sometimes of the rising of dirt and impurities to the surface . . . waste or foreign matter mixed with a substance or left as a residue after that substance has been used or processed . . . .

Id. at 694.

Scale is an oxide that forms on steel billets when molten steel hardens. Ninety-five percent of scale consists of iron, silicon, and aluminum which has oxidized on the billets and contains a small amount of refractory material that has fallen into the molten metal held by the billet molds. Nucor sells scale to a manufacturer which processes the scale and sells the processed scale to cement companies. The scale's iron oxide, rather than refractories, provides value to the processed scale.

Bag dust consists of particles, including some minute pieces of refractory material, removed by an exhaust system during the refining process. Nucor has sold, or at times given away, the bag dust to a firm that processes the dust into a micronutrient

used in fertilizer. Since bag dust has been classified as a hazardous material by the Environmental Protection Agency, Nucor gives away any bag dust which cannot be sold inasmuch as Nucor lacks proper storage facilities for this material. The value of bag dust is attributed to zinc and iron, neither of which originates in the refractory material used by Nucor.

In its refund claims, Nucor essentially contends that since virtually all the refractories are eventually present in slag, scale, or bag dust, purchase and use of refractories are excluded from Nebraska's sales and use tax because the refractory material enters into or becomes an ingredient or component part of tangible personal property manufactured, processed, or fabricated for ultimate sale at retail. See § 77-2702(11)(a) and (20). Nucor also contends that its purchase and use of refractories are not subject to sales and use tax because refractories are purchased for resale in the regular course of Nucor's steelmaking business. See § 77-2702(10)(a), (14), and (20).

INGREDIENT AND COMPONENT PART EXEMPTION

Nucor first claims that the refractory material is personal property that enters into and becomes "an ingredient or component part of tangible personal property manufactured, processed, or fabricated for ultimate sale at retail," see § 77-2702(20), and, thus, is not subject to the sales and use tax imposed under § 77-2703(1) and (2).

Regarding Nucor's claims, refractory materials are not subject to sales and use tax if two statutory requirements are fulfilled: (1) the refractories enter into and become an ingredient or component part of a finished product (slag, scale, bag dust), and (2) the finished product (slag, scale, bag dust) is manufactured, processed, or fabricated for ultimate sale at retail. See § 77-2702(11)(a) and (20).

Concerning the Nebraska sales and use tax, the exemptive requirement that the property enter and become an ingredient or component part of a finished product has been discussed in two decisions of this court.

In *American Stores Packing Co. v. Peters*, 203 Neb. 76, 277 N.W.2d 544 (1979), this court determined that cellulose casings

used in the manufacture of skinless meat products (frankfurters) did not become an ingredient or component part of the frankfurters. Casings served as a mold for frankfurters, and only a small amount of glycerin, which was contained in the casings, found its way into the frankfurters. In concluding that the casings did not become an ingredient or component part of the frankfurters, we stated:

> The determination of whether or not tangible property enters into or becomes an ingredient or component part of other property does not ordinarily offer any difficulty. The lumber which goes into the manufacture of a piece of furniture obviously becomes a component part of that furniture, i.e., the function of the lumber is that of being a component and it serves no other purpose. In the case before us, the casing served the apparently indispensable function of a mold. In the end, the casing is discarded. . . . The principal function of the glycerine and moisture is to enable the casing to serve its function. The transfer of some part of the glycerine into meat which already contains glycerine appears *incidental.*

(Emphasis supplied.) *Id.* at 83, 277 N.W.2d at 548.

In *Nucor Steel v. Herrington*, 212 Neb. 310, 322 N.W.2d 647 (1982), this court again interpreted the "ingredient and component part" exclusion from sales and use tax and held:

> Where graphite electrodes are used in the manufacture of steel for the dual purpose of providing essential carbon for the steel manufacturing process and for the conduction of electricity which provides heat for the process, and where a substantial part of the graphite electrodes enters into and becomes an *essential* ingredient or component part of the finished steel and the remainder is consumed in the manufacturing and refining process, the use of such graphite electrodes in the manufacturing and processing of steel for ultimate sale at retail is not subject to taxation under the provisions of §§ 77-2702 and 77-2703.

(Emphasis supplied.) *Id.* at 318-19, 322 N.W.2d at 651. Also, in *Nucor Steel v. Herrington, supra*, the court "distinguished steel processing cases in which the property involved was an *essential*

component that entered into the chemical process of making steel" (emphasis supplied), *id.* at 316, 322 N.W.2d at 650, from those cases in which "the taxed substance was only *incidentally* added to the final product rather than being an *essential* ingredient or component part of the finished product." (Emphasis supplied.) *Id.* at 317, 322 N.W.2d at 650.

"Incidental" means "occurring merely by chance or without intention or calculation: occurring as a minor concomitant . . . being likely to ensue as a chance or minor consequence . . . met or encountered casually or by accident." Webster's Third New International Dictionary, Unabridged 1142 (1981). "Incidentally" means "by chance: as a matter of minor import: CASUALLY." *Id.*

From *American Stores Packing Co. v. Peters, supra*, and *Nucor Steel v. Herrington, supra*, the principle evolves that material which only accidentally or incidentally becomes incorporated into a finished product and which is not an essential ingredient of the finished product is subject to sales and use tax because such material is not an ingredient or component part of tangible personal property manufactured, processed, or fabricated for ultimate sale at retail.

So long as a material enters into and is an essential ingredient or component part of a product manufactured, processed, or fabricated for ultimate sale at retail, the material is excluded from the Nebraska sales and use tax, notwithstanding that the material may be used for more than one purpose in manufacturing, processing, or fabricating the product. *Nucor Steel v. Herrington, supra.*

The refractories involved in Nucor's present appeal are clearly used for the purpose of protecting the steel-manufacturing equipment from high temperatures. The refractory material may, nevertheless, qualify for exclusion from sales and use tax if refractories enter into and become an essential ingredient or component part of the slag, scale, or bag dust as products manufactured, processed, or fabricated for ultimate sale at retail.

For scale and bag dust, refractories do not contribute any value. Although small quantities of refractories are present in scale and bag dust involved in the steelmaking process, the

value of scale and bag dust is not attributable to any substance found in the refractories. From a practical as well as an analytical point of view, bag dust and scale would be the same with or without refractories. Consequently, refractories are merely incidental to scale and bag dust.

It is unclear whether refractories become an essential ingredient or component part of slag. On one hand, Nucor's concern about prolonging the life of refractories, coupled with the manner in which refractories exist in slag, leads to the conclusion that the presence of refractories in slag is only incidental to the slag. On the other hand, approximately 95 percent of the refractories are eventually involved in slag. Hence, the evidence is inconclusive whether the slag's value is attributable to the introduction of refractories or exists independent of refractories.

However, notwithstanding a determination that refractories enter into and become an essential ingredient or component part of the slag, the slag itself must be a product "manufactured, processed, or fabricated for ultimate sale at retail" before refractory material is exempt from the Nebraska sales and use tax.

In *American Stores Packing Co. v. Peters*, 203 Neb. 76, 277 N.W.2d 544 (1979), without avail the taxpayer claimed that a cellulose casing was incorporated into a finished meat product, i.e., a frankfurter. Obviously, a frankfurter is a product "manufactured, processed, or fabricated for ultimate sale at retail." In *Nucor Steel v. Herrington*, 212 Neb. 310, 322 N.W.2d 647 (1982), the taxpayer successfully argued that carbon electrodes were incorporated into the finished product of steel, which is a product "manufactured, processed, or fabricated for ultimate sale at retail."

Yet, it is far from obvious that the slag is a product "manufactured, processed, or fabricated for ultimate sale at retail." "Manufacture," in its ordinary usage, means "to make (as raw material) into a product suitable for use . . . to make from raw materials by hand or by machinery . . . to produce according to an organized plan and with division of labor . . . ." Webster's Third New International Dictionary, Unabridged 1378 (1981). "Process" means "to subject to a particular

method, system, or technique of preparation, handling, or other treatment designed to effect a particular result . . . ." *Id.* at 1808. "Fabricate" means "to form by art and labor: MANUFACTURE, PRODUCE . . . to form into a whole by uniting parts: CONSTRUCT, BUILD . . . to build up into a whole by uniting interchangeable standardized parts . . . ." *Id.* at 811.

Nucor's slag consists of lime, impurities from the scrap metal, and a small amount of refractory material. Slag contains refractory material which has served as an insulator protecting Nucor's equipment against extremely high temperatures, but has accidentally, or at least without design in the steelmaking process, fallen from the insulated equipment into the floating slag atop the molten metal, or which, more simply, has been discarded because the refractories have lost their capacity to adequately insulate Nucor's equipment during the steelmaking process. In the light of the foregoing definitions of "manufacture" and "process," refractories which have fallen from the walls of a furnace or which have been discarded on a slag pile cannot be reasonably characterized as material used in a product, slag, which has been "manufactured, processed, or fabricated for ultimate sale at retail."

Furthermore, as the definition of "process" indicates, the system or method used must be "designed to effect a particular result . . . ." The definition of "manufacture" commences with "to make" or "to produce," and the definition of "fabricate" begins with "to form." In reference to processing, manufacturing, or fabrication, "to" means "for the purpose of" or "with the result of." *Id.* at 2401. Clearly, Nucor's business activity is manufacturing steel. The presence of refractory material in slag, scale, and bag dust is only incidental to Nucor's business activity, as evidenced by the fact that Nucor selects refractories solely on the basis of performance and longevity as effective insulators for steel-manufacturing equipment and not on the basis of refractory material as an element of slag, scale, or bag dust.

In support of its argument that refractories are an ingredient or component part of a product manufactured, processed, or fabricated for ultimate retail sale, Nucor relies heavily on *North*

Star Steel v. Iowa Dept. of Revenue, 380 N.W.2d 677 (Iowa 1986), in which the Iowa Supreme Court determined that refractory material used in the steelmaking process was not subject to the Iowa use tax in view of a processing exemption in Iowa Code § 423.1(1) (1977), which provided:

> " '*Use*' means and includes the exercise by any person of any right or power over tangible personal property incident to the ownership of that property, except that it shall not include processing, or the sale of that property in the regular course of business. Property used in 'processing' within the meaning of this subsection shall mean and include (a) any tangible personal property including containers which it is intended shall, by means of fabrication, compounding, manufacturing, or germination, become an integral part of other tangible personal property intended to be sold ultimately at retail . . . "

380 N.W.2d at 680. As used by the court in *North Star Steel*, "processing 'refers to an operation whereby raw material is subjected to some special treatment by artificial or natural means which changes its form, context, or condition, and results in marketable tangible personal property.' " 380 N.W.2d at 683. With the foregoing definition of "processing," the court in *North Star Steel* determined that refractory material was property used in "processing" within the meaning of the Iowa use tax statute and, therefore, was exempt from taxation in Iowa because "[t]here is no evidentiary support whatsoever for the further determination by the agency that North Star did not 'intend' the refractory material to enter the slag and bag dust, retail products." *Id.*

However, in *North Star Steel*, there was no mention of two important facts present in Nucor's current appeal to this court, namely, Nucor (1) selects refractories solely for their durability and performance as insulation for steel-manufacturing equipment and (2) takes precautionary measures to maximize the duration of refractories and minimize their dissipation. Thus, *North Star Steel* is readily distinguished from Nucor's case because there is ample evidence to support the finding that Nucor had no plan or design for introduction of the refractory

material, directly or indirectly, into slag, scale, and bag dust in connection with the production of steel. Furthermore, while the court in *North Star Steel* determined that refractory material was used in the "processing" of slag and bag dust, it is extremely difficult, if not impossible, to characterize carting debilitated refractories from the smelter to the slag pile as "special treatment" involved in steelmaking. Although slag and bag dust were sold at retail, such sale does not necessarily mean that the items are "processed" for ultimate sale at retail. Consequently, *North Star Steel* is unpersuasive for a determination of Nucor's present appeal.

Nucor also relies on *Lone Star Indus. v. Dep't of Revenue*, 97 Wash. 2d 630, 647 P.2d 1013 (1982). In *Lone Star*, the Supreme Court of Washington found that purchase and use of refractory material for a kiln used in the manufacture of cement were exempt from Washington's use tax. Nucor points out that the court in *Lone Star* based its holding on the fact that the refractory material became an ingredient of cement, but ignores the fact that the court made a specific finding that the refractory material contained *necessary* and *essential* ingredients for cement. Thus, the *Lone Star* decision comports with the principle that refractories, to be exempt from a sales and use tax, must enter into and become essential ingredients or component parts of slag, scale, or bag dust, which occur in the process of steelmaking.

Nucor has failed to establish that refractories entered into and became essential ingredients or component parts of Nucor's slag, scale, or bag dust. Nucor has also failed to show that slag, scale, or bag dust are property manufactured, processed, or fabricated for ultimate sale at retail. For these reasons, Nucor has failed to establish that it is entitled to an exemption from Nebraska's sales and use tax. See § 77-2702(11)(a) and (20).

RESALE IN REGULAR COURSE OF BUSINESS

Nucor's second argument is that the refractory materials are purchased for resale in the regular course of Nucor's business and, thus, are excluded from taxation under the definitions of "sale at retail," "sale for resale," and "use." See

§ 77-2702(10)(a), (14), and (20). Nucor argues that since refractory material is resold as slag, scale, or bag dust in the regular course of its business, the refractory material is not subject to the sales and use tax.

As we have previously stated in this opinion, Nucor selects refractories on the basis of their performance as insulators for Nucor's equipment used in making steel. Efficacy in reference to slag, scale, or bag dust is not a consideration in Nucor's selection of refractory material. Since Nucor clearly does not purchase refractories for the purpose of reselling the refractories, Nucor does not satisfy the requirement of § 77-2702(14), namely, exemption from the Nebraska sales and use tax concerning property purchased "for the purpose of reselling it . . . ." In view of our discussion regarding the relationship between refractory material and slag, scale, and bag dust, that is, whether refractories become ingredients or component parts of slag, scale, and bag dust as byproducts in Nucor's business of steelmaking, Nucor has failed to demonstrate that refractories are resold "as an . . . integral part of other . . . property" to qualify for exemption from the sales and use tax pursuant to § 77-2702(14).

CONCLUSION

After our de novo review of the record, we arrive at the same conclusion reached by the district court, namely, Nucor is not entitled to the tax refunds claimed. Consequently, the district court's judgment affirming the Tax Commissioner's orders rejecting and denying Nucor's refund claims is affirmed.

AFFIRMED.

LEE WICKLINE, APPELLANT, V. FRANK GUNTER, APPELLEE.
448 N.W.2d 584

Filed December 1, 1989. No. 88-965.

Habeas Corpus: Extradition and Detainer: Prisoners. Habeas corpus is not the proper action to challenge the validity of a detainer, where the state filing the detainer has not requested transfer of the prisoner.

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

Lee Wickline, pro se.

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

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

GRANT, J.

Petitioner-appellant, Lee Wickline, who is presently serving a prison sentence in Nebraska, filed a "Petition for Writ of Habeas Corpus ad Subjiciendum" in Lancaster County. Frank Gunter, described in the petition as the "Director of the Nebraska Department of Correctional Services," is the respondent-appellee. The district court found on the pleadings that Wickline was lawfully imprisoned, held that Wickline failed to allege sufficient facts to entitle him to the writ of habeas corpus, and dismissed the action. Wickline timely appealed to this court.

In this court, Wickline's assignments of error allege that the trial court erred in finding that Wickline's petition failed to allege facts sufficient to entitle him to a writ of habeas corpus. We affirm.

The record and our earlier decisions concerning appellant show the following. On June 7, 1988, Wickline was convicted of theft and burglary in Holt County, Nebraska, and was sentenced to a term of 6 to 10 years' imprisonment on each charge, with the sentences to be served concurrently. On May 26, 1989, appellant's convictions were affirmed. See *State v. Wickline*, 232 Neb. 329, 440 N.W.2d 249 (1989).

On August 1, 1988, the sheriff's department of Cass County,

North Dakota, filed a complaint and warrant for the arrest of appellant with the Nebraska Department of Correctional Services. The complaint had been originally filed in Cass County, North Dakota, and alleged that on or about March 24, 1988, Wickline committed a burglary in Cass County, North Dakota. The Nebraska Department of Correctional Services filed the complaint and warrant as a detainer and informed the sheriff of Cass County, North Dakota, that he would "be advised approximately 30 days prior to Wickline's release date which is now tentatively scheduled for September 4, 1998."

On October 26, 1988, Wickline filed a petition for a writ of habeas corpus alleging, in substance, that he did not commit a crime in or against North Dakota, that he was not in North Dakota at the time of the alleged crime, and that the North Dakota complaint was an arbitrary act by North Dakota which causes Wickline, in his Nebraska incarceration, to be deprived of opportunities for early release, involvement in rehabilitation programs, and eligibility for lesser security classifications. Wickline also alleged that the detainer causes him to be detained in "excess" of his current sentence. Wickline's petition prayed for an order granting the writ and quashing the North Dakota detainer.

In response to the trial court's order to show cause, appellee alleged that Wickline's sentence had not been set aside or vacated, that his detention was lawful pursuant to the order of the district court of Holt County, Nebraska, and that Wickline's sentence was within lawful limits. Appellee's response acknowledged the filing of the North Dakota complaint and warrant constituting a detainer and the filing of two other detainers, and alleged compliance with the notice requirements of the interstate Agreement on Detainers, Neb. Rev. Stat. § 29-759 (Reissue 1985). Appellee's response prayed that Wickline's petition be dismissed because Wickline's imprisonment was lawful and because the other issues raised in the complaint were not the proper subject matter in a habeas proceeding.

Both Nebraska and North Dakota are contracting parties to the Agreement on Detainers. That agreement provides a means for a state filing a detainer or for a prisoner subject to a detainer

to initiate proceedings leading to the expeditious trial of a complaint underlying a detainer. Article IV of the Agreement on Detainers provides a procedure for a state filing a detainer based on an untried complaint to obtain temporary custody of a prisoner to dispose of the complaint. Article III of the Agreement on Detainers provides a procedure for the prisoner to bring about an expeditious trial on an untried complaint.

Wickline has not exercised his right under the Agreement on Detainers, article III, to initiate proceedings to require North Dakota to dispose of its complaint by forcing North Dakota to either bring him to trial on the complaint within 180 days of initiation or to subject the complaint to future dismissal with prejudice. *State v. Reynolds*, 218 Neb. 753, 359 N.W.2d 93 (1984); *Cuyler v. Adams*, 449 U.S. 433, 101 S. Ct. 703, 66 L. Ed. 2d 641 (1981). Under article III, Wickline would be required to waive extradition rights and would consent to attend any court proceedings necessary to effectuate the agreement.

The State of North Dakota has not requested the transfer of Wickline for trial in North Dakota through either the Agreement on Detainers or the Uniform Criminal Extradition Act, Neb. Rev. Stat. §§ 29-729 to 29-758 (Reissue 1985).

Consequently, the issue presented is whether habeas corpus is an appropriate action to attack the validity of a foreign detainer absent a request by the state filing the detainer for transfer. Recently, in *Rust v. Gunter*, 228 Neb. 141, 143, 421 N.W.2d 458, 460 (1988), we reiterated the language of *Pruitt v. Parratt*, 197 Neb. 854, 251 N.W.2d 179 (1977), which stated:

> "This court has numerous times held that in the case of a prisoner held pursuant to a judgment of conviction, habeas corpus is available as a remedy only upon a showing that the judgment, sentence, and commitment are void. [Citations omitted.] Persons lawfully convicted of crime are excepted from the benefits of the statutory right to the writ. § 29-2801, R.R.S. 1943 [citation omitted]. The writ is not available merely to challenge the conditions of confinement of a prisoner under valid sentence. [Citation omitted.]"

Wickline's petition does not challenge the validity of his

conviction, sentence, or imprisonment in Nebraska, and it was evident from his petition that he was not being held in "excess" of his sentence. Wickline did not allege that he was entitled to be discharged. Thus, Wickline is essentially challenging the alleged increased severity of the condition of his confinement caused by the detainer. The rule is clear that a challenge stating facts not ultimately entitling the petitioner to discharge is not cognizable in a habeas corpus proceeding. See *Gamron v. Parratt*, 199 Neb. 163, 256 N.W.2d 867 (1977). As we stated in *Rust*, where the habeas petitioner sought to challenge his placement in solitary confinement, "Whatever [the petitioner] may view as incorrect about the conditions of his confinement, his complaints under the circumstances are inappropriate subject matter for a petition and proceedings for a writ of habeas corpus." 228 Neb. at 144, 421 N.W.2d at 460.

Other state courts have come to a similar conclusion that their respective habeas actions are not available to challenge foreign detainers. See, *State v. Warren*, 740 S.W.2d 427 (Tenn. Crim. App. 1986); *Russell v. Cooper*, 724 P.2d 1302 (Colo. 1986). But see *Aaron v. State*, 497 So. 2d 603 (Ala. App. 1986).

The State of Nebraska has acknowledged and addressed Wickline's position by enacting the Agreement on Detainers. Wickline's desire for a habeas corpus hearing similar to the extradition habeas hearing need not be granted absent North Dakota's request for his transfer. Wickline appears to argue he has a due process right to challenge a detainer before the Nebraska Department of Correctional Services may treat the detainer as valid. We hold that habeas corpus is not the proper action to challenge the validity of a detainer based upon an untried complaint, where the state filing the detainer has not requested transfer of the prisoner.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL F. HARMS, APPELLANT.

449 N.W.2d 1

Filed December 1, 1989. No. 88-978.

1. **Motions to Suppress: Appeal and Error.** In determining the correctness of a ruling on a motion to suppress, the Supreme Court will uphold a trial court's findings of fact unless those findings are clearly wrong.
2. **Constitutional Law: Search and Seizure: Motor Vehicles.** An occupant of a vehicle will ordinarily have a legitimate expectation to be free of unreasonable governmental intrusion so as to give the occupant standing to challenge the stop as violative of his fourth amendment rights.
3. **Constitutional Law: Search and Seizure.** The capacity to claim the protection of the fourth amendment as to unreasonable searches and seizures depends not upon a property right in the invaded place, but upon whether the person who claims the protection of the amendment has a legitimate expectation of privacy in the invaded place.
4. _____: _____. Ownership and possessory rights in "places" are still important in determining whether a particular person has a legitimate expectation of privacy in a particular place.
5. **Search and Seizure: Police Officers and Sheriffs: Evidence.** Evidence illegally obtained by federal law enforcement personnel cannot be used in Nebraska state courts, provided the lawfulness of the seizure is properly raised and adjudicated.
6. **Constitutional Law: Search and Seizure: Motions to Suppress: Proof: Search Warrants.** In a motion to suppress, the State has the burden to prove that the search and seizure was constitutionally permissible when the police, in conducting the search, acted without a search warrant.
7. **Pretrial Procedure: Motions to Suppress.** It is clearly the intention of Neb. Rev. Stat. § 29-822 (Reissue 1985) that motions to suppress evidence are to be ruled on and finally determined before trial, unless the motion is within the exceptions contained in the statute.

Appeal from the District Court for Pawnee County: ROBERT T. FINN, Judge. Reversed and remanded for a new trial.

Kirk E. Naylor, Jr., for appellant.

Robert M. Spire, Attorney General, and Kenneth W. Payne for appellee.

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

WHITE, J.

After a bench trial to the Pawnee County District Court, Michael F. Harms was found guilty of unlawful manufacture or

distribution of a controlled substance and possession of marijuana weighing more than 1 pound. He appeals to this court. For the reasons set forth below, we reverse and remand for a new trial.

On October 23, 1987, Harms was driving a pickup in Pawnee County, Nebraska. This pickup was owned by Dennis Jurgens, who was a passenger in the pickup. The pickup approached and stopped at a check stop "selective" conducted by the Nebraska State Patrol at the junction of Highways 4 and 99. After State Patrol officers observed marijuana in the pickup, both Jurgens and Harms were arrested. Subsequent searches of the vehicle and of real property owned by Jurgens uncovered large quantities of marijuana. Informations were later filed against both defendants. For a complete discussion of the check stop selective and the searches, see *State v. One 1987 Toyota Pickup, ante* p. 670, 447 N.W.2d 243 (1989).

On April 12, 1988, Harms filed a motion to suppress any evidence discovered as a result of the stop of the pickup. On April 20, a hearing on this motion was held. Considerable evidence was elicited concerning the State Patrol's method of establishing and conducting the check stop selective. The motion to suppress was overruled.

On September 8, Harms filed a motion to suppress as evidence a notebook recovered from a portable shed on the Jurgens property. The evidence at trial showed that on April 21, 1988, Gordon McDevitt, a deputy U.S. marshall, went to the Jurgens farm to serve a "warrant for arrest in rem." While on the Jurgens property McDevitt, by using the services of a locksmith, gained access to a locked portable toolshed. Once inside the shed, McDevitt discovered a spiral-bound notebook hidden in a portable cooler. He gave the notebook to Pawnee County Sheriff John Schulze. This motion to suppress was also overruled.

After a trial to the court on September 19, Harms was found guilty on both counts. We note that Harms made timely objections to the admission of the evidence at trial.

Harms appeals from these convictions. His sole assignment of error is that the trial court erred in overruling his motions to suppress.

This court has stated that in determining the correctness of a ruling on a motion to suppress, the Supreme Court will uphold a trial court's findings of fact unless those findings are clearly wrong. *State v. One 1987 Toyota Pickup, supra*; *State v. Marcotte, ante* p. 533, 446 N.W.2d 228 (1989). Our review of the record in this case does not disclose whether the trial court made factual findings. In any event, it is not necessary for this court to examine those findings, if any, because it is evident that the trial court erroneously applied the law in overruling the motions to suppress.

With regard to the April 12 motion to suppress, we must initially determine whether Harms has standing to assert a fourth amendment challenge to the stop at the check stop selective. Both Harms and the State focus on whether Harms, as driver but not owner of the vehicle, has standing to challenge the search of the vehicle. Such inquiry is misplaced. The proper inquiry is whether Harms, as an individual present in the vehicle, has standing to challenge the initial stop of the vehicle.

Other jurisdictions have considered this issue and have reached the conclusion that an occupant in a vehicle will usually have standing to challenge the stop of the vehicle. In *State v. Eis*, 348 N.W.2d 224 (Iowa 1984), the codefendants, who were the driver and the passenger of a vehicle which was stopped by a deputy sheriff, moved to suppress evidence obtained as a result of that stop. The trial court sustained the motion to suppress, and the prosecution sought review in the Iowa Supreme Court.

An issue before the court was whether defendant Dells, as a passenger in the vehicle, had standing to assert a fourth amendment challenge to the stop of the vehicle, which was owned and operated by defendant Eis. Standing would turn on whether Dells had a legitimate expectation of privacy that was invaded when the deputy sheriff stopped the truck in which he was riding. The court stated:

> The Supreme Court decision in *Rakas* [*v. Illinois*, 439 U.S. 128, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978)] does not answer the [standing] question because that case involved a challenge to the searching rather than the stopping of a vehicle. The legality of the stop was not an issue. . . . General principles governing the rights of vehicle

occupants to challenge stops were discussed in the Court's later decision in *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979). This court reviewed and applied the *Prouse* principles in *State v. Hilleshiem*, 291 N.W.2d 314, 316-19 (Iowa 1980).

As we noted in *Hilleshiem*, one of the principles recognized in *Prouse* is that the stopping of a vehicle is a seizure of its occupants within the meaning of the fourth amendment. . . . The vehicle occupants have a protected privacy interest in freedom of movement that is invaded when the vehicle is stopped. . . . The Supreme Court made no distinction in *Prouse* between the rights of passengers and those of drivers. The accused in that case may have been a passenger. *See* 440 U.S. at 650 n. 1, 99 S.Ct. at 1394, n. 1, 59 L.Ed.2d at 665. The accused persons in *Hilleshiem* included both drivers and passengers.

Eis at 226.

The court went on to state:

No principled basis exists for distinguishing between the privacy rights of passengers and drivers in a moving vehicle. When the vehicle is stopped they are equally seized; their freedom of movement is equally affected. We therefore hold that the occupants of motor vehicles, whether drivers or passengers, ordinarily have a legitimate expectation of privacy which is invaded when the vehicle is stopped by the government. This holding presupposes the occupant's rightful presence in the vehicle. Otherwise the privacy expectation is not legitimate. *See Rakas*, 439 U.S. at 143 n. 12, 99 S.Ct. at 430, n. 12, 58 L.Ed.2d at 401.

Eis at 226.

The court noted that "[t]he State acknowledges that courts which have held to the contrary have done so without helpful analysis." *Id.* The court found that Dells had a legitimate expectation of privacy that was invaded by the stop, and thus Dells had the requisite standing to assert a fourth amendment violation. After determining that the vehicle stop was illegal, the court affirmed the trial court's order in sustaining the motion to suppress.

Other jurisdictions have also reached the same result as *Eis*.

In *State v. DeMasi*, 419 A.2d 285 (R.I. 1980), *vacated on other grounds* 452 U.S. 934, 101 S. Ct. 3072, 69 L. Ed. 2d 948 (1981), *cert. denied* 460 U.S. 1052, 103 S. Ct. 1500, 75 L. Ed. 2d 931 (1983), the court held that all occupants of the vehicle had standing to challenge the constitutionality of the stop because "all three shared a legitimate expectation that they would be free from unreasonable governmental intrusion occasioned by the stop, the request for identification, and the warrant check. To hold otherwise here would be to draw artificial, formalistic distinctions not grounded in logic." *DeMasi* at 294. The court went on to point out that not all passengers in a vehicle will automatically have a legitimate expectation of privacy so as to be able to challenge a stop. Such a determination, the court noted, would be made on a case-by-case basis as suggested in *Rakas*.

In *Parkhurst v. State*, 628 P.2d 1369 (Wyo. 1981), *cert. denied* 454 U.S. 899, 102 S. Ct. 402, 70 L. Ed. 2d 216, the court found that a defendant who was a passenger in a vehicle detained by police had standing to challenge the stop because, as a guest in his brother's vehicle, he "could reasonably expect that the car in which he was a guest would be free from state encroachment." *Parkhurst* at 1374.

In *People v. Kunath*, 99 Ill. App. 3d 201, 425 N.E.2d 486 (1981), the court held that the defendant, as an occupant of the vehicle stopped by police, could challenge the stop of the vehicle, since it entailed an infringement of his personal freedom. See, also, *State v. Haworth*, 106 Idaho 405, 679 P.2d 1123 (1984); *State v. Beja*, 451 So. 2d 882 (Fla. App. 1984); *State v. Losee*, 353 N.W.2d 876 (Iowa App. 1984); *State v. Epperson*, 237 Kan. 707, 703 P.2d 761 (1985); *State v. Scott*, 59 Or. App. 220, 650 P.2d 985 (1982), *appeal after remand* 68 Or. App. 386, 681 P.2d 1188 (1984).

We conclude that an occupant of a vehicle will ordinarily have a legitimate expectation to be free of unreasonable governmental intrusion so as to give the occupant standing to challenge the stop as violative of his fourth amendment rights.

In the present case, we hold that Harms, as an occupant of the pickup which was detained by the State Patrol, had a legitimate expectation to be free of unreasonable governmental

intrusion. He therefore has standing to assert a fourth amendment challenge to the stop of the vehicle.

Having determined that Harms has standing to challenge the stop of the vehicle, we must next determine whether the stop violated Harms' fourth amendment rights. In *State v. One 1987 Toyota Pickup, ante* p. 670, 447 N.W.2d 243 (1989), we determined that the October 23, 1987, check stop selective, conducted by the Nebraska State Patrol, violated Jurgens' fourth amendment rights because the troopers who conducted the check stop selective acted with unconstrained discretion. Jurgens was the registered owner of the pickup and was present with Harms in the vehicle when it was detained at the roadblock. For the reasons set forth in *State v. One 1987 Toyota Pickup*, we hold that Harms was unreasonably seized in violation of the fourth amendment to the U.S. Constitution. Any evidence obtained as a result of that stop is "fruit of the poisonous tree," *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963), and is inadmissible. Therefore, the trial court erred in overruling the April 12 motion to suppress.

Harms also contends that it was error for the trial court to overrule the September 8, 1988, motion to suppress as evidence the notebook found in a shed on the Jurgens property. To resolve this contention, we must first determine whether Harms has standing to assert a fourth amendment challenge to the search of the shed. This court has often stated that the capacity to claim the protection of the fourth amendment as to unreasonable searches and seizures depends not upon a property right in the invaded place, but upon whether the person who claims the protection of the amendment has a legitimate expectation of privacy in the invaded place. See *State v. Hodge and Carpenter*, 225 Neb. 94, 402 N.W.2d 867 (1987); *State v. Havlat*, 222 Neb. 554, 385 N.W.2d 436 (1986); *State v. Searles*, 214 Neb. 849, 336 N.W.2d 571 (1983), *cert. denied* 466 U.S. 906, 104 S. Ct. 1684, 80 L. Ed. 2d 158 (1984); *State v. Cemper*, 209 Neb. 376, 307 N.W.2d 820 (1981); *State v. Vicars*, 207 Neb. 325, 299 N.W.2d 421 (1980). We also stated in *Cemper, supra*, that ownership is still a factor to be considered in determining whether a person has a legitimate expectation of

privacy: "Ownership and possessory rights in 'places' are still important in determining whether or not a particular person has a legitimate expectation of privacy in a particular place." *Cemper* at 382, 307 N.W.2d at 823. The critical question, therefore, is whether Harms had a legitimate expectation of privacy in the shed where the notebook was found.

The record discloses that the shed was small and portable, having been mounted on skids. It was never permanently affixed to any real property, but instead was moved to various properties where it remained temporarily. In March 1988, it was moved onto Jurgens' property, where it was located when it was searched. The shed was built in 1978 or 1979 by Jurgens and Harms, using scrap materials from construction jobs. Jurgens and Harms worked as partners in a construction business, and both of them stored tools and personal property in the shed. The shed was kept locked, and only Harms and Jurgens had keys to the lock. When Marshall McDevitt searched the shed, he had to use the services of a locksmith to open the lock and gain access to the shed. Moreover, Harms testified that the shed was owned by both himself and Jurgens.

Based on these facts, it is clear that Harms had a reasonable expectation of privacy in the shed. He therefore has standing to assert a fourth amendment challenge to the search of the shed.

We must next focus on whether the notebook was illegally obtained by the federal marshall. As a threshold question, we must consider whether this evidence, assuming it was illegally seized by federal law enforcement personnel, is admissible in a state court criminal prosecution. If evidence which is illegally obtained by federal officers can be used in state criminal prosecutions, then the question of whether the evidence was illegally seized becomes irrelevant.

In *Weeks v. United States*, 232 U.S. 383, 34 S. Ct. 341, 58 L. Ed 652 (1914), the Supreme Court established the rule which excluded, in a federal criminal prosecution, evidence obtained by federal agents in violation of the defendant's fourth amendment rights. The Court in *Weeks* also held that the admission of evidence unlawfully seized by local officers acting on their own account was not error because "the Fourth Amendment is not directed to individual misconduct of such

officials. Its limitations reach the Federal Government and its agencies." *Weeks* at 398. On this basis, federal prosecutors were free to use as evidence in federal criminal prosecutions evidence unlawfully seized by state officers. The question soon arose, when prosecutors attempted to introduce into federal criminal proceedings evidence illegally obtained by state officers, whether federal agents had participated in the search and seizure to such an extent as to make the exclusionary rule of *Weeks* applicable. In *Byars v. United States*, 273 U.S. 28, 47 S. Ct. 248, 71 L. Ed. 520 (1927), the Court held that where federal officers participated in the search under color of their federal office, and the search was in effect a joint operation between federal and state officers, the effect is the same as if the federal agents had engaged in conduct solely on their own. In *Lustig v. United States*, 338 U.S. 74, 78-79, 69 S. Ct. 1372, 93 L. Ed. 1819 (1949), the Court stated what has come to be known as the "silver platter" doctrine: "The crux of that doctrine [*Byars*] is that a search is a search by a federal official if he had a hand in it; it is not a search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a silver platter." Later, in *Elkins v. United States*, 364 U.S. 206, 80 S. Ct. 1437, 4 L. Ed. 2d 1669 (1960), the Court abolished the "silver platter" doctrine, holding that evidence obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant's immunity from unreasonable searches and seizures under the fourth amendment is inadmissible over the defendant's timely objection in a federal criminal trial. One year later, in *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961), the Court, in making the exclusionary rule applicable to states, held that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." It would appear that *Mapp* would decide the question under consideration here; however, Justice Goldberg, in his concurring opinion in *Cleary v. Bolger*, 371 U.S. 392, 83 S. Ct. 385, 9 L. Ed. 2d 390 (1963), indicated further discussion of the issue has not been totally foreclosed:

> There is a strong interest, which many decisions of this Court reflect [citations omitted], in ensuring compliance

> by federal officers with rules having the force of federal law, designed to safeguard the rights of citizens charged with criminal acts. Whether the Supremacy Clause of the Constitution compels state courts to enforce that interest by excluding evidence obtained by federal officers in violation of the Federal Criminal Rules, including reverse "silver platter" situations wherein illegally procured evidence has been handed over to state officers, will warrant serious consideration in an appropriate case. We need not and therefore do not decide that question here.

Cleary at 404.

The U.S. Court of Appeals for the Second Circuit, citing to *Elkins* and *Byars*, stated that "[e]vidence seized by federal officers in violation of the Fourth Amendment presumably may not be used in a state criminal prosecution, especially when state officers have participated in the unlawful search." *United States v. Fay*, 344 F.2d 625, 629 n.1 (2d Cir. 1965). Similarly, in *The People v. Wilson*, 24 Ill. 2d 425, 430, 182 N.E.2d 203, 205 (1962), the court held that "the State can not divorce itself from [the federal officers'] conduct when it undertakes a prosecution" in a case where all the evidence is secured by or under their direction.

In light of *Mapp* and *Elkins*, we see no logical reason why evidence which is unlawfully seized by federal law enforcement personnel should be admissible in state court criminal prosecutions. We therefore hold that evidence illegally obtained by federal law enforcement personnel cannot be used in Nebraska state courts, provided the lawfulness of the seizure is properly raised and adjudicated.

In the present case, the evidence shows that Marshall McDevitt, acting pursuant to a warrant for arrest in rem, removed a notebook from a shed on the Jurgens property, then handed that notebook over to the Pawnee County sheriff for use in a state court criminal proceeding. There was also some evidence to suggest that the county sheriff was involved in the search which uncovered the notebook. This notebook, unless it can be established that it was legally obtained, cannot be admitted into evidence in Harms' criminal trial.

With regard to a motion to suppress, the burden of going

forward is on the movant to establish a prima facie case of an unconstitutional search and seizure, and when such prima facie case has been established, the burden of going forward shifts to the State to establish that the search and seizure was constitutionally permissible. We stated in *State v. Vrtiska*, 225 Neb. 454, 406 N.W.2d 114 (1987), *cert. denied* 484 U.S. 863, 108 S. Ct. 180, 98 L. Ed. 2d 133, that the burden of proof depends on whether the search was conducted pursuant to a search warrant or without a search warrant:

> If police have acted pursuant to a search warrant, the defendant bears the burden of proof that the search or seizure is unreasonable; but if police acted without a search warrant, the State has the burden of proof that the search was conducted under circumstances substantiating the reasonableness of such search or seizure.

Vrtiska at 461, 406 N.W.2d at 120.

The evidence presented at trial shows that Marshall McDevitt went to the Jurgens farm to execute a "warrant for arrest in rem." The warrant for arrest in rem was captioned "United States of America . . . vs. The North Half of the Northwest Quarter of Section 29, Township 3, North, Range 12, East of the 6th P.M. in Pawnee County, Nebraska, with its Buildings and Appurtenances . . . ." The document commanded the U.S. marshall to "arrest, attach and return until further order of the court the said defendant property with its buildings and appurtenances," and then give proper notice to "all persons claiming the same or knowing or having anything to say why the same should not be condemned and forfeited pursuant to the prayer of said [forfeiture] Complaint. . . ." The document was issued by the U.S. district court clerk.

We conclude this warrant for arrest in rem was not a search warrant. Under federal law, a search warrant must be issued by a federal magistrate or a judge of a state court of record within the district wherein the property or person sought is located. Fed. R. Crim. P. 41(a). Under Nebraska law, a search warrant may issue after a judge or magistrate determines that probable cause exists to issue the warrant, and the basis upon which the probable cause determination was made must be contained in the search warrant. See Neb. Rev. Stat. § 29-814.04 (Reissue

1985). The evidence in this case shows that the warrant for arrest in rem was issued by a district court clerk, not by a magistrate or judge. Nor does the evidence show that the warrant was issued after a probable cause determination. Moreover, "in rem" is defined as "against or with respect to a thing (as a right, status, or title to property)." Webster's Third New International Dictionary, Unabridged 1167 (1981). A proceeding in rem is one which is taken directly against property or one which is brought to enforce a right in the property. This warrant concerns the rights the government has in certain real property owned by Jurgens. Based on these facts, we hold the document entitled "warrant for arrest in rem" is not a search warrant.

Because the federal marshall acted without a search warrant, the State has the burden of proving that the search of the shed was lawful. The sole evidence adduced at the suppression hearing concerned Harms' reasonable expectation of privacy in the shed. The State presented no evidence. The trial judge waited to rule on the motion to suppress until after Marshall McDevitt and Sheriff Schulze testified at trial. We note that it is clearly the intention of Neb. Rev. Stat. § 29-822 (Reissue 1985) that motions to suppress evidence are to be ruled on and finally determined before trial, unless the motion is within the exceptions contained in the statute. See *State v. Pope*, 192 Neb. 755, 224 N.W.2d 521 (1974). It is the preferable practice that the trial judge rule on motions to suppress before trial begins. In any event, even considering the testimony of Sheriff Schulze and Marshall McDevitt which was presented at trial, the State did not carry its burden of proving the lawfulness of the search. In sum, Marshall McDevitt testified that he went to the Jurgens farm to serve a warrant for arrest in rem and that he had no other warrants or instructions signed by a federal judge authorizing him to seize personal property on the real estate. He also testified that he was not sure if the warrant for arrest in rem authorized him to seize personal property located on the real property. Sheriff Schulze merely testified as to the notebook's chain of custody after McDevitt turned it over to him. The entire record contains absolutely no evidence to even suggest that a warrant for arrest in rem authorizes law enforcement

personnel to search and remove personal property from the real estate described in the warrant. The State did not even attempt to prove that the warrant for arrest in rem was lawfully issued by the clerk of the federal district court, nor does the record reflect under what authority, statutory or otherwise, the warrant was issued. In the face of this total absence of evidence, we can only conclude that the State did not meet its burden of proving the lawfulness of the search. Therefore, the trial court erred in overruling the September 8 motion to suppress.

We cannot say the error in overruling the motions to suppress was harmless beyond a reasonable doubt. The notebook could link Harms to the marijuana found on the farm. The error is properly characterized as trial error, which does not bar retrial after this reversal. See *State v. Chambers, ante* p. 235, 444 N.W.2d 667 (1989). Accordingly, Harms' convictions are reversed, and the cause is remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

STATE OF NEBRASKA, APPELLEE, V. KURT TANNER, APPELLANT.
448 N.W.2d 586

Filed December 1, 1989. No. 88-1038.

Trial: Evidence. Where evidence necessary to conduct tests or analyses by the defense is unavailable due to the neglect or intentional alteration by the State, suppression of the test results at trial is the exclusive remedy under Neb. Rev. Stat. § 29-1913(2) (Reissue 1985).

Appeal from the District Court for Nemaha County, ROBERT T. FINN, Judge, on appeal thereto from the County Court for Nemaha County, THOMAS J. GIST, Judge. Judgment of District Court affirmed.

Louie M. Ligouri for appellant.

Robert M. Spire, Attorney General, and David Edward Cygan for appellee.

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

WHITE, J.

After a trial to the court, the defendant, Kurt Tanner, was found guilty of driving while under the influence of alcoholic liquor. The defendant was sentenced to probation for a term of 1 year. Upon appeal to the district court, the judgment was affirmed.

The defendant has now appealed to this court and contends that there was insufficient evidence to find him guilty beyond a reasonable doubt and that the trial court erred in overruling his motion to dismiss. We affirm.

At 11:20 p.m. on May 19, 1988, after hearing a "squealing noise" coming from Tanner's vehicle, Deputy Sheriff James Haith stopped the vehicle. Upon approaching the driver and requesting him to produce his driver's license, Deputy Haith smelled alcohol on Tanner's breath and observed an open 12-pack beer container inside the vehicle. He also noticed that a passenger in the vehicle had a can of beer in his hand.

Deputy Haith requested Tanner to perform several field sobriety tests, which Tanner failed. Tanner was then arrested, and a blood sample was subsequently taken from him for later analysis.

A complaint was filed on May 31, 1988, charging Tanner with operating a motor vehicle while under the influence of alcoholic liquor or of any drug, or while having a concentration of ten-hundredths of 1 gram or more by weight of alcohol per 100 milliliters of his blood.

On July 11, 1988, Tanner filed a motion for discovery, requesting that the blood sample be made available to him for further testing. On July 19 at a hearing on this motion, the trial judge ordered the prosecution to make the sample available to a lab of the defendant's choice. After the State failed to comply with this order, the defendant, on July 25, moved to dismiss the case. At a hearing on this motion on August 11, the county attorney stated that the prosecution could not comply with the order because the blood sample had coagulated prior to or during the initial testing and was thus unsuitable for accurate

testing. An initial test of the coagulated blood showed a .173 blood-alcohol content. The prosecution further stated that because of the unreliability of the blood sample, it would not use the test results in prosecuting its case. Tanner made no further request to have the State produce the sample so its condition could be verified by his lab. After noting that the proper remedy under Neb. Rev. Stat. § 29-1913 (Reissue 1985) would be to exclude the evidence, the trial court denied the motion to dismiss.

Also at this hearing, the State was granted leave to amend the complaint to allege only that Tanner was operating a motor vehicle while under the influence of alcoholic liquor.

After a bench trial on August 25, in which the State's only evidence was the testimony of Deputy Haith, Tanner was found guilty on the amended complaint.

On appeal, Tanner first contends that there was insufficient evidence to find him guilty beyond a reasonable doubt. 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. Swift, ante* p. 55, 443 N.W.2d 613 (1989); *State v. Washington*, 232 Neb. 838, 442 N.W.2d 395 (1989); *State v. Auman*, 232 Neb. 341, 440 N.W.2d 254 (1989). Moreover, this court has previously held that a police officer's opinion testimony, based on personal observations of the defendant, is sufficient to sustain a finding that the defendant operated a motor vehicle when the defendant was under the influence of alcohol. See, *State v. Thomte*, 226 Neb. 659, 413 N.W.2d 916 (1987); *State v. Burling*, 224 Neb. 725, 400 N.W.2d 872 (1987); *State v. Jablonski*, 199 Neb. 341, 258 N.W.2d 918 (1977). "As used in § 39-669.07, the phrase 'under the influence of alcoholic liquor' means after the ingestion of alcohol in an amount sufficient to impair to any appreciable degree the ability to operate a motor vehicle in a prudent and cautious manner." *State v. Burling, supra* at 728, 400 N.W.2d at 875.

At trial, Deputy Haith testified that he has investigated approximately 24 driving while intoxicated cases since the beginning of 1988, that during his law enforcement training he received instruction on DWI procedures and field sobriety tests, and that he has observed the conduct of people who have consumed alcohol. He testified that upon asking Tanner for his operator's license, he smelled alcohol on Tanner's breath and observed an open 12-pack container in Tanner's vehicle. Deputy Haith further testified that Tanner failed the three field sobriety tests that he requested Tanner to perform. He also stated on direct examination that based upon the field sobriety tests, it was his opinion that Tanner was driving under the influence of alcoholic liquor.

Taking the view most favorable to the State, Deputy Haith's testimony, which was based on his observations of Tanner, provides sufficient evidence to support Tanner's conviction for operating a motor vehicle while under the influence of alcoholic liquor. Tanner's first assignment of error is without merit.

Tanner next contends that the trial court erred in overruling his motion to dismiss, which was made after the State failed to comply with the discovery order. Section 29-1913(2) provides:

> If the evidence necessary to conduct the tests or analyses by the defense is unavailable because of the neglect or intentional alteration by representatives of the prosecuting authority, other than alterations necessary to conduct the initial tests, the tests or analyses by the prosecuting authority shall not be admitted into evidence.

The record is unclear as to the cause of the coagulation and the point at which the sample coagulated. Whether the coagulation was due to the neglect or intentional alteration by the State, the penalty is exclusion of the evidence. The statute does not provide for dismissal as a remedy. The trial court applied the only available remedy under § 29-1913(2) by suppressing the test results. *State v. Brodrick*, 190 Neb. 19, 205 N.W.2d 660 (1973). We further note that the failure to preserve evidence potentially useful to the defendant does not violate the 14th amendment due process clause unless the defendant shows that the officers acted in bad faith in destroying the evidence. *Arizona v. Youngblood*, ____ U.S. ____, 109 S. Ct. 333, 102 L.

Ed. 2d 281 (1988). "The presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." *Youngblood, supra* at 109 S. Ct. at 337 n.1. It is not enough that the unavailable evidence could have exculpated the defendant if preserved; the exculpatory value of the evidence must be apparent before the evidence was destroyed. *Youngblood, supra.*

In the present case, Tanner has made no such showing. An issue not presented to or passed upon by the trial court is not an appropriate issue for consideration on appeal. *State v. Blair*, 230 Neb. 775, 433 N.W.2d 518 (1988). Moreover, because Tanner did not demand that the sample be produced by the State so that its condition could be verified by his experts once it was learned that the sample had coagulated, he waived its production. The second assignment of error is without merit.

AFFIRMED.

SHANAHAN, J., concurring.

Although the majority speaks in terms of physical evidence "destroyed" by the State or evidence which has become unavailable through the State's neglect or intentional alteration, Tanner's claim involves existing physical evidence which was available for scientific evaluation. Thus, much in the mode of the Wildean observation that some historians write about events which never occurred, Tanner's appeal has been disposed by some legal principles which are inapplicable.

As noted, Tanner was charged with violation of Neb. Rev. Stat. § 39-669.07 (Supp. 1987), the offense of drunk driving or one's operating a motor vehicle while such operator has a "concentration of ten-hundredths of 1 gram or more by weight of alcohol per 100 milliliters of [the operator's] blood," or while such operator is "under the influence of alcoholic liquor," that is, "intoxicated," which means that as the result of drinking alcohol, the operator of a motor vehicle experiences an appreciable loss of normal control over bodily and mental faculties during operation of the vehicle. See *State v. Johnson*, 215 Neb. 391, 338 N.W.2d 769 (1983).

In conjunction with Tanner's arrest for drunk driving, the

State contemporaneously obtained a sample of Tanner's blood as evidence to prove the offense charged. In prosecutions for felonies and misdemeanors punishable by imprisonment, which includes drunk driving in Nebraska, a defendant may request certain physical evidence, such as a sample of the defendant's blood which the State has acquired, and obtain the physical evidence from the State for independent testing by the defendant's expert, subject to appropriate safeguards imposed by the trial court. See Neb. Rev. Stat. § 29-1913(1) (Reissue 1985). Thus, pursuant to § 29-1913(1), as a part of the discovery process provided in Nebraska criminal procedure, the defendant, by timely motion in a trial involving jeopardy to a defendant's liberty, is entitled to have an expert of the defendant's selection, but subject to appropriate safeguards imposed by the trial court, independently examine, test, or analyze physical evidence which is in the State's custody or possession and which may be subject to varying expert opinion. *State v. Adkins*, 280 S.E.2d 293 (W. Va. 1981); *Sabel v. State*, 248 Ga. 10, 282 S.E.2d 61 (1981); *State v. Davis*, 399 So. 2d 1168 (La. 1981); *People v White*, 40 N.Y.2d 797, 358 N.E.2d 1031, 390 N.Y.S.2d 405 (1976). If there is relevant evidence presented establishing that a valid scientific test cannot be performed on physical evidence which is subject to the discovery process in a criminal proceeding, a court may deny a defendant's request that physical evidence be independently examined, tested, or analyzed by the defendant's expert. *Roberts v. State*, 243 Ga. 604, 255 S.E.2d 689 (1979).

On July 19, 1988, pursuant to Tanner's discovery motion under § 29-1913(1), the court ordered the State to produce the sample of Tanner's blood for testing by Tanner's expert. Without any intervening action by the court or change in the situation, as far as the record reflects, on July 21 the prosecutor, notwithstanding the existing discovery order for production of Tanner's blood sample for testing by Tanner's expert, filed a "supplemental reply" to Tanner's discovery motion and, for the first time, claimed and alleged that Tanner's blood sample had "clotted during the initial testing" and, therefore, "the blood sample in the possession of the State of Nebraska is not suitable for further testing." At a hearing on August 11, the State

offered no proof to substantiate the allegations in its supplemental reply to Tanner's discovery motion. Instead, as the majority notes, the prosecutor represented to the court that "the blood sample had coagulated *prior to* or during the initial testing and was thus unsuitable for accurate testing," but that the "initial test of the coagulated blood showed a .173 blood-alcohol content." (Emphasis supplied.) It is peculiar to the point of absolutely amazing that if, as the majority recounts, Tanner's blood sample had coagulated before the State's test on the sample, the State, nonetheless, achieved "[a]n initial test of the coagulated blood [which] showed a .173 blood-alcohol content." Yet, the State maintained that Tanner's coagulated blood sample was unsuitable for testing. Quite obviously, coagulation never impeded or prevented testing by the State. Apparently, the State tested the coagulated sample of Tanner's blood, which, after the State's testing, coagulated even further so that any additional testing was "unsuitable" or impossible. Such a bloody phenomenon, although perhaps a scientific possibility, boggles the mind of those untrained in serology.

Although the State discarded the claim that Tanner operated a motor vehicle while he had a blood-alcohol concentration of "ten-hundredths of 1 gram," there remained the allegation that Tanner was "under the influence of alcoholic liquor" or intoxicated when he was driving the vehicle. After an appropriate test or analysis of Tanner's blood sample and a determination of the alcohol level in Tanner's blood at the time of his arrest, an expert would have scientific information as the basis for an opinion whether Tanner was intoxicated during operation of the vehicle. Whether Tanner's blood sample, which was admittedly in the State's possession, would have afforded such information was ostensibly unknown to the trial court and, with due deference, is most likely unknown to this court. Regarding the sample of Tanner's blood, susceptibility to testing and analysis rested in the province of an expert and not in the prosecutor's unsubstantiated assertions. When an individual's liberty is jeopardized by prosecution for a criminal offense, proof, not a prosecutor's palaver, should govern the outcome. Without relevant information for the exercise of an

independent determination necessary for the efficacious discovery process in criminal cases, especially under circumstances such as those present in Tanner's case, a trial court is reduced to the status of a forensic functionary for a prosecutor.

Consequently, the more plausible solution to the problem presented in Tanner's appeal would be the production of Tanner's blood sample, which was in the State's possession, for testing by Tanner's expert to determine whether the blood sample had any scientific value. If Tanner's expert concluded that the blood sample had become unsusceptible for testing due to the State's neglect or intentional alteration, the trial court, on acceptance of the conclusion by Tanner's expert, would be in a position to decide what action should be taken as a consequence of the State's impropriety concerning the blood sample. In all this, the fact remains that in accordance with the right to discovery under § 29-1913(1) concerning production and independent testing or analysis of physical evidence in the State's possession, the discovery process in criminal cases and the order for production in Tanner's case should not have been frustrated or thwarted by the State's conduct displayed in the case now before us.

Next, the majority states: "Moreover, because Tanner did not demand that the sample be produced by the State so that its condition could be verified by his experts once it was learned that the sample had coagulated, he waived its production." The implication is that once the State asserted that Tanner's blood sample had coagulated, Tanner, at the risk of waiving the avails of the previous and existing production order, was required to demand production of the allegedly coagulated blood sample. In short, according to the majority, Tanner had to make the additional request that the State comply with the court's existing discovery order—a request that one bound by a court's order comply with the order. If one disregards the legal redundancy inherent in the necessity of a request for a court's order to comply with the court's previous order, Tanner's conduct, nevertheless, constituted a waiver of his right to production of the blood sample. "A waiver is the voluntary and intentional relinquishment of a known right, privilege, or

claim, and may be demonstrated by or inferred from a person's conduct." *State v. Kennedy*, 224 Neb. 164, 170, 396 N.W.2d 722, 726 (1986). By not standing on discovery rights under the court's existing order and by proceeding to trial without objection in the face of the State's failure to comply with the discovery order, which authorized independent testing by Tanner's expert, Tanner waived the discovery order and his right to complain on account of the State's noncompliance with the order. See, *Butler v. Pettigrew*, 409 F.2d 1205 (7th Cir. 1969); *Price v. Maryland Cas. Co.*, 561 F.2d 609 (5th Cir. 1977); *Reuber v. United States*, 787 F.2d 599 (D.C. Cir. 1986); *Lapenna v. Upjohn Co.*, 110 F.R.D. 15 (E.D. Pa. 1986). As the result of Tanner's waiver, there is no error to be reviewed regarding the trial court's conduct in not enforcing its discovery order that the State produce Tanner's blood sample for testing by Tanner's expert.

Thus, I agree with the majority's conclusion that the evidence supports Tanner's conviction, but disagree with the majority's explanation that Tanner's assignment of error concerning production of the blood sample is without merit. However, as the result of Tanner's waiver of the discovery order, the district court's judgment, affirming Tanner's conviction, should be affirmed.

CAPORALE and GRANT, JJ., join in this concurrence.

MARLYN J. MUSIL, APPELLEE AND CROSS-APPELLANT, V. J.A. BALDWIN MANUFACTURING COMPANY, APPELLANT AND CROSS-APPELLEE.

448 N.W.2d 591

Filed December 1, 1989. No. 89-155.

1. **Workers' Compensation.** When a worker has reached maximum recovery, the remaining disability is permanent and such a worker is no longer entitled to compensation for temporary disability.
2. **Workers' Compensation: Attorney Fees: Time.** 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, and the worker is entitled to recover interest on the payments which have accrued at the time payment is made by the employer.

3. _____: _____: _____. To avoid the payments assessable under Neb. Rev. Stat. § 48-125 (Reissue 1988), an employer need not prevail in opposition to an employee's claim for compensation, but must have an actual basis, in law or fact, for disputing the employee's claim and refraining from payment of compensation.
4. **Workers' Compensation.** Although the total amount of compensation may be in dispute, the employer has a duty to promptly pay any undisputed compensation, and the only legitimate excuse for delay of compensation is the existence of genuine doubt from a medical or legal standpoint that any liability exists.
5. _____. Compensation for permanent partial disability to the body as a whole is compensated on the basis of loss of earning capacity and employability rather than functional or medical loss.

Appeal from the Nebraska Workers' Compensation Court. Reversed and remanded for further proceedings.

David A. Barron, of Cline, Williams, Wright, Johnson & Oldfather, for appellant.

William J. Ross, of Ross, Schroeder & Brauer, for appellee.

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

BOSLAUGH, J.

The plaintiff, Marlyn J. Musil, was injured on October 29, 1984, in an accident arising out of and in the course of her employment as a heavy duty welder by the defendant, J.A. Baldwin Manufacturing Company. The plaintiff claims the accident resulted in injury to her left shoulder, neck, and arm. Her average weekly wage at the time of the accident was $288. The plaintiff continued working after the accident until March 24, 1986.

The defendant paid compensation to the plaintiff for temporary total disability from March 29, 1986, through February 29, 1988. This action was commenced on March 30, 1988, to recover additional compensation under the Nebraska Workers' Compensation Act.

After the hearing before a single judge, the plaintiff

recovered an award for temporary total disability from March 1, 1985, through June 13, 1988, and for a 35-percent permanent loss of earning power thereafter, together with medical expenses; a penalty for waiting time from February 19, 1988, to June 13, 1988; attorney fees and interest; and the right to request vocational rehabilitation.

On rehearing, the plaintiff recovered an award for total disability from March 24, 1986, to the date of the rehearing and thereafter until her total disability ceases. The compensation court further found that the plaintiff presently had suffered a total loss of earning power; that the plaintiff was not physically capable of participating in a plan of vocational rehabilitation; that there was no reasonable controversy; and that the plaintiff should recover $5.76 per week as additional compensation from February 29, 1988, and attorney fees, deposition expenses, and medical expenses. From that award, the defendant has appealed.

The defendant contends that the compensation court erred in awarding compensation for temporary total disability and attorney fees and costs on the rehearing.

The plaintiff has cross-appealed, contending that the compensation court incorrectly computed the penalty due the plaintiff.

The principal controversy in this case is whether the plaintiff is entitled to recover compensation for temporary total disability after March 24, 1986. The defendant contends that the undisputed evidence shows that the plaintiff has reached maximum medical improvement and, therefore, cannot be temporarily totally disabled.

In *Gardner v. Beatrice Foods Co.*, 231 Neb. 464, 436 N.W.2d 542 (1989), we held that when a worker has reached maximum recovery, the remaining disability is permanent and such a worker is no longer entitled to compensation for temporary disability. If the plaintiff in this case has reached maximum recovery from the October 29, 1984, accident, she is no longer entitled to compensation for temporary total disability, but is entitled to compensation for whatever permanent disability she has.

The plaintiff has received a variety of treatments for the

injury she sustained, including surgery on at least two occasions, medication, and physical therapy. The medical evidence shows that although the plaintiff has good motion in her shoulder, she has little use of her left arm because of pain. She is unable to lift any weight of consequence and cannot perform repetitive motions with the arm.

On January 30, 1988, Dr. Robert T. Urban reported that the plaintiff had "very little use of the left upper extremity"; had constant pain with motion and at rest; was barely able to use her arm in self-care; could lift only 2 to 5 pounds, but not in a repetitive fashion; and could do no overhead work. Dr. Urban estimated her disability to be 22 percent to the body as a whole.

In his February 25, 1988, report, Dr. Urban described the plaintiff's condition as "chronic pain syndrome in the upper extremity."

In her report on June 13, 1988, Dr. Jan C. Weber stated that the plaintiff's diagnosis was "musculoskeletal neck pain and fibromyositis. It appears to be a chronic condition that will remain the same. It is unlikely that anything can be done to alleviate her pain in the hand and left shoulder as she has been through rehabilitation." On August 25, 1988, Dr. Weber reported, "Maximum healing was achieved in June 1988 after she had no further benefit from physical therapy. It appears to me that she has not changed much since Dr. Urban gave her a 20% whole body disability rating. I would give her a rating somewhat lower than this at 15%."

Dr. Gary L. Chingren reported on September 8, 1988, that "I would feel she has a not greater than 10 percent permanent physical impairment and loss of physical function to the whole arm from her shoulder injury." On September 21, 1988, Dr. Chingren reported that the plaintiff's "10 percent impairment of the upper extremity is extrapolated to a 6 percent whole person physical impairment."

The medical evidence may be summarized by stating that there is considerable evidence that the plaintiff has reached her maximum recovery and that there is no substantial evidence that further treatment will result in an improvement in her condition. There is no substantial evidence to support a finding that her disability continues to be temporary in nature. The

cause must, therefore, be remanded to the compensation court for a determination as to the nature and extent of the plaintiff's permanent disability and an award of the compensation to which she is entitled.

With regard to the defendant's second assignment of error, the evidence supports the finding of the compensation court that there is no reasonable controversy as to the plaintiff's being disabled and that she is entitled to attorney fees, interest, and the 50-percent penalty for waiting time for payments of compensation which are due but unpaid.

As we stated in *Roesler v. Farmland Foods*, 232 Neb. 842, 442 N.W.2d 398 (1989), "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." And, as contended by the plaintiff in her cross-appeal, the worker is entitled to recover interest on the payments which have accrued at the time payment is made by the employer. § 48-125(2).

Although there is a controversy in regard to the nature and extent of the plaintiff's permanent disability, there is no evidence to support a contention that the plaintiff has no permanent disability. To avoid the payments assessable under § 48-125, an employer need not prevail in opposition to an employee's claim for compensation, but must have an actual basis, in law or fact, for disputing the employee's claim and refraining from payment of compensation. *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 408 N.W.2d 280 (1987).

In 3 A. Larson, The Law of Workmen's Compensation § 83.41(c) at 15-1433 to 15-1435 (1989), the author states:

> If bona fide settlement negotiations accompany the nonpayment of compensation, this may purge the delay or refusal of unreasonableness, but the fact that some settlement offer has been made is not necessarily a defense. A question that has arisen in several jurisdictions is whether a penalty should apply when the employer admits liability for a lesser amount than that claimed, but pays nothing. *It is usually held that the employer should*

> *have paid at least the amount for which liability was undisputed, and that a penalty is therefore warranted.*

(Emphasis supplied.)

In *Holton v. F.H. Stoltze Land Lbr. Co.*, 195 Mont. 263, 637 P.2d 10 (1981), the court held that although the total amount of compensation may be in dispute, the employer's insurer has a duty to promptly pay any undisputed compensation, and that the only legitimate excuse for delay of compensation is the existence of genuine doubt from a medical or legal standpoint that any liability exists. See, also, *Berry v. Workmen's Comp. App. Bd.*, 276 Cal. App. 2d 381, 81 Cal. Rptr. 65 (1969); *Lethermon v. American Insurance Company*, 129 So. 2d 507 (La. App. 1961); *Dufrene v. St. Charles Parish Police Jury*, 371 So. 2d 378 (La. App. 1979); *Bradley v. Mercer*, 563 P.2d 880 (Alaska 1977).

In this case, the defendant's insurance carrier wrote to the plaintiff on March 1, 1988, offering a lump-sum settlement based on Dr. Urban's estimate of 22 percent disability to the body as a whole. The offer, however, failed to take into account that compensation for permanent partial disability to the body as a whole is compensated on the basis of loss of earning capacity and employability rather than functional or medical loss. Neb. Rev. Stat. § 48-121(1) and (2) (Reissue 1988). There is substantial evidence that if the plaintiff's permanent disability is to her body as a whole, as opposed to a schedule injury, her disability is in excess of 22 percent.

But instead of paying compensation to the plaintiff for some amount of permanent partial disability, the defendant has paid no compensation to the plaintiff since February 29, 1988. Under these circumstances, the plaintiff is entitled to attorney fees; the 50-percent penalty for waiting time; and interest on all payments which have accrued, until the date they are paid.

The judgment of the compensation court is reversed and the cause remanded for further proceedings in conformity with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLANT, V. CHARLES A. COMEAU, APPELLEE.
STATE OF NEBRASKA, APPELLANT, V. LARRY L. RUSH, APPELLEE.
448 N.W.2d 595

Filed December 1, 1989. Nos. 89-186, 89-187.

1. **Constitutional Law: Statutes: Presumptions: Proof.** A statute is presumed to be constitutional, and the burden of establishing unconstitutionality is on the party attacking its validity.
2. **Constitutional Law: Statutes: Proof.** Unconstitutionality must be clearly established before a statute will be declared void.
3. **Constitutional Law: States: Statutes.** The police power is an attribute of state sovereignty, and, within the limitations of state and federal Constitutions, the state may, in its exercise, enact laws for the promotion of public safety, health, morals, and generally for the public welfare.
4. **Constitutional Law.** The constitutional right to keep and bear arms is not absolute.
5. **Constitutional Law: Statutes.** The constitutional right to keep and bear arms is subject to reasonable regulation by statute if the statute does not frustrate the guarantee of the constitutional provision.
6. _____: _____. Neb. Rev. Stat. § 28-1206 (Reissue 1985) is held not to be invalid as in conflict with article I, § 1, of the Constitution of Nebraska.
7. _____: _____. Neb. Rev. Stat. § 28-1207 (Reissue 1985) is held not to be invalid as in conflict with article I, § 1, of the Constitution of Nebraska.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY and DONALD E. ROWLANDS II, Judges. Exceptions sustained, and causes remanded for further proceedings.

Robert M. Spire, Attorney General, and William L. Howland, and Kent D. Turnbull, Lincoln County Attorney, and John H. Marsh for appellant.

Kent E. Florom, Lincoln County Public Defender, for appellees.

Robert I. Eberly and Robert Dowlut for amici curiae National Rifle Association of America and Nebraska Rifle and Pistol Association.

Jerry Soucie for amicus curiae Nebraska Criminal Defense Attorneys Association.

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

BOSLAUGH, J.

These cases involve an interpretation and application of the "Right to Bear Arms" amendment to the Nebraska Constitution, which was proposed by the initiative process and adopted at the general election on November 8, 1988. Article I, § 1, of the Constitution of Nebraska, as amended, now provides as follows:

> All persons are by nature free and independent, and have certain inherent and inalienable rights; among these are life, liberty, the pursuit of happiness, and the right to keep and bear arms for security or defense of self, family, home, and others, and for lawful common defense, hunting, recreational use, and all other lawful purposes, and such rights shall not be denied or infringed by the state or any subdivision thereof. To secure these rights, and the protection of property, governments are instituted among people, deriving their just powers from the consent of the governed.

In case No. 89-186, the defendant, Charles A. Comeau, was charged with possessing a firearm from which the manufacturer's identification marks or serial numbers had been removed, defaced, altered, or destroyed. The defendant filed a "demurrer" which alleged that the information failed to state a crime because Neb. Rev. Stat. § 28-1207 (Reissue 1985), under which the defendant was being prosecuted, was now unconstitutional. Treating the demurrer as a motion to dismiss, the trial court sustained it and dismissed the information.

In case No. 89-187, the defendant, Larry L. Rush, was charged, as a habitual criminal, with being a felon in possession of a firearm having a barrel less than 18 inches in length. The defendant filed a "demurrer" which alleged that the information failed to state a crime because Neb. Rev. Stat. § 28-1206 (Reissue 1985), under which the defendant was being prosecuted, was now unconstitutional. Treating the demurrer as a motion to dismiss, the trial court sustained it and dismissed the information.

The State then commenced proceedings under Neb. Rev. Stat. § 29-2315.01 (Reissue 1985) to review the orders dismissing the informations. In this court the cases have been

consolidated for briefing and argument.

It is fundamental that a statute is presumed to be constitutional, and the burden of establishing unconstitutionality is on the party attacking its validity. *In re Guardianship and Conservatorship of Sim*, 225 Neb. 181, 403 N.W.2d 721 (1987). Unconstitutionality must be clearly established before a statute will be declared void. *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987).

Essentially, the question presented by these appeals is whether the amendment prevents the Legislature from passing any laws regulating the possession of firearms.

The defendants contend that the amendment must be read literally and that the language which states that the right to keep and bear arms is "inalienable" and shall not be "infringed" by state statute or local ordinance prevents any regulation by the Legislature of the right to possess arms. The defendants concede that the use of weapons may be regulated, but argue that mere possession may not be.

The State contends that the plain meaning of the amendment is that the right to keep and bear arms is limited to "lawful purposes." Lawful purposes are not defined in the amendment except as "for security or defense of self, family, home, and others, and for lawful common defense, hunting, recreational use, and all other lawful purposes . . . ." The State argues that in the exercise of the police power, the Legislature may define what purposes are lawful purposes.

The police power is an attribute of state sovereignty, and, within the limitations of state and federal Constitutions, the state may, in its exercise, enact laws for the promotion of public safety, health, morals, and generally for the public welfare. *Finocchiaro, Inc. v. Nebraska Liq. Cont. Comm.*, 217 Neb. 487, 351 N.W.2d 701 (1984).

There are very few rights which are absolute, and this is of necessity. In every phase of everyday experience, there are extremes beyond which some restraint or regulation is necessary for the common good.

Even in those cases where statutes have been held to be invalid because in conflict with a constitutional provision concerning the right to keep and bear arms, many courts have

recognized that the right is not absolute. In *City of Princeton v. Buckner*, 377 S.E.2d 139 (W. Va. 1988), in which the Supreme Court of Appeals of West Virginia held a statute requiring a license to carry certain weapons invalid, the court said:

> The question remains whether the State may reasonably regulate the right of a person to keep and bear arms in this State.
>
> We stress that our holding above in no way means that the right of a person to bear arms is absolute. *See* cases cited *infra* at p. 146. Other jurisdictions concluding that state statutes or municipal ordinances have violated constitutional provisions guaranteeing a right to bear arms for defensive purposes, though not specific in what ways this is to be done, have recognized that a government may regulate the exercise of the right, provided the regulations or restrictions do not frustrate the guarantees of the constitutional provision. *See, e.g., In Re Brickey*, 8 Idaho 597, 599, 70 P. 609, 609 (1902); *City of Las Vegas v. Moberg*, 82 N.M. 626, 627, 485 P.2d 737, 738 (Ct.App.1971). Particularly, on three occasions, the Supreme Court of Oregon, in striking statutes as violative of the state's constitutional right to bear arms, has repeatedly stressed that the court's holdings should not be construed to mean that an individual has an "unfettered right" to *possess* or use constitutionally protected arms in any way he chooses. The Oregon court has consistently emphasized that the legislature may regulate such *possession* and use. *State v. Delgado*, 298 Or. at 403, 692 P.2d at 614; *State v. Blocker*, 291 Or. at 259, 630 P.2d at 826; *State v. Kessler*, 289 Or. at 370; 614 P.2d at 99.
>
> . . . .
>
> Our research has revealed that courts throughout the country have recognized that the constitutional right to keep and bear arms is not absolute, and these courts have uniformly upheld the police power of the state through its legislature to impose reasonable regulatory control over the state constitutional right to bear arms in order to promote the safety and welfare of its citizens. *See, e.g., Bristow v. State*, 418 So.2d 927, 930 (Ala.Crim.App.),

cert. denied (Ala.1982); *People v. Blue*, 190 Colo. 95, 102-03, 544 P.2d 385, 390-91 (1975); *State v. Rupp*, 282 N.W.2d 125, 130 (Iowa 1979); *In re Atkinson*, 291 N.W.2d 396, 399 (Minn.1980); *State v. Angelo*, 3 N.J.Misc. 1014, 1015, 130 A. 458, 459 (1925); *State v. Dees*, 100 N.M. 252, 254-55, 669 P.2d 261, 263-64 (Ct.App.1983); *Commonwealth v. Ray*, 218 Pa.Super. 72, 79, 272 A.2d 275, 279 (1970); *Carfield v. State*, 649 P.2d 865, 871 (Wyo.1982). We stress, however, that the legitimate governmental purpose in regulating the right to bear arms cannot be pursued by means that broadly stifle the exercise of this right where the governmental purpose can be more narrowly achieved. *City of Lakewood, supra.*

At least forty-two jurisdictions have constitutional provisions guaranteeing a right to bear arms; however, most are distinguishable from art. III, § 22 either in their failure to specifically recognize the right to self-defense, or in their express recognition that the constitutional provision is subject to legislative regulation. *See* R. Dowlut & J. Knoop, *State Constitutions and the Right to Keep and Bear Arms*, 7 Okla. City U.L.Rev. 177, 236-240 (1982). The State, in the appendix to its brief, cites thirteen states which, like art. III, § 22, grant a rather broad, unrestrictive right to bear arms for the defense of self and the state. With the exception of Vermont, which imposes no significant regulation, the remaining jurisdictions regulate the ownership and use of arms in general, particularly handguns.

Again excluding Vermont, certain statutory regulations are common to most of the jurisdictions having constitutional provisions comparable to West Virginia's. For instance, *the prohibition against the possession or ownership of handguns by persons previously convicted of a felony or other specified crime is widely accepted.* Four states prohibit the open or concealed carrying of handguns without a license or permit; several others specifically prohibit carrying a concealed handgun without a license, while at least one of these jurisdictions, namely, Arizona, further prohibits carrying a handgun in

> public establishments or certain specified public places.
>
> . . . .
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> Based upon the foregoing, we conclude that the right to keep and bear arms guaranteed by *W. Va. Const.* art. III, § 22 is not unlimited. The individual's right to keep and bear arms and the State's duty, under it [sic] police power, to make reasonable regulations for the purpose of protecting the health, safety and welfare of its citizens must be balanced. *See People v. Blue*, 190 Colo. 95, 102-03, 544 P.2d 385, 390-91 (1975). Accordingly, the West Virginia legislature may, through the valid exercise of its police power, reasonably regulate the right of a person to keep and bear arms in order to promote the health, safety and welfare of all citizens of this State, provided that the restrictions or regulations imposed do not frustrate the constitutional freedoms guaranteed by article III, section 22 of the *West Virginia Constitution*, known as the "Right to Keep and Bear Arms Amendment."

(Emphasis supplied.) 377 S.E.2d at 145-49.

If the use of arms is subject to regulation, then regulation of the right to possession may be the only practical way to make an effectual regulation of the use. For example, if the use of arms by persons of unsound mind is to be prohibited, probably the only effectual way to prevent their use is to prohibit the possession of arms by such persons.

It is well known that the identification and tracing of a weapon is an important factor in solving crimes involving the use of a weapon. It is for that reason that identifying marks are sometimes removed from weapons. It would be of little use to prohibit the *use* of weapons from which identifying marks have been removed if the possession of such weapons is lawful. The most effective way to prevent the use of such weapons is to prohibit their possession. Similarly, the most effective way to prevent the use of handguns by felons is to prohibit the possession of handguns by felons.

We think the better view is that reasonable regulation of the possession of arms is not prohibited by the amendment.

In *People v. Blue*, 190 Colo. 95, 544 P.2d 385 (1975), the Supreme Court of Colorado held that a statute prohibiting

possession of guns by persons convicted of a felony was not invalid under a constitutional provision guaranteeing the right to bear arms. The Colorado constitutional provision was as follows:

> The right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto legally summoned, shall be called in question; but nothing herein contained shall be construed to justify the practice of carrying concealed weapons.

Colo. Const. art. II, § 13.

The Colorado court said:

> It is argued that the statute, which prohibits possession, use, and carrying of a weapon, is a blanket proscription that cannot be reconciled with the literal constitutional language. A felon is a "person" within the meaning of Article II, Section 13, the argument runs, and once he has served his term he is reinstated to the full rights of citizenship, *Colo. Const.* Art. VII, Sec. 10, including the absolute right to bear arms.
>
> However, not all constitutional rights are absolute. *Mosgrove v. Town of Federal Heights*, 190 Colo. 1, 543 P.2d 715; *Stapleton, Jr. v. Dist. Ct.*, 179 Colo. 187, 499 P.2d 310; *Anderson v. People*, 176 Colo. 224, 490 P.2d 47, *cert. denied*, 405 U.S. 1042, 92 S.Ct. 1316, 31 L.Ed.2d 583; *United States v. Akeson*, 290 F. Supp. 212 (D. Colo. 1968); *Sigma Chi Fraternity v. Regents of the University of Colorado*, 258 F. Supp. 515 (D. Colo. 1966). When rights come into conflict, one must of necessity yield. The conflicting rights involved here are the individual's right to bear arms and the state's right, indeed its duty under its inherent police power, to make reasonable regulations for the purpose of protecting the health, safety, and welfare of the people. *Cottrell v. Teets*, 139 Colo. 558, 342 P.2d 1016; *Denver v. Denver & Rio Grande Co.*, 63 Colo. 574, 167 P. 969, *aff'd* 250 U.S. 241, 39 S.Ct. 450, 63 L.Ed. 958; *The People v. Hupp*, 53 Colo. 80, 123 P. 651.
>
> We do not read the Colorado Constitution as granting an absolute right to bear arms under all situations. It has limiting language dealing with defense of home, person,

> and property. These limitations have been recognized by the General Assembly in the enactment of section 18-12-105, C.R.S. 1973, which restricts the right to bear arms in certain circumstances, while permitting in other circumstances the carrying of a concealed weapon in defense of home, person, and property, and also when specifically authorized by written permit.
>
> In our view, the statute here is a legitimate exercise of the police power.
>
> "* * * To limit the possession of firearms by those who, by their past conduct, have demonstrated an unfitness to be entrusted with such dangerous instrumentalities, is clearly in the interest of the public health, safety, and welfare and within the scope of the Legislature's police power." *People v. Trujillo*, 178 Colo. 147, 497 P.2d 1.
>
> *See also People v. Trujillo*, 184 Colo. 387, 524 P.2d 1379.
>
> To be sure, the state legislature cannot, in the name of the police power, enact laws which render nugatory our Bill of Rights and other constitutional protections. *Lakewood v. Pillow, supra*; *People v. Hinderlider*, 98 Colo. 505, 57 P.2d 894; *Platte Etc., C. & M. Co. v. Dowell*, 17 Colo. 376, 30 P. 68, *appeal dismissed*, 154 U.S. 512, 14 S.Ct. 1150, 38 L.Ed. 1079. But we do not read this statute as an attempt to subvert the intent of Article II, Section 13. The statute simply limits the possession of guns and other weapons by persons who are likely to abuse such possession.

190 Colo. at 102-03, 544 P.2d at 390-91.

In *State v. Ricehill*, 415 N.W.2d 481 (N.D. 1987), the Supreme Court of North Dakota held that a statute prohibiting possession of firearms by convicted felons did not violate that state's constitutional guarantee of the right to keep and bear arms.

The constitutional provision was as follows:

> All individuals are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property and reputation; pursuing and obtaining safety and happiness;

and to keep and bear arms for the defense of their person, family, property, and the state, and for lawful hunting, recreational, and other lawful purposes, which shall not be infringed.

N.D. Const. art. I, § 3.

The North Dakota court stated:

> Ricehill argues that the right to bear arms is absolute. He argues that the language of the provision states that the right to bear arms "shall not be infringed," and that this means that the Legislature may place no limits on the possession of arms. We disagree with such a broad reading of the provision. Instead, we believe our Constitution's protection of the right to keep and bear arms is not absolute; although it prevents the negation of the right to keep and bear arms, that right nevertheless remains subject to reasonable regulation under the State's police power. As the Michigan Supreme Court stated in construing that State's right to bear arms, "regardless of the basis of the right to bear arms, the State, nevertheless, has the police power to reasonably regulate it." *People v. Brown*, 253 Mich. 537, 235 N.W. 245, 246 (1931).
>
> In this case the Legislature prohibited the possession of firearms by persons who have previously committed serious crimes. It is patently reasonable for the Legislature to conclude that it is protecting the public welfare by enacting legislation that keeps firearms out of the hands of people who have shown a disposition to harm others. The Louisiana Supreme Court stated, in rejecting a State constitutional right-to-bear-arms challenge to its prohibition against possession of a firearm by a felon under a police-power rationale:
>
> "It is beyond question that the statute challenged in the instant case was passed in the interest of the public and as an exercise of the police power vested in the legislature. Its purpose is to limit the possession of firearms by persons who, by their past commission of certain specified serious felonies, have demonstrated a dangerous disregard for the law and present a potential threat of further or future criminal activity." *State v. Amos*, 343 So.2d 166, 168

(La. 1977).

415 N.W.2d at 483. The North Dakota court also cited *People v. Blue,* 190 Colo. 95, 544 P.2d 385 (1975), with approval.

We conclude that the statutes in question are reasonable regulations of the right to keep and bear arms and the judgments dismissing the informations were erroneous. Since the defendants have not been placed in jeopardy, the cause in each case is remanded for further proceedings.

EXCEPTIONS SUSTAINED, AND CAUSES REMANDED FOR FURTHER PROCEEDINGS.

MUTUAL OF OMAHA, APPELLEE, V. RAYMOND BROUSSARD, APPELLANT.

448 N.W.2d 600

Filed December 1, 1989. No. 89-190.

1. **Workers' Compensation: Appeal and Error.** The findings of fact made by the Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong.
2. **Workers' Compensation: Evidence: Appeal and Error.** In testing the sufficiency of 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.
3. **Workers' Compensation: Appeal and Error.** Facts determined and findings made after rehearing in the Workers' Compensation Court generally may not be redetermined by the Supreme Court on review.
4. **Workers' Compensation: Witnesses.** As the trier of fact, the Workers' Compensation Court is the sole judge of witnesses and the weight to be given to testimony.
5. **Workers' Compensation.** Generally, issues of causation in workers' compensation cases are for determination by the fact finder.
6. **Workers' Compensation: Proof.** In a workers' compensation case, the burden is on the claimant employee to prove by a preponderance of the evidence that the alleged injury or disability was caused by the employee's employment and that such disability was not the result of the progression of the employee's condition present before the employment-related incident alleged as the cause of such disability.
7. **Workers' Compensation: Presumptions.** There is no presumption from the mere occurrence of an unexpected unforeseen injury that the injury was in fact caused by the employment.

8. **Workers' Compensation: Proof.** The presence of a preexisting disease or condition enhances the degree of proof required to establish that the injury arose out of and in the course of employment.
9. **Expert Witnesses.** The value of the opinion of an expert witness is no stronger than the facts upon which it is based.
10. **Trial: Expert Witnesses.** The trier of fact is not required to take the opinion of experts in regard to causal connection between alleged injury and disability as binding upon it.
11. **Workers' Compensation: Proof.** A workers' compensation award cannot be based on mere possibility or speculation.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Glenn A. Pettis, Jr., for appellant.

Melvin C. Hansen and Kevin J. Dostal, of Hansen, Engles & Locher, P.C., for appellee.

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

HASTINGS, C.J.

Mutual of Omaha brought this action in the Nebraska Workers' Compensation Court naming its employee Raymond Broussard as the defendant. Plaintiff sought a determination of the rights and liabilities of the parties resulting from an alleged accident occurring on November 25, 1985. From a determination by that court on rehearing that the defendant was not entitled to any further benefits, Broussard has appealed. We affirm.

On November 25, 1985, while in a bent-over position attempting to slide or push a box of computer listings weighing approximately 100 pounds, Broussard experienced sharp pains in his lower back and legs. The incident occurred at Mutual of Omaha during the course of Broussard's employment as a research mathematician. Broussard was earning an average weekly wage of $337.34 and was working 40 hours a week.

Broussard has a history of back problems. The first injury to his back occurred in June 1978 while he was serving in the National Guard as a medic. As Broussard was assisting in the unloading of a patient from an ambulance, another medic dropped her part of the litter. He caught the patient, taking the

full brunt of the weight on his shoulders and lower back muscles. He felt a sharp pain in the lower back radiating down both legs, reported the incident, and was treated with decreased activity.

On January 8, 1983, again while serving in the National Guard, Broussard hurt his back. On this occasion, Broussard injured his back lifting a table while setting up a classroom. He reported the incident and received treatment consisting of medication, bed rest, and heat. Broussard states that it took about 3 months to get over the residuals of this injury.

On August 7, 1983, another incident of back strain occurred in connection with his military service. Broussard was giving a training exercise as part of a physical training session. While doing trunk twisters, an exercise requiring a person to lie on one's back, place one's legs into the air, and move the legs at 180° angles from side to side, he again suffered back pain. He reported the incident and received medication and bed rest. The effects of this injury lasted only a couple of days.

On August 4, 1984, there was another episode of back pain. Broussard was helping his wife unload clothes from the washer into the dryer when the injury occurred. He went to a Veterans' Administration (VA) hospital, received medication to last 4 or 5 days, and underwent physical therapy for a couple of months.

Found in the record is a VA medical certificate dated September 5, 1984. That document describes treatment for back and leg pain, noting that Broussard had painted two rooms prior to the onset of the constant pain. The diagnosis was recurrent lower back strain.

On October 2, 1984, Broussard requested the VA provide him a note stating that he was unable to return to military duty because of back problems.

In March of 1985, Broussard sustained another back injury while playing golf. A Dr. Horrocks treated him for this injury. The medical record for this treatment states that Broussard has "a 9 year history of disc disease, primarily involving radiculopathy on the right down the proximal posterior leg. Probably representing compression at L-5-S-1."

There is a notation in his medical records dated May 21, 1985, in response to a reevaluation of his back pains. That entry

notes lower back pain for 10 years and that the patient still feels pain if he twists his body and is otherwise normal, with no recent injury.

In July 1985, Broussard and his wife moved some railroad ties in their yard. The next morning he awoke with excruciating pain and went to a hospital emergency room. The diagnosis made by the treating physician at the hospital was "acute low back strain - Poss. disc syndrome." He was given medication, treated with bed rest, and told to see his family physician, and the following week received an injection of Kenalog and Xylocaine.

Broussard's wife described another incident of back pain occurring during the summer of 1985. She stated that Broussard was "unloading" in their apartment, called her for help, and complained of muscular pain in his back.

During this period of time, Dr. Horrocks had noted in his records on at least two occasions the possibility of chymopapain injections. A CT scan was taken of the lumbar spine around July 15, 1985, which scan was normal.

Following the November 25, 1985, incident at work, Broussard was treated by a Dr. Wampler, who noted that the incident of moving the box was not the only cause of Broussard's condition and that his past history of muscular back injuries was a contributing cause.

Broussard's family physician recommended that Broussard see Dr. Ray, an orthopedist. Both a CT scan and an MRI were conducted. The CT scan was normal; however, the MRI suggested disk herniation at the L-5 level. A chymopapain injection was done on February 11, 1986. However, that treatment was not successful. In April 1986, a Dr. Hacker performed a microdiskectomy, which gave Broussard relief from the pain caused by the chymopapain injection, but did not give him complete relief.

Broussard's lawyer then referred Broussard, in December 1986, to Dr. Fitzgibbons, an orthopedist. In his report, Dr. Fitzgibbons detailed the medical treatment given Broussard following the alleged incident of November 25, 1985. The only reference to the recurring nature of Broussard's back problem existing prior to that date was a statement that "[i]n 1978,

apparently he had a history of some back problem, but he recovered from this apparently reasonably well." Finally, the physician concluded with this comment: "In regard to the cause of the patient's symptoms, they *appear* to be caused by the incident at work on the 23 November 1984 [sic]." (Emphasis supplied.) It should be noted that Dr. Fitzgibbons on two other occasions in this report provided dates which were off by a period of 1 year. Dr. Fitzgibbons estimated Broussard's impairment "is going to be somewhere between 10 and 20 percent of the body as a whole."

Broussard has also undergone examinations in connection with his military service and request for disability benefits, receiving a 20-percent service-related disability rating and discharge from military service.

Following a rehearing before a three-judge panel of the compensation court, an order of dismissal was entered. As a part of that order a finding was made that Broussard had testified to incidents involving significant injuries to his back starting in 1978 and again in 1983, 1984, and 1985, which imposed upon Broussard an enhanced burden of proof.

The court went on to point out that Dr. Fitzgibbons was the only medical expert who suggested that the symptoms which he found on December 16, 1986, "appear to be caused by the incident at work of November *23*, 198*4* when he bent over to push a box at Mutual of Omaha." (Emphasis supplied.) However, the court also pointed out that the only history of prior injury which Dr. Fitzgibbons had was the 1978 military injury from which, according to the physician, Broussard apparently had recovered reasonably well.

Accordingly, the compensation court, citing *Riha v. St. Mary's Church & School, Inc.*, 209 Neb. 539, 308 N.W.2d 734 (1981), stated that the value of the opinion of an expert is no stronger than the facts upon which it is based and then concluded: "The medical evidence presented by the defendant is not sufficient to sustain his burden of proof and his claim for disability and all other benefits for which he may have been entitled . . . should be dismissed."

The findings of fact made 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. Neb. Rev. Stat. § 48-185 (Reissue 1988); *Schlotfeld v. Mel's Heating & Air Conditioning, ante* p. 488, 445 N.W.2d 918 (1989). In testing the sufficiency of 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. *LaPage v. City of Lincoln, ante* p. 576, 446 N.W.2d 738 (1989); *Schlotfeld, supra.* 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 Workers' Compensation Court. *LaPage v. City of Lincoln, supra.* As the trier of fact, the Workers' Compensation Court is the sole judge of witnesses and the weight to be given to testimony. *Id.* Issues of causation are for determination by the fact finder. *Hamer v. Henry*, 215 Neb. 805, 341 N.W.2d 322 (1983).

In a workers' compensation case, the burden is on the claimant employee to prove by a preponderance of the evidence that the alleged injury or disability was caused by the employee's employment and that such disability was not the result of the progression of the employee's condition present before the employment-related incident alleged as the cause of such disability. See *Fees v. Rivett Lumber Co.*, 228 Neb. 617, 423 N.W.2d 483 (1988).

There is no presumption from the mere occurrence of an unexpected unforeseen injury that the injury was in fact caused by the employment. Neb. Rev. Stat. § 48-151 (Reissue 1988); *Gilbert v. Sioux City Foundry*, 228 Neb. 379, 422 N.W.2d 367 (1988). The presence of a preexisting disease or condition enhances the degree of proof required to establish that the injury arose out of and in the course of employment. *Fees v. Rivett Lumber Co., supra.* See, also, *Spangler v. State, ante* p. 790, 448 N.W.2d 145 (1989).

The key to a determination of this appeal is the expert testimony.

> "[U]nless the character of an injury is objective, that is, where its nature and effect are plainly apparent, then it is a subjective condition necessitating expert testimony; and

> that *where the claimed injuries are of such a character as to require skilled and professional persons to determine the cause and extent thereof, the question is one of science.* Such a question must necessarily be determined from testimony of skilled professional persons and cannot be determined from the testimony of unskilled witnesses having no scientific knowledge of such injuries. The employee must show by competent medical testimony the causal connection between the alleged injury, the employment, and the disability.

(Emphasis in original.) *Kingslan v. Jensen Tire Co.*, 227 Neb. 294, 298-99, 417 N.W.2d 164, 167 (1987).

The compensation court expressly considered the statements of Drs. Wampler and Fitzgibbons. In respect to Dr. Fitzgibbons' statement, the court noted the previously mentioned deficiencies regarding the extent of his knowledge as to the history of Broussard's difficulties relating to his back. The court went on to correctly cite *Riha, supra*, for the proposition of law holding the value of the opinion of an expert is no stronger than the facts upon which it is based. This led to the conclusion that Broussard had failed to satisfy his burden of proof.

This court has consistently held that the trier of fact is not required to take the opinion of experts in regard to causal connection between alleged injury and disability as binding upon it. *Tatara v. Northern States Beef Co.*, 230 Neb. 230, 430 N.W.2d 547 (1988); *Randall v. Safeway Stores*, 215 Neb. 877, 341 N.W.2d 345 (1983).

However, Broussard contends that the statement of Dr. Fitzgibbons is binding and points to *Mann v. City of Omaha*, 211 Neb. 583, 319 N.W.2d 454 (1982), in support of this contention.

Mann is clearly distinguishable. In that case there was no question as to the credibility given to the testimony of two doctors who testified that stress was the cause of the heart attack for which the claimant, a police officer, sought benefits.

In the instant case the testimony of Dr. Fitzgibbons was not based on firsthand knowledge and was based on an incomplete

history which omitted several serious back episodes between 1978 and Broussard's alleged November 25, 1985, injury. The extensive preexisting condition of acute back strains of Broussard received only a cursory reference to a single injury that occurred in 1978 from which, the doctor states, Broussard recovered "apparently reasonably well." That, of course, was not accurate. Additionally, the conclusion of causation was not expressly made with a reasonable degree of medical certainty.

In summary, Broussard has not sustained his enhanced burden of proof with sufficient medical testimony on the issue of causation. A workers' compensation award cannot be based on mere possibility or speculation, and if an inference favorable to Broussard can only be reached on that basis, then he cannot recover. *McMichael v. Lancaster Cty. Sch. Dist. 001, ante* p. 603, 447 N.W.2d 35 (1989).

Considering these deficiencies and being mindful that credibility and the weight to be given testimony, and the issue of causation generally, are all matters of fact to be determined by the compensation court sitting as the finder of fact, *Tatara, supra*, we cannot say that the decision of the compensation court was clearly wrong.

The judgment of the compensation court is affirmed.

AFFIRMED.

CYNTHIA LOU VANCE, APPELLANT, V. LANCE LEONARD VANCE, APPELLEE.

448 N.W.2d 605

Filed December 1, 1989. No. 89-382.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Affirmed.

Benjamin M. Belmont, of Lustgarten & Roberts, P.C., for appellant.

Lawrence H. Yost, of Yost, Schafersman, Yost, Lamme, Hillis & Mitchell, P.C., for appellee.

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

PER CURIAM.

The marriage of the petitioner, Cynthia Lou Vance, and the respondent, Lance Leonard Vance, was dissolved on September 5, 1985. Custody of Desirae, the minor child of the parties, born January 25, 1983, was placed in the court, with physical custody granted to the respondent and visitation granted to the petitioner.

On August 3, 1988, the petitioner filed a petition to modify the judgment so as to award custody of Desirae to the petitioner. The matter was heard on March 23, 1989. The trial court found that the petitioner had failed to prove there had been a change of circumstances indicating that the respondent was unfit to have custody of the minor child or that the best interests of the child required that custody be awarded to the petitioner. From that judgment the petitioner has appealed.

Child custody is initially entrusted to the discretion of the trial court. When the trial court has retained legal custody of a child, any change in physical custody is to be determined by the best interests of the child. *Christen v. Christen*, 228 Neb. 268, 422 N.W.2d 92 (1988).

From our de novo review of the record, we conclude that the evidence supports the findings of the trial court and that there has been no abuse of discretion in finding that custody of the child should not be awarded to the petitioner. The judgment is, therefore, affirmed.

AFFIRMED.

HEADNOTES
Contained in this Volume

Abandonment 540, 749
Accounting 685
Actions 28, 39, 179, 583, 670, 705, 758, 818
Administrative Law 293, 508, 863
Adoption 513
Affidavits 318, 371, 670
Agency 1, 853
Agents 556
Aggravating and Mitigating Circumstances 74
Aiding and Abetting 74
Appeal and Error 12, 23, 32, 53, 55, 57, 66, 71, 74, 160, 191, 198, 211, 223, 228, 235, 262, 298, 309, 314, 329, 338, 351, 355, 368, 371, 373, 378, 387, 412, 477, 483, 488, 508, 517, 524, 533, 543, 567, 578, 580, 586, 595, 603, 610, 628, 634, 644, 670, 679, 705, 715, 720, 729, 749, 758, 767, 776, 785, 790, 808, 818, 825, 826, 843, 848, 853, 882, 916
Appeal Bonds 595
Arbitration and Award 826
Arrests 533, 729
Assault 517
Attorney and Client 28, 634
Attorney Fees 151, 488, 901

Blood, Breath, and Urine Tests 533
Bonds 335

Child Support 427
Circumstantial Evidence 318, 517, 776, 853
Claims 853
Collateral Attack 644
Collateral Estoppel 528
Compromise and Settlement 12
Confessions 729
Consideration 12, 39
Constitutional Law 57, 74, 228, 262, 309, 533, 595, 610, 634, 644, 670, 729, 767, 882, 907
Contracts 1, 12, 248, 387, 556, 561, 592, 634, 749, 808, 826
Controlled Substances 318
Convictions 55, 74, 235, 314, 318, 351, 436, 477, 517, 595, 679, 767, 776
Corporations 758

Corroboration 74
Court Rules 12
Courts 30, 53, 371, 427, 644, 679, 790, 825
Criminal Law 74, 243, 309, 436, 517, 528, 533, 670, 679, 715, 720, 729, 767, 834, 843

Damages 1, 634
Death Penalty 74
Debtors and Creditors 12, 378, 749, 853
Decedents' Estates 53, 198, 513
Declaratory Judgments 39, 191, 262
Demurrer 39, 48, 685, 758
Directed Verdict 160
Discrimination 228, 309
Disturbing the Peace 595
Double Jeopardy 528
Drunk Driving 533, 720, 776
Due Process 262, 729

Effectiveness of Counsel 57, 74, 151, 314, 355, 567, 767
Employer and Employee 826
Employment Security 66
Entrapment 834
Equal Protection 228, 610
Equity 262, 378, 412, 543, 586, 644, 749, 853
Estoppel 293, 695
Evidence 12, 71, 74, 160, 211, 235, 258, 298, 309, 318, 338, 368, 412, 483, 488, 528, 533, 543, 556, 567, 603, 628, 670, 729, 767, 790, 808, 848, 882, 893, 916
Expert Witnesses 211, 355, 603, 790, 916
Extradition and Detainer 878
Eyewitnesses 533

Final Orders 179, 198, 211, 685, 785
Forcible Entry and Detainer 622
Foreclosure 749, 785
Foreign Judgments 427
Fraud 556, 634, 695, 853

Gifts 853
Guaranty 387, 396, 561, 749

Habeas Corpus 878
Habitual Criminals 477
Hearsay 211, 679
Homicide 74, 436, 720

Identification Procedures 729
Immunity 705
Indictments and Informations 243, 715
Injunction 586, 644

Insanity 74, 211
Insurance 248, 335, 556
Intent 1, 74, 191, 243, 387, 436, 517, 543, 556, 561, 679, 705, 834, 853
Interest 808

Joinder 39, 74
Judges 74
Judgments 53, 179, 223, 387, 528, 608, 785, 818, 825
Judicial Construction 262
Judicial Notice 74, 355
Juries 74, 228, 309, 628
Jurisdiction 262, 371, 427, 524, 644, 785
Jurors 228
Jury Instructions 32, 74, 160, 436, 628, 715, 720
Juvenile Courts 338, 610

Laches 749
Landlord and Tenant 583
Leases 583
Legislature 191, 262, 436
Liability 1, 160, 248, 705, 749
Licenses and Permits 503, 715
Liens 378, 608
Limitations of Actions 179, 634, 695, 749
Liquor Licenses 191
Loans 378

Malpractice 634
Mental Health 211
Minors 610
Mortgages 378
Motions for New Trial 30, 223, 524, 628, 825
Motions to Dismiss 223
Motions to Suppress 533, 670, 729, 882
Motor Vehicles 235, 248, 329, 503, 549, 670, 679, 715, 720, 882
Municipal Corporations 39, 644

Negligence 1, 32, 160, 329, 549, 586, 628, 634, 705, 720, 749, 848
Negotiable Instruments 818
Notice 39, 262, 335, 371, 396, 749

Ordinances 160, 578, 644
Other Acts 74, 211

Parental Rights 338, 483, 540
Parties 39, 74, 758
Partnerships 685
Pensions 644
Pleadings 32, 39, 48, 160, 179, 198, 758, 848

Pleas 373, 843
Police Officers and Sheriffs 533, 729, 776, 834, 882
Postconviction 57, 355, 567, 767, 841
Prejudgment Interest 853
Presumptions 74, 378, 533, 556, 578, 634, 729, 853, 907, 916
Pretrial Procedure 882
Principal and Agent 1, 634, 705, 853
Principal and Surety 749
Prior Convictions 477
Prisoners 878
Probable Cause 533, 670, 729
Probation and Parole 314, 843
Promissory Notes 378, 818
Proof 57, 74, 160, 211, 223, 228, 235, 262, 309, 314, 318, 335, 338, 355, 412, 436, 483, 517, 528, 543, 567, 586, 603, 628, 679, 705, 715, 720, 758, 767, 776, 790, 826, 834, 843, 848, 853, 863, 882, 907, 916
Property 262
Prosecuting Attorneys 228, 243, 309
Proximate Cause 628, 720
Public Policy 248, 826
Public Service Commission 23, 262
Public Utilities 644

Rates 644
Real Estate 608, 622
Receivers 685
Records 74, 293, 610, 729
Recreation Liability Act 160
Recusal 74
Reformation 543, 556
Releases 705
Res Judicata 528
Restitution 758, 843
Right to Counsel 74, 729, 767
Rules of Evidence 74, 211, 309, 543
Rules of the Supreme Court 808

Sanitary and Improvement Districts 39
Schools and School Districts 293
Search and Seizure 533, 670, 729, 882
Search Warrants 670, 882
Security Interests 396, 749
Sentences 74, 314, 373, 767, 843
Speedy Trial 57
States 262, 907
Statute of Frauds 12
Statutes 191, 262, 436, 715, 720, 790, 863, 907

Stock 758
Summary Judgment 329, 335, 396, 513, 592, 634, 705, 826
Supersedeas Bonds 785
Supreme Court 355

Taxation 412, 863
Testimony 74, 298
Theft 228, 314
Time 211, 314, 335, 524, 634, 825, 901
Torts 634, 705
Trial 1, 74, 160, 179, 198, 211, 228, 235, 258, 309, 338, 368, 543, 670, 729, 767, 790, 808, 848, 893, 916
Trusts 28

Uniform Commercial Code 39, 396, 818

Valuation 412
Value of Goods 228
Vendor and Vendee 608
Verdicts 74, 228, 298, 517, 679, 776, 848

Wages 488, 826
Waiver 12, 373, 622, 685, 749, 785
Warrants 39, 533
Waters 586
Wiretaps 318
Witnesses 74, 160, 298, 309, 318, 567, 916
Words and Phrases 1, 39, 66, 74, 160, 198, 228, 235, 368, 387, 396, 436, 517, 533, 540, 543, 556, 595, 610, 622, 628, 679, 705, 720, 749, 776, 818, 834, 853
Workers' Compensation 1, 71, 488, 603, 790, 901, 916