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DUANE P. HEILIGER, APPELLEE, V. WALTERS AND HEILIGER ELECTRIC, INC., A NEBRASKA CORPORATION, APPELLANT.

461 N.W.2d 565

Filed October 26, 1990. No. 90-013.

1. **Workers' Compensation: Proof.** In a workers' compensation case, by a preponderance of evidence a claimant must prove that the claimant's employment proximately caused the claimed injury or disability and thereby correspondingly negate that a claimant's condition existing independent of the claimant's employment and before a work-related incident alleged to be a cause of the claimed disability is the sole cause of the disability for which compensation is sought.
2. _____: _____. A claimant is entitled to an award under the Workers' Compensation Act for a work-related injury and disability if the claimant shows, by a preponderance of evidence, that the claimant sustained an injury and disability proximately caused by an accident which arose out of and in the course of the claimant's employment, even though a preexisting disability or condition has combined with the present work-related injury to produce the disability for which the claimant seeks an award.
3. **Workers' Compensation.** A workers' compensation claimant may recover when an injury, arising out of and in the course of employment, combines with a preexisting condition to produce disability, notwithstanding that in the absence of the preexisting condition no disability would have resulted.
4. **Workers' Compensation: Proof: Case Disapproved.** Language in previous decisions, such as *Brokaw v. Robinson*, 183 Neb. 760, 164 N.W.2d 461 (1969); *Benson v. Barnes & Barnes Trucking*, 217 Neb. 865, 354 N.W.2d 127 (1984); *Hayes v. A.M. Cohron, Inc.*, 224 Neb. 579, 400 N.W.2d 244 (1987); and *Gilbert v. Sioux City Foundry*, 228 Neb. 379, 422 N.W.2d 367 (1988), which has imposed an enhanced degree of proof by an employee prosecuting a claim under the Nebraska Workers' Compensation Act is disapproved.
5. **Workers' Compensation: Proof.** For an award based on disability, a claimant must establish, by a preponderance of the evidence, that the employment proximately caused an injury which resulted in disability compensable under the Workers' Compensation Act.
6. **Proximate Cause: Trial.** Determination of causation is, ordinarily, a matter for the trier of fact.
7. **Workers' Compensation.** An employee's disability as a basis for compensation under Neb. Rev. Stat. § 48-121(1) and (2) (Reissue 1988) is determined by the employee's diminution of employability or impairment of earning power or earning capacity, and is not necessarily determined by a physician's evaluation and assessment of the employee's loss of bodily function.
8. _____. An employee's return to work does not in every case terminate an employee's total disability from a work-related injury and does not preclude a finding that the employee's total disability continues notwithstanding the return to work.
9. _____. If an employee, after a work-related injury, receives wages equal to or

greater than the wages received before the injury, the wages may be considered in the determination whether an employee has sustained an impairment of earning capacity.

10. _____. When an injured worker has attained maximum physical recovery after a work-related injury, any residual disability from a compensable injury is permanent and prevents the worker's entitlement to compensation for temporary disability.
11. **Workers' Compensation: Second Injury Fund.** In the absence of an established claim against the Second Injury Fund, Neb. Rev. Stat. § 48-128 (Reissue 1988), an employee may be entitled to full compensation from the employer, notwithstanding that the employee's disability is the result of a preexisting condition aggravated by a work-related injury.
12. **Expert Witnesses.** A fact finder or trier of fact may accept or reject an opinion from an expert witness.
13. _____. A good faith conflict due to self-contradiction of an expert's opinions presents a question to be resolved by the trier of fact.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Wesley C. Mues, of Knapp, Mues, Beavers, Luther & Fangmeyer, for appellant.

Andrew J. McMullen for appellee.

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

SHANAHAN, J.

Walters and Heiliger Electric, Inc. (W & H Electric), appeals from an award on rehearing by the Nebraska Workers' Compensation Court in favor of Duane P. Heiliger (Heiliger). We affirm.

STANDARD OF REVIEW

Findings of fact made by the Nebraska Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case. [Citations omitted.] In testing the sufficiency of evidence to support findings of fact made by the Nebraska Workers' Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. [Citations omitted.] Factual determinations by the Workers' Compensation Court will not be set aside on

> appeal unless such determinations are clearly erroneous. Regarding facts determined and findings made after rehearing in the Workers' Compensation Court, § 48-185 precludes the Supreme Court's substitution of its view of facts for that of the Workers' Compensation Court 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.

Fees v. Rivett Lumber Co., 228 Neb. 617, 620, 423 N.W.2d 483, 486 (1988); *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 408 N.W.2d 280 (1987); Neb. Rev. Stat. § 48-185 (Reissue 1988).

BACKGROUND FOR CLAIM

Heiliger's Injury.

As a shareholder and president of W & H Electric, a corporate electrical contractor, Heiliger was also employed as an electrician for W & H Electric and was frequently involved in its electrical work. In his duties as an electrician, Heiliger lifted heavy objects such as spools of copper wire. Before March 16, 1988, Heiliger was also responsible for onsite management of W & H Electric's projects, work which required that he drive to each of the company's projects and help individual workers. Heiliger's only office work involved W & H Electric's occasional bidding on new projects.

On March 16, 1988, Heiliger and a fellow worker, Eugene Walters, who was also the vice president and office manager of W & H Electric, were transferring "[t]housand foot reels of copper wire" from a pickup to a storage trailer at one of W & H Electric's jobsites. Each spool, weighing slightly more than 100 pounds, had to be moved from the pickup into the trailer's doorway, which was about 2 feet above the bed of the pickup. Heiliger, facing generally toward the spools in the pickup and with his feet stationary on the pickup's bed, lifted a spool and, in a "twisting motion," placed the spool in the trailer's elevated entry. During the process of lifting and twisting with a spool of

wire, Heiliger "felt a sensation in his back," and experienced "back and leg pain, mainly leg pain." According to Heiliger, "I knew that I'd—I'd injured myself." At that point, Heiliger told Walters that Heiliger had sustained "this [back] injury." A year earlier, Heiliger had a back malady of undetermined origin and had undergone disk surgery in March 1987, but had experienced no back problem for the "eight to nine" months immediately preceding March 1988. When Walters and Heiliger returned to W & H Electric's shop on March 16, Heiliger told other W & H Electric employees that he had injured his back earlier that day.

Heiliger's Medical Treatment and Surgery.

On account of persistent back pain, on March 30, 1988, Heiliger went to the office of Dr. Ramon R. Salumbides, the surgeon who had performed a hemilaminectomy on Heiliger in March 1987. Regarding Heiliger's previous hemilaminectomy, Dr. Salumbides had noted in 1987:

> Patient approximately three weeks now post lumbar laminectomy and disc excision of L5-S1 on the left side. He does not complain of any severe pain in his back or leg. . . . He occasionally has some tightness which is experienced in the lumbar area. Upon certain turning he will experience some achiness also in the posterior aspect of the left thigh but rather mild.
>
> EXAMINATION: The wound is healing well. No tenderness over the operative site. Straight leg raising test is bilaterally negative. His gait is normal. Patient is able to flex his back 90 degrees but would experience some discomfort in the back of the left thigh.
>
> Post-operative course is quite satisfactory.

At the time of Heiliger's March 1988 visit, Dr. Salumbides recorded the following:

> MAR 30 1988 [Heiliger] is returning for a consult because of recurrence of back pain. He states that two weeks ago he did some heavy lifting involving weights of up to about 100 pounds. He was lifting wires weighing that much and was transferring and twisting his back in the process. He then experienced sudden and severe pain in his

lumbar area with radiation towards the left buttock. Much of the pain is mostly concentrated over his lumbar are[a]. He feels that he describes a funny sensation in the posterior aspect of the left thigh but no actual pain. He has not had any treatment in the form of medications or physical therapy since that time. Over the last two days he feels much better. Sitting and walking is well tolerated. Turning from side to side while in bed on occasion causes some discomfort. Getting out of bed in the morning is also most difficult for him.

When Heiliger's back pain persisted, Dr. Salumbides, on April 28, 1988, reexamined Heiliger and later recommended another hemilaminectomy, which Dr. Salumbides performed on May 3, 1988, at the same general site as the previous hemilaminectomy, the fifth lumbar and first sacral vertebras.

Immediately after his 1988 hemilaminectomy, Heiliger recuperated at home. Dr. Salumbides initially recommended that Heiliger neither drive a vehicle nor lift heavy objects and, 30 days after the hemilaminectomy, placed Heiliger on a 20-pound limit in lifting. At that point, Heiliger returned to work, but was unable to tolerate the pain generated from standing for any significant time and was unable to perform manual labor for W & H Electric. During this postoperative employment with W & H Electric, Heiliger reviewed electrical plans and gave advice concerning the company's projects. When it became evident that Heiliger could not work the same as he had done before the injury in 1988, Heiliger sold his W & H Electric shares to Walters and left the company's employment on July 12, 1988, because W & H Electric needed only one office manager—Walters.

Subsequently, on January 10, 1989, Dr. Salumbides made the following notation in his records concerning Heiliger:

RECOMMENDATION: 1. Patient has been advised still to refrain from heavy lifting if at all possible.

2. On occasion he is allowed to lift 50 pounds. He states that prolonged sitting still bothers his back but not really much.

3. At this time I would think that patient is medically stable and certainly has had a satisfactory post-operative

course.

4. He has a permanent disability rating of 20 percent.

Dr. Louis J. Gogela, a neurosurgeon, examined Heiliger on behalf of W & H Electric and, on July 18, 1989, concluded:

> Mr. Heiliger informed me of the injury he received to the back on March 16, 1988, when he was "unloading a load of copper wire." He apparently twisted his back. He did not actually fall. He experienced immediate pain in the left leg. He had no back pain with this. I am aware of the surgery that was performed on May 2, 1988, when a disc was removed at the L5 level on the left. Mr. Heiliger had had surgery to his back previously. He also told me he had recovered quite nicely from that surgery and that he was comfortable until the injury of March 16. He remarked that he "never was as well after the second operation as after the first operation."
>
> . . . .
>
> It is evident that Mr. Heiliger does have some residual stemming from the injury to his back and the encroachment upon the nerve root by the disc fragment and the subsequent surgery. Only a year had elapsed since the surgery. I would be inclined to suspect that Mr. Heiliger's present symtpoms [sic] are permanent. I would be inclined to assess his residual disability to his back at about 10%. I believe it would be reasonable to say this added degree of disability is probably 5% over an original 5% stemming from the first surgical procedure and the need for it.

Concerning Dr. Gogela's evaluation, above, Dr. Salumbides responded by letter on August 11, 1989:

> I have recently been reviewing my records of [Heiliger]. During the patient's visit with me dated 1-10-89, I had given him a permanent disability rating of 20 percent.
>
> You will note there is a discrepacy [sic] since Dr. Gogela has given a total of 10 percent disability rating. The letter I did send you dated August 1, 1989 expressed my complete agreement with Dr. Gogela's appraisal and evaluation of Mr. Heiliger even though I had initially given him a 20 percent disability rating.

> It is really very difficult to specifically pin down the exact number or exact percentage of disability because at this time most of the patient's disability is related to the residual amount of pain that he has. As much as I hate to be nonspecific, I guess what I can say is that I'm not going to quarrel if anybody should come up with a 10 percent disability rating but certainly the disability rating that he has should not exceed 20 percent.

The August 1, 1989, letter mentioned by Dr. Salumbides in the foregoing report is not a part of the record.

Heiliger's Impairment of Earning Capacity.

A vocational consultant who had reviewed the medical evidence later submitted to the Workers' Compensation Court testified that Heiliger had suffered a loss of earning capacity "around 50%, approximately 50%" as the result of the "accident — or injury that [Heiliger] sustained in March of 1988." Also, according to the consultant, Heiliger's injury prevented his performing managerial and supervisory duties "in the competitive labor market."

In its award, the Workers' Compensation Court found that Heiliger had "sustained a 20 percent permanent partial disability to the body as a whole," that is, a 20-percent disability within the purview of Neb. Rev. Stat. § 48-121(2) (Reissue 1988), and concluded that Heiliger's back injury

> was probably an aggravation or reinjury of a lumbar laminectomy [Heiliger] underwent in 1987. Dr. Gogala [sic], who examined [Heiliger] on behalf of the defendant, makes it clear that [Heiliger] suffers some residual stemming from the compensable injury of March 16, 1988. [Heiliger] is entitled to benefits as provided under the Nebraska Workers' Compensation Law.

In its award the Nebraska Workers' Compensation Court also awarded Heiliger compensation for 8 weeks of temporary total disability.

CLAIMANT'S BURDEN OF PROOF; PREPONDERANCE OF EVIDENCE

In its first assignment of error, W & H Electric contends that medical evidence fails to establish a causal relationship between

the March 16, 1988, copper wire incident and Heiliger's physical injury and disability on which the award is based.

Neb. Rev. Stat. § 48-151(2) (Reissue 1988) provides that in all workers' compensation cases, an "accident" shall mean "an unexpected or unforeseen injury happening suddenly and violently . . . and producing at the time objective symptoms of an injury. The claimant shall have a burden of proof to establish by a preponderance of the evidence that such unexpected or unforeseen injury was in fact caused by the employment."

In a workers' compensation case, by a preponderance of evidence a claimant must prove that the claimant's employment proximately caused the claimed injury or disability and thereby correspondingly negate that a claimant's condition existing independent of the claimant's employment and before a work-related incident alleged to be a cause of the claimed disability is the sole cause of the disability for which compensation is sought. *Fees v. Rivett Lumber Co.*, 228 Neb. 617, 423 N.W.2d 483 (1988). Under the preceding rule, proof that employment proximately caused a compensable injury and disability simultaneously establishes that a claimant's disability is not solely attributable to deterioration of an employee's antecedent condition which has resulted in disability.

In *Brokaw v. Robinson*, 183 Neb. 760, 764, 164 N.W.2d 461, 465 (1969), this court stated that "the presence of a preexisting disease or condition would enhance the degree of proof required to establish that an injury arose out of and in the course of employment." Moreover, in *Brokaw* the court concluded that "there was no evidence that the plaintiff had any preexisting disease or condition . . . ." *Id.* Thus, the degree or standard of proof in relation to a claimant's preexisting disability, disease, or condition was not an issue in *Brokaw*. Nevertheless, the foregoing proposition concerning an enhanced degree of proof was expressed in *Brokaw* without supporting authority and, more important, without any explanation for the departure from the statutory standard in § 48-151(2) (Cum. Supp. 1965), which was identical to the current § 48-151(2) concerning a claimant's burden of proof and the requisite preponderance of evidence. In the interim between *Brokaw* and enactment of the present § 48-151(2), the

claimant's burden of proof and the preponderance of evidence standard have remained unchanged in the Workers' Compensation Act. See § 48-151(2) (Cum. Supp. 1965 & Reissues 1968, 1974, 1978, 1984 & 1988). Also, as reflected in this court's decisions before *Brokaw*, a claimant is entitled to an award under the Workers' Compensation Act for a work-related injury and disability if the claimant shows, by a preponderance of evidence, that the claimant sustained an injury and disability proximately caused by an accident which arose out of and in the course of the claimant's employment, even though a preexisting disability or condition has combined with the present work-related injury to produce the disability for which the claimant seeks an award. See, *Cole v. Cushman Motor Works*, 159 Neb. 97, 65 N.W.2d 330 (1954); *Tucker v. Paxton & Gallagher Co.*, 153 Neb. 1, 43 N.W.2d 522 (1950).

After *Brokaw*, decisions of this court have reiterated, verbatim or in substance, an "enhanced degree of proof" requirement in a workers' compensation case involving a preexisting disability or condition; for example, *Benson v. Barnes & Barnes Trucking*, 217 Neb. 865, 870, 354 N.W.2d 127, 131 (1984): "[W]e acknowledge that where there is knowledge of a preexisting condition, the claimant carries a greater burden of proof." See, also, *Gilbert v. Sioux City Foundry*, 228 Neb. 379, 382, 422 N.W.2d 367, 370 (1988): "[T]he 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." For other illustrative decisions expressing the standard of an enhanced degree of proof by a claimant, see, *Kingslan v. Jensen Tire Co.*, 227 Neb. 294, 417 N.W.2d 164 (1987); *Hayes v. A.M. Cohron, Inc.*, 224 Neb. 579, 400 N.W.2d 244 (1987); and *Hyatt v. Kay Windsor, Inc.*, 198 Neb. 580, 254 N.W.2d 92 (1977). Thus, in decisions such as *Benson*, *Gilbert*, *Kingslan*, *Hayes*, and *Hyatt*, this court has expressed the rule that "a preexisting condition enhances the degree of proof required to establish" that a work-related injury resulted in a compensable disability, a rule which supplies no definition or characterization of the "enhanced degree of proof" and which is contrary to the statutory standard prescribed in § 48-151(2) regarding a claimant's burden of proof and a preponderance of

evidence.

Fairly recently, in *Spangler v. State*, 233 Neb. 790, 448 N.W.2d 145 (1989), this court acknowledged that a workers' compensation claimant may recover when an injury, arising out of and in the course of employment, combines with a preexisting condition to produce disability, notwithstanding that in the absence of the preexisting condition no disability would have resulted. Also, we stated in *Spangler*:

> 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 [citation omitted], or that the employment injury aggravated, accelerated, or inflamed the preexisting condition [citations omitted].

233 Neb. at 795, 448 N.W.2d at 149.

Although a claimant with a preexisting disability or condition may face various obstacles, both medical and legal, and must satisfy the statutory requirements for an award under the Nebraska Workers' Compensation Act, an enhanced degree of proof, establishing a cause-and-effect relationship between a work-related injury and consequent disability, is not among a claimant's burdens for obtaining an award under the Nebraska Workers' Compensation Act. The "enhanced degree of proof" standard actually conflicts with the clear language and express provision of § 48-151(2) of the Nebraska Workers' Compensation Act governing prosecution of a worker's claim under the act. Consequently, in adherence to § 48-151(2) of the Nebraska Workers' Compensation Act, we return to the statutory standard contained in § 48-151(2) and now disapprove of language in this court's previous decisions, such as *Brokaw v. Robinson*, 183 Neb. 760, 164 N.W.2d 461 (1969); *Benson v. Barnes & Barnes Trucking, supra*; *Hayes v. A.M. Cohron, Inc., supra*; and *Gilbert v. Sioux City Foundry, supra*, which has imposed an enhanced degree of proof by an employee prosecuting a claim under the Nebraska Workers' Compensation Act.

Thus, for an award based on disability, a claimant must

establish, by a preponderance of the evidence, that the employment proximately caused an injury which resulted in disability compensable under the Workers' Compensation Act. *Grauerholz v. Cornhusker Packing Co.*, 230 Neb. 641, 432 N.W.2d 831 (1988). See, also, *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 408 N.W.2d 280 (1987). "An employee has the burden to show the cause-and-effect relationship involving employment, an industrial injury, and disability." *Fees v. Rivett Lumber Co.*, 228 Neb. 617, 621, 423 N.W.2d 483, 486 (1988).

As expressed in *Mendoza v. Omaha Meat Processors, supra* at 778, 408 N.W.2d at 285: "Determination of causation is, ordinarily, a matter for the trier of fact."

In view of the medical evidence in Heiliger's case, the Workers' Compensation Court, in resolving a factual question, could have reasonably concluded, and did conclude, that Heiliger sustained a work-related injury on March 16, 1988, which caused the disability involving his back. First, as expressed by Dr. Salumbides in his notation of March 30, 1988:

> [Heiliger] states that two weeks ago [March 16, 1988,] he did some heavy lifting involving weights of up to about 100 pounds. He was lifting wires weighing that much and was transferring and twisting his back in the process. He then experienced sudden and severe pain in his lumbar area....

Dr. Gogela provided the further diagnostic information:

> Mr. Heiliger informed me of the injury he received to the back on March 16, 1988, when he was "unloading a load of copper wire." He apparently twisted his back....
>
> ....
>
> It is evident that Mr. Heiliger does have some residual stemming from the injury to his back and the encroachment upon the nerve root by the disc fragment and the subsequent surgery.

Thus, there is sufficient evidence to support the factual conclusion by the Nebraska Workers' Compensation Court, namely, on March 16, 1988, Heiliger was involved in a work-related accident when he twisted his back while moving the copper wire, an accident which caused injury and

permanent disability to Heiliger. For that reason, we are unable to state that the Nebraska Workers' Compensation Court was clearly erroneous in its factual determination that Heiliger's accident of March 16, 1988, was the cause of his injury and permanent disability. W & H Electric's first assignment of error is without merit.

HEILIGER'S DISABILITY

W & H Electric also contends that there is insufficient evidence to support the Workers' Compensation Court's finding that Heiliger was temporarily totally disabled for 8 weeks and, thereafter, sustained a 20-percent permanent partial disability to the body as a whole.

Temporary Total Disability.

W & H Electric argues that Heiliger was not temporarily totally disabled, because he returned to work 30 days after the hemilaminectomy in 1988 and, from the date of the accident until he left employment with W & H Electric some 4 months later, received the same salary as that paid before the accident. An employee's disability as a basis for compensation under § 48-121(1) and (2) is determined by the employee's diminution of employability or impairment of earning power or earning capacity, and is not necessarily determined by a physician's evaluation and assessment of the employee's loss of bodily function. *Kleiva v. Paradise Landscapes*, 227 Neb. 80, 416 N.W.2d 21 (1987); *Thom v. Lutheran Medical Center*, 226 Neb. 737, 414 N.W.2d 810 (1987); *Norris v. Iowa Beef Processors*, 224 Neb. 867, 402 N.W.2d 658 (1987); *Akins v. Happy Hour, Inc.*, 209 Neb. 236, 306 N.W.2d 914 (1981). In relation to "total disability" under § 48-121(1) and "disability partial in character" under § 48-121(2), "temporary" and "permanent" refer to the duration of disability, while "total" and "partial" refer to the degree or extent of the diminished employability or impairment of earning power or earning capacity.

As Professor Arthur Larson observes:

> [T]otal disability may be found in the case of workers who, while not altogether incapacitated for work, are so handicapped that they will not be employed regularly in any well-known branch of the labor market. The essence

> of the test is the probable dependability with which claimant can sell his services in a competitive labor market, undistorted by such factors as business booms, sympathy of a particular employer or friends, temporary good luck, or the superhuman efforts of the claimant to rise above his crippling handicaps.

2 A. Larson, The Law of Workmen's Compensation § 57.51(a) at 10-164.68, 164.68(18) (1989). See, also, *Gunderson v. City of Ashland*, 701 S.W.2d 135 (Ky. 1985) (notwithstanding an employee's return to work after a work-related injury, the return to work does not necessarily terminate an employee's existing total disability when the employee's disability prevents performance of the employee's customary work and competition for employment in the job market). Thus, an employee's return to work does not in every case terminate an employee's total disability from a work-related injury and does not preclude a finding that the employee's total disability continues notwithstanding the return to work.

If an employee, after a work-related injury, receives wages equal to or greater than the wages received before the injury, the wages may be considered in the determination whether an employee has sustained an impairment of earning capacity. *Breland v. Ceco Steel Products Corp.*, 173 Neb. 354, 113 N.W.2d 528 (1962). Cf. *Guerra v. Iowa Beef Processors, Inc.*, 211 Neb. 433, 318 N.W.2d 887 (1982) (earning power is not synonymous with wages).

Before Heiliger's 1988 hemilaminectomy, his employment required daily lifting of heavy electrical items such as spools of copper wire. After his 1988 hemilaminectomy, Heiliger could no longer perform manual labor for W & H Electric. According to a vocational expert, Heiliger's injury resulted in a 50-percent loss of earning capacity and prevented Heiliger's entry into the competitive labor market, since he could no longer perform the managerial and supervisory duties for or as an electrical contractor. When Heiliger realized that he could no longer do the work which he had done before the 1988 injury, Heiliger sold his business interest to Walters and left employment with W & H Electric.

The Workers' Compensation Court determined that

Heiliger's total disability was temporary, from May 3, 1988, the date of the hemilaminectomy, to June 27, 1988, inclusively. The particular significance of June 27, 1988, in relation to termination of Heiliger's total disability is unexplained by the parties and undisclosed by the record. When an injured worker has attained maximum physical recovery after a work-related injury, any residual disability from a compensable injury is permanent and prevents the worker's entitlement to compensation for temporary disability. See *Aldrich v. ASARCO, Inc.*, 221 Neb. 126, 375 N.W.2d 150 (1985). The question whether an injured employee has reached maximum physical recovery after medical treatment is, generally, a factual question for the Workers' Compensation Court. *Bindrum v. Foote & Davies*, 235 Neb. 903, 457 N.W.2d 828 (1990).

In his clinical notes dated January 10, 1989, Dr. Salumbides stated that "[a]t this time I would think that [Heiliger] is medically stable and certainly has had a satisfactory post-operative course. . . . He has a permanent disability rating of 20 percent." This medical evidence would have supported a finding of Heiliger's temporary total disability beyond June 27, 1988. Yet, the Workers' Compensation Court found that Heiliger's temporary total disability terminated on June 27, 1988, a date which is considerably earlier than January 10, 1989, when Dr. Salumbides expressed his evaluation that Heiliger had "a permanent disability of 20 percent." Consequently, W & H Electric has no ground to complain of a determination that Heiliger's temporary total disability terminated earlier than January 10, 1989. Heiliger has not cross-appealed to raise the question whether he was temporarily and totally disabled beyond June 27, 1988. Therefore, the Nebraska Workers' Compensation Court's factual determination concerning Heiliger's temporary total disability is not clearly erroneous.

We note that W & H Electric argues only that Heiliger's return to work and receipt of wages prevent an award for temporary total disability, and does not raise the issue whether the Workers' Compensation Court should have allowed a credit against Heiliger's award in view of wages paid to Heiliger during his temporary total disability. Therefore, we express no

opinion about that aspect of Heiliger's claim and award.

Permanent Partial Disability.

W & H Electric argues that the evidence fails to support a finding that Heiliger sustained a 20-percent permanent partial disability, because Dr. Gogela evaluated or assessed Heiliger's permanent partial disability at 10 percent to the body as a whole and allocated one-half of Heiliger's permanent partial disability, that is, 5 percent of his disability, to Heiliger's 1987 injury and one-half of the disability to Heiliger's 1988 work-related injury. We have stated that "an employee is entitled to full compensation, notwithstanding the fact that his present disability is the result of an aggravated preexisting condition. Absent the provisions of § 48-128, an employer would be liable for all of the injury." *Benson v. Barnes & Barnes Trucking*, 217 Neb. 865, 875, 354 N.W.2d 127, 133 (1984). See, also, Neb. Rev. Stat. § 48-128 (Reissue 1988) (injury increasing disability; Second Injury Fund). As mentioned in this opinion under the sectional heading "Claimant's Burden of Proof; Preponderance of Evidence," a claimant is entitled to an award under the Workers' Compensation Act for a work-related injury disability if the claimant shows, by a preponderance of evidence, that the claimant sustained the injury and disability proximately caused by an accident which arose out of and in the course of the claimant's employment, even though a preexisting disability or condition had combined with the present work-related injury to produce the disability for which the claimant seeks an award. *Spangler v. State*, 233 Neb. 790, 448 N.W.2d 145 (1989); *Cole v. Cushman Motor Works*, 159 Neb. 97, 65 N.W.2d 330 (1954); *Tucker v. Paxton & Gallagher Co.*, 153 Neb. 1, 43 N.W.2d 522 (1950). Thus, allocation of disability attributable to a work-related injury and disability attributable to an antecedent or preexisting disability or condition which may or may not be work-related is irrelevant in this case inasmuch as there is no claim against the Second Injury Fund.

W & H Electric also argues that Dr. Salumbides renounced his determination that Heiliger sustained a 20-percent permanent partial disability and adopted Dr. Gogela's determination of 10 percent permanent partial disability;

therefore, the evidence does not support a finding of 20 percent permanent partial disability. W & H Electric relies on Dr. Salumbides' statement in his written report of August 11, 1989: "I . . . expressed my complete agreement with Dr. Gogela's appraisal and evaluation of Mr. Heiliger even though I had initially given him a 20 percent disability." However, in that same report Dr. Salumbides also stated that "[i]t is really very difficult to specifically pin down the exact . . . percentage of disability . . . but certainly the disability rating that he has should not exceed 20 percent."

A fact finder or trier of fact may accept or reject an opinion from an expert witness. *Joyner v. Steenson*, 227 Neb. 766, 420 N.W.2d 278 (1988); *Cathcart v. Blacketer*, 217 Neb. 755, 351 N.W.2d 70 (1984).

Although Dr. Salumbides' expressions appear somewhat inconsistent or even contradictory, the Workers' Compensation Court may have eliminated any confusion by its outright rejection of Dr. Gogela's evaluation concerning Heiliger's disability. Even if Dr. Salumbides' statements are contradictory, in *Vredeveld v. Gelco Express*, 222 Neb. 363, 369, 383 N.W.2d 780, 783 (1986), we stated:

> "A conflict or contradiction regarding an expert's opinion need not result from opinions expressed by different experts. A conflict or contradiction of opinions may arise in the course of testimony given by the same expert witness. A good faith conflict due to self-contradiction of an expert's opinions presents a question to be resolved by the trier of fact."

The Workers' Compensation Court, as the trier of fact, was entitled to weigh the evidence in light of the source of the evidence, consider the medical relationship between Heiliger and the physician who cared for or examined Heiliger and supplied medical information, resolve in favor of Heiliger any conflicts in the evidence, disregard Dr. Gogela's evaluation of Heiliger's permanent partial disability, and accept Dr. Salumbides' initial determination that Heiliger had sustained a disability of 20 percent to the body as a whole as the result of the accident on March 16, 1988.

The award of the Nebraska Workers' Compensation Court is

supported by the evidence, is not clearly erroneous, and is, therefore, affirmed. Since W & H Electric has failed to reduce the amount of Heiliger's award reviewed in this appeal, we order W & H Electric to pay Heiliger $1,500 to be applied toward the fee of Heiliger's lawyer for services in this court. See Neb. Rev. Stat. § 48-125(1) (Reissue 1988) (attorney fee for employee when employer appeals and fails to obtain a reduction of an award to the employee).

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. EARL C. CLARK, APPELLANT.
461 N.W.2d 576

Filed October 26, 1990. No. 90-048.

1. **Convictions: Appeal and Error.** In determining whether the evidence is sufficient to sustain a conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact, and the conviction must be sustained if, taking the view of the evidence most favorable to the State, there is sufficient evidence to support the conviction.
2. **Appeal and Error.** Where a law action is tried to the court without a jury, the finding of the court has the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong.
3. **Verdicts: Appeal and Error.** In criminal cases, the verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the State, to support it.
4. **Convictions: Controlled Substances: Proof: Intent.** To sustain a conviction for possession of a controlled substance, all the State must prove is that the defendant "knowingly or intentionally" possessed the substance.
5. **Sentences: Appeal and Error.** A sentence which is within the range prescribed by statute will not be disturbed absent an abuse of discretion.
6. **Sentences: Probation and Parole: Appeal and Error.** A sentence of probation, as opposed to a sentence of imprisonment, is a matter within the discretion of the trial court and will not be set aside on appeal absent an abuse of discretion.

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

Thomas M. Kenney, Douglas County Public Defender, and Cheryl M. Kessell for appellant.

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

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

BOSLAUGH, J.

After a trial to the court, the defendant, Earl C. Clark, was convicted of possession of cocaine and sentenced to imprisonment for 1 to 3 years, with credit for 155 days. He has appealed and contends that the evidence was insufficient to support his conviction and that his sentence is excessive.

The record shows that on July 6, 1989, the Omaha Police Division was carrying out a "reverse sting" sale operation in the area of 40th and Pinkney Streets in Omaha, Nebraska, which consisted of officers posing as drug dealers. Kevan Barbour, a narcotics unit officer, testified that he would sell crack cocaine to parties who approached him and that when a party had purchased drugs, Barbour would signal other officers to arrest the subject.

Officer Barbour further testified that on July 6, 1989, the defendant approached him and stated that he wanted a "twenty." A "twenty" refers to 20 dollars' worth of crack cocaine. Barbour removed what he thought was 20 dollars' worth of cocaine from a sack on the ground and handed it to the defendant. After examining the cocaine, the defendant stated that it was too small and handed it back. Barbour then handed the defendant a larger package of cocaine, and, according to Officer Barbour, the defendant handed over $20. After receiving the $20 from the defendant, Officer Barbour gave the signal to other officers to arrest the defendant. While the defendant was being arrested, he dropped the packet of cocaine, which Barbour recovered.

The defendant testified to a somewhat different version of the event. He testified that he asked Officer Barbour for "a twenty," that Officer Barbour handed him a package of cocaine, and that he handed it back to Barbour because it was

too small. The defendant further testified that Barbour then handed him a larger package of cocaine and that he looked at it for about a minute and a half while deciding whether to make the purchase. According to the defendant, Officer Barbour at that time just "snatched the money" from him and he was instantly tackled by other officers and arrested. The defendant testified that he did not offer money to Barbour to purchase the cocaine and that he was "on the verge of giving [the cocaine package] back to [Officer Barbour]" when he had his money snatched away. He asserts that he did not intend to purchase the cocaine from Officer Barbour.

The defendant's first assignment of error is that there was insufficient evidence to support his conviction for possession of cocaine because he did not have the "intent" to possess and control said substance.

In determining whether the evidence is sufficient to sustain a conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact, and the conviction must be sustained if, taking the view of the evidence most favorable to the State, there is sufficient evidence to support the conviction. *State v. Johns*, 233 Neb. 477, 445 N.W.2d 914 (1989); *State v. Bustos*, 230 Neb. 524, 432 N.W.2d 241 (1988); *State v. Trevino*, 230 Neb. 494, 432 N.W.2d 503 (1988); *State v. Lewis*, 230 Neb. 224, 430 N.W.2d 686 (1988).

Where a law action is tried to the court without a jury, the finding of the court has the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. *State v. Foster*, 196 Neb. 332, 242 N.W.2d 876 (1976); *Siefford v. Housing Authority*, 192 Neb. 643, 223 N.W.2d 816 (1974). In criminal cases, the verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the State, to support it. *State v. Lacy*, 195 Neb. 299, 237 N.W.2d 650 (1976); *State v. Fowler*, 193 Neb. 420, 227 N.W.2d 589 (1975).

To sustain a conviction for possession of a controlled substance, all the State must prove is that the defendant

"knowingly or intentionally" possessed the substance, see Neb. Rev. Stat. § 28-416(3) (Cum. Supp. 1988). In this case, the evidence, taking the view most favorable to the State, was more than sufficient for the trial court to conclude that the defendant "knowingly or intentionally" possessed the controlled substance.

The evidence shows that the defendant drove to an area where he knew he could purchase crack cocaine. He approached an undercover police officer who was posing as a drug dealer and asked to buy 20 dollars' worth of crack cocaine. The undercover officer handed the defendant a $20 package of cocaine. The defendant was unhappy with the size of the cocaine package, so he returned it to the undercover officer. The undercover officer then handed the defendant a larger package of cocaine, which the defendant examined. According to Officer Barbour, the defendant then handed Barbour the $20 and Barbour signaled the other officers to arrest the defendant. Taking the view of the evidence most favorable to the State, we find that the evidence was more than sufficient for the trial court to find beyond a reasonable doubt that the defendant "knowingly or intentionally" possessed cocaine.

In his second assignment of error, the defendant contends that the sentence imposed by the district court was an abuse of discretion and that the court erred by sentencing him to a term of imprisonment rather than probation.

A sentence which is within the range prescribed by statute will not be disturbed absent an abuse of discretion. *State v. Sutton*, 231 Neb. 30, 434 N.W.2d 689 (1989); *State v. Kitt*, 231 Neb. 52, 434 N.W.2d 543 (1989); *State v. Hoffman*, 227 Neb. 131, 416 N.W.2d 231 (1987). See, also, *State v. Guida*, 230 Neb. 961, 434 N.W.2d 522 (1989). Further, a sentence of probation, as opposed to a sentence of imprisonment, is a matter within the discretion of the trial court and will not be set aside on appeal absent an abuse of discretion. *State v. Thayer*, 235 Neb. 70, 453 N.W.2d 474 (1990); *State v. Grell*, 233 Neb. 314, 444 N.W.2d 911 (1989); *State v. Knoefler*, 227 Neb. 410, 418 N.W.2d 217 (1988).

The defendant is 30 years of age. He was convicted of a Class IV felony, which carries a maximum term of 5 years'

imprisonment, a $10,000 fine, or both. See, Neb. Rev. Stat. § 28-105(1) (Reissue 1985) and § 28-416(3). The defendant was sentenced to a term of 1 to 3 years' imprisonment, with 155 days' credit for time served prior to sentencing. The sentence imposed on the defendant was well within the statutory guidelines.

In sentencing the defendant, the trial court noted that the defendant had been involved with drugs since 1980 and had "[a]t least three prior drug-related convictions, two DWI, 12 misdemeanor, other misdemeanor convictions." The trial court stated that the defendant was sentenced to prison because "[a] sentence to probation would simply promote disrespect for the law." There was no abuse of discretion regarding the sentence imposed in this case.

The judgment of the district court is affirmed.

AFFIRMED.

C. MARVIN ROBERTS AND DOROTHY ROBERTS, HUSBAND AND WIFE, APPELLEES, V. WICK BUILDING SYSTEMS, INC., APPELLANT.
461 N.W.2d 740

Filed November 2, 1990. No. 88-047.

Appeal from the District Court for Lancaster County, ROBERT R. CAMP, Judge, upon the recommendation of the Appellate Division of the District Court, MORAN, WOLF, and HANNON, District Judges. Reversed and remanded with directions.

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

Rodney P. Cathcart, of Erickson & Sederstrom, P.C., for appellees.

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

PER CURIAM.

On the bases of the briefs, the record, and the recommendation of the Appellate Division of the District Court, we find that because of the insufficiency of the evidence and failure of proof as to plaintiffs' claims alleged in their amended petition and errors of law in the admission of parol evidence in regard to defendant's cross-petition, all as set forth in the recommendation of the Appellate Division, the judgment of the district court is reversed and the cause remanded with directions to vacate the plaintiffs' judgment against defendant on plaintiffs' petition and to enter judgment in the amount of $3,384 in favor of defendant and against plaintiffs on defendant's counterclaim. Costs are taxed against plaintiffs.

REVERSED AND REMANDED WITH DIRECTIONS.

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

461 N.W.2d 740

Filed November 2, 1990. No. 89-761.

Appeal from the District Court for Douglas County, JERRY M. GITNICK, Judge, upon the recommendation of the Appellate Division of the District Court, HENDRIX, SPRAGUE, and JOHN P. MURPHY, District Judges. Reversed and remanded for a new trial.

Thomas M. Kenney, Douglas County Public Defender, and Thomas C. Riley for appellant.

Robert M. Spire, Attorney General, and Kenneth W. Payne for appellee.

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

PER CURIAM.

On the bases of the briefs, the record, and the recommendation of the Appellate Division of the District

Court and because of the erroneous admission of evidence by the trial court and erroneous and prejudicial questioning by the prosecutor, the judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

WHITE, J., dissents.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL R. YAGER, APPELLANT.

461 N.W.2d 741

Filed November 2, 1990. No. 89-790.

1. **Rules of Evidence: Other Acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Neb. Rev. Stat. § 27-404(2) (Reissue 1989).
2. _____: _____. The purposes set forth in Neb. Rev. Stat. § 27-404(2) (Reissue 1989) are illustrative only and are not intended to be exhaustive or mutually exclusive.
3. _____: _____. Neb. Rev. Stat. § 27-404(2) (Reissue 1989) is an inclusionary rule which permits the use of evidence of other crimes, wrongs, or acts if such is relevant for any purpose other than to show the defendant's propensity or disposition to commit the crime charged.
4. **Rules of Evidence: Appeal and Error.** In reviewing the actions of a trial court in admitting evidence of other crimes under Neb. Rev. Stat. § 27-402(2) (Reissue 1989) to determine if there was unfair prejudice in the admission of the evidence, an appellate court considers (1) whether the evidence was relevant, (2) whether the evidence had a proper purpose, (3) whether the probative value of the evidence outweighed its potential for unfair prejudice, and (4) whether the trial court, if requested, instructed the jury to consider the evidence only for the purpose for which it was admitted.
5. **Rules of Evidence: Other Acts: Time: Intent.** The admissibility of evidence concerning other conduct must be determined upon the facts of each case, and no exact limitation of time can be fixed as to when other conduct tending to prove intent to commit the offense charged is too remote.
6. **Rules of Evidence: Other Acts: Time.** Remoteness, or the temporal span

between a prior crime, wrong, or other act offered as evidence under Neb. Rev. Stat. § 27-404(2) (Reissue 1989) and a fact to be determined in a present proceeding, goes to the weight to be given to such evidence and does not render the evidence of the other crime, wrong, or act irrelevant and inadmissible.

7. _____: _____: _____. The question of whether evidence of other conduct otherwise admissible under the provisions of Neb. Rev. Stat. § 27-402(2) (Reissue 1989) is too remote in time is largely within the discretion of the trial court. While remoteness in time may weaken the value of the evidence, such remoteness does not, in and of itself, necessarily justify exclusion of the evidence.
8. **Rules of Evidence.** Neb. Rev. Stat. § 27-404(2) (Reissue 1989) is subject to the overriding protection of Neb. Rev. Stat. § 27-403 (Reissue 1989).
9. _____. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Neb. Rev. Stat. § 27-403 (Reissue 1989).
10. **Rules of Evidence: Words and Phrases.** Most, if not all, items which one party to an action offers in evidence are calculated to be prejudicial to the opposing party; therefore, it is only unfair prejudice with which Neb. Rev. Stat. § 27-403 (Reissue 1989) is concerned. In the context of § 27-403, such prejudice means a tendency to suggest a decision on an improper basis.

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

Larry F. Fugit for appellant.

Robert M. Spire, Attorney General, and Alfonza Whitaker for appellee.

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

FAHRNBRUCH, J.

Claiming that the Sarpy County District Court erred in admitting evidence of his sexual contact with two young males other than the victim, Michael R. Yager appeals his jury conviction for sexual assault of a male child. We affirm.

The defendant was born on April 30, 1957. He babysat a number of small children at his mother's residence in LaVista, where he resided. Yager began babysitting 8-year-old C.M. in August 1988. On December 15, 1988, C.M. told his mother and stepfather that the defendant touched him on his penis and that it hurt.

At trial, the child testified that Yager touched his penis on five or six occasions. C.M. testified that on the last occasion, his jeans were off and Yager reached in C.M.'s underpants and pulled on his penis to the extent that it hurt him. On the other occasions, C.M. said, the defendant rubbed C.M.'s penis. The boy further testified that on one occasion, Yager unbuttoned his own pants and made the boy rub Yager's penis. The victim told a police officer that the incidents occurred from Thanksgiving Day of 1988 to and including December 15, 1988.

A police officer testified that when she interviewed the defendant on December 16, he told her that when the victim experienced a stomach ache, the defendant rubbed the boy's stomach to soothe him. The defendant said his hand may have slipped while rubbing the boy's stomach and accidentally touched the boy's penis. At trial, Yager denied ever touching C.M.'s penis.

Yager was charged by amended information in the district court for Sarpy County with three counts of sexual assault of a child. Upon the defendant's motion, the trial court dismissed two of the counts.

Sexual assault of a child is prohibited by Neb. Rev. Stat. § 28-320.01 (Reissue 1989), which provides: "(1) A person commits sexual assault of a child if he or she subjects another person fourteen years of age or younger to sexual contact and the actor is at least nineteen years of age or older. (2) Sexual assault of a child is a Class IV felony." Neb. Rev. Stat. § 28-318 (Reissue 1989) defines "sexual contact" as

> the intentional touching of the victim's sexual or intimate parts or the intentional touching of the victim's clothing covering the immediate area of the victim's sexual or intimate parts. Sexual contact shall also mean the touching by the victim of the actor's sexual or intimate parts or the clothing covering the immediate area of the actor's sexual or intimate parts when such touching is intentionally caused by the actor. Sexual contact shall include only such conduct which can be reasonably construed as being for the purpose of sexual arousal or gratification of either party.

Yager was found guilty by a jury of one count of sexual assault

of a child. The defendant was sentenced to a 4-month term of imprisonment, with credit for the time spent in jail awaiting disposition of his case.

Before trial, the district court overruled Yager's motion in limine to prevent evidence of his sexual relations with two other witnesses. At trial, over Yager's objection, one of the witnesses, A.L., testified that when he was 8 years old and while Yager was babysitting him, Yager took him downstairs, where he touched and fondled him. A.L. further testified that until he was 21 or 22 years old, he had a sexual relationship with the defendant and that during that time, he and the defendant had approximately 100 sexual contacts. The defendant's last sexual contact with A.L. was 6 to 7 years prior to the defendant's trial.

The other witness, A.G., who was 23 years old, testified over Yager's objection that when he was 12 years of age, Yager gave him a ride in his car and molested him. A.G. testified that on that occasion, the sexual contact was limited to touching and that he and Yager both had their pants off. The witness related that Yager and he continued their relationship for 2 to 2½ years. During that period, Yager and A.G. had 20 to 30 sexual contacts or penetrations, according to A.G. At the time of trial, A.G. was being treated in the Lincoln Regional Center after being sentenced as a mentally disordered sex offender to a term of imprisonment for sexually assaulting minor males. The last sexual contact between Yager and A.G. would have been within 10 years of Yager's trial.

Yager's two assignments of error may be consolidated to allege that the trial court erred by allowing A.L.'s and A.G.'s testimony into evidence.

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Neb. Rev. Stat. § 27-404(2) (Reissue 1989). The purposes set forth in § 27-404(2) are illustrative only and are not intended to be exhaustive or mutually exclusive. *State v. Schaaf*, 234 Neb. 144, 449 N.W.2d 762 (1989). Section 27-404(2) is an

inclusionary rule which permits the use of evidence of other crimes, wrongs, or acts if such is relevant for any purpose other than to show the defendant's propensity or disposition to commit the crime charged. *State v. Boppre*, 234 Neb. 922, 453 N.W.2d 406 (1990).

In reviewing the actions of a trial court in admitting evidence of other crimes under § 27-402(2) to determine if there was unfair prejudice in the admission of the evidence, an appellate court considers (1) whether the evidence was relevant, (2) whether the evidence had a proper purpose, (3) whether the probative value of the evidence outweighed its potential for unfair prejudice, and (4) whether the trial court, if requested, instructed the jury to consider the evidence only for the purpose for which it was admitted. See, *Huddleston v. United States*, 485 U.S. 681, 108 S. Ct. 1496, 99 L. Ed. 2d 771 (1988); *State v. Ryan*, 233 Neb. 74, 444 N.W.2d 610 (1989); *State v. Boppre, supra*.

Yager first asserts that A.L.'s and A.G.'s testimony concerning sexual contacts with him which he claims occurred 15 to 20 years and 11 years prior to trial, respectively, was totally irrelevant because the testimony concerned events which were too remote in time to have any relevance.

Evidence that Yager had sexually assaulted other young boys and continued those relationships over a number of years was relevant to prove Yager's motive, intent, and sexual arousal or gratification and the absence of mistake or accident when he had sexual contact with C.M. The evidence had the tendency to make the existence of any of those items relating to the crime with which Yager was charged more probable than it would be without that evidence. See Neb. Rev. Stat. § 27-401 (Reissue 1989). The real question here is whether the events are so remote in time as to be irrelevant.

The admissibility of evidence concerning other conduct must be determined upon the facts of each case, and no exact limitation of time can be fixed as to when other conduct tending to prove intent to commit the offense charged is too remote. *State v. Ruyle*, 234 Neb. 760, 452 N.W.2d 734 (1990). Indeed, this court has held that a trial court did not abuse its discretion in admitting evidence of conduct similar to the crime charged

even though the conduct occurred over 10 years before the crime charged was committed. See *State v. Kern*, 224 Neb. 177, 397 N.W.2d 23 (1986).

> [R]emoteness, or the temporal span between a prior crime, wrong, or other act offered as evidence under Rule 404(2) and a fact to be determined in a present proceeding, goes to the weight to be given to such evidence and does not render the evidence of the other crime, wrong, or act irrelevant and inadmissible.

Schaaf, supra at 160, 449 N.W.2d at 772.

Yager's assertion that A.L.'s and A.G.'s testimony concerned events which were too remote in time is without merit. It is initially noted that the defendant is mistaken regarding the timing of those events. A.L. testified that his sexual relationship with Yager lasted until he was 21 or 22 years of age. Since he was 28 years of age at the time of trial, the last incident was 6 or 7 years prior to the events at issue, not 15 to 20 years as Yager asserts. Likewise, A.G. stated that his last sexual contact occurred with the defendant when A.G. was 14 to 14 1/2 years of age. This would be approximately 8 1/2 to 9 years before C.M. was sexually assaulted by Yager.

The question of whether evidence of other conduct otherwise admissible under the provisions of § 27-402(2) is too remote in time is largely within the discretion of the trial court. While remoteness in time may weaken the value of the evidence, such remoteness does not, in and of itself, necessarily justify exclusion of the evidence. *State v. Rincker*, 228 Neb. 522, 423 N.W.2d 434 (1988).

The crux of Yager's argument is that the evidence was offered to prove his propensity or disposition to commit sexual assault of a child. In *State v. Andersen*, 232 Neb. 187, 440 N.W.2d 203 (1989), the defendant was convicted of two charges of first degree sexual assault and three charges of sexual assault of a child. On appeal, the defendant alleged that the State was improperly permitted to present evidence of his homosexuality, the sexual content of movies he showed to the victims, and the fact that he had previously entertained teenage boys in his home. In response, this court asserted: "The evidence tended to show the defendant's motive, preparation, plan, and intent to

commit the crimes at issue and was admissible." *Id.* at 202, 440 N.W.2d at 215. This court further asserted that the defendant's "sexual preference for males enhances the credibility of the victims' testimony that the defendant's acts were committed for sexual gratification." *Id.*

Applying *Andersen, supra*, to this case, the evidence at issue tended to show Yager's motive and intent to commit sexual assault on C.M. As was the case in *Andersen*, the evidence is probative on the issue of the defendant's sexual arousal or gratification, an element of the offense of sexual assault of a child. See §§ 28-318(5) and 28-320.01.

Furthermore, the defendant's intentional sexual contacts with A.L. and A.G. were also relevant to prove that the defendant's sexual contact with the victim was not accidental, as he related to a police officer. See *State v. Ruyle, supra* (the defendant's threats to burn or torch an apartment were relevant to show that the fire was not an accident). Thus, the trial court did not abuse its discretion in determining that the evidence was offered for a proper purpose. See *Ruyle, supra* (due to proper purposes for admission of other conduct, court did not abuse its discretion).

Section 27-404(2) is subject to the overriding protection of Neb. Rev. Stat. § 27-403 (Reissue 1989). *State v. Craig*, 219 Neb. 70, 361 N.W.2d 206 (1985). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." § 27-403. The defendant lastly asserts that any probative value A.L.'s and A.G.'s testimony may have had was outweighed by its prejudicial effect and should have been excluded under § 27-403.

In view of the sexual nature of the crime charged, evidence of Yager's other sexual contacts with young males was highly probative on the issue of Yager's sexual arousal or gratification, as well as his intent and motive, and to establish that it was no accident that he touched the victim's penis. While the evidence was prejudicial, as this court has stated:

> Most, if not all, items which one party to an action

> offers in evidence are calculated to be prejudicial to the opposing party; therefore, it is only "unfair prejudice" with which [§ 27-403 is] concerned. In the context of § 27-403 such prejudice means a tendency to suggest a decision on an improper basis.

Lincoln Grain v. Coopers & Lybrand, 216 Neb. 433, 439, 345 N.W.2d 300, 306 (1984). After reviewing the record, we cannot say that the prejudice was such as to suggest a decision on an improper basis. The trial court did not abuse its discretion in determining that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. See *State v. Jacobs*, 226 Neb. 184, 410 N.W.2d 468 (1987) (balancing the need for evidence of other crimes, wrongs, or acts against the possible resulting prejudice is within the discretion of the trial court).

Finally, we conclude that the trial court correctly instructed the jury to consider the evidence only for the purpose for which it was admitted. The trial court instructed the jury that the testimony of A.L. and A.G. should be considered only for the limited purpose of establishing the defendant's state of mind. The court further instructed the jury that if it found from other evidence, beyond a reasonable doubt, that the defendant engaged in the particular conduct alleged to have occurred on December 15, 1988, it could consider the testimony of A.L. and A.G. as to whether such conduct constituted sexual contact as defined in a previous instruction.

The trial court did not err in ruling that the evidence of the defendant's sexual relations with A.L. and A.G. was relevant. The evidence was admitted for a proper purpose and did not unfairly prejudice the defendant. The jury was properly instructed on the use of that evidence. Therefore, the defendant's assignments of error are meritless.

The defendant's conviction for sexual assault of a child is affirmed.

AFFIRMED.

SHANAHAN, J., dissenting.

Even the conviction of one accused of pedophilia should be based on evidence admissible in accordance with the letter and spirit of the Nebraska Evidence Rules, a result very unlikely in

view of today's decision.

At the core of the problem caused by the majority's opinion is a misunderstanding concerning "character" and, therefore, misapplication of Neb. Evid. R. 404(2), which states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Additionally, according to Neb. Evid. R. 401: "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Consequently, Neb. Evid. R. 402 provides in part: "Evidence which is not relevant is not admissible." The preceding excerpts from the Nebraska Evidence Rules are virtually verbatim counterparts of the corresponding Federal Rules of Evidence.

The focal point of Rule 404(2) is "character," which may be defined as a propensity or disposition to act in a particular manner. In relation to Rules 401 and 402, Rule 404(2) pertains to relevancy of evidence and has been characterized as a "specialized rule of relevancy." 2 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 404[08] at 404-58 (1989). In *State v. Craig*, 219 Neb. 70, 77, 361 N.W.2d 206, 212 (1985), we acknowledged that "Rule 404(2) of the Nebraska Evidence Rules . . . is an 'inclusionary rule,' permitting the use of relevant, specific acts for all purposes except to prove character of a person in order to show that such person acted in conformity with character." Therefore, Rule 404(2) permits introduction of evidence concerning a defendant's "other crimes, wrongs, or acts" if such evidence complies with the relevancy definition in Rule 401 and unless the sole purpose for the offer is to establish a defendant's propensity to act in a particular manner and thereby supply a basis for the inference that the defendant committed the crime charged.

> The general exclusion of evidence of other crimes or wrongs in criminal prosecutions rests on sound policy and

> constitutional concerns. Introduction of evidence that the defendant committed other crimes and unwholesome acts may lead jurors to return a verdict of guilty for reasons other than finding all the elements of the alleged crime beyond a reasonable doubt. Although reasonable doubt of guilt exists on this occasion, the jury might conclude the defendant is a "bad man," who deserves punishment regardless of his innocence of the crime charged and warrants imprisonment to prevent future maleficent acts. Such results defeat the letter and policy of substantive criminal law mandating conviction based upon a non-vague concrete statute; instead, jurors have found the defendant guilty based upon past unsavory acts without necessarily violating any criminal statute in the process.
>
> Alternatively, and just as improperly, upon learning that the accused committed other crimes or wrongs, jurors might infer that the defendant has a propensity to commit crimes and probably committed this crime as charged.

Patterson, *Evidence of Prior Bad Acts: Admissibility Under the Federal Rules*, 38 Baylor L. Rev. 331, 332-33 (1986).

As noted by the Supreme Court in *Michelson v. United States*, 335 U.S. 469, 475-76, 69 S. Ct. 213, 93 L. Ed. 168 (1948), a decision before adoption of the Federal Rules of Evidence:

> The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.

See, also, *United States v. Phillips*, 599 F.2d 134, 136 (6th Cir. 1979) (concerns expressed by Fed. R. Evid. 404(b) are "(1) that

the jury may convict a 'bad man' who deserves to be punished—not because he is guilty of the crime charged but because of his prior or subsequent misdeeds; and (2) that the jury will infer that because the accused committed other crimes, he probably committed the crime charged").

Thus, Rule 404(2) forbids a prosecutor's introducing evidence of a defendant's uncharged misconduct to support a general inference of bad character which increases the probability that the defendant committed the crime charged. As previously mentioned, for admissibility under Rule 404(2), a defendant's other crimes, wrongs, or acts must have probative value in reference to the crime charged against the defendant. A suitable test for admissibility of a defendant's other acts as "extrinsic offense evidence" is found in *United States v. Beechum,* 582 F.2d 898, 910-11 (5th Cir. 1978):

> The rule [Fed. R. Evid. 404(b)] follows the venerable principle that evidence of extrinsic offenses should not be admitted solely to demonstrate the defendant's bad character. Even though such evidence is relevant, because a man of bad character is more likely to commit a crime than one not, the principle prohibits such evidence because it is inherently prejudicial. . . . Without an issue other than mere character to which the extrinsic offenses are relevant, the probative value of those offenses is deemed insufficient in all cases to outweigh the inherent prejudice. Where, however, the extrinsic offense evidence is relevant to an issue such as intent, it may well be that the evidence has probative force that is not substantially outweighed by its inherent prejudice. If this is so, the evidence may be admissible.
>
> What the rule calls for is essentially a two-step test. First, it must be determined that the extrinsic offense evidence is relevant to an issue other than the defendant's character. Second, the evidence must possess probative value that is not substantially outweighed by its undue prejudice and must meet the other requirements of rule 403.

The *Beechum* court continued:

> In measuring the probative value of the evidence, the

> judge should consider the overall similarity of the extrinsic and charged offenses. If they are dissimilar except for the common element of intent, the extrinsic offense may have little probative value to counterbalance the inherent prejudice of this type of evidence. Of course, equivalence of the elements of the charged and extrinsic offenses is not required. But the probative value of the extrinsic offense correlates positively with its likeness to the offense charged. Whether the extrinsic offense is sufficiently similar in its physical elements so that its probative value is not substantially outweighed by its undue prejudice is a matter within the sound discretion of the trial judge.

582 F.2d at 915. See, also, *United States v. Green*, 648 F.2d 587, 592 (9th Cir. 1981):

> It is unnecessary to specify the exception [in Fed. R. Evid. 404(b)] within which a particular line of inquiry or piece of evidence is admissible. It is enough that the evidence is relevant to an issue in the case other than a defendant's criminal propensity. It is, of course, for the trial court to make the initial determination of relevancy, and the evidence must be carefully scrutinized to determine probative value.

With the preceding as background, the majority's conclusion about admissibility of evidence regarding Yager's sexual contacts with males before the incident charged is irreconcilable with Rule 404(2). The crime charged against Yager was pedophilia in the form of criminal sexual contact with a child, that is, one who is at least 19 years of age subjects another person, who is 14 years of age or younger, to sexual contact. See Neb. Rev. Stat. § 28-320.01 (Reissue 1989). A.L., one of the State's witnesses, testified that he was 8 years old when he had his first sexual encounter with Yager, who, being 4 years older than A.L., was 12 years old at the time. Thus, the encounter 20 years before Yager's trial involved two preteens or near-adolescent boys, not a 19-year-old male and a male child under the age of 14 years. Of A.L.'s "100 sexual contacts" with Yager, how many occurred before Yager was 19 years of age? For that matter, how many sexual contacts occurred when A.L. was beyond 14 years of age, including the period when A.L. was

over 21 years of age? By the time that Yager was 19 years of age, A.L. was more than 14 years of age and, hence, no longer a child within the purview of § 28-320.01. Based on the age differential, sheer arithmetic precludes admissibility of sexual encounters between A.L. and Yager. Sexual encounters between Yager and A.L., when the latter was an adult, cannot be realistically characterized as pedophiliac activity by Yager. Consequently, ambiguity, even absolute uncertainty, regarding the timeframe of Yager's prior sexual contact with A.L. eviscerates reliability and probative value from the prior sexual contacts used as evidence against Yager. See *United States v. Biswell*, 700 F.2d 1310 (10th Cir. 1983) (vagueness in testimony about other acts renders reliability questionable and diminishes probative value). Moreover, without similarity between Yager's prior sexual contacts with A.L. and the criminal act charged against Yager, dissimilarity destroyed the requisite relevance for admissibility; hence, the evidence of Yager's prior sexual contact with A.L. was inadmissible. See *United States v. Tate*, 715 F.2d 864, 866 (4th Cir. 1983) (possession of a firearm on a previous occasion is irrelevant to the issue whether the defendant was in possession of a firearm on the date charged, and "the commission of the same bad act on a previous occasion is bound to have had the effect of tending to show that the defendant had the propensity to commit the crimes for which he was on trial").

A warning against seductive simplism in admission of "other acts" evidence is expressed in 22 C. Wright & K. Graham, Federal Practice and Procedure § 5240 at 479-80 (1978):

> Particularly to be deplored is what might be called the "smorgasbord" approach to analysis of other crimes evidence in which the court simply serves up a long list of permissible uses without any attempt to show how any of them are applicable to the case at hand. . . . What is to be avoided is the mere listing of possible uses in the hope that at least one will seem to the reader to be applicable to the facts of the instant case.
>
> . . . .
>
> . . . [C]ourts must be on guard to prevent the motive label from being used to smuggle forbidden evidence of

propensity to the jury.

Condemning mere lip service to the great potential for prejudice inherent in evidence of prior sexual conduct, the Supreme Court of Washington, in *State v. Saltarelli*, 98 Wash. 2d 358, 364, 655 P.2d 697, 700 (1982), criticized using "motive and intent as 'magic passwords whose mere incantation will open wide the courtroom doors to whatever evidence may be offered in their names.' [Quoting from] *United States v. Goodwin*, 492 F.2d 1141, 1155 (5th Cir. 1974)." The *Saltarelli* court then agreed with the observation from Slough & Knightly, *Other Vices, Other Crimes*, 41 Iowa L. Rev. 325 (1956):

> "When deciding the issue of guilt or innocence in sex cases, where prejudice has reached its loftiest peak, our courts have been most liberal in announcing and fostering a nebulous exception, offering scant attention to inherent possibilities of prejudice. Just when protection is most needed, the rules collapse."

98 Wash. 2d at 364, 655 P.2d at 700.

In the attempt to justify admissibility of Yager's sexual contacts with A.G., the majority's own language supplies the strongest reason and cogent argument against admissibility of evidence concerning Yager's "other crimes, wrongs, or acts," namely: "Evidence that Yager had sexually assaulted other young boys and continued those relationships over a number of years was relevant to prove Yager's motive, intent, and sexual arousal or gratification and the absence of mistake or accident when he had sexual contact with C.M." When the majority's verbal camouflage is removed, the preceding excerpt patently demonstrates that the evidence of Yager's previous sexual contacts pertained to his character, his propensity for sexual contact with another male, and as such, was inadmissible under Rule 404(2). "Motive" has been defined as " 'the reason that nudges the will and prods the mind to indulge criminal intent.' " *United States v. Beechum*, 582 F.2d 898, 912 n.15 (5th Cir. 1978) (quoting from Slough & Knightly, *supra*). Another court has suggested that "motive" is an "inducement, or that which leads or tempts the mind to indulge in a criminal act," *State v. Saltarelli, supra* at 365, 655 P.2d at 700, while still another court has stated: "Motive is an idea, belief or emotion that impels or

incites one to act in accordance with his state of mind or emotion," *People v. Gibson*, 56 Cal. App. 3d 119, 129, 128 Cal. Rptr. 302, 308 (1976). Thus, the majority uses the "motive" mask to disguise inadmissible evidence of Yager's character and propensity for particular sexual conduct. In Yager's case, "motive" is a mistaken label to conceal the true nature of the "other acts" evidence—"propensity evidence under a different name." R. Lempert & S. Saltzburg, A Modern Approach to Evidence § 2 at 217 (1977). In *State v. Craig*, 219 Neb. 70, 361 N.W.2d 206 (1985), to rebut a defendant's defense or claim that, while frolicking with the victim on a couch, he accidentally pulled down the pajama bottoms of the victim, his 13-year-old daughter, we approved admissibility of evidence that the defendant, on several occasions before the sexual assault of the victim identified in the criminal charge, had disrobed the victim for the purpose of sexual contact. However, in Yager's case, the participants in the previous sexual activity were not the subject victims in the charge against Yager. Consequently, testimony from A.L. and A.G. was unquestionably evidence concerning Yager's character and propensity for sexual contact with another male and, therefore, inadmissible under Rule 404(2).

Next, the majority suggests four safeguards against unfair prejudice. One of the suggested safeguards is an instruction informing the jury concerning the permissible use of "other acts" evidence. As one court has observed:

> We are not nearly so sanguine concerning the efficacy of jury instructions in curing the prejudice caused by the introduction of other crimes evidence. To tell a jury to ignore the defendant's prior convictions in determining whether he or she committed the offense being tried is to ask human beings to act with a measure of dispassion and exactitude well beyond mortal capacities. In such cases, it becomes particularly unrealistic to expect effective execution of the "mental gymnastic" required by limiting instructions, *Nash v. United States,* 54 F.2d 1006, 1007 (2d Cir.) (Learned Hand, J.), *cert. denied,* 285 U.S. 556, 52 S.Ct. 457, 76 L.Ed. 945 (1932), and "the naive assumption that prejudicial effects can be overcome by instructions to jury" becomes more clearly than ever "unmitigated

> fiction," *Krulewitch v. United States*, 336 U.S. 440, 453, 69 S.Ct. 716, 723, 93 L.Ed. 790 (1949) (Jackson, J., concurring).

United States v. Daniels, 770 F.2d 1111, 1118 (D.C. Cir. 1985).

Chiding the notion that a limiting instruction eliminates unfair prejudice often existing in "other acts" evidence, the court in *People v. Gibson, supra* at 130, 128 Cal. Rptr. at 308 (1976), provided a realistic comment about use of "other acts" evidence:

> It is the essence of sophistry and lack of realism to think that an instruction or admonition to a jury to limit its consideration of highly prejudicial evidence to its limited relevant purpose can have any realistic effect. It is time that we face the realism of jury trials and recognize that jurors are mere mortals. Of what value are the declarations of legal principles with respect to the admissibility of other-crimes evidence . . . if we permit the violation of such principles in their practical application? We live in a dream world if we believe that jurors are capable of hearing such prejudicial evidence but not applying it in an improper manner.
>
> . . . The expectation that the jury could limit its use of ["other acts"] evidence as circumstantial evidence of defendant's *intent* and *motive* . . . is indeed an exercise in futility and illusory imagery.

(Emphasis in original.)

If we believe that a limiting instruction would result in a jury's analytically disregarding the unfair prejudice inherent in evidence of Yager's previous sexual conduct, then we have become residents of a fantasyland.

Nevertheless, the majority states that the jury was properly instructed on the use of evidence concerning Yager's sexual contact with A.L. and A.G. The court instructed the jury: "Sexual contact shall include only such conduct which can be reasonably construed as being for the purpose of sexual arousal or gratification of either party." Later, the court instructed: "If you find from other evidence, beyond a reasonable doubt, that the defendant engaged in the particular conduct [with the victim] as alleged, you may then consider the testimony of

[A.L. and A.G.] as to whether such conduct constituted sexual contact as defined in a previous instruction." The instructions emphasized the use of Yager's prior acts to establish his propensity for sexual gratification with another male and thereby provided the inference that Yager, so disposed toward a particular form of sexual activity, probably committed the criminal sexual act charged against Yager. Thus, the instructions on use of "other acts" evidence ignited a flammable situation in Yager's case.

Curiously enough, the majority relies on two previous decisions of this court, *State v. Ryan*, 233 Neb. 74, 444 N.W.2d 610 (1989), and *State v. Boppre*, 234 Neb. 922, 453 N.W.2d 406 (1990), as support for the suggested four safeguards against unfair prejudice from "other acts" evidence. In both *Ryan* and *Boppre*, the presently suggested four safeguards against unfair prejudice were actually adopted as a four-part test or four requirements for admissibility. Referring to *Huddleston v. United States*, 485 U.S. 681, 108 S. Ct. 1496, 99 L. Ed. 2d 771 (1988), in *Ryan*, we stated, "The U.S. Supreme Court has set out the *requirements for the admissibility of evidence* under Fed. R. Evid. 404(b), the equivalent of Neb. Evid. R. 404(2)" (emphasis supplied), 233 Neb. at 104, 444 N.W.2d at 631, and then expressed a four-part test which included, as requirements or conditions for admissibility, the four items which the majority has today characterized as safeguards against "unfair prejudice in the admission of the ['other acts'] evidence." In fact, the *Huddleston* Court did not enunciate four "requirements for the admissibility of evidence under Fed. R. Evid. 404(b)," but did consider means to minimize possible prejudice from admission of "other acts" evidence. Nonetheless, in *State v. Boppre, supra* at 953, 453 N.W.2d at 429, we were even more emphatic and explicit when we stated, "There are four requirements for the admissibility of evidence under" Rule 404(2) and then itemized the four requirements, today characterized as safeguards, by reference to *Ryan* as decisional support for the four requirements controlling admissibility of "other acts" evidence.

Thus, the four requirements for admissibility under Neb. Evid. R. 404(2), expressed in *Ryan* and *Boppre*, have, by some

undisclosed process, been today transformed into safeguards against unfair prejudice from evidence admitted. However, in the course of that metamorphosis, this court has failed to acknowledge our undeniable mistake which originated in *Ryan* and continues through *Boppre*, namely, the four-part test or four requirements for admissibility under Rule 404(2). Instead of facing and correctively eliminating the *Ryan-Boppre* error, we have succumbed to the ostrich syndrome. The four requirements for admissibility under Rule 404(2), expressed in *Ryan* and *Boppre*, still exist, are unjustified under the Nebraska Evidence Rules, and only tend to further confuse an already confused area surrounding Rule 404(2)—"Confusion worse confounded." To illustrate the confusion engendered by *Ryan* and *Boppre*, consider an all-too-likely situation. Suppose evidence is properly admitted on Monday in a weeklong jury trial, but on Friday, when the case is submitted to the jury, the trial court omits the mandatory *Ryan-Boppre* instruction, one of the requirements for admissibility of "other acts" evidence. What was admissible on Monday has become inadmissible on Friday when the case is submitted for a verdict without the mandatory instruction. The preceding situation evolves into something more bizarre in view of the rule that, in a jury trial of a criminal case, admission of inadmissible evidence results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt. See *State v. Cox*, 231 Neb. 495, 437 N.W.2d 134 (1989). Which is it: requirements for admissibility, or safeguards against unfair prejudice? Consequent courtroom chaos defies description. What may be viewed as "today's achievement is only tomorrow's confusion."

The point in Yager's case is not pedophilia as criminal sexual contact, despicable and predatory sexual conduct toward children. Rather, the points are propensity as proof against an accused and a leapfrog approach to Rule 404(2) when admissibility of "other crimes, wrongs, or acts" is determined by reference to the exceptions expressed in the rule, an unnecessary exercise under an "inclusionary rule," without a precedent determination that the "other acts" evidence is relevant to an issue other than a defendant's propensity to act in

a particular manner. Indiscriminate use of evidence of "other crimes, wrongs, or acts" will take us down the path to an eventual confrontation with two basic constituents in a fair trial for one accused of a crime—the presumption of innocence and the State's burden of proof beyond a reasonable doubt. "The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." *Estelle v. Williams*, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976). "The presumption of innocence in favor of the accused is a fundamental component of the due process right to a fair and impartial trial." *U.S. v. Apodaca*, 843 F.2d 421, 430 (10th Cir. 1988). As expressed in *United States v. Daniels*, 770 F.2d 1111, 1118 (D.C. Cir. 1985): "The exclusion of other crimes evidence is not simply a 'technicality' designed to prevent law enforcement personnel from doing their job; it reflects and gives meaning to the central precept of our system of criminal justice, the presumption of innocence." See, also, *United States v. Foskey*, 636 F.2d 517 (D.C. Cir. 1980). Further, "[l]est there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). "There is no presumption that such other-crimes evidence is relevant. . . . Otherwise, of course, the accused might be convicted because of his participation in the other crimes rather than because he is guilty beyond a reasonable doubt of the crime alleged." *United States v. Manafzadeh*, 592 F.2d 81, 86 (2d Cir. 1979). See, also, *United States v. Hodges*, 770 F.2d 1475, 1479 (9th Cir. 1985):

> [T]he defendant must be tried for what he did, not for who he is. Under our system, an individual may be convicted only for the offense of which he is charged and not for other unrelated criminal acts which he may have committed. Therefore, the guilt or innocence of the accused must be established by evidence relevant to the particular offense being tried, not by showing that the defendant has engaged in other acts of wrongdoing.

The "other acts" evidence was inadmissible in Yager's case. Today's decision has done nothing to rein a runaway rule which threatens to trample on a defendant's right to a fair trial.

STATE OF NEBRASKA, APPELLEE, V. GLENN B. HARRINGTON, APPELLANT.

461 N.W.2d 752

Filed November 2, 1990. No. 89-1147.

1. **Constitutional Law: Weapons.** Neb. Rev. Stat. § 28-1206 (Reissue 1989) is not invalid or in conflict with article I, § 1, of the Nebraska Constitution.
2. **Criminal Law: Weapons: Self-Defense.** Under Neb. Rev. Stat. § 28-1206(1) (Reissue 1989), it is a crime for a convicted felon to possess any firearm with a barrel less than 18 inches in length, and such a person has no right to possess such a firearm for defense of self or other purposes.
3. **Double Jeopardy: Proof.** The double jeopardy clause of the fifth amendment to the U.S. Constitution prohibits a subsequent prosecution where the State relies upon proof of conduct which constitutes an offense for which the defendant has already been prosecuted.

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

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

Robert M. Spire, Attorney General, and Donald A. Kohtz for appellee.

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

PER CURIAM.

The defendant, Glenn B. Harrington, was charged with being a felon in possession of a firearm with a barrel less than 18 inches in length, in violation of Neb. Rev. Stat. § 28-1206(1) (Reissue 1989), and with being a habitual criminal. After trial to a jury, he was found guilty and was sentenced as a habitual

criminal to imprisonment for 12 to 20 years, with credit for 41 days served.

The defendant has appealed and has assigned as error that (1) § 28-1206(1) is unconstitutional, (2) the trial court erred in failing to instruct the jury as requested that the State must prove the defendant's possession of the firearm was not for the purpose of security or defense, and (3) the prosecution of the defendant was barred by the double jeopardy clause.

The record shows that at about 1:45 a.m. on September 26, 1988, the defendant knocked on the door of Inez Rhone, the mother of the defendant's girl friend, Michelle. The defendant asked to speak with Michelle. Rhone told the defendant that it was too late to be out and that he should leave.

Some 10 minutes later, after she had returned to bed, Rhone heard another knock at her door. This time Charles Hudson, a friend of Rhone's, answered the door and found the defendant outside the door. Rhone testified that while Hudson was exchanging statements with the defendant, Hudson suddenly slammed the door shut and exclaimed, "Move out of the way, he's got a gun."

After the door was slammed in his face, defendant put his fist through several windows of Rhone's house. She testified that after breaking out the windows, defendant fired two gunshots into the air and threatened to kill her, Hudson, and Michelle before the night was over.

Rhone then phoned the police, who arrested the defendant some 15 minutes later and found a pistol in his possession.

The defendant testified that on the night in question, he was in fear of his life because of threats made by members of the "Crips" gang and that he fled to Rhone's house because he was being pursued by Crips gang members. He became upset when Rhone refused to offer him safety in her house. The defendant argued that his possession of the pistol was justified as an incident to his constitutional right to bear arms for self-defense.

The record further shows that as a result of this incident, the defendant had been charged with a number of misdemeanor offenses in the county court, one of which was for discharging a projectile, in violation of Omaha Mun. Code, ch. 20, art. VII, § 20-196 (1980). On October 18, 1988, the defendant pled no

contest to that offense and was sentenced to 6 months in the county jail, with credit for 22 days served.

The defendant's first assignment of error is controlled by our decision in *State v. Comeau*, 233 Neb. 907, 448 N.W.2d 595 (1989). In the *Comeau* case, we held that § 28-1206, the felon in possession of firearms statute, did not violate article I, § 1, of the Nebraska Constitution.

With regard to the second assignment of error, § 28-1206(1) makes it a crime for a convicted felon to possess a firearm. There is no exception for a convicted felon who believes he may need a firearm for self-defense, and the defendant violated that statute by being in possession of a firearm. His possession of the firearm for allegedly self-defense purposes did not excuse or justify his violation of the statute. Since the statute creates no right for a felon to possess a firearm for self-defense, it was unnecessary to instruct the jury as requested by the defendant.

In his third assignment of error, the defendant argues that his conviction in this case violated the double jeopardy provision of the 5th amendment to the U.S. Constitution, which amendment is made applicable to the states through the 14th amendment and which provides: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V.

As a result of the incident that occurred on September 26, 1988, the defendant had been charged in the county court and sentenced on October 18, 1988, for discharging a projectile.

The defendant claims that in order to prove the element of possession necessary to convict him for felon in possession of a firearm, the State relied upon conduct surrounding his conviction for the offense of discharging a projectile. The defendant argues that the State's reliance upon the same conduct violated the constitutional prohibition against being twice placed in jeopardy for the same offense. The defendant relies upon *Grady v. Corbin*, ____ U.S. ____, 110 S. Ct. 2084, 109 L. Ed. 2d 548 (1990).

In *Grady*, the U.S. Supreme Court held that "the Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that [subsequent] prosecution, will prove conduct

that constitutes an offense for which the defendant has already been prosecuted." 110 S. Ct. at 2093.

The issue is whether the State relied upon "conduct" that constituted an offense for which the defendant had already been prosecuted to establish an essential element of the offense charged in this case.

In the *Grady* case, the court noted that prosecution for minor offenses and major offenses involving the same conduct may be permissible if all offenses are joined in one case. It is the proof of *conduct* for which the defendant has already been prosecuted that bars the subsequent prosecution.

The prosecution in this case was barred by the rule announced by the U.S. Supreme Court in the *Grady* case. For that reason, the judgment is reversed and the cause remanded with directions to dismiss the information.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

STATE OF NEBRASKA, APPELLEE, V. JOSEPH J. WALKER, APPELLANT.
461 N.W.2d 755

Filed November 2, 1990. No. 89-1296.

1. **Trial: Motions to Suppress: Pretrial Procedure: Appeal and Error.** To preserve a question concerning the admissibility of evidence for review on appeal, it is necessary to object at trial to the admission of that evidence even though it was considered in a pretrial motion to suppress.
2. **Motions to Suppress: Appeal and Error.** The Supreme Court will uphold the findings of fact made by the trial court on a motion to suppress unless those findings are clearly erroneous.
3. **Confessions: Evidence: Proof.** Before a defendant's statements or confessions are admissible in evidence, the State must show that the accused's statements were made freely and voluntarily and were not the product of any direct or implied promise or an inducement, no matter how slight.
4. **Confessions: Appeal and Error.** To determine voluntariness, the trial court looks to the totality of the circumstances, and, absent an abuse of discretion, a determination by the trial judge that a confession was made voluntarily will not be overturned on appeal.

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

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

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

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

GRANT, J.

Defendant, Joseph J. Walker, appeals from his conviction in the Douglas County District Court of unlawful possession of a controlled substance, cocaine, with intent to deliver, in violation of Neb. Rev. Stat. § 28-416(1)(a) (Cum. Supp. 1988). After a jury trial, defendant was found guilty and was later sentenced to a term of imprisonment of not less than 5 nor more than 10 years, with credit given for 162 days previously served. We affirm.

On this appeal, defendant assigns the following errors: (1) The district court erred in overruling defendant's motion to suppress physical evidence, and (2) the district court erred in overruling defendant's motion to suppress statements made to Omaha police officers during defendant's interrogation.

On April 11, 1989, at 4 p.m., Officer Kevan Barbour of the Omaha Police Division received a telephone call from an unknown private security officer, who told Barbour about narcotics activity taking place at 16th and Lothrop Streets in Omaha. In an attempt to verify the validity of the call, Officer Barbour asked the caller a series of questions regarding the alleged narcotics activity. The questions concerned the location of the activity, the type of activity occurring, and what led the caller to believe it was drug-related activity. Once he was satisfied that it was not a prank phone call, Officer Barbour had a cruiser dispatched to the area to investigate drug activity, specifically the sale of narcotics taking place out of a cream-colored vehicle containing four black males in the 16th and Lothrop Streets vicinity.

At approximately 4:15 p.m., Omaha Police Officer John

Swanson and his partner, Officer Kurt Sorys, received the dispatch and proceeded to investigate the tip. Upon their arrival in the area, the officers saw several cars parked along the street, including a 1972 mustard-colored car with three black male occupants which "stood out" among the other vehicles. As the officers approached the car, they saw the front seat passenger make a "startled look" and quickly remove something from his pocket. Officer Swanson asked this passenger to step out of the car and then proceeded to do a pat-down search of the passenger. Officer Swanson found nothing remarkable on this man's person, but saw an empty .38-caliber shell in the spot where the man had been seated. Officer Sorys then searched the driver and found four live shells and a pocketknife. Finally, the officers had defendant, who was the back seat passenger, leave the car for a pat-down search. Officer Swanson found "a plastic Baggie containing eight snow seals containing cocaine" on the floor in the area where defendant had been seated. All three people were arrested and taken to the Omaha police station for questioning.

At approximately 5:10 p.m. on April 11, 1989, Omaha Police Officer Donald Truckenbrod advised defendant of his constitutional *Miranda* rights, using the standard rights advisory form, which requires yes or no answers to a series of questions, including questions concerning his rights to remain silent and to have his attorney present during questioning. Defendant answered each question affirmatively and coherently, indicating he knew his rights and was willing to talk to Officer Truckenbrod at that time. The interview proceeded, and defendant admitted that the drugs were his.

Defendant's first assignment of error is that the district court "erred in overruling Defendant's [pretrial] motion to suppress physical evidence" seized during the investigation. The evidence seized was a plastic bag containing eight individually wrapped packets of cocaine. The individual packets are commonly called "snow seals." Before the trial, a hearing was held on defendant's motion to suppress, and the court denied the motion. The record shows that this evidence was offered and received at trial with no objection from defendant. We have held that "to preserve a question concerning the admissibility of

evidence for review on appeal, it is necessary to object at trial to the admission of that evidence even though it was considered in a pretrial motion to suppress . . . ." *State v. DiBaise*, 232 Neb. 217, 218, 440 N.W.2d 223, 224-25 (1989); *State v. Boppre*, 234 Neb. 922, 453 N.W.2d 406 (1990). Defendant did not object to the admission of the evidence at trial. His first assignment of error is without merit.

Defendant's second assignment of error is that the district court erred in overruling his motion to suppress the statements that he made to Officer Truckenbrod during his initial interview. This court ruling was made after a pretrial hearing on defendant's motion to suppress his statements. Timely objections were made to the introduction of the statements at trial and were overruled. By his assignment of error in this regard, defendant presents only the question of the trial court's ruling at the hearing on defendant's motion to suppress his statements. Since defendant did object at trial to the introduction of his statements, contrary to the situation presented in *State v. Pointer*, 224 Neb. 892, 402 N.W.2d 268 (1987), his contention will be considered and the sufficiency of the evidence in connection with the trial court's order at the suppression hearing will be reviewed.

Defendant does not contend that his *Miranda* rights were violated, but that his statements were not freely and voluntarily given, and, thus, his constitutional rights under the 5th and 14th amendments were violated. He contends that his statements were not freely and voluntarily given because he had been drinking alcoholic beverages throughout the day and had injected himself with heroin shortly before the arrest. Defendant attempts to bring himself within the statement in *State v. Bodtke*, 219 Neb. 504, 510, 363 N.W.2d 917, 922 (1985): "If an accused lacks sufficient powers of reason and volition, the most meticulous explanation of constitutional rights will not make a statement voluntary."

The Supreme Court will uphold the findings of fact made by the trial court on a motion to suppress unless those findings are clearly erroneous. *State v. Hayes*, 229 Neb. 53, 424 N.W.2d 624 (1988). In considering whether the trial court's findings were clearly erroneous, this court is mindful that the trial court

observed the witnesses who testified regarding the motion to suppress. *Id.*

We have held that before a defendant's statements or confessions are admissible in evidence, the State must show that the accused's statements were made freely and voluntarily and were not the product of any direct or implied promise or any inducement, no matter how slight. See, *State v. Hayes, supra*; *State v. Hankins*, 232 Neb. 608, 441 N.W.2d 854 (1989).

To determine voluntariness, the trial court looks to the totality of the circumstances, and, absent an abuse of discretion, a determination by the trial judge that a confession was made voluntarily will not be overturned on appeal. *State v. Clark*, 228 Neb. 599, 423 N.W.2d 471 (1988); *State v. Hankins, supra.*

In this case, defendant testified at the suppression hearing that he had been drinking gin and beer throughout the day of his arrest and that he had injected heroin that afternoon as well. Defendant also testified that as a result of his drinking and ingesting drugs, "I know that I couldn't have gave, you know, coherent answers to whatever he [the police officer] was saying."

The record also reflects that the interrogating officer, Truckenbrod, had much experience with suspects under the influence of drugs, alcohol, or both and in determining whether such suspects exhibited any signs of inability to answer questions voluntarily. The officer testified that defendant indicated that he understood the questions being asked; that he did not complain of being tired, hungry, thirsty, or sick during the interview; and that he answered questions in a coherent manner. The officer testified that defendant's faculties were not impaired at the time of defendant's statements.

There is the initial factual question as to whether defendant had actually ingested alcohol and drugs in the amounts defendant described. There is then the factual question as to what effect those substances, if ingested, had on defendant. There was sufficient evidence under the totality of the circumstances for the trial judge to find that defendant's statements were made voluntarily. At the suppression hearing, the trial court specifically found by virtue of defendant's

testimony regarding specific occurrences during the questioning that he "had his faculties with him at the time he was being interviewed. If he can remember those things, he's remembering what he wants to remember." The factual findings by the trial court were not clearly wrong, and the trial court did not abuse its discretion in denying defendant's motion to suppress his statements.

The judgment and sentence are affirmed.

AFFIRMED.

JOHN REYNOLDS, GUARDIAN AND CONSERVATOR OF KAREN L. REYNOLDS, A PROTECTED PERSON, APPELLANT, V. SCHOOL DISTRICT OF OMAHA, APPELLEE.

461 N.W.2d 758

Filed November 2, 1990. No. 90-054.

1. **Workers' Compensation: Evidence: Appeal and Error.** In determining whether the evidence is sufficient to support an award by the Workers' Compensation Court, the evidence must be considered in the light most favorable to the successful party.
2. **Workers' Compensation.** As the trier of fact, the Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given their testimony.
3. _____. When personal injury is caused to an employee by accident or occupational disease, arising out of and in the course of his or her employment, such employee shall receive compensation therefor from his or her employer.
4. **Workers' Compensation: Appeal and Error.** Whether travel falls within the scope and course of employment under the Workers' Compensation Act in a particular case must be determined by the facts in that case. The determination of whether a particular activity arises out of and in the course of employment is a factual determination and may not be reversed unless clearly wrong.
5. **Workers' Compensation: Words and Phrases.** Generally, under what is known as the "going and coming rule," if an employee is injured while going to or from the employee's workplace, the injury does not arise out of or in the course of the employment.
6. _____. Under the commercial traveler exception to the going and coming rule, where an employee is required to travel in the performance of the employee's duties and an accident occurs while the employee is so engaged, it arises out of and in the course of the worker's employment and is compensable.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Thomas Blount, of Bertolini, Schroeder & Blount, for appellant.

Patrick B. Donahue, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee.

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

FAHRNBRUCH, J.

Karen L. Reynolds, through her guardian and conservator, appeals the denial of workers' compensation benefits for permanently disabling injuries she received in an automobile accident which occurred while she was driving home from Monroe Junior High School (Monroe) in Omaha, where she was employed as a teacher. We affirm.

Reynolds, who suffered a severe head injury, in this appeal lists two assignments of error, which may be consolidated to claim that the Workers' Compensation Court on rehearing erred in its determination that the accident and Reynolds' injuries did not arise out of or in the course of her employment.

In determining whether the evidence is sufficient to support an award by the Workers' Compensation Court, the evidence must be considered in the light most favorable to the successful party. *Snyder v. IBP, inc.*, 235 Neb. 319, 455 N.W.2d 157 (1990). As the trier of fact, the Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given their testimony. *Brazee v. City of Lincoln*, 234 Neb. 680, 452 N.W.2d 529 (1990).

The record, considered in the light most favorable to the defendant, School District of Omaha, reflects the following: As of March 5, 1987, Reynolds was employed as a life science teacher at Monroe. She was selected as a facilitator for the gifted student program at the school. At that time, a person selected as a facilitator taught for a half day and used the remainder of his or her working hours to coordinate gifted and talented students' activities within the school. School facilitators, at the time, were trained by the central office

facilitators, and seminars for the teachers were offered nationally and locally.

As part of her duties as a facilitator, Reynolds attended a gifted program conference in Lincoln on Thursday, March 5, and Friday, March 6, 1987. The Omaha school district paid Reynolds' fee for the conference and granted Reynolds professional leave for her absence from Monroe. She was paid her regular wages during the time she attended the conference. Substitute teachers for Reynolds were provided for both March 5 and 6. Reynolds was not required to report to Monroe on either day of the conference, nor was she required to return to school at the conclusion of the conference on Friday, March 6.

Reynolds provided her own transportation to the conference on March 5 and returned to her home that evening without incident. On March 6, she left her Omaha home near 92d and Pacific Streets and drove to Lincoln in her own automobile to attend the conference. Reynolds telephoned her younger sister on the afternoon of March 6 and informed her that she would pick her up after work in Omaha that evening and that they would then continue on to Monroe.

Shortly after 5 p.m., Reynolds arrived at her sister's place of employment, located just north of 69th and Dodge Streets in Omaha. Reynolds intended to give her sister some flowers as a belated birthday gift.

After leaving her sister's workplace, Reynolds, accompanied by her sister, drove to Monroe at 52d and Bedford Streets. While at Monroe, Reynolds read her messages, checked on some gerbils she kept in her classroom, watered plants, and mimeographed materials from the conference. Reynolds then drove back to her sister's place of employment and dropped off the sister. At 6:43 p.m., Reynolds, without ever having returned to the direct route from the conference in Lincoln to her home, was involved in a two-car collision at 72d and Dodge Streets in Omaha. As a result of the accident, Reynolds suffered a left frontal open depressed skull fracture and an intracerebral hematoma. As shown by the evidence, Reynolds will have a protracted course of neurological impairment, and she will remain permanently disabled as a result of the injuries she sustained. At the initial one-judge hearing and on rehearing

before a three-judge panel, the Workers' Compensation Court found that Reynolds had been totally disabled since the accident, a finding that has not been challenged.

A majority of the three-judge panel of the compensation court dismissed the petition, concluding that Reynolds' injuries did not arise out of or in the course of her employment. The majority incorporated the findings from the one-judge hearing, wherein it was found that Reynolds' travel from Lincoln to Omaha in the course of her employment terminated on March 6, 1987, when she arrived at a point on the direct route nearest to her home. The compensation court found that at that point, Reynolds bypassed the direct route to her home and ultimately proceeded to Monroe.

"When personal injury is caused to an employee by accident or occupational disease, arising out of and in the course of his or her employment, such employee shall receive compensation therefor from his or her employer . . . ." Neb. Rev. Stat. § 48-101 (Reissue 1988). See, also, *Badgett v. St. Joseph Hosp.*, 222 Neb. 467, 384 N.W.2d 302 (1986) (claimant must establish that injury for which compensation is sought arose out of and in course of employment).

Whether travel falls within the scope and course of employment under the Workers' Compensation Act in a particular case must be determined by the facts in that case. *Stoll v. School Dist. (No. 1) of Lincoln*, 207 Neb. 670, 301 N.W.2d 68 (1981). The determination of whether a particular activity arises out of and in the course of employment is a factual determination and may not be reversed unless clearly wrong. *McGee v. Panhandle Technical Sys.*, 223 Neb. 56, 387 N.W.2d 709 (1986); *Gray v. State*, 205 Neb. 853, 290 N.W.2d 651 (1980).

Generally, under what is known as the "going and coming rule," if an employee is injured while going to or from the employee's workplace, the injury does not arise out of or in the course of the employment. See 1 A. Larson, The Law of Workmen's Compensation § 15.11 (1990). For nearly 60 years, Nebraska has adhered to this rule. See, *Siedlik v. Swift & Co.*, 122 Neb. 99, 239 N.W. 466 (1931); *Richtarik v. Bors*, 142 Neb. 226, 5 N.W.2d 199 (1942); *Monroe v. St. Marks Lutheran*

Church, 184 Neb. 741, 171 N.W.2d 644 (1969); *Butt v. City Wide Rock Exc. Co.*, 204 Neb. 126, 281 N.W.2d 406 (1979).

The plaintiff attempts to bring this case within the commercial traveler exception to the going and coming rule. Under that exception, where an employee is required to travel in the performance of the employee's duties and an accident occurs while the employee is so engaged, it arises out of and in the course of the worker's employment and is compensable. See *McGee, supra*.

The compensation court found that Reynolds was in the course of her employment while attending the conference in Lincoln. This finding has not been contested. Nevertheless, the fact remains that Reynolds' status as a commercial traveler terminated when she extended her trip beyond that which was necessary for her return to her home. As the compensation court stated, "Reynolds' travel in the course of her employment ceased when she arrived at that point in her route that she would have followed home, probably the Pacific Street exit of I-680." Since Lincoln lies southwest of Omaha and Reynolds proceeded several miles northeast of her home to Monroe, the record fully supports this finding. It is uncontroverted that Reynolds was not required to return to school on either March 5 or 6. This case is no different than if Reynolds had gone home that night and had driven to and from work the next day. In that instance, her injury would clearly not be compensated, as she would simply be traveling to and from her workplace. Even if Reynolds was performing overtime work on the night of the accident, the going and coming rule would still be applicable to the facts of this case. See 1 A. Larson, The Law of Workmen's Compensation § 16.14 (1990).

We have further analyzed this case under the special errand exception to the going and coming rule. See, *Johnson v. Fairbanks Clinic*, 647 P.2d 592 (Alaska 1982); *Swanson by Swanson v. Fairway Foods*, 439 N.W.2d 722 (Minn. 1989); 1 A. Larson, *supra*, § 16.11. Significantly, there was no instruction, direction, requirement, or suggestion that Reynolds return to Monroe on March 6 on a special errand. That being the case, the special errand rule is inapplicable. See *Stephens by Stephens v. Maxima Corp.*, 774 S.W.2d 931 (Tenn. 1989) (holding that an

employee's conduct did not fall within the purview of the special errand rule because her employer had not instructed, directed, required, or even suggested that she return home to retrieve an employment form and that such action had been the employee's decision).

The compensation court's finding that Reynolds' injuries did not arise out of or in the course of her employment is not clearly wrong. The dismissal of the plaintiff's petition is affirmed.

AFFIRMED.

WHITE, J., dissenting.

The majority here approves a most peculiar decision of the Workers' Compensation Court. All agree that the trip to Lincoln was in the scope of employment and that the trip to Omaha was covered until a point at Interstate 680 and Pacific Street, where, instead of proceeding east on Pacific Street to her home, the employee continued on I-680 to Dodge Street in a direct route to her place of employment, Monroe Junior High School. The journey into and out of a parking lot adjacent to Dodge Street should be disregarded as a minor deviation not contributing to the accident and injuries.

At the moment the employee passed the eastbound exit on Pacific Street, the fickle arms of the compensation act were withdrawn, to embrace again the employee the moment she entered Monroe Junior High. Although the employer argues in its brief that the employee's duties did not require her to return to Monroe, it conceded in oral argument that her presence was within the scope of employment and any injuries occurring at the school would have been compensable. No similar factual situation has been presented to us for determination.

It seems to me that the compensation court could have chosen three separate dispositions and, with those options, chose the least defensible, fair, and beneficent. The compensation court could have determined: (1) A trip by an employee for business of an employer, begun at the employee's home, loses its business purpose when the employee returns to her principal place of employment; (2) a trip begun at the employee's home continues its business purpose until the employee returns to her home, excluding any deviations for nonemployment purposes; or (3) a trip begun at the employee's

home loses its business purpose at any time when the return trip deviates from the "direct route" to the home, regardless of the business purpose of the continuation of the trip beyond the compensation court's point of no financial return.

Obviously, I believe the second alternative is the most logical and more attuned to the beneficent intentions of the Legislature in the passage of the compensation act.

MELVIN LEE MINER, APPELLANT, V. ROBERTSON HOME FURNISHING AND CORNHUSKER CASUALTY, APPELLEES, STATE OF NEBRASKA, VOCATIONAL REHABILITATION FUND, INTERVENOR-APPELLEE.

462 N.W.2d 96

Filed November 2, 1990. No. 90-094.

1. **Workers' Compensation: Evidence: Appeal and Error.** In determining whether the evidence is sufficient to support an award by the Workers' Compensation Court, the evidence must be considered in the light most favorable to the successful party.
2. **Workers' Compensation: Appeal and Error.** Findings of fact made by the Workers' Compensation Court after rehearing will not be set aside unless clearly wrong.

Appeal from the Nebraska Workers' Compensation Court. Remanded with directions.

O. William VonSeggern for appellant.

Scott A. Burcham, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellees.

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

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

WHITE, J.

Melvin Lee Miner appeals the dismissal on rehearing of his claim before the Workers' Compensation Court, in which the three-judge panel reversed and set aside an award of disability benefits.

Miner's assignments of error assert that there was insufficient evidence in the record to warrant the compensation court's decision and that the court's findings of fact do not support the dismissal. We remand to the compensation court with directions to make further evidentiary findings.

We have held that in determining whether the evidence is sufficient to support an award by the compensation court, the evidence must be considered in the light most favorable to the successful party. The findings of fact made by the compensation court after rehearing will not be set aside unless clearly wrong. *Canas v. Maryland Cas. Co., ante* p. 164, 459 N.W.2d 533 (1990); *Snyder v. IBP, inc.*, 235 Neb. 319, 455 N.W.2d 157 (1990). However, in this case the record is not clear as to whether certain evidence was considered by the court in making its determination.

Miner, who at the time of the initial hearing was 32 years old and the father of a 3-year-old, has a history of back problems. He first injured his back in 1976 when lifting slabs at work at TRW Capacitators. While helping a friend move a television in 1985, he reinjured his back. In April 1986, he told his physician, Dr. Gordon Bainbridge, that he had recurring episodes of back pain, but the symptoms usually improved with a few days' rest. At that time he had surgery for a herniated disk. His pain increased in July 1986 after helping his father-in-law move irrigation pipe. In August 1986, Dr. Bainbridge recommended that Miner wear a lumbosacral corset.

About 1 month after beginning work as an appliance repairman for the defendant Robertson Home Furnishing, Miner suffered additional pain while loading a refrigerator. Miner did not report the October 10, 1986, incident to his employer, nor did he seek medical attention immediately. Miner testified that he continued working for Robertson until February or March 1987, when he had a lumbar laminectomy on his back.

Robertson and its insurer, defendant Cornhusker Casualty, paid Miner's medical bills and disability of $133.33 per week from the date of the injury until the initial hearing in November 1988. Miner had additional back surgery in 1988.

After the employer and its insurance company requested that Miner consult with Quality Rehabilitation Services, Miner offered a vocational rehabilitation plan which called for him to be trained as a pilot so that he could become a crop duster. The plan was denied by Larry Lorenzen, the vocational rehabilitation specialist of the compensation court, because (1) the new occupation would increase Miner's earning capacity, (2) the specialist did not believe that Miner could physically handle the job, and (3) the work was of a seasonal nature. Miner submitted a second plan, dated February 10, 1989.

Miner's petition was dismissed on rehearing on December 19, 1989. The three-judge panel held that Miner's injury, if proven, would be subjective, in which case Miner would be required to show with reasonable medical certainty or probability a causal connection between the disability and his employment. The court found that he could not meet that burden without an expert opinion supporting the claimed causal connection. Finding that the record lacked a statement of opinion by a medical expert supporting Miner's contention, the court reversed Miner's disability award and set it aside. The court noted that exhibits 26 and 27, depositions which were taken following the initial hearing, were "submitted and received in evidence post hearing."

At issue here are two pieces of evidence: an entry in Dr. Bainbridge's notes and the revised rehabilitation plan. Miner argues that an entry by Dr. Bainbridge of May 23, 1989, supports his claim and meets the requirements for an expert medical opinion, while the defendants suggest that the compensation court dismissed the appeal after taking the note into consideration.

The note in question was offered as a part of exhibit 1 at Miner's deposition taken on October 30, 1989, after the rehearing. The exhibit consists of Dr. Bainbridge's office notes on Miner, beginning with July 15, 1986, and continuing to October 12, 1989. Earlier entries in Dr. Bainbridge's notes,

from April 9, 1986, to June 2, 1988, had been offered and received as exhibit 2 at the initial hearing. The entry at issue reads:

> At this time, we are going to continue a good aggressive exercise program and he is waiting to undergo vocational rehabilitation and incidentally, he tells me that the insurance company told him that the second accident when he was lifting a refrigerator was not the cause, but was related to the first accident and as I have told Melvin there is a 10% recurrence after you have had a previous disc problem and certainly the timing of the lifting of the refrigerator and the pain that he developed afterwards, suggests that indeed the injury that he had when he lifted the refrigerator is what caused his recurrent disc problem.

The defendants objected to the offer of exhibit 1 at the deposition. In the three-judge panel's dismissal, it noted that exhibit 27, Miner's deposition, had been "received in evidence post hearing." However, this does not tell us whether the court considered the May 23, 1989, entry or whether it considered the objection to its receipt. We are not faced with a question of accepting the factual findings of the Workers' Compensation Court, but with insufficient information to determine whether the court adequately made factual findings on this issue. We must remand with directions to the court to rule on the receipt of this evidence.

The record also is unclear as to whether the court received the second rehabilitation plan, which was offered as exhibit 12. Miner argues that the plan, which called for him to be retrained in the field of biomedical technology, had been agreed to by all parties and therefore acts as a binding settlement. The record shows that the plan, dated February 10, 1989, was listed as an exhibit in the pretrial order, but that the defendants objected to the offer of exhibit 12 at the rehearing. Initially, the court reserved ruling on the objection. The record does not show that any later ruling was made.

When testimony was received from Lorenzen concerning the second plan, the defense again objected, noting that the witness was being asked "to comment on an exhibit that is not before the Court." Lorenzen testified as to the costs associated with the

second plan and stated that he believed that Miner would be able to find suitable employment as a biomedical technician after his training. The record does not indicate, however, that any ruling on the objection was made by the court. Again, we cannot accept the compensation court's findings as findings of fact when we cannot determine whether it considered the evidence. We remand with directions to the court to rule on the receipt into evidence of the second rehabilitation plan, dated February 10, 1989.

We remand to the Workers' Compensation Court with directions to make findings on the evidentiary issues and to address the question of whether a settlement agreement is binding on all parties.

REMANDED WITH DIRECTIONS.

CAPORALE, J., dissenting.

It seems to me the majority overlooks the fundamental principle that a workers' compensation claimant must in all instances prove by a preponderance of the evidence that the accident arising out of and in the course of employment proximately caused the claimed injury and resultant disability. *Heiliger v. Walters & Heiliger Electric, Inc., ante* p. 459, 461 N.W.2d 565 (1990). Unless the character of the injury is objective, that is, its nature and effect are plainly apparent, the injury is subjective and the causal relationship between it, the accident, and any resultant injury and disability must be proved by expert opinion. *Fees v. Rivett Lumber Co.*, 228 Neb. 617, 423 N.W.2d 483 (1988). But see *Luehring v. Tibbs Constr. Co.*, 235 Neb. 883, 457 N.W.2d 815 (1990). In order to support an award, medical evidence must be sufficiently definite and certain as to support a conclusion that there was a causal connection between the accident and the disability. *Gilbert v. Sioux City Foundry*, 228 Neb. 379, 422 N.W.2d 367 (1988). That rule led us to hold that a medical opinion based on reasonable medical certainty that the disability "could" have been caused by the injuries in question lacked the degree of definiteness and certainty required. *Caradori v. Frontier Airlines*, 213 Neb. 513, 329 N.W.2d 865 (1983).

Thus, even if we assume that Dr. Bainbridge's questioned note should have been received in evidence and was not, the

error would be harmless, for I submit saying that "A suggests B" is no more definite and certain than saying that "A could have caused B."

Accordingly, I would affirm.

BOSLAUGH, J., joins in this dissent.

CRAIG D. WAY, APPELLANT, V. HENDRICKS SODDING AND LANDSCAPING, INC., ET AL., APPELLEES.

462 N.W.2d 99

Filed November 2, 1990. No. 90-134.

1. **Workers' Compensation: Evidence: Appeal and Error.** In testing the sufficiency of the 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.
2. **Workers' Compensation: Proof.** In a workers' compensation case, the claimant must prove by a preponderance of the evidence that his claimed disability was caused by an accident arising out of and in the course of employment.
3. **Workers' Compensation: Appeal and Error.** The 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 and will not be set aside on appeal unless clearly erroneous.
4. _____: _____. The issue in regard to causation of an injury or disability is one for determination by the fact finder, whose findings will not be set aside unless clearly wrong.
5. **Trial: Expert Witnesses.** The opinion of an expert witness is not binding on the trier of fact.
6. **Workers' Compensation.** As the trier of fact, the compensation court is the sole judge of the credibility of witnesses and the weight to be given their testimony.
7. **Workers' Compensation: Appeal and Error.** Regarding facts determined and findings made after rehearing in the Workers' Compensation Court, Neb. Rev. Stat. § 48-185 (Reissue 1988) precludes the Supreme Court from substituting its view of facts for that of the Workers' Compensation Court if the record contains evidence to substantiate the findings made by the Workers' Compensation Court.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Douglas McArthur for appellant.

Dallas D. Jones and Jill Gradwohl Schroeder, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellees.

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

BOSLAUGH, J.

This is an appeal in a proceeding under the Workers' Compensation Act.

The plaintiff, Craig D. Way, was injured in an accident on October 18, 1986, which arose out of and in the course of his employment as a laborer by the defendant Hendricks Sodding and Landscaping, Inc. The accident occurred when the plaintiff cut his right leg above the knee while using a powersaw to cut a railroad tie. As a result of this injury, the plaintiff was temporarily totally disabled, incurred medical and hospital expenses, and sustained a 20-percent permanent disability to his right leg. The plaintiff has been paid compensation for the October 18, 1986, injury to his right leg, and there is no issue at this time as to the compensation due the plaintiff for that injury.

In his petition, filed on December 21, 1988, the plaintiff alleged that the weakened condition of his right leg resulted in chronic lumbar strain due to the additional stress exerted on his lower back, which resulted in temporary total disability and permanent partial disability to the body as a whole.

After the hearing before a single judge of the compensation court, the plaintiff recovered an award in which the court found that the plaintiff was still temporarily totally disabled from the accident of October 18, 1986. The court further found that the plaintiff had suffered a further back injury as a result of an accident arising out of and in the course of his employment by the defendant Hendricks, which entitled the plaintiff to compensation for permanent partial disability to the body as a whole when he reached maximum medical improvement.

On rehearing, the three-judge panel found that the plaintiff was entitled to temporary total disability payments for his leg injury in the amount of $181.56 per week from October 19, 1986, to April 19, 1987, from May 18, 1987, to July 15, 1987, and from December 8, 1987, to April 19, 1988 (a total of 53 5/7

weeks); that the defendants should pay the plaintiff's medical expenses and continue to provide future medical and hospital care for plaintiff's leg injury; that plaintiff's evidence failed to establish that he had suffered a back injury as a result of an accident arising out of and in the course of his employment by the defendants, but that instead, the plaintiff's back injury resulted from a degenerative preexisting back condition; and that no attorney fees or costs should be assessed against the defendants. From that award, the plaintiff has appealed.

The plaintiff contends that the compensation court erred in modifying the original award and by failing to find that his current back condition was causally related to his employment. The principal issue in this appeal is whether the plaintiff's back condition arose out of and in the course of his employment.

In testing the sufficiency of the 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. *Canas v. Maryland Cas. Co., ante* p. 164, 459 N.W.2d 533 (1990); *Snyder v. IBP, inc.*, 235 Neb. 319, 455 N.W.2d 157 (1990).

In a workers' compensation case, the claimant must prove by a preponderance of the evidence that his claimed disability was caused by an accident arising out of and in the course of employment. *Mutual of Omaha v. Broussard*, 233 Neb. 916, 448 N.W.2d 600 (1989); *Spangler v. State*, 233 Neb. 790, 448 N.W.2d 145 (1989); *Fees v. Rivett Lumber Co.*, 228 Neb. 617, 423 N.W.2d 483 (1988).

The 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 and will not be set aside on appeal unless clearly erroneous. Neb. Rev. Stat. § 48-185 (Reissue 1988); *Fenster v. Clark Bros. Sanitation*, 235 Neb. 336, 455 N.W.2d 169 (1990); *Knowlton v. Airport Transportation Co.*, 235 Neb. 96, 454 N.W.2d 278 (1990); *Brazee v. City of Lincoln*, 234 Neb. 680, 452 N.W.2d 529 (1990). The issue in regard to causation of an injury or disability is one for determination by the fact finder, whose findings will not be set aside unless clearly wrong. *Canas v. Maryland Cas. Co., supra*; *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 408

N.W.2d 280 (1987); *Masters v. Iowa Beef Processors*, 220 Neb. 835, 374 N.W.2d 21 (1985).

Since the compensation court on rehearing found that the plaintiff had failed to establish by a preponderance of the evidence that his back condition was the result of an injury caused by an accident which arose out of and in the course of his employment by the defendant Hendricks, the issues are whether the evidence establishes that the finding of the compensation court was clearly wrong, whether the evidence compels a finding that the plaintiff's back was injured as the result of an accident arising out of and in the course of his employment by Hendricks, and whether the plaintiff is entitled to compensation for his alleged back injury as a matter of law.

The record in this case shows that on October 18, 1986, while in the employment of the defendant Hendricks, the plaintiff sustained a laceration across his right thigh while he was cutting railroad ties with a powersaw. As a result, the plaintiff underwent surgery, and thereafter rehabilitation, to repair the laceration to the quadriceps muscle of his right leg.

The plaintiff claims that the injury to his right leg caused him to alter his normal walking gait, which in turn put stress on his lower back and consequently aggravated a lower back injury which he suffered prior to the leg injury of October 18, 1986. Further, the plaintiff claims that his back condition was aggravated by work activities he performed in the course of his employment by the defendant Hendricks.

The record discloses that prior to the accident on October 18, 1986, the plaintiff experienced back pain while in the employ of the defendant Hendricks. On September 16, 1984, the plaintiff was fixing a tire at Hendricks when he felt a sharp pain in his lower back. As a result, he consulted Dr. Homer Wall, a chiropractor. Dr. Wall recommended massage, hotpacks, and electrostimulation as treatment. The plaintiff received two treatments and did not again complain of back pain until an incident during physical therapy on the "Cybex machine" in February 1987.

The plaintiff testified that on February 20, 1987, while rehabilitating his right leg, he began to suffer lower back pain. His treating physician, Dr. Donald Walla, an orthopedic

surgeon, attributed the back pain to a lumbar strain. Dr. Walla recommended that plaintiff "back off" on the right leg rehabilitation and instead receive therapy for his back with heat, ultrasound, and massage.

On April 16, 1987, after weeks of therapy, Dr. Walla declared plaintiff's lumbar strain resolved. Dr. Walla also determined that plaintiff had 80 percent strength in his right leg and, as a result, authorized him to resume his job at Hendricks, subject to several restrictions. The restrictions limited the plaintiff's bending, squatting, kneeling, and driving of a "CAT machine."

On May 12, 1987, plaintiff returned to Dr. Walla's office, complaining of leg problems. Dr. Walla found that plaintiff's lumbar strain remained asymptomatic, but discovered evidence of right thigh atrophy. Due to the right thigh atrophy, Dr. Walla recommended that plaintiff stay off work indeterminately and undergo Cybex strengthening and testing weekly.

On June 11, 1987, Dr. Walla again authorized plaintiff to resume his job at Hendricks, subject to restrictions on his bending, lifting, jumping, and carrying. Plaintiff returned to his job on July 16, 1987, and remained there until December 7, 1987, when he again experienced problems with his right leg. Dr. Walla subsequently recommended that the plaintiff stay off work.

On March 28, 1988, Dr. Walla determined that plaintiff had reached maximum medical improvement. Dennis Derr, a rehabilitation consultant with Eischen Rehabilitation Services, made a written request upon Dr. Walla to rate plaintiff's right leg to determine his permanent partial disability. Dr. Walla responded to Derr's request by noting that a permanent partial impairment could be given to plaintiff, since he had completed his healing and rehabilitative period. Thus, Dr. Walla assigned a permanent impairment of 20 percent to plaintiff's right lower extremity.

On April 20, 1988, plaintiff returned to a truck-driving job at Hendricks. The job required no lifting and complied with Dr. Walla's assigned physical activity level. In this position, plaintiff merely had to push a clutch pedal on a tractor or dump truck, which required an estimated 12 to 15 pounds of pushing from the left leg, and had to push the brake and accelerator,

which required minimal pushing from the right leg.

Plaintiff testified that on May 1, 1988, while driving a dump truck for Hendricks, he slammed on the brakes and experienced lower back pain radiating through the buttock into the right thigh area. After this alleged incident, the plaintiff never returned to work at Hendricks. He contends that the alleged May 1, 1988, braking incident (and/or an alleged May 2, 1988, truck-exiting incident) was a work-related activity which aggravated his preexisting back condition and caused his present temporary total disability.

Dr. Walla testified by deposition that on May 2, 1988, the plaintiff visited his office, complaining of right leg and lower back pain. Apparently, plaintiff never described to Dr. Walla the alleged May 1, 1988, braking incident or the alleged May 2, 1988, truck-exiting incident, because Dr. Walla made absolutely no mention of either event in his records. Dr. Walla examined the plaintiff and ordered x rays of his lumbar spine. The x rays showed a narrowed L5 disk space, which Dr. Walla diagnosed as a degenerative fifth lumbar disk with degenerative arthritis of the lumbosacral spine. Although Dr. Walla acknowledged that plaintiff also suffered from chronic back strain, he testified that the plaintiff's problem was "more of a problem with a degenerative disk disease."

In addition to x rays, plaintiff had a CAT scan performed on his lumbar spine on May 9, 1988, a lumbar myelogram on May 26, 1988, and a CT scan on May 29, 1988. The myelogram showed a possibility of disk herniation at the L5-S1 level and a bulge of the annulus posteriorally at the L3-4 level. The CT scan revealed a calcified disk at the L5-S1 level and some bulging calcification at the L4-5 level. When Dr. Walla's treatment proved ineffectual, he referred the plaintiff to Dr. H. Randal Woodward, a specialist in orthopedic surgery in Omaha.

Dr. Woodward testified by deposition that the plaintiff had related a different date to him as to when the plaintiff's back pain arose. According to Dr. Woodward, the plaintiff stated that in March 1988, not May 1988, he began to feel back pain after slamming on the brakes. Dr. Woodward found, after he had examined the plaintiff and reviewed the diagnostic tests performed by Dr. Walla, that the plaintiff's back problems had

probably existed in plaintiff's back for some time and that it was impossible to determine how long they had taken to develop to the extent of the calcification which was evident. Dr. Woodward explained that at least a year before the CT scan was taken, calcium was building up in the plaintiff's lumbar spine.

An MRI scan was performed in January 1989, which identified further problems in plaintiff's lumbar spine. The MRI scan disclosed disk herniations at L1-2, L3-4, and L4-5. Dr. Woodward stated that plaintiff's back problems, as evidenced by the MRI scan, existed at least since March 1988 and probably even predated March 1988. Further, Dr. Leonard Weber, a neurosurgeon who also examined plaintiff and the diagnostic tests conducted by Dr. Walla, testified by deposition that the MRI scan disclosed changes of loss of water in the disks at the L4 and L5 levels and in the first sacral vertebra, which is a very common change occurring in degenerating disks.

The plaintiff relied upon the medical testimony of Dr. Walla to connect his back condition to his employment. Dr. Walla, who was the plaintiff's treating physician until June 30, 1989, testified by deposition that the injury to plaintiff's right leg caused him to alter his normal walking gait, which in turn put stress on his lower back and consequently aggravated a lower back injury which he suffered on September 16, 1984. In addition thereto, Dr. Walla testified that the plaintiff's back condition was further aggravated by work activities he performed in the course of his employment with Hendricks, specifically the alleged May 1, 1988, braking incident and/or the May 2, 1988, truck-exiting incident.

The opinion of an expert witness is not binding on the trier of fact. *Hare v. Watts Trucking Service*, 220 Neb. 403, 370 N.W.2d 143 (1985); *Mulder v. Minnesota Mining & Mfg. Co.*, 219 Neb. 241, 361 N.W.2d 572 (1985); *Hamer v. Henry*, 215 Neb. 805, 341 N.W.2d 322 (1983). As the trier of fact, the compensation court is the sole judge of the credibility of witnesses and the weight to be given their testimony. *Canas v. Maryland Cas. Co.*, *ante* p. 164, 459 N.W.2d 533 (1990); *Brazee v. City of Lincoln*, 234 Neb. 680, 452 N.W.2d 529 (1990). Regarding facts determined and findings made after rehearing in the Workers' Compensation Court, § 48-185 precludes the Supreme Court

from substituting its view of facts for that of the Workers' Compensation Court if the record contains evidence to substantiate the findings made by the Workers' Compensation Court. *Mutual of Omaha v. Broussard*, 233 Neb. 916, 448 N.W.2d 600 (1989); *LaPage v. City of Lincoln*, 233 Neb. 576, 446 N.W.2d 738 (1989); *Fees v. Rivett Lumber Co.*, 228 Neb. 617, 423 N.W.2d 483 (1988).

In regard to the plaintiff's altered gait, neither Drs. Woodward and Weber, who each examined the plaintiff on two occasions, nor Dr. Walla ever recorded any gait problems. In fact, each physician noted that the plaintiff had a normal gait and only a slight weakness in his right thigh. In addition, Norman LeGrande, president of Hendricks, testified that after the plaintiff's accident on October 18, 1986, he did not see the plaintiff limp, nor did he observe any other abnormalities in the plaintiff's gait. Rod Brown, a coworker of the plaintiff's at Hendricks, also testified that he had the opportunity to observe the plaintiff on a daily basis after he returned to work and never saw him limping at any time.

Furthermore, the evidence surrounding the alleged work-related incidents which are claimed to have aggravated the plaintiff's preexisting back injury is at best equivocal and unconvincing. Dr. Walla testified by deposition that on May 2, 1988, when the plaintiff visited his office complaining of lower back pain, he never described to Dr. Walla the alleged May 1, 1988, braking incident or the alleged May 2, 1988, truck-exiting incident. Dr. Walla's records make absolutely no mention of either event.

Dr. Woodward testified by deposition that the plaintiff had related a different date to him as to when the plaintiff's back pain arose. According to Dr. Woodward, the plaintiff stated that in March 1988, not May 1988, he began to feel back pain after slamming on the brakes.

Dr. Michael Morrison, an orthopedic surgeon who examined the plaintiff, testified by deposition that the plaintiff related a different event to him as the source of plaintiff's back pain. According to Dr. Morrison, the plaintiff stated that on May 2, 1988, while plaintiff was getting off a dump truck, he began to feel back pain and that this event caused his present back

condition.

LeGrande testified at the hearing that the plaintiff's last day at work with Hendricks was April 28, 1988, some 2 or 3 days before plaintiff's alleged work-related accidents. Moreover, LeGrande testified that the plaintiff phoned him on May 8, 1988, and stated that he had injured his back and that he had not done it on the job.

Considering the above testimonial ambiguities and being mindful that the credibility of and the weight to be given to the 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, we cannot say that the decision of the compensation court was clearly wrong. The compensation court simply found that the plaintiff had failed to meet his burden of proving that his back condition arose out of and in the course of his employment by the defendant Hendricks. The testimony of the plaintiff's witnesses which was equivocal, when considered together with the plaintiff's inconsistent descriptions of the events which led to his back pain, did not compel the fact finder to determine that the plaintiff had sustained a back injury as the result of an accident arising out of and in the course of his employment by the defendant Hendricks.

The judgment of the compensation court is, therefore, affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. CHERYL NEELY, APPELLEE.
462 N.W.2d 105

Filed November 2, 1990. No. 90-696.

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

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

James H. Truell, York County Public Defender, for appellee.

WHITE, J.

This is an appeal pursuant to Neb. Rev. Stat. § 29-824 (Reissue 1989) to one judge of this court, challenging the district court's order to suppress evidence found in the defendant's automobile.

Defendant, Cheryl Neely, is currently charged with attempted burglary, possession of burglar's tools, theft, and being a felon in possession of a firearm, and as a habitual criminal under Neb. Rev. Stat. § 29-2221 (Reissue 1989). She was arrested on November 2, 1989, as she left the Super 8 Motel in York, Nebraska. Neely was identified by the night clerk as being at the Super 8 Motel at approximately 3:30 a.m. He observed her walk through the lobby and come to a stop in front of room 207. He testified that she stood in front of the door with her hands near the doorknob for a period of time without opening the door or calling out to the occupants of the room. She then turned and looked in the general direction of the clerk and exited the motel. The clerk testified that Neely was not registered at the motel that evening and that two men were registered in room 207.

The clerk testified that he was aware that the Super 8 Motel had been burglarized in April and December 1988. He stated that in December 1988 he saw a black female enter the motel through the front door and go up the stairs. He described her as wearing glasses and dark clothing and being of medium height and slender build. He testified that a wallet containing cash was taken from one of the rooms that night and was later recovered empty in another room. He testified that the woman he saw enter the motel in December 1988 was the same woman who entered the motel on November 2, 1989.

As part of the investigation following the 1988 thefts from the Super 8 Motel, the York Police Department had received information from the Kearney Police Department regarding similar motel room thefts that had occurred in Kearney and elsewhere in Nebraska and Colorado. The bulletin received from the Kearney Police Department described a suspect similar to Neely. Additionally, on April 29, 1989, the York Police Department received a Teletype from the Hays, Kansas, police department notifying them of similar motel burglaries at

the Super 8 Motel in Hays, Kansas. The Teletype also described a suspect similar to Neely.

After the clerk observed Neely in the motel on November 2, he called the York Police Department and informed them that he had an individual "trying to enter a room." He did not report anything stolen. Shortly after the call from the clerk, York Police Officers Wolfe and Cobb were dispatched to the Super 8 Motel. As Officer Wolfe approached the motel in his patrol car, he observed a black female with glasses driving a vehicle with Colorado license plates exiting the service road leading from the Super 8 Motel. He testified that he knew about similar burglaries from other jurisdictions where the suspect was a black female wearing dark clothing and glasses and driving a vehicle with Colorado license plates.

Officer Cobb contacted the clerk inside the motel, who described Neely. Officer Cobb then instructed Wolfe to stop the vehicle. The driver of the vehicle identified herself as Cheryl Neely and the passenger, a black male, stated his name was Lee Turner, but could not provide any identification. Officer Wolfe testified that when he stopped Neely he saw only a soda bottle, other litter, and some baggage scattered in the interior of the car.

Officer Cobb instructed Wolfe to place Neely under arrest. The testimony is in conflict as to whether she was initially charged with only criminal trespass or with both criminal trespass and attempted burglary. Wolfe took Neely back to the Super 8 Motel, where the desk clerk identified her as the person he had seen in the motel that night. Wolfe then transported her to the police station for booking. Wolfe testified that both he and Cobb were aware that nothing had been reported stolen from the Super 8 Motel that night.

Officer Wolfe impounded Neely's vehicle because the passenger accompanying her did not have a driver's license. The vehicle was towed to the police department and then searched by Officer Cobb approximately 20 minutes after the vehicle arrived at the police station. Cobb did not obtain a warrant to search the vehicle or any containers found within the vehicle.

Officer Cobb searched the interior passenger compartment of the car as well as the trunk. In the trunk he opened and searched a brown suitcase that belonged to Neely. Inside the

suitcase he found 22 "do not disturb" signs and identification belonging to a Sarah Hazel Francis. He also opened and searched a camera case, where he found a 9-millimeter handgun and some ammunition. Officer Cobb testified that Neely identified the camera case as hers while she was being questioned at the police station. After the search Neely's belongings were placed in the locked inventory room of the York County Jail.

Following Neely's preliminary hearing, Officer Cobb again searched her suitcase as well as her purse while both items were located in the jail's locked inventory room. He did not have a warrant to search either the suitcase or the purse. He testified that he searched the suitcase in order to seize the "do not disturb" signs located inside the suitcase in preparation for trial.

Officers Wolfe's and Cobb's testimony concerning the purpose for the search of Neely's vehicle is contradictory. Officer Wolfe testified at both the preliminary and suppression hearings that he impounded the vehicle because Neely's passenger did not have a driver's license. He stated that the vehicle was the police department's responsibility and was searched in order to compile an inventory of its contents. He referred to the search as an inventory search on at least one occasion. Officer Cobb testified that the initial purpose of the search was to inventory the contents of the car. Cobb himself compiled the inventory list, but he also stated that the search was incident to arrest and he was looking for criminal evidence while conducting the search. The State did not present any evidence as to what were the standard inventory procedures used by the York Police Department.

Neely sought to suppress all the evidence found inside the suitcase and the camera case, as well as any statements made by her as a result of the search. She claimed the warrantless search of the suitcase and camera case violated her fourth amendment rights. Her initial motion to suppress the evidence was overruled by the district court on July 25, 1990. Neely then moved to suppress the evidence found in the second search of the suitcase conducted while the suitcase was held in the jail inventory room.

The district court then sustained both motions, reversing the previous ruling. The court based its decision on the recent U.S. Supreme Court case of *Florida v. Wells*, ____ U.S. ____, 110 S. Ct. 1632, 109 L. Ed. 2d 1 (1990), having found that the prosecution failed to present sufficient evidence on the existence of standard inventory procedures used by the York Police Department.

In its appeal for summary review, the State has assigned as error the following: First, the district court erred in ruling that the search of the vehicle was an inventory search governed by the rule in *Florida v. Wells, supra*; second, the court erred by failing to uphold the search as justified under the "automobile exception" to the warrant requirement; third, the court erred in ruling that the defendant had an expectation of privacy in her property held in the inventory lockup of the York County Jail; and last, the court erred in suppressing all the evidence found from the search of the suitcase and the camera case, as well as any statements made by the defendant.

The issue in this case is whether Neely's fourth amendment rights were violated when Officer Cobb conducted the warrantless search of her suitcase and camera case following her arrest.

The fourth amendment to the U.S. Constitution protects people against unreasonable searches and seizures by the government. U.S. Const. amend. IV. The Nebraska Constitution has a similar provision. See Neb. Const. art. I, § 7. The fourth amendment was made applicable to the states in *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961). Before government action constitutes a search under the fourth amendment, a person must exhibit a subjective expectation of privacy in the thing to be searched. *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967) (Harlan, J., concurring). In addition, the expectation of privacy must be both reasonable and recognized by society. *Id.* It is obvious that Neely had a reasonable and legitimate expectation of privacy in her luggage. Officer Cobb's actions constituted a search under the fourth amendment.

Searches under the fourth amendment are unlawful only if unreasonable. A criminal search conducted pursuant to a

warrant supported by probable cause is usually considered reasonable. However, the U.S. Supreme Court has created several categories of searches considered reasonable under the fourth amendment though conducted without a warrant. I must decide if this warrantless search was reasonable and therefore not violative of the fourth amendment. Since the testimony and the assigned errors in the State's brief are conflicting as to which type of search this was, I will consider the legality of the search under three recognized exceptions to the warrant requirement: the search incident to arrest exception, the automobile exception, and the inventory exception.

THE SEARCH INCIDENT TO ARREST EXCEPTION

In *Chimel v. California,* 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969), the Supreme Court held that it is reasonable under the fourth amendment for an officer to conduct a warrantless search of an arrested person in order to remove weapons that might endanger the officer or aid the person's escape. The arresting officer may search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. In addition, the officer may search for and seize any evidence within the arrestee's immediate control, i.e., the area in which the person may gain possession of a weapon or evidence. This would also prevent the arrestee from reaching out for a weapon or other object. This is known as the "wingspan" rule.

In *New York v. Belton*, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981), the Supreme Court expanded the *Chimel* rule to include the passenger area of the arrested person's automobile. The Court held that when an officer has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of the automobile. The search may include any open or closed containers within the passenger compartment. Again, the rationale for this rule was to prevent the vehicle's occupant from obtaining weapons from the inside of the vehicle or from possibly destroying evidence. The Court in *United States v. Edwards*, 415 U.S. 800, 94 S. Ct. 1234, 39 L.

Ed. 2d 771 (1974), stated that searches and seizures that could be made at the time of arrest may legally be conducted later, when the arrestee arrives at the police station.

Officer Cobb testified in the July 3, 1990, hearing on the motion to suppress that he searched the car for inventory purposes, but also considered the search incident to arrest and was looking for criminal evidence. Assuming this was a search of the vehicle incident to Neely's arrest conducted at the police station as permitted under *Edwards*, Officer Cobb was not justified in conducting the search without a warrant because Neely's suitcase and camera case were not located in the passenger compartment of the vehicle. The Court's decision in *New York v. Belton* extended the rationale of *Chimel* to include closed containers located in the passenger area of a vehicle. Presumably, an occupant of a vehicle could reach a container located in the passenger compartment in order to obtain a weapon or destroy evidence. It was not possible for Neely to reach the gun found in the camera case or to destroy any of the evidence found in her suitcase because both were locked in the trunk of the vehicle at the time of her arrest. The second search of her suitcase was conducted several days after her arrest, while she was incarcerated. Certainly, she did not have access to her belongings at that time. Therefore, the rationale of the exception to the warrant requirement in *Chimel* and *New York v. Belton* does not apply. This warrantless search was not justified as incident to Neely's arrest and was therefore unreasonable under the fourth amendment unless another exception applies.

THE AUTOMOBILE EXCEPTION

In *Carroll v. United States*, 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543 (1925), the Supreme Court held that automobiles and other mobile vehicles may be searched without a warrant, provided there is probable cause to believe the vehicle contains contraband. The Court drew a distinction between the warrantless search of a house and the search of a ship or automobile, stating that it is not practical to secure a warrant because the vehicle may quickly be moved. The Court specified that the officer must have probable cause to believe the

automobile he stops contains contraband. In *Chambers v. Maroney,* 399 U.S. 42, 90 S. Ct. 1975, 26 L. Ed. 2d 419 (1970), the Court expanded its reasoning in *Carroll* to uphold the warrantless search of an automobile at the police station. The Court repeated the "moving auto" rationale in Carroll and stated that if an effective search is to be made at any time, either the search must be made immediately without a warrant or the car must be seized and held until a warrant can be obtained. The Court stated that

> [f]or constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.

Chambers, supra at 399 U.S. at 52.

In 1971, the Court again considered the warrantless auto search issue in *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971). In *Coolidge*, the police conducted a search of the defendant's automobile at the police station pursuant to a defective warrant. Because the warrant had not been issued by a neutral and detached magistrate, the Court considered the search to be conducted without a warrant. The Court paraphrased *Chambers* as holding that where there is probable cause, the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained, "exigent circumstances" justify the warrantless search. *Coolidge, supra.* The Court then disallowed the search under the *Carroll/Chambers* rationale because the police had known for some time that the car was involved in the crime, the car was regularly parked in the driveway of the suspect's house, and the objects sought in the car were neither dangerous nor stolen. *Coolidge, supra.* The Court stated that since no circumstances existed to justify the warrantless search because the vehicle was parked in the driveway, it did not contain contraband or dangerous weapons, and the suspect was not fleeing the area, the "automobile exception" to the warrant requirement was irrelevant.

The Court specifically addressed the issue of whether closed

containers located in automobiles may be searched without a warrant in *United States v. Chadwick*, 433 U.S. 1, 97 S. Ct. 2476, 53 L. Ed. 2d 538 (1977), and *Arkansas v. Sanders*, 442 U.S. 753, 99 S. Ct. 2586, 61 L. Ed. 2d 235 (1979). In *Chadwick*, the police had probable cause to believe a footlocker contained drugs, seized the footlocker after it had been placed in the trunk of an automobile, and later searched the footlocker without a warrant. The government contended that the rationale supporting the warrantless search of automobiles applies to the warrantless search of luggage. The Court rejected this argument and stated that a person's expectation of privacy in luggage is much greater than in an automobile. The Court went on to say that since the footlocker was seized by the police and was not in danger of being removed from the vicinity, a valid search warrant could easily have been obtained prior to the search. *Chadwick, supra.*

In *Arkansas v. Sanders, supra*, the Court decided the same issue involving the warrantless search of an unlocked suitcase found in the trunk of a cab in which the defendant had been riding at the time of his arrest. The Court held that once the luggage was taken from the cab, the police could have held it until a search warrant was obtained. Therefore, there were no exigent circumstances mandating an immediate search. *Id.* *Sanders* was later limited in *United States v. Ross*, 456 U.S. 798, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982), to the specific situation in which there was probable cause to search a particular container but not probable cause to search the vehicle generally.

In *United States v. Ross, supra*, the police arrested an individual believed to be a narcotics dealer, and at the time of arrest opened the car's trunk and found a closed paper bag which contained heroin. An officer then drove the car to the station, where he searched it again without a warrant and found a leather pouch containing cash. The issue in *Ross* was whether, in the course of a search of a vehicle under the automobile exception, the police are entitled to search containers found within the vehicle. The Court began its analysis by reiterating the rule in *Carroll v. United States*, 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543 (1925), but stated specifically that the exception to the warrant requirement established in *Carroll* applied only

to vehicle searches that are supported by probable cause. *Ross, supra.* The Court distinguished its holdings in *Chadwick, supra,* and *Sanders, supra,* because the police in *Ross* had probable cause to search the entire vehicle, while in *Chadwick* and *Sanders* there was probable cause to search only the container. The Court then held that if probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search. The Court rejected any distinction between trunks, glove compartments, or packages in the case of a vehicle search, and stated that such distinctions must give way to the interest in the prompt and efficient completion of the search, provided its purpose and scope have been precisely defined. *Ross, supra.*

In this case, the State claims that the search of the luggage in the trunk of Neely's automobile was justified under the automobile exception as expanded in *Ross.* The *Carroll* line of cases establishes an automobile exception to the warrant requirement, provided two criteria are met. First, the officer must have probable cause to believe the *vehicle* contains contraband. Probable cause has been defined in *Illinois v. Gates,* 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), as a practical, commonsense decision by a magistrate that, given all the circumstances, there is a fair probability that evidence of a crime will be found in a particular place. Second, there must be exigent circumstances justifying the warrantless search. In the case of an automobile, these circumstances consist of the mobility of the automobile and the possibility that the suspect may take himself and the evidence in the vehicle out of the jurisdiction before a warrant can be obtained.

The State has failed to meet the first criterion justifying warrantless automobile searches. Officers Wolfe and Cobb did not have probable cause to search Neely's vehicle. They had probable cause to *arrest* Neely, given past information received from other jurisdictions and the eyewitness identification by the Super 8 Motel desk clerk. But they also knew, based on the clerk's story, that nothing had been stolen from the Super 8 Motel that night and that Neely had not been successful in breaking into a motel room. It was not reasonable to assume

that stolen property or burglary tools would be present in Neely's vehicle on the night she was arrested, because nothing was stolen from the motel, she did not enter a motel room, and the clerk did not see her use any type of object to effect entry. There was no "fair probability" under *Gates* that any evidence from the crime she allegedly committed that night would be concealed in her vehicle.

Additionally, the York Police Department's last information regarding Neely's alleged previous burglaries was in April 1989, 6 months before her arrest. It was not reasonable to believe that any contraband from previous crimes would still remain in her vehicle 6 months later. Presumably, burglars do not leave property stolen for profit undisposed of for 6 months. The State argued in the hearing on this appeal that Neely was engaged in a pattern of ongoing criminal activity and therefore it was possible that her vehicle contained evidence of past crimes. While that may be true, a mere possibility that her vehicle contained contraband from her previous activities does not satisfy the probable cause standard under *Gates*. Neely's vehicle was not identified as being used to conduct this alleged pattern of burglaries. The only information the police had regarding her vehicle was that a woman of her description suspected to have committed other motel burglaries drove a vehicle with Colorado license plates. The officer did not stop Neely because he believed her vehicle contained stolen property, but because he believed she was the person who attempted to enter a Super 8 Motel room that evening.

The *Carroll/Ross* line of cases also make it clear that the "exigent circumstances" permitting warrantless searches of automobiles are based on the inherent mobility of cars and other vehicles. Although the case law permits automobile searches to be conducted after the car has been brought to the station house, the Supreme Court has disallowed warrantless automobile searches when all rationale for searching the auto without a warrant under *Carroll v. United States*, 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543 (1925), has dissipated. See *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971). In this case, the officers impounded the car because Neely's passenger was not licensed to drive, for safekeeping,

and to inventory its contents. Neely was placed in custody and taken to the station house before the vehicle arrived there. The car was safely stored at the station house both before and after the search. There was no possibility that she could have moved the vehicle out of the jurisdiction. Therefore, there was no reason the officers could not have obtained a warrant before searching the vehicle, or at least before opening Neely's luggage in the trunk.

The *Carroll/Ross* cases mandate that in order to search an automobile without a warrant, the officer must have probable cause to believe there is contraband *in the vehicle* and also must have a "moving auto." The officers in this case had no reasonable basis for believing that Neely's vehicle contained fruits of her alleged crime. When arrested, she was charged only with trespass and attempted burglary, neither of which involved the theft of goods or the use of dangerous weapons or burglary tools. Her alleged previous criminal activities were too remote in time to constitute a sufficient basis for probable cause that contraband was located in her vehicle at the time she was arrested. Despite the fact that *United States v. Ross*, 456 U.S. 798, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982), permits warrantless searches of all items located in a vehicle, the Court in *Ross* did not abandon the rationale for the automobile exception first laid out in *Carroll*. In *Ross*, the police did have probable cause to search the vehicle. The Court merely extended the scope of the search. Since the officers in this case had neither probable cause to search nor a "moving vehicle," they were not justified in searching the luggage in the trunk of Neely's vehicle without first obtaining a warrant. As Justice Stewart stated in *Coolidge v. New Hampshire, supra* at 403 U.S. at 461-62, "The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." The State cannot later justify the warrantless search of Neely's vehicle under the automobile exception because she was fortuitously arrested while in her vehicle.

Any reliance on *United States v. Chadwick*, 433 U.S. 1, 97 S. Ct. 2476, 53 L. Ed. 2d 538 (1977), or *Arkansas v. Sanders*, 442 U.S. 753, 99 S. Ct. 2586, 61 L. Ed. 2d 235 (1979), is misplaced

here. In both of those cases the police had probable cause to search the actual container rather than probable cause to search the vehicle. In this case, the officers had no idea until the search that the containers were in the vehicle.

THE INVENTORY EXCEPTION

In *South Dakota v. Opperman,* 428 U.S. 364, 96 S. Ct. 3092, 49 L. Ed. 2d 1000 (1976), the Supreme Court upheld a warrantless search of a car impounded for various parking violations. The police, following standard police procedure, inventoried the contents of the car and found marijuana in the glove compartment. The Court reversed the decision of the South Dakota Supreme Court and held that under the fourth amendment, inventories pursuant to standard police procedures are reasonable. The Court stated that the police were engaged in a caretaking search of the vehicle because the owner was not present to make arrangements for his vehicle and valuables were visible inside the car. The Court also stated that there was no evidence that the standard inventory procedure used by the police was a pretext for investigatory searches. *Id.*

In *Colorado v. Bertine,* 479 U.S. 367, 107 S. Ct. 738, 93 L. Ed. 2d 739 (1987), the Court upheld a warrantless search of a backpack located in a van following impoundment of the vehicle after the driver had been arrested for drunk driving. The Court recognized that inventory searches were a well-defined exception to the warrant requirement of the fourth amendment. The Court then held that reasonable police regulations relating to inventory procedures administered in good faith satisfy the fourth amendment. The Court stated that the police may exercise discretion in searching as long as that discretion is exercised according to standard criteria and on the basis of something other than suspicion of criminal activity. *Bertine, supra.* Justice Blackmun, in his concurrence, emphasized the importance of having inventories conducted only pursuant to standardized police procedures. He stated that it is permissible for police officers to open closed containers during an inventory search only if they are following standard police procedures that mandate the opening of such containers in every impounded vehicle. *Bertine, supra* (Blackmun, J.,

concurring).

The Court's most recent statement concerning inventory searches is in *Florida v. Wells*, ____ U.S. ____, 110 S. Ct. 1632, 109 L. Ed. 2d 1 (1990). In that case, Florida police arrested the driver of a vehicle for driving while intoxicated, impounded the vehicle, and conducted an inventory search of the car and a locked suitcase in the trunk. The police discovered marijuana during the search. The Florida police had no standard policy with respect to whether closed containers encountered during an inventory search should be opened. The Court held that because the Florida police had no policy with regard to opening closed containers during inventory searches, the search was not sufficiently regulated to satisfy the fourth amendment. The Court did state that inventory searches need not be conducted in a totally mechanical manner, and police officers may use their discretion in deciding to open containers whose contents cannot be determined from examining the exterior. *Wells, supra.*

In this case there is no evidence in the record of any standard inventory procedures used by the York Police Department. Assuming this search was conducted for inventory purposes, the search was not reasonable under the fourth amendment because it was not conducted pursuant to any standard inventory procedures used by the York police, as mandated in *Bertine* and *Wells*. It is unnecessary to determine whether those procedures must include a policy governing the opening of containers found in vehicles, because the State failed to present evidence that *any* search procedure was used by the York Police Department.

The district court based its suppression of the evidence found in Neely's luggage on *Florida v. Wells, supra*. While the court was correct in suppressing the evidence under *Wells* because the York Police Department failed to conduct the search pursuant to standard policy, it was mistaken in its determination that *Wells* conflicted with *United States v. Ross*, 456 U.S. 798, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982). *Ross* dealt with the scope of warrantless searches under the automobile exception, as discussed above. The search in *Ross* was not conducted for inventory purposes. The inventory and automobile exceptions

to the warrant requirement are separate and based on entirely different rationales. *Wells* is not in conflict with *Ross*.

Last, the State's claim that Neely has no expectation of privacy in her luggage while it remains in the jail's locked inventory is without merit. *Hudson v. Palmer*, 468 U.S. 517, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984), the case on which the State relies for that proposition, dealt with the privacy rights of an inmate incarcerated in state prison. In this case, Neely has not yet been convicted of any offense, but is merely incarcerated while awaiting trial in the York County Jail. The holding in *Hudson, supra*, is inapplicable to her case. She had a legitimate expectation of privacy in her luggage while it was in her car, as well as while it is stored in the jail's inventory.

The order of the district court suppressing the evidence found in the suitcase and camera case during both the first search of the vehicle and the second search of the suitcase from the jail's inventory room is affirmed.

AFFIRMED.

HOLDREGE COOPERATIVE ASSOCIATION, APPELLANT, V. BETTE G. WILSON, PERSONAL REPRESENTATIVE OF THE ESTATE OF JOHN E. WILSON, DECEASED, APPELLEE.

463 N.W.2d 312

Filed November 9, 1990. No. 88-914.

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 may reasonably 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. _____: _____. When ruling on a demurrer, a court may not assume the existence of any facts not alleged, find facts in aid of the pleading, or consider what evidence may be introduced at trial.
4. **Constitutional Law: Rules of the Supreme Court: Statutes.** A party presenting a case involving the federal or state constitutionality of a statute must serve a copy of the brief assigning unconstitutionality on the Attorney General and file proof

of service with the Clerk of the Supreme Court. Neb. Ct. R. of Prac. 9E (rev. 1989).

5. **Constitutional Law: Rules of the Supreme Court: Statutes: Appeal and Error.** If a party fails to observe Neb. Ct. R. of Prac. 9E (rev. 1989), this court will not consider the constitutionality of the statute under attack.
6. **Decedents' Estates: Claims: Executors and Administrators: Notice: Limitations of Actions.** As to claims presented in the manner described in Neb. Rev. Stat. § 30-2486 (Reissue 1989) within the time limit prescribed in Neb. Rev. Stat. § 30-2485 (Reissue 1989), the personal representative may mail a notice to any claimant stating that the claim has been disallowed. Every claim which is disallowed in whole or in part by the personal representative is barred unless the claimant files a petition for allowance in the court or commences a proceeding against the personal representative not later than 60 days after the mailing of the notice of disallowance if the notice warns the claimant of the impending bar. Neb. Rev. Stat. § 30-2488(a) (Reissue 1989).
7. **Decedents' Estates: Executors and Administrators: Actions: Standing.** A personal representative of a decedent domiciled in this state at his death has the same standing to sue and be sued in the courts of this state as his decedent had immediately prior to death.
8. **Constitutional Law: Courts: Jurisdiction.** Neb. Const. art. V, § 9, provides in relevant part that the district courts shall have both chancery and common-law jurisdiction, and such other jurisdiction as the Legislature may provide.
9. **Decedents' Estates: Statutes: Appeal and Error.** In interpreting various sections of the Nebraska Probate Code, this court may examine the comments to the code.
10. **Decedents' Estates: Claims: Courts.** Neb. Rev. Stat. § 30-2488(b)(2) (Reissue 1989) authorizes transfers of claims in excess of $10,000 to the district court.
11. **Statutes: Legislature: Intent.** When statutory language is ambiguous and must be construed, recourse should be had to the legislative history for the purpose of discovering the lawmakers' intent.
12. _____: _____: _____. In considering legislative history, a court may look to interim study reports on the legislation under consideration.
13. **Statutes.** In the interpretation of statutes, special provisions of a statute in regard to a particular subject will prevail over general provisions in the same or other statutes so far as there is a conflict. Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one.
14. **Decedents' Estates: Claims: Executors and Administrators: Limitations of Actions: Jurisdiction.** When a claim presented in the manner described in Neb. Rev. Stat. § 30-2486 (Reissue 1989) and within the time limit described in Neb. Rev. Stat. § 30-2485 (Reissue 1989) is disallowed by the personal representative, the dissatisfied claimant may, within 60 days of the mailing of notice of the disallowance, commence a proceeding against the personal representative in the district court insofar as the claim relates to matters within the district court's chancery or common-law jurisdiction.
15. **Decedents' Estates: Claims: Limitations of Actions: Notice.** For claims presented under Neb. Rev. Stat. § 30-2486(1) (Reissue 1989), court proceedings

must be commenced no more than 60 days after the personal representative has mailed a notice of disallowance.

Appeal from the District Court for Phelps County: BERNARD SPRAGUE, Judge. Reversed and remanded for further proceedings.

Kent A. Schroeder, of Ross, Schroeder & Brauer, for appellant.

Rebecca E. Miller, of Miller Law Office, for appellee.

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

FAHRNBRUCH, J.

When the personal representative of the estate of John E. Wilson, deceased, disallowed its claim, Holdrege Cooperative Association (Holdrege) sued Wilson's personal representative in the district court for Phelps County for $22,915.01, the balance Holdrege alleged was due on goods it supplied to Wilson during his lifetime.

Finding it lacked subject matter jurisdiction, the district court sustained a demurrer filed by Wilson's personal representative and thereafter, when Holdrege failed to plead further, dismissed its lawsuit. Holdrege timely appealed to this court. We reverse, and remand the cause for further proceedings.

In reviewing an order sustaining a demurrer, this court accepts the truth of facts well pled and the factual and legal inferences which may reasonably be deduced from such facts, but does not accept conclusions of the pleader. See *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, 234 Neb. 789, 452 N.W.2d 746 (1990). 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. *Weimer v. Amen*, 235 Neb. 287, 455 N.W.2d 145 (1990). A court may not assume the existence of any facts not alleged, find facts in aid of the pleading, or consider what evidence may be introduced at trial. *St. Paul Fire & Marine Ins. Co., supra.*

In its amended petition in the district court, Holdrege alleged in substance that while Wilson was alive and at his request,

Holdrege delivered to him gasoline, oil, tires, hardware, and miscellaneous supplies. Holdrege further alleged that Wilson agreed to pay Holdrege for said items, that he had not fully paid for the goods before he died, and that there was a balance of $22,915.01 due and owing at the time of Wilson's death.

The amended petition further alleged that the estate of Wilson was currently being probated in the county court for Phelps County, that Bette G. Wilson had been appointed the personal representative of Wilson's estate, that Holdrege filed its claim against the decedent's estate as prescribed in Neb. Rev. Stat. §§ 30-2404 and 30-2486(1) (Reissue 1989), and that the claim was disallowed by the personal representative on March 25, 1988.

The record reflects that Holdrege filed its amended petition in the district court within 60 days after the personal representative disallowed its claim.

Apparently, the district court, in support of its decision that it had no subject matter jurisdiction, and Wilson's personal representative, in support of her demurrer, relied upon Neb. Rev. Stat. § 24-517(1) (Reissue 1989), which states that the county court has "[e]xclusive original jurisdiction of all matters relating to decedents' estates, including the probate of wills and the construction thereof."

On appeal, Holdrege contends that a literal reading of § 24-517(1) violates Neb. Const. art. V, § 9, which provides in relevant part, "The district courts shall have both chancery and common law jurisdiction, and such other jurisdiction as the Legislature may provide . . . ." The question of the constitutionality of § 24-517(1) is not properly before us. A party presenting a case involving the federal or state constitutionality of a statute must serve a copy of the brief assigning unconstitutionality on the Attorney General and file proof of service with the Clerk of the Supreme Court. Neb. Ct. R. of Prac. 9E (rev. 1989). The record discloses that Holdrege did not comply with the foregoing rule. If a party fails to observe rule 9E, this court will not consider the constitutionality of the statute under attack. *Voyles v. DeBrown Leasing, Inc.*, 222 Neb. 250, 383 N.W.2d 36 (1986). See *Line v. Line*, 228 Neb. 700, 423 N.W.2d 790 (1988). In

passing, we note that in 1970, Neb. Const. art. V, § 16, was repealed. It provided that "[c]ounty courts shall be courts of record, and shall have original jurisdiction in all matters of probate, settlement of estates of deceased persons, and in such proceedings to find and determine heirship . . . ." Since 1970, there has been no similar constitutional provision. Because no constitutional question has properly been presented, we move on to consideration of the statutes germane to this appeal.

Holdrege initially presented its claim against Wilson's estate by filing a written statement with the clerk of the county court pursuant to § 30-2486(1). The personal representative mailed a "Notice of Disallowance of Claim" to Holdrege, notifying it that its claim had been disallowed and that it had 60 days to protest the disallowance.

> As to claims presented in the manner described in section 30-2486 within the time limit prescribed in section 30-2485, the personal representative may mail a notice to any claimant stating that the claim has been disallowed. . . . Every claim which is disallowed in whole or in part by the personal representative is barred . . . unless the claimant files a petition for allowance in the [county] court or commences a proceeding against the personal representative not later than sixty days after the mailing of the notice of disallowance . . . if the notice warns the claimant of the impending bar.

Neb. Rev. Stat. § 30-2488(a) (Reissue 1989).

Once its claim was disallowed, Holdrege chose the latter course prescribed in § 30-2488 by proceeding against the personal representative. "The claimant may commence a proceeding against the personal representative in any court which has subject matter jurisdiction and the personal representative may be subjected to jurisdiction, to obtain payment of his or her claim against the estate . . . ." § 30-2486(2). "[A] personal representative of a decedent domiciled in this state at his death has the same standing to sue *and be sued* in the courts of this state . . . as his decedent had immediately prior to death." (Emphasis supplied.) Neb. Rev. Stat. § 30-2464(c) (Reissue 1989). Had John E. Wilson been alive when Holdrege filed its suit, this action to recover money

for goods sold could have been brought in the district court. See Neb. Rev. Stat. § 24-302 (Reissue 1989) (district courts have and exercise general, original, and appellate jurisdiction in all matters, both civil and criminal, except where otherwise provided). Thus, it is clear that the Nebraska Probate Code provides that the claimant may proceed in the district court against the personal representative in a case such as this. Constitutional authorization for this jurisdiction is found in Neb. Const. art. V, § 9, which provides in relevant part that the district courts shall have both chancery and common-law jurisdiction, "*and such other jurisdiction as the Legislature may provide* . . . ." (Emphasis supplied.)

In interpreting various sections of the Nebraska Probate Code, this court may examine the comments to the code. See, e.g., *In re Estate of McFayden*, 235 Neb. 214, 454 N.W.2d 676 (1990); *In re Estate of Redpath*, 224 Neb. 845, 402 N.W.2d 648 (1987); *In re Estate of Watson*, 217 Neb. 305, 348 N.W.2d 856 (1984).

The comments to the Nebraska Probate Code, as well as other code provisions, negate the personal representative's contention that the only avenue available to a party with a claim against an estate is in the county court. The comment to § 30-2486 provides in relevant part:

> The filing of a claim with the probate court under subdivision (1) of this section does not serve to initiate a proceeding concerning the claim. Rather, it serves merely to protect the claimant who may anticipate some need for evidence to show that his claim is not barred. The probate court acts simply as a *depository* of the statement of claim
> . . . .

(Emphasis supplied.) From this comment, it can be said that since the county court acts merely as a depository of the claim, a proceeding in a separate court may be instituted. Further, § 30-2488(b)(2) authorizes transfers of claims in excess of $10,000 to the district court. Proceedings to determine whether a decedent left a valid will may also be transferred to the district court. Neb. Rev. Stat. § 30-2429.01 (Reissue 1989).

Legislative history lends additional support to the conclusion that the district court possessed subject matter jurisdiction in

this case. When statutory language is ambiguous and must be construed, recourse should be had to the legislative history for the purpose of discovering the lawmakers' intent. *County of Lancaster v. Maser*, 224 Neb. 566, 400 N.W.2d 238 (1987). In considering legislative history, a court may look to interim study reports on the legislation under consideration. See, e.g., *In re Estate of Watson, supra*.

In this case, the ambiguity is created by the conflict between § 24-517(1), which grants exclusive original jurisdiction to the county court in probate matters, and §§ 30-2464(c), 30-2486(2), and 30-2488(a), which permit the claimant to proceed against the personal representative in district court or other court that has subject matter jurisdiction when the personal representative has disallowed a claim presented in the manner described in § 30-2486.

Section 24-517(1), which grants exclusive original jurisdiction to the county court in probate matters, is unchanged from its original enactment in 1972. See 1972 Neb. Laws, L.B. 1032. Section 30-2486(2), as enacted in 1974, provided that "[t]he claimant may commence a proceeding against the personal representative in the county court in which the claim is presented without regard to the amount in controversy or in any federal or state court where the personal representative may be subjected to jurisdiction . . . ." § 30-2486(2) (Reissue 1975).

Due to a 1981 amendment, § 30-2486(2) now provides that the claimant may commence a proceeding against the personal representative in any court which has subject matter jurisdiction and the personal representative may be subjected to jurisdiction, to obtain payment of his or her claim against the estate, but the commencement of the proceeding must occur within the time limited for presenting the claim.

A plain reading of the statutes reveals that from the time of enactment of the probate code, the Legislature sought to modify the grant of jurisdiction set forth in § 24-517(1). Legislative history supports this interpretation. In discussing a 1981 amendment to § 30-2488 which authorized transfers to the district court by a personal representative, the legislative interim study on the bill reported, "Only the personal

representative may transfer under this section [§ 30-2488]; the claimant . . . has the ability to proceed directly to [the] court outside the probate preoceeding [sic] under section 30-2486(2)." Judiciary Committee Interim Report, L.R. 268, 86th Leg., 2d Sess. 122 (Dec. 1980).

As previously stated, there is an apparent conflict between § 24-517(1), which places exclusive jurisdiction in the county court, and the foregoing statutes, which authorize suits in the district court. In interpreting the statutes involved, we are guided by the well-established rule that special provisions of a statute in regard to a particular subject will prevail over general provisions in the same or other statutes so far as there is a conflict. See *Glockel v. State Farm Mut. Auto. Ins. Co.*, 219 Neb. 222, 361 N.W.2d 559 (1985). Moreover, where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one. *SID No. 1 v. County of Adams*, 209 Neb. 108, 306 N.W.2d 584 (1981). The statutes contained in the probate code address the exact situation presented here and are controlling to the extent they conflict with § 24-517.

We hold that when a claim presented in the manner described in § 30-2486 and within the time limit described in Neb. Rev. Stat. § 30-2485 (Reissue 1989) is disallowed by the personal representative, the dissatisfied claimant may, within 60 days of the mailing of notice of the disallowance, commence a proceeding against the personal representative in the district court insofar as the claim relates to matters within the district court's chancery or common-law jurisdiction.

The sole remaining question is whether the proceeding against the personal representative was brought within the statutory time period. Section 30-2486(3) provides that for claims presented under § 30-2486(1), court proceedings must be commenced no more than 60 days after the personal representative has mailed a notice of disallowance. The record reveals that the notice of disallowance was mailed on March 30, 1988. While the record is silent as to when Holdrege filed its original petition in the district court, its amended petition was filed on May 27, 1988. Since the proceeding against the personal representative was commenced within 60 days after

she mailed the notice of disallowance, Holdrege's claim was not time-barred.

Because the district court for Phelps County had subject matter jurisdiction, the demurrer should have been overruled. We reverse, and remand the cause to the district court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

L. DALE WATLEY AND DELORES WATLEY, INDIVIDUALLY AND AS TRUSTEES, APPELLANTS, V. BOARD OF EQUALIZATION OF GARFIELD COUNTY, NEBRASKA, ET AL., APPELLEES.

L. DALE WATLEY AND DELORES WATLEY, INDIVIDUALLY AND AS TRUSTEES, APPELLANTS, V. BOARD OF EQUALIZATION OF HOLT COUNTY, NEBRASKA, ET AL., APPELLEES.

462 N.W.2d 426

Filed November 16, 1990. Nos. 88-685, 88-686.

1. **Taxation: Valuation: Appeal and Error.** In the Nebraska Supreme Court, the review of the decision of a county board of equalization is de novo, and the court is required to reach a conclusion independent of the findings of the trial court.
2. **Taxation: Valuation: Proof.** The burden is on the landowner to prove that the land was valued excessively or was not equalized with the value of other similar property.

Appeal from the District Court for Garfield and Holt Counties: EDWARD E. HANNON, Judge. Affirmed.

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

Dale C. Crandall, Garfield County Attorney, and Boyd W. Strope, Holt County Attorney, for appellees.

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

WHITE, J.

This is an appeal from the decision of the district court for

Garfield and Holt Counties in a consolidated trial. The boards of equalization denied the relief sought by the landowners, L. Dale Watley and Delores Watley. The district court affirmed the decisions of the boards.

In the Nebraska Supreme Court, the review of the decision of a county board of equalization is de novo, and the court is required to reach a conclusion independent of the findings of the trial court. *Gordman Properties Co. v. Board of Equal.*, 225 Neb. 169, 403 N.W.2d 366 (1987).

Involved in this case is the appropriate classification and thus valuation of the tracts of farmland owned by appellants for the tax year commencing January 1, 1987. In the years prior to 1987, the subject land was used to raise irrigated crops. However, in March 1986, the owners contracted with the U.S. Department of Agriculture's Agricultural Stabilization and Conservation Service to place the land in a conservation reserve program for a period of 10 years and to receive in exchange a payment from the Department of Agriculture.

The irrigation equipment was removed in the fall of 1986, making the land, in the opinion of the appellants, nonirrigated land or rangeland.

The unusual posture of this case is reflected in the complete absence of any proof in the record (1) that the land is valued in excess of its fair market value or (2) that the valuation is not equalized with other irrigated land. It is simply the assertion of appellants that the voluntary decision to retire irrigated land to a reserve program converts it into a lesser classification of farmland at the option of the owner.

In a March 14, 1986, letter, the State Tax Commissioner's determination agreed with appellants' proposed classification of reserve program land. However, in April 1986, the Nebraska Department of Revenue concluded that beginning January 1, 1987, the classification at the time of enrollment should be used in valuing land voluntarily placed in the reserve program.

The burden is on the landowner to prove that his land was valued excessively or was not equalized with the value of other similar property. *Fremont Plaza v. Dodge County Bd. of Equal.*, 225 Neb. 303, 405 N.W.2d 555 (1987). As observed by the trial court, the actual earning capacity of the now reserve

land far exceeds that of nonirrigated land. The appellants have not shown that the valuation of their land as irrigated cropland, not based on its actual earning capacity, is excessive or is disproportionate to the value of other similar property, in violation of Neb. Const. art. VIII, § 1.

The judgment of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DENNIS R. JURGENS, APPELLANT.

462 N.W.2d 862

Filed November 16, 1990. No. 88-980.

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.

Pursuant to our directions in *State v. Jurgens*, 235 Neb. 103, 454 N.W.2d 280 (1990), the district court for Pawnee County has made findings as follows: (1) The warrant obtained by Investigator Dishong was derived from a source independent of the prior illegal stop, and (2) Investigator Dishong would not have obtained the warrant had the Nebraska State Patrol not conducted the illegal "check stop selective."

This court found in *State v. Jurgens, supra*, that the agent's decision to seek the warrant was prompted by the illegal stop and that if no source independent of the illegal stop existed to justify the issuance of the search warrant, then the fruits of that search must be suppressed. See *Murray v. United States*, 487 U.S. 533, 108 S. Ct. 2529, 101 L. Ed. 2d 472 (1988).

It follows that the convictions of appellant Jurgens must be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. JAMES MARTIN DINEEN, RESPONDENT.

462 N.W.2d 618

Filed November 16, 1990. No. 89-340.

Original action. Judgment of disbarment.

Dennis G. Carlson, Counsel for Discipline, for relator.

Bruce G. Mason, of Ross & Mason, P.C., for respondent.

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

PER CURIAM.

This original action was brought by the Counsel for Discipline of the Nebraska State Bar Association, seeking an order of disbarment of respondent, James Martin Dineen, pursuant to Neb. Ct. R. of Discipline 21 (rev. 1989).

An order of this court to show cause why the motion should not be sustained was served on the respondent. Answer was filed, and on June 6, 1990, this court appointed Patrick W. Healey, a member of the bar of this court, as a referee to take evidence and make factual findings.

An evidentiary hearing was held on September 21, and on October 9, the referee's report was filed with this court, recommending that the respondent be disbarred.

Neb. Ct. R. of Discipline 10L (rev. 1989) provides that exceptions to the report of the referee may be filed within 10 days after the filing of the report. Respondent has not filed exceptions to the report, nor has he filed any other pleading. Counsel for Discipline now moves this court for judgment on the pleadings.

The court hereby sustains the motion of the Counsel for

Discipline, adopts the findings of fact and recommendation of the referee, and finds that the respondent, James Martin Dineen, should be and hereby is disbarred from the practice of law in the State of Nebraska.

JUDGMENT OF DISBARMENT.

WHITE, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. RALPH E. THOMAS, APPELLANT.
462 N.W.2d 862

Filed November 16, 1990. No. 89-875.

1. **Postconviction: Prisoners: Standing: Probation and Parole: Words and Phrases.** A prisoner who has been paroled is "in custody under sentence" for purposes of Neb. Rev. Stat. § 29-3001 (Reissue 1989) of the Postconviction Act.
2. **Postconviction.** One who requests relief pursuant to Neb. Rev. Stat. § 29-3001 (Reissue 1989) must allege facts that constitute a denial of his rights under the Nebraska or federal Constitution, causing the judgment against him to be voidable.
3. **Postconviction: Appeal and Error.** The findings of the postconviction hearing court will not be disturbed unless clearly erroneous.
4. **Expert Witnesses: Effectiveness of Counsel: Proof.** Expert testimony is generally not admissible as proof that the assistance of counsel in a criminal case was ineffective.
5. **Constitutional Law: Effectiveness of Counsel.** An accused is entitled to the effective assistance of counsel under the sixth amendment to ensure that he receives a fair trial and is able to actively combat the prosecution's charges in an adversarial proceeding.
6. **Constitutional Law: Effectiveness of Counsel: Proof.** In order to prove that his counsel was ineffective so as to render his trial unjust, therefore requiring reversal of his conviction, a defendant must address two components: First, he must prove that his counsel's performance was defective by showing that his counsel's representation fell below prevailing professional standards of reasonableness in the area; and second, he must show that his counsel's performance prejudiced his defense and that there was a reasonable probability that but for the conduct of his counsel, the result of the proceeding would have been different.
7. **Pretrial Procedure: Appeal and Error.** The trial court has broad discretion in granting the discovery requests of defense counsel, and error can be founded only upon an abuse of discretion.

Appeal from the District Court for Knox County: MERRITT C. WARREN, Judge. Affirmed.

Rodney W. Smith for appellant.

Robert M. Spire, Attorney General, and Alfonza Whitaker for appellee.

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

WHITE, J.

Ralph E. Thomas appeals the Knox County District Court's denial of his motion to vacate his conviction and sentence pursuant to the Postconviction Act, Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1989). In 1981, Thomas was convicted of first degree assault and sentenced to 3 to 5 years' imprisonment. He was released on bond on April 23, pending his direct appeal to this court. This court affirmed his conviction on December 28, 1981. See *State v. Thomas*, 210 Neb. 298, 314 N.W.2d 15 (1981). Thomas failed to appear to begin serving his sentence and, following a jury trial on July 6, 1989, was convicted of the charge of failure to appear. He was sentenced to imprisonment for 1 year, to be served consecutively to his previous sentence for first degree assault. This court affirmed his conviction for failure to appear on August 10, 1990. See *State v. Thomas, ante* p. 84, 459 N.W.2d 204 (1990). Thomas has been paroled on both charges after serving approximately 2½ years on the two sentences.

The district court denied Thomas' motion to vacate his first degree assault conviction and sentence after a hearing on April 17, 1989. The court determined that Thomas had failed to prove the performance of his attorney, Richard McCoy, was deficient and that McCoy performed at least as well as a criminal trial lawyer with ordinary training and skill in the criminal law in the area. The court also decided that Thomas failed to demonstrate that but for McCoy's failure to appear at the motion to consolidate, at the taking of 22 depositions before trial, and at Thomas' first scheduled sentencing hearing, the result of the proceeding would have been different. Thomas appeals the district court's ruling. The State's motion for

summary affirmance was denied by this court on March 1, 1990.

On August 4, 1980, Thomas, along with his two brothers who were codefendants in the assault prosecution, assaulted Thornton Rave in Santee, Knox County, Nebraska. Rave, a part-time police officer in Santee, was investigating a report that the Thomas brothers were breaking windows out of a police car parked at the residence of the chief of police, Dean Kitto. As Rave was questioning a neighbor about the broken windows, he was confronted and attacked by the Thomas brothers. Ralph Thomas struck Rave with his fist, Gary Thomas hit Rave with a board, and Randy Thomas jumped on top of Rave as he fell to the ground. Rave testified that as a result of the beating he suffered a broken eardrum, a slight concussion, bruises, scratches, and a permanent loss of hearing.

Ralph Thomas claimed he struck Rave in self-defense. He stated that he and his brothers approached Rave to ask him to take away the gun and Mace of Kitto, who they claimed was intoxicated and had earlier sprayed Gary Thomas with Mace in a local tavern. Thomas testified that as he approached Rave to discuss the situation, Rave tried to strike him.

Thomas' assigned errors can be summarized as an ineffective assistance of counsel claim. First, he claims the district court erred in denying him the opportunity to depose an attorney, a physician, and a witness for the State. He claims that he needed the depositions in order to demonstrate that his attorney, Richard McCoy, was ineffective by failing to call an expert medical witness to testify as to the victim's injuries, to establish what the standard of practice for a criminal trial attorney was in the area, and to show that McCoy's failure to appear at the State's taking of the deposition of Cora Jones harmed him because Jones was involved in a feud with his family and was not a credible witness. Second, he claims the court erred in not permitting an attorney to testify as to the standard of practice of a criminal trial lawyer in the area. He offered the testimony to demonstrate that McCoy's performance fell below this standard. Last, he claims that McCoy was ineffective as counsel because he failed to appear at the hearing on the motion to

consolidate the trials of Thomas and his two brothers, at the taking of 22 depositions prior to trial, and at Thomas' first scheduled sentencing hearing.

Section 29-3001 permits "[a] prisoner in custody under sentence" to file a motion asking the court to vacate and set aside his sentence. Since the appellant in this case is currently on parole, it is necessary to determine whether a prisoner who has been paroled is "in custody under sentence" for purposes of the Postconviction Act.

In *Jones v. Cunningham*, 371 U.S. 236, 83 S. Ct. 373, 9 L. Ed. 2d 285 (1963), the U.S. Supreme Court held that a parolee was "in custody" for purposes of habeas corpus relief within the meaning of 28 U.S.C. § 2241 (1958). The Court stated that even though the Virginia Parole Board had released the petitioner from physical imprisonment, it imposed conditions upon him which significantly confined and restrained his freedom. The Court stated that this was enough to keep him "in custody" of the Virginia Parole Board within the meaning of the habeas corpus statute. *Jones, supra.*

In *State v. Losieau*, 180 Neb. 696, 144 N.W.2d 435 (1966), this court held that a defendant was "in custody under sentence" for purposes of the Postconviction Act even though the defendant had not yet begun to serve the imposed sentence. The defendant was sentenced on a burglary conviction as a habitual criminal and was paroled 9 years later. He violated his parole and was sentenced again on new charges. He was returned to the penitentiary to finish serving his first sentence and sought to challenge his second conviction under the Postconviction Act before he began serving it. This court stated that the Postconviction Act is a comprehensive postconviction measure embracing federal and state constitutional claims and is broader as to the basis for relief than the federal habeas corpus remedies. The court concluded that in order to safeguard the defendant's rights and avoid the dangers of delaying the defendant's postconviction remedies until he was serving his second sentence, relief under the Postconviction Act was available even though the defendant had not begun to serve his sentence. *Losieau, supra.*

The U.S. Supreme Court has held that a parolee is "in

custody" for purposes of the habeas corpus statutes. See *Jones, supra*. This court has stated that the Postconviction Act is broader as a basis for relief than the federal remedies. It has determined, in keeping with a broad reading of the act, that under the act a prisoner may challenge a conviction even if he has not yet begun to serve his sentence. We conclude that a broad reading of the act also includes permitting a parolee the right to challenge his conviction under the act.

As with the petitioner in *Jones, supra*, Thomas has been released from physical custody. However, he is not free from all restraints of the correctional system. He remains under the jurisdiction of the Nebraska Board of Parole until his term of parole is finished satisfactorily. See Neb. Rev. Stat. § 83-1,121 (Reissue 1987). He is subject to revocation of his parole and return to prison if he violates the terms of his parole in any way. See Neb. Rev. Stat. § 83-1,119 (Reissue 1987). As a condition of parole he may be required to be employed, remain in a certain geographical area unless granted written permission to leave the area, report to his parole officer, submit to certain medical or psychological treatment, refrain from associating with certain persons, or abide by any other conditions determined by the Board of Parole. See Neb. Rev. Stat. § 83-1,116 (Reissue 1987). Thomas does not possess the same degree of liberty and freedom as a citizen not under the jurisdiction of the Board of Parole. The restrictions imposed upon a prisoner who is paroled are sufficient to render that person "in custody under sentence" for purposes of the Postconviction Act. Thomas falls within the definition of § 29-3001 and is permitted to pursue all remedies available under the act. We now reach the merits of his claim.

One seeking postconviction relief has the burden of establishing a basis for such 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). One is not entitled to relief under the act merely because he believes that his trial was imperfect. *State v. Landers*, 212 Neb. 48, 321 N.W.2d 418 (1982). Rather, the person requesting relief under the act must allege facts that constitute a denial of his rights under the Nebraska or federal Constitution, causing the judgment against him to be voidable.

State v. Start, 229 Neb. 575, 427 N.W.2d 800 (1988). The findings of the postconviction hearing court will not be disturbed unless clearly erroneous. *State v. Luna, supra.*

First, we will consider together Thomas' requests to take the deposition of an attorney and to present testimony of another attorney, Phyllis Beck, in order to establish the standard of practice for a criminal trial attorney in the area. Since Nebraska law prohibits expert testimony on matters of law, we need not analyze these assigned errors under the standards applicable to ineffective assistance of counsel claims.

In *State v. Ohler*, 219 Neb. 840, 366 N.W.2d 771 (1985), one of the errors assigned on appeal was the lower court's refusal to permit expert testimony regarding the standard of practice for a criminal trial attorney in the area. This court stated that expert testimony is generally not admissible as proof that the assistance of counsel in a criminal case was ineffective. This court reaffirmed the holding in *Ohler* in *State v. Gagliano*, 231 Neb. 911, 438 N.W.2d 783 (1989).

Under the rule in *Ohler*, Thomas may not present the testimony of Beck as to the standard of practice for a criminal trial attorney in the area in order to aid his ineffective assistance of counsel claim. Since he is not permitted to present the evidence at the postconviction hearing, taking the deposition of Beck would be futile. The trial court did not abuse its discretion in refusing Thomas' discovery request to take the deposition of an attorney or his request to present the testimony of Beck.

The sixth amendment to the U.S. Constitution guarantees a person accused of a crime the right to counsel during the criminal prosecution. The Nebraska Constitution has a similar provision. See Neb. Const. art. I, § 11. The accused is entitled to the assistance of an attorney to ensure that he receives a fair trial and is able to actively combat the prosecution's charges in an adversarial proceeding. See *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The right to counsel means the right to the effective assistance of counsel. *Strickland, supra* (quoting *McMann v. Richardson*, 397 U.S. 759, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970)). In order to prove that his counsel was ineffective so as to render his trial unjust, therefore requiring reversal of his conviction, the convicted

defendant must address two components. First, he must show that his counsel's performance was defective. This requires showing that his counsel's representation fell below the prevailing professional standards of reasonableness in the area. Second, he must show that his counsel's deficient performance prejudiced his defense. To prove prejudice, the defendant must show that there was a reasonable probability that but for the conduct of his counsel, the result of the proceeding would have been different. *Strickland, supra.*

Nebraska requires that the defendant bear the same burden in making a postconviction ineffective assistance of counsel claim.

> "When, in a postconviction motion, a defendant 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 accused, performed at least as well as an attorney with ordinary training and skill in the criminal law in the area. Further, there must be a showing of how the defendant was prejudiced in the defense of his or her case as a result of the attorney's actions or inactions."

State v. Meis, 233 Neb. 355, 360, 445 N.W.2d 610, 614 (1989) (quoting *State v. Patterson*, 232 Neb. 304, 440 N.W.2d 242 (1989)). See, also, *State v. Domingus*, 234 Neb. 267, 450 N.W.2d 668 (1990); *State v. Chapman*, 234 Neb. 369, 451 N.W.2d 263 (1990).

We begin with the defendant's discovery requests. It is well established that the trial court has broad discretion in granting the discovery requests of defense counsel, and error can be founded only upon an abuse of discretion by the court. *State v. Isley*, 195 Neb. 539, 239 N.W.2d 262 (1976). In this postconviction proceeding, Thomas sought to take the depositions of a physician, another attorney, and Cora Jones in order to facilitate the making of his ineffective assistance of counsel claim against his attorney, Richard McCoy. We know of no precedent that permits a defendant, in a postconviction proceeding, to request additional discovery which would facilitate making that same postconviction claim. The

defendant is "fishing" for evidence to support his ineffective assistance of counsel claim and has not supplied us with authority granting him the right to discover evidence, as opposed to his right under the Postconviction Act to present evidence he already possesses. Thomas has made no showing that any information he may gain in these depositions will aid him in proving that his counsel was ineffective. Rather, the one deposition he was permitted to take, that of his counsel, McCoy, establishes that McCoy performed adequately as counsel to Thomas.

Thomas claims that McCoy was ineffective because he failed to call a medical expert to testify at trial to the discrepancies in testimony between Thornton Rave's claimed injuries and other witness testimony as to how the assault on Rave occurred. In his deposition McCoy testified that he did not call a medical witness because the State was not going to call one either. He did not believe that Rave, as a layperson, could competently testify as to the extent of his injuries and did not want to provide needed medical testimony for the State. This was a strategic decision by McCoy, and although in hindsight it may have been a mistake given the fact that the court allowed the testimony of Rave, McCoy's decision was not unreasonable. His performance in this instance did not fall below acceptable standards of practice for a criminal trial attorney in the area. Thus, Thomas has failed to satisfy the requirements of the first component of the *Strickland* test. The trial court did not abuse its discretion by disallowing Thomas' discovery request.

Thomas next claims that because McCoy did not appear at the taking of the deposition of Cora Jones, the fact that she was "feuding" with the Thomas family was not brought out. Thomas claims that this "feud" bears on her credibility as a witness and McCoy's failure to establish this was evidence that he was ineffective as Thomas' counsel. Even if we assume that the failure to attend the deposition of Jones was conduct that fell below the reasonable standard of practice for a criminal trial attorney in the area, Thomas has failed to allege any facts that show he was prejudiced by McCoy's actions. He has failed to establish what Jones would have said had she been questioned about the feud. McCoy testified in his deposition

that he received copies of all the depositions taken by the State before trial. Presumably this included Jones' deposition. McCoy cross-examined Jones regarding her feelings about the Thomas brothers when she was called as a witness at trial. Jones testified that she bore no hard feelings against the Thomas brothers.

Jones was called as a witness by the State primarily because she was an eyewitness to the assault. McCoy cross-examined her extensively on her perception of the event, and she was also questioned during her deposition about what she saw. It is possible that the "feud" theory might have been pursued more aggressively if McCoy had been present at her deposition. However, extensive questioning about her relationship with the Thomas brothers would have made very little difference in the impact of her testimony. As discussed above, the value of Jones' testimony was that she witnessed the assault. Even if the jury had found Jones to be unbelievable, her testimony was corroborated by several other witnesses. Thomas was not prejudiced by McCoy's failure to attend Jones' deposition and thus has failed to establish a necessary element of an ineffective assistance of counsel claim. Consequently, the trial court did not abuse its discretion by refusing to grant Thomas' request to take a second deposition of Jones.

Last, we turn to Thomas' claim that his attorney's failure to appear at his first sentencing hearing, at the hearing on the motion to consolidate, and at the taking of the depositions of the State's witnesses constitutes ineffective assistance of counsel.

Thomas' original sentencing hearing was scheduled for February 17, 1981. His attorney, McCoy, did not appear at the hearing. McCoy believed Thomas had fired him as his attorney and informed the court that he would not be present at the scheduled hearing. The court continued the hearing until February 25 and ordered McCoy to appear because Thomas denied that he fired McCoy. McCoy did appear to represent Thomas at the February 25 hearing, and Thomas was sentenced at that time after statements by McCoy on behalf of Thomas. Thomas' claim that McCoy failed to appear at his sentencing is totally without merit.

McCoy also did not appear at the hearing on the motion to consolidate the trials of Thomas and his two brothers. Even if we assume that McCoy's failure to appear at the hearing was not a reasonable practice among trial attorneys in the area, Thomas has again failed to show how McCoy's failure to represent him at the hearing prejudiced him. Despite the fact that the hearing on the motion to consolidate may have been a critical stage of the prosecution, Thomas must still show that his failure to be represented at the hearing affected the outcome of his trial. The mere fact that he was unrepresented at a critical stage is not sufficient to satisfy the ineffective assistance of counsel test under *Strickland, supra*.

McCoy testified that it was his desire that the trials of the three brothers be consolidated so there would be another party to blame for the assault. He stated that Gary Thomas was more blameworthy because he attacked Rave with a board, while Ralph Thomas just used his fists. There is no evidence in the record that counsel for Thomas' two brothers tried to lay the majority of the blame on Ralph Thomas during the trial. Rather, Gary Thomas testified in defense of Ralph Thomas while on the stand. Thomas has not stated at any time that he objected to being tried with his two brothers or that the consolidated trial hurt his defense in any way. Thomas has not met the burden placed on him under *Strickland*. The trial court did not err in failing to find that Thomas' counsel was ineffective by not appearing at the hearing.

Thomas has also not shown that McCoy's failure to appear at the State's depositions prejudiced him. Again, assuming that the failure to appear at depositions of the opposing party's witnesses is not a reasonable practice among criminal trial attorneys, we find that Thomas has not offered any evidence to show that McCoy's failure to attend affected the outcome of his trial. As discussed above, McCoy received copies of all the depositions. He also cross-examined all the witnesses called by the State at the trial. Counsel for Thomas' brothers did attend the depositions and cross-examined all the deponents. Certainly, Thomas' brothers had the same interest in being acquitted of any assault charges as Thomas and were thus motivated to expose any weaknesses in the State's case. The

brothers' counsel did not use any testimony at the depositions to impeach, rehabilitate, or bolster the testimony of any witness at trial. Thomas has failed to substantiate his contention that McCoy's counsel was ineffective. He has not shown that he was prejudiced by McCoy's failure to attend the depositions and has therefore not satisfied the second element of the *Strickland* test. The trial court did not err in disallowing Thomas' claim.

Thomas has failed to make any showing that his counsel during the prosecution for the first degree assault charge, Richard McCoy, was ineffective. The judgment of the district court is affirmed.

AFFIRMED.

HASTINGS, C.J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. FREDERICK A. CAPLES, APPELLANT.
462 N.W.2d 428

Filed November 16, 1990. No. 89-1284.

1. **Motions to Suppress: Appeal and Error.** The trial court's ruling on a motion to suppress is to be upheld on appeal unless its findings are clearly erroneous.
2. **Constitutional Law: Search and Seizure.** The fourth amendment guards against unreasonable searches and seizures by the government.
3. _____: _____. The criteria for judging government intrusions under the fourth amendment are twofold. First, the government must intrude upon the legitimate privacy expectations of the individual. This is the search or seizure. Second, the search or seizure must be unreasonable. A person is not protected by the fourth amendment from any government intrusion, but only those actions that are unreasonable.
4. **Constitutional Law: Search and Seizure: Police Officers and Sheriffs.** Whenever a police officer restrains an individual's liberty by force or some show of authority, the officer has "seized" that person for purposes of the fourth amendment.
5. **Constitutional Law: Search and Seizure: Weapons.** A search of a person's outer clothing in an attempt to find weapons is a "search" under the fourth amendment.
6. **Constitutional Law: Search and Seizure: Police Officers and Sheriffs: Weapons.** When a police officer observes conduct that leads him to believe that criminal

activity may be afoot and that the persons involved in that activity may be armed and dangerous, he is entitled for the protection of himself and others to stop those persons and conduct a carefully limited search of their outer clothing in order to discover weapons which may be used to assault him. This type of search is reasonable under the fourth amendment.

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

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

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

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

WHITE, J.

The defendant, Frederick A. Caples, appeals his conviction, pursuant to Neb. Rev. Stat. § 28-1206 (Reissue 1989), of felon in possession of a firearm.

At about 2 a.m. on March 7, 1989, two uniformed officers from the Omaha Police Division responded to a radio dispatch that shots were fired in the area of 29th Street and Patrick Avenue in north Omaha. The dispatcher informed Officers Howard and Campbell that the suspect in the incident was a black male driving a gold-colored BMW. The officers drove to the area and met Officer Hronek, who was making an unrelated traffic stop and had heard part of the dispatch. Officer Hronek and the other two officers stopped their police cruisers in the middle of the street, facing in opposite directions so that the drivers could speak to each other. Howard and Campbell informed Hronek of the description of the car and driver.

While the officers were stopped in the street, a BMW driven by a black male pulled up and stopped behind Howard and Campbell's police cruiser. Howard testified that the car was a light tan or cream-colored BMW. Hronek said, "[T]hat's our man," to Officers Howard and Campbell, approached the car, told the driver about the shooting incident, and asked him to step out of the car. Hronek asked the driver to keep his hands where he could see them and then proceeded to "pat down" the

driver. During the course of the pat-down search, Hronek found a .25-caliber handgun in the left inner coat pocket of the driver. He then placed the driver under arrest. The driver of the BMW was later identified as the defendant-appellant, Caples. Caples had been convicted of a felony in California in 1986.

Caples moved to suppress evidence of the firearm on the grounds that the pat-down search of his person was illegal under the fourth amendment. Caples contended that the search was made without authority because it was warrantless, that the search was not made incident to and following a lawful arrest, that his initial detention and subsequent arrest were made without probable cause, and that the search of his person was conducted without probable cause or consent. There is no record of the district court's denial of the motion, but evidence of the gun was received during the bench trial. Caples was convicted after the issue of his guilt was submitted to the court on the police reports and the testimony received at the suppression hearing. He now appeals his conviction and assigns as error the district court's admission of evidence concerning the firearm.

The trial court's ruling on a motion to suppress is to be upheld on appeal unless its findings are clearly erroneous. *State v. Blakely*, 227 Neb. 816, 420 N.W.2d 300 (1988); *State v. Gibson*, 228 Neb. 455, 422 N.W.2d 570 (1988).

The fourth amendment guards against unreasonable searches and seizures by the government. See U.S. Const. amend. IV. The Nebraska Constitution has a similar provision. See Neb. Const. art. I, § 7. When an individual has a reasonable and legitimate expectation of privacy in the thing to be searched or seized, he is entitled to be free from unreasonable governmental intrusion. *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967). Thus, the criteria for judging government intrusions under the fourth amendment are twofold. First, the government must intrude upon the legitimate privacy expectations of the individual. This is the search or seizure. Second, the search or seizure must be unreasonable. A person is not protected by the fourth amendment from *any* government intrusion, but only those actions that are unreasonable.

Whenever a police officer restrains an individual's liberty by force or some show of authority, the officer has "seized" that person for purposes of the fourth amendment. *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Additionally, a search of a person's outer clothing in an attempt to find weapons is a "search" under the fourth amendment. *Id.* In this case, Officer Hronek approached the appellant, Caples; asked him to step out of his car, keeping his hands visible at all times; and then searched his outer clothing for weapons. Obviously, Caples had a reasonable and well-recognized expectation of privacy in his physical person. He was not free to walk away from the scene, nor was he free to decline Officer Hronek's pat-down search of his body. Thus, Officer Hronek's actions in this case constituted a search and seizure of Caples. We must now consider whether the search and seizure was reasonable under prevailing fourth amendment standards.

In *Terry v. Ohio, supra*, the U.S. Supreme Court held that when a police officer observes conduct that leads him to believe that criminal activity may be afoot and that the persons involved in that activity may be armed and dangerous, he is entitled for the protection of himself and others to stop those persons and conduct a carefully limited search of the outer clothing of such persons in order to discover weapons which may be used to assault him. This type of search is reasonable under the fourth amendment, and any weapons found during the search may be admitted into evidence against the person from whom they were taken. *Id.* The Court distinguished the "Terry stop" from the situation in which the officer has probable cause to arrest the person and searches incident to that arrest. The Court discussed at length the nature of the government interest in conducting brief investigatory stops and balanced this against the degree of intrusion on individual rights that occurs in a search for weapons where probable cause to arrest for a crime is lacking. The Court then determined that the proper balance of the two interests lies in permitting a reasonable search for weapons by an officer when he has reason to believe he is dealing with an armed or dangerous person, regardless of whether the officer has probable cause to arrest the individual for a crime. The Court also stated that it was

unnecessary that the officer be certain that the suspect was armed; the issue was whether a reasonably prudent man in the circumstances would have believed his safety or the safety of others was in danger. In justifying the intrusion, the officer must be able to point out specific and articulable facts which, together with rational inferences from those facts, reasonably warrant the intrusion. *Id.*

This court has closely followed the holding in *Terry* in permitting prearrest protective searches of suspects believed to be armed. See, *State v. Anderson*, 204 Neb. 186, 281 N.W.2d 743 (1979); *State v. DeJesus*, 216 Neb. 907, 347 N.W.2d 111 (1984).

This case fits neatly within the rule in *Terry*. Officers Howard and Campbell heard the dispatch describing the suspect in the shooting as a black male driving a gold-colored BMW and then relayed this information to Hronek. When Caples fortuitously pulled up behind Howard and Campbell's cruiser in the BMW, the officers observed he was a black male and determined him to be an individual matching the description of the suspect wanted in the shooting incident. It was at that time that Hronek "stopped and frisked" Caples.

Under *Terry*, it was reasonable for all the officers to believe that Caples might have been involved in the shooting incident. Caples and the BMW matched the description of the suspect and the car in the shooting. Although Caples claims that his BMW is actually silver, it is certainly possible that it appeared gold or tan at night under streetlights. Caples was also present in the area in which the shooting occurred and was the sole occupant of the BMW. Under *Terry*, these facts were sufficient to lead Hronek to reasonably believe that the driver of the BMW was the same individual involved in the shooting incident. It was reasonable for Hronek to detain and question Caples about the incident.

Furthermore, it was also reasonable for Hronek to believe that Caples might have been armed and dangerous, thus necessitating the pat-down search. The officers were aware that the suspect was armed and had fired shots in the area only a few minutes before. When Hronek observed Caples in his vehicle, nothing occurred to dispel his belief that this was probably the

individual involved in the shooting. It was reasonable for Hronek to conclude that if this was the individual, he was probably armed, had fired shots a short time before, and might fire his weapon again. Therefore, Hronek was justified in conducting the pat-down search in order to protect his safety and that of the other officers. Hronek testified that he did conduct the search for his safety. Hronek briefly patted the outer clothing of Caples and found the weapon. He did not search the BMW or the surrounding area. Only when he found the weapon did he have sufficient probable cause to believe that Caples was the individual responsible for the shooting incident. He then placed Caples under arrest. Because the search was brief, carefully limited to the outer clothing of Caples, and conducted for the officer's safety, it complied with the requirements of *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

The search and seizure of Caples was justified under the rationale in *Terry, supra*, and was reasonable under the fourth amendment. The evidence of the weapon found on Caples' person was properly admitted by the district court. The district court's judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LAWRENCE A. THOMAS, APPELLANT.

462 N.W.2d 618

Filed November 16, 1990. No. 89-1295.

1. **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.
2. _____: _____. Only where evidence lacks sufficient probative value as a matter of law may the Supreme Court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.
3. **Convictions: 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.
4. **Appeal and Error.** The Supreme Court will only consider those errors which are assigned and discussed.

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

Thomas M. Kenney, Douglas County Public Defender, and Cheryl M. Kessell for appellant.

Robert M. Spire, Attorney General, and Wynn Clemmer for appellee.

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

FAHRNBRUCH, J.

Lawrence A. Thomas appeals his jury conviction of robbing Susan Francke in a Target department store parking lot in Omaha, for which he received a sentence of 5 to 10 years' imprisonment. We affirm.

The defendant, Thomas, assigns as error that the evidence is so lacking in probative force that it is insufficient as a matter of law to support his conviction. In arguing his assignment of error, Thomas focuses on the victim's identification of him as the perpetrator of the robbery.

The evidence is uncontroverted that shortly after 2:30 p.m. on February 15, 1989, Francke was robbed of her purse; money; a traveler's check; blank checks, one of which was later forged; and other valuables when she was unlocking her car after making a purchase at Target. The evidence is also uncontroverted that Francke's attention was directed to the robber when he was near the rear of her car and said, "Hi, how are you?" The victim replied, "Fine," but she became apprehensive that he was after her purse. She looked at the robber closely. He came closer, grabbed the strap of Francke's purse, and fled. When the robber realized that the strap had broken from the purse and that Francke still had her purse, he returned. A struggle ensued, and the robber fled with the victim's purse and its contents. During the struggle, the robber pushed Francke and yelled obscenities at her. She became "scared." She testified that her purse was taken from her by force and violence.

After the robber grabbed Francke's purse, he fled from the Target parking lot and proceeded across the street to a gas

station about a block away. Francke testified that the robber left the gas station in an older off-colored green four-door automobile. As stated, the foregoing evidence was unchallenged.

The victim returned to the Target store, and Omaha police were summoned. The victim described the robber as a male, 5 feet 7 inches or 5 feet 8 inches in height, about 165 pounds, 25 to 27 years old, and wearing jeans and some type of jacket. That evening, in order to make a record for herself, Francke, who used art in her employment, sketched the robber's face and listed his description. Francke's robber was not included in a photo array presented to her that evening. However, the next day, when another photo lineup, including the defendant's photo, was presented to her, she readily recognized Thomas as the robber. She asked police to arrange a physical lineup so that she could verify Thomas' height and weight. Nine days later a physical lineup was arranged, and she again identified Thomas as the robber. Francke also identified Thomas as her robber at his trial.

The defendant became a suspect in Francke's robbery after one of the checks from Francke's purse was forged and presented at a liquor store about 5:30 p.m. on February 15. The person had arrived at the liquor store in a beige-colored automobile. Police interviewed two friends of Thomas' in connection with the check incident and initially arrested one of them for the Francke robbery; however, neither the victim nor a witness who testified could identify him as the robber. Thereafter, Thomas was arrested and charged with robbing Francke.

Lillie Jenkins, an eyewitness to the robbery, corroborated Francke's testimony that the robbery took place in the Target parking lot. She also saw the robber flee to the gas station described by Francke. Jenkins testified she saw the robber leave the gas station in an automobile which she described as having a dark-green top and lighter green body. Shortly after the robbery, Jenkins observed the same two-tone green automobile traveling on the street at another location. She observed that two men were in the car and that the passenger had a gold tooth. The evidence reflects that Thomas had a gold tooth and that

one of the men whom police interviewed about the check forgery also had a gold tooth. Jenkins testified that she did not get a good enough look at the robber to identify him, nor could she identify the man in the two-tone green car because she just glanced at him and the car. Neither Jenkins nor another witness could identify Francke's robber in photo arrays.

The defendant's wife, Margie Thomas, who admitted she had been convicted twice previously for giving false information to the police, testified that neither she nor her husband was employed. Mrs. Thomas claimed that she and her husband spent their days together at home without leaving. She testified that the defendant had been home with her all day on February 15, 1989. The defendant's wife testified that one of the men who were interviewed by the police in connection with the check forgery had dropped by the Thomas home and asked to store his car in their garage because it was "hot." The man owned a two-tone light- and dark-green older Cadillac Seville, according to the defendant's wife. However, when Mrs. Thomas left to pick up her child from school, the man drove away in a beige-colored car. Mrs. Thomas testified that after she returned from school with her child, both of the men whom the police interviewed in connection with the check forgery were visiting with her husband. They were all friends. Mrs. Thomas testified that one of her husband's friends asked her to pass a "lady's" check, which she refused to do.

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 value as a matter of law may the Supreme Court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt. *State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990). See *State v. Brown*, 225 Neb. 418, 405 N.W.2d 600 (1987). Moreover, 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. *State v. Reynolds, supra*; *State v. Brown, supra*.

In this case, the jury chose to believe and give more weight to the testimony of the State's witnesses than to the testimony of Thomas' wife. There was sufficient relevant evidence from which the jury could find beyond a reasonable doubt that Thomas was the person who robbed Francke. Thomas' assignment of error has no merit.

Thomas argues that the sentence imposed upon him is excessive. We do not reach that issue because there was no assignment of error challenging the sentence. We reiterate that the Supreme Court will consider only those errors which are assigned and discussed. *Houska v. City of Wahoo*, 235 Neb. 635, 456 N.W.2d 750 (1990); *State v. Garcia*, 235 Neb. 53, 453 N.W.2d 469 (1990); Neb. Ct. R. of Prac. 9D(1)d (rev. 1989). See Neb. Rev. Stat. § 25-1919 (Reissue 1989).

AFFIRMED.

IN RE INTEREST OF STEVEN JON RASMUSSEN, ALLEGED TO BE A MENTALLY ILL DANGEROUS PERSON. STATE OF NEBRASKA, APPELLEE, V. STEVEN JON RASMUSSEN, APPELLANT.

462 N.W.2d 621

Filed November 16, 1990. No. 89-1306.

1. **Appeal and Error.** Generalized and vague assertions do not advise this court of the issues submitted for decision. In such a circumstance, the decision appealed from will be affirmed unless this court elects to note plain error.
2. **Mental Health: Courts: Appeal and Error.** A district court's review of an appeal from a mental health board is de novo on the record. A final order of the district court is appealed to the Nebraska Supreme Court in accordance with the procedure in criminal cases.
3. **Mental Health: Appeal and Error.** In reviewing a district court's judgment under the Nebraska Mental Health Commitment Act, the Supreme Court will affirm the district court's judgment unless, as a matter of law, the judgment is unsupported by evidence which is clear and convincing.
4. **Mental Health: Evidence: Time: Appeal and Error.** In reviewing a decision from a mental health commitment hearing, a court should remember that in determining whether a person is dangerous, the focus must be on the subject's condition at the time of the hearing.

5. **Mental Health: Proof: Evidence: Time.** Actions and statements of a person alleged to be mentally ill and dangerous which occur prior to the hearing are probative of the subject's present mental condition. In order for a past act to have any evidentiary value, it must form some foundation for a prediction of future dangerousness and be, therefore, probative of that issue.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Reversed and remanded with directions to vacate the commitment.

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

Ronald L. Staskiewicz, Douglas County Attorney, and Marjorie A. Records for appellee.

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

FAHRNBRUCH, J.

Appellant, Steven Jon Rasmussen, seeks to set aside his involuntary civil commitment to a mental health facility. We reverse, and remand the cause with directions to vacate the commitment.

We first note that appellant's brief fails to assign any specific error. Appellant's sole assignment of error recites: "The District Court erred in affirming the Mental Health Board's Commitment Order." Such "generalized and vague assertions do not advise this court of the issues submitted for decision." *Coyle v. Janssen*, 212 Neb. 785, 786, 326 N.W.2d 44, 45 (1982). In such a circumstance, the decision appealed from will be affirmed unless this court elects to note plain error. *Reynolds v. Meyers*, 224 Neb. 509, 398 N.W.2d 722 (1987); *In re Interest of P.W.*, 224 Neb. 197, 397 N.W.2d 36 (1987); *Coyle v. Janssen, supra*. See, also, *Russell v. Norton*, 229 Neb. 379, 427 N.W.2d 762 (1988); Neb. Rev. Stat. § 25-1919 (Reissue 1989); Neb. Ct. R. of Prac. 9D(1)d (rev. 1989).

In Rasmussen's case, we find there was plain error as a matter of law, since the record fails to support by clear and convincing evidence that Rasmussen was a danger to himself or others at the time he was involuntarily committed by the Douglas County Mental Health Board (Board).

After a commitment hearing, the Board announced its finding that Rasmussen was a mentally ill person who was dangerous to himself and/or other people. Rasmussen appealed that decision to the district court for Douglas County. In affirming the Board's commitment, that court found that

> Rasmussen . . . is mentally ill and dangerous to himself and others. [Rasmussen's] conduct on the day in question at the time of his detainment by law enforcement officers shows to the Court that the plaintiff does not have the mental capacity to safely take care of his basic needs without proper medication which he has refused to take in the past, and the evidence *indicates there is a strong possibility* that he will continue this practice in the future.

(Emphasis supplied.) Rasmussen timely appealed to this court.

A district court's review of an appeal from a mental health board is de novo on the record. A final order of the district court is appealed to the Nebraska Supreme Court in accordance with the procedure in criminal cases. Neb. Rev. Stat. § 83-1043 (Reissue 1987). In reviewing a district court's judgment under the Nebraska Mental Health Commitment Act, Neb. Rev. Stat. §§ 83-1001 et seq. (Reissue 1987 & Cum. Supp. 1988), the Supreme Court will affirm the district court's judgment unless, as a matter of law, the judgment is unsupported by evidence which is clear and convincing. *In re Interest of Adams*, 230 Neb. 109, 430 N.W.2d 295 (1988); *In re Interest of Kennebrew*, 224 Neb. 885, 402 N.W.2d 264 (1987).

In reviewing a decision from a mental health commitment hearing, a court should remember that in determining whether a person is dangerous, the focus must be on the subject's condition *at the time of the hearing*, not the date the subject of the commitment hearing was initially taken into custody. See, *In re Interest of McDonell*, 229 Neb. 496, 427 N.W.2d 779 (1988); *In re Interest of Blythman*, 208 Neb. 51, 302 N.W.2d 666 (1981). Actions and statements of a person alleged to be mentally ill and dangerous which occur prior to the hearing are probative of the subject's present mental condition. However, in order for a past act to have any evidentiary value, it must form some foundation for a prediction of future dangerousness and be, therefore, probative of that issue. *Id.*

The record reflects that on April 1, 1989, Omaha Police Officer Kris R. Jacobson responded to a disturbance call that a man was inhabiting a sewer drain. Jacobson testified that upon his arrival near the sewer drain, he observed Rasmussen, dressed only in pants, running down a hill toward the roadway upon which Jacobson had arrived. (Rasmussen was also wearing shoes when he was taken to Douglas County Hospital for emergency admittance.) Rasmussen stopped in the middle of the roadway when he saw Jacobson. Jacobson then left his police cruiser, approached Rasmussen, identified himself as a police officer, and asked Rasmussen to put his hands where he could see them. Rasmussen ignored this request and instead put both of his hands in his pockets and proceeded to remove some keys and coins and toss them onto the roadway. Jacobson repeated his request, and again Rasmussen ignored it.

As Jacobson approached, Rasmussen jumped onto the back of a moving UPS (United Parcel Service) truck. As the truck passed, Jacobson pulled Rasmussen from the truck. The officer then placed Rasmussen on the ground, handcuffed him, and placed him in the police cruiser.

City workers, who had called the police and had pointed out Rasmussen, told Jacobson where they first saw appellant, and at that place a briefcase with some clothing, personal effects, bank papers, a Bible, and an Iowa identification were found.

When asked his name, Rasmussen, while in the cruiser, responded "Steve" and cooperated with Jacobson. During the conversation, Rasmussen was asked where he resided, and he responded "Council Bluffs, Iowa," but became emotional as he described how his stepfather and mother allegedly swindled him out of his house and money. Rasmussen would not sit still. He turned completely sideways and went down to the cruiser floor on his knees despite being handcuffed from behind. Jacobson put Rasmussen back onto the seat and asked him to sit up so the two could continue their conversation. Jacobson, in an attempt to assess Rasmussen's situation, continued to ask the appellant background questions. Instead of responding, Rasmussen continued to cry and kept telling Jacobson about his stepfather's taking his house and money. Later, Rasmussen said that he had been in the military, where he used drugs, and

said he was dishonorably discharged after having been accused of selling drugs. When asked what branch of the military he had been in, Rasmussen responded that "the military was the military and he had been programmed to kill."

When asked if he had any previous mental institutionalization, Rasmussen said that he had been institutionalized (2 years earlier) in Clarinda, Iowa. When asked whether he would voluntarily commit himself, Rasmussen responded that he knew the plan, he was "like Houdini," he had been there before, and they could not help him.

Based on his investigation and after consultation with his superiors, Jacobson retained custody of Rasmussen and transported him to Douglas County Hospital for emergency admittance in accordance with § 83-1020 (Cum. Supp. 1988). That statute provides in part:

> Whenever any peace officer believes that any individual is a mentally ill dangerous person and that the harm described by section 83-1009 is likely to occur before mental health board proceedings under the Nebraska Mental Health Commitment Act may be invoked to obtain custody of the individual, such peace officer may immediately take such individual into custody, cause him or her to be taken into custody, or continue his or her custody if he or she is already in custody. . . . When a mental health center, a state hospital, or other government or private hospital has the capability to detain such an individual in the county in which the individual is found, the individual shall be placed in such facility.

Section 83-1009 (Reissue 1987) provides:

> Mentally ill dangerous person shall mean any mentally ill person, alcoholic person, or drug abusing person who presents:
>
> (1) A substantial risk of serious harm to another person or persons within the near future as manifested by evidence of recent violent acts or threats of violence or by placing others in reasonable fear of such harm; or
>
> (2) A substantial risk of serious harm to himself or herself within the near future as manifested by evidence of

recent attempts at, or threats of, suicide or serious bodily harm or evidence of inability to provide for his or her basic human needs, including food, clothing, shelter, essential medical care, or personal safety.

The emergency admittance was granted, and Rasmussen does not challenge that admittance. At a subsequent involuntary civil commitment hearing before the Douglas County Mental Health Board on April 18, 1989, Rasmussen objected to the admission of Jacobson's testimony concerning the statements Rasmussen made to the officer while both were in Jacobson's cruiser. In his objection, Rasmussen claimed that due process and § 83-1059 (Reissue 1987) require that prior to their admission into evidence, an independent determination on the record must be made that any statements made to the police while a subject of a mental health commitment is in custody were made knowingly, intelligently, and voluntarily. Section 83-1059 provides that during a mental commitment hearing in no event shall evidence be considered which is inadmissible in criminal proceedings. The district court in Rasmussen's case found this court's holding in *Kraemer v. Mental Health Board of the State of Nebraska*, 199 Neb. 784, 261 N.W.2d 626 (1978), *cert. denied* 441 U.S. 960, 99 S. Ct. 2403, 60 L. Ed. 2d 1064 (1979), controlling and sufficient to answer Rasmussen's objection. We do not reach the issues raised in Rasmussen's objection because the ruling on it was not specifically assigned as error in this appeal, as required by § 25-1919. See, also, *Houska v. City of Wahoo*, 235 Neb. 635, 456 N.W.2d 750 (1990); Neb. Ct. R. of Prac. 9D(1)d (rev. 1989).

We do, however, review the record to determine if there was plain error in Rasmussen's involuntary commitment. There is substantial evidence in the record that at the time of his emergency admittance to a mental health facility Rasmussen was mentally ill and a danger to himself. Dr. Martin Weiler, Rasmussen's treating psychiatrist, testified before the Board that Rasmussen, at the time he was given emergency admittance, bordered on a delusional-type thinking, was psychotic, and, based upon reasonable medical certainty, was diagnosed as having a bipolar disorder for which he had been treated in two Iowa hospitals for about 4 months. Dr. Weiler

testified that Rasmussen had been discharged with medication from the Iowa hospitals, but had not been taking his medication. The psychiatrist said that for the most part, after Rasmussen's emergency admittance, his patient had been taking his medication, although there had been times when he refused it. At the time of the commitment hearing, Dr. Weiler testified that Rasmussen was no longer psychotic. When asked, "Do you have an opinion whether if the patient were to be released from the hospital today without further treatment whether he would be able to meet his own basic human needs for his own personal safety?" Dr. Weiler answered, "Well, right at present time I think he would be able to take care of his basic needs." The psychiatrist was not "100 percent sure" whether his patient would take his medication. Dr. Weiler testified that Rasmussen had not threatened anyone while he had been in the hospital between April 5 and April 18, the date of the hearing.

As a matter of law, the evidence does not clearly and convincingly support a finding that Rasmussen, at the time of his commitment hearing, presented a substantial risk of serious harm to another person or persons within the near future as manifested by evidence of recent violent acts or threats of violence or by placing others in reasonable fear of such harm, as required for commitment under § 83-1009(1). His statement to Officer Jacobson that he was "programmed to kill" in the military falls far short of a threat to kill another.

Furthermore, there is no evidence in the record that Rasmussen, at the time of the mental health commitment hearing, posed a substantial risk of serious harm to himself within the near future as manifested by evidence of recent attempts at, or threats of, suicide or serious bodily harm, which is one of the prescriptions required under § 83-1009(2) to commit a person. Finally, the second prescription under § 83-1009(2) to commit a mentally ill person requires clear and convincing evidence that Rasmussen had an inability to provide for his basic human needs, including food, clothing, shelter, essential medical care, or personal safety. The district court was properly concerned with whether Rasmussen, upon release, would continue to take his prescribed medication. It is possible that if Rasmussen fails to take his medication he could pose a

substantial risk of serious harm to himself. However, the district court found only that the evidence "*indicates there is a strong possibility*" that Rasmussen will not continue to take his medication. An "indication of a strong possibility" does not, as a matter of law, support a finding that Rasmussen would not continue to take his medication. That being so, under the facts of this case, the evidence is not clear and convincing that Rasmussen, at the time of his commitment hearing, lacked the ability to provide for his basic human needs, including food, clothing, shelter, essential medical care, or personal safety, or that he posed a substantial risk of harm to himself.

We reverse the judgment of the district court and remand the cause with directions that Rasmussen's commitment to a mental health facility be vacated.

REVERSED AND REMANDED WITH DIRECTIONS TO VACATE THE COMMITMENT.

CHARLES E. HAASE, APPELLEE AND CROSS-APPELLANT, V. JUDY M. HAASE, NOW KNOWN AS JUDY M. BURNETT, APPELLANT AND CROSS-APPELLEE.

462 N.W.2d 625

Filed November 16, 1990. No. 90-002.

Appeal from the District Court for Brown County: EDWARD E. HANNON, Judge. Affirmed.

Ronald J. Albin for appellant.

Richard E. Gee for appellee.

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

PER CURIAM.

This is an appeal from a district court order modifying a decree of dissolution. The wife appeals, alleging that the district

court erred in finding a material change in circumstances affecting the best interests of the children, which required changing custody of the parties' two children to the husband in lieu of divided custody. The husband cross-appeals, claiming that the lower court erred in setting visitation without considering the children's school schedules.

> "In an appeal involving an action for dissolution of marriage, the Supreme Court's review of a trial court's judgment is de novo on the record to determine whether there has been an abuse of discretion by the trial judge, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, the Supreme Court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another."

Huffman v. Huffman, ante p. 101, 104, 459 N.W.2d 215, 219 (1990); *Ritter v. Ritter*, 234 Neb. 203, 450 N.W.2d 204 (1990); *Ensrud v. Ensrud*, 230 Neb. 720, 433 N.W.2d 192 (1988). From our review de novo on the record in these proceedings, we find no abuse of discretion by the district court.

The wife has also raised a question regarding the admissibility of certain evidence received at the hearing on the husband's motion to modify the dissolution decree. Assuming, but not deciding, that the evidence was inadmissible, the balance of the record fails to establish an abuse of discretion by the district court in disposing of the issues and the parties' contentions.

Although requested, we decline to award an attorney fee in this appeal.

AFFIRMED.

IN RE INTEREST OF P.L., S.L., AND A.L., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. I.L., APPELLANT.

462 N.W.2d 432

Filed November 16, 1990. No. 90-057.

1. **Juvenile Courts: Appeal and Error.** An adjudication order in a juvenile court is an appealable order.
2. **Juvenile Courts: Parental Rights.** The juvenile court has broad discretion as to the disposition of children who are found to be neglected under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988).

Appeal from the Separate Juvenile Court of Lancaster County: TONI G. THORSON, Judge. Affirmed.

Miles W. Johnston, Jr., for appellant.

Linda S. Porter, Deputy Lancaster County Attorney, for appellee.

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

GRANT, J.

I.L., father of P.L., S.L., and A.L., appealed, on January 9, 1990, from an "Order Committing Children to the Temporary Legal Custody of the Nebraska Department of Social Services," entered by the separate juvenile court of Lancaster County on December 21, 1989. Appellant assigns as error the actions of the trial court (1) in overruling appellant's motion for change of venue; (2) "in finding said children lacked parental care by the fault of the appellant, in that appellant had threatened P.L. with a knife"; and (3) in finding that "said children were without proper parental care and support as appellant had no permanent home and was unable to care for said children." We affirm.

The record shows the following: On August 23, 1989, an amended petition was filed in the juvenile court, alleging that P.L., born July 29, 1973, S.L., born July 19, 1977, and A.L., born July 8, 1978, were juveniles within the definition of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988) in that they lacked proper parental care by reason of the fault or habits of both

their mother and their father, and that the children lacked proper parental care and support through no fault of their father, who was unable to care for the children. I.L. entered his voluntary appearance and appeared, with his attorney, at a detention hearing on August 23, 1989.

At this detention hearing, I.L., through his counsel, stipulated there was probable cause for a detention order, and did not object to temporary custody of the children with the Nebraska Department of Social Services, but did object to placement of the children with certain persons. On November 3, 1989, I.L., through his counsel, filed a motion for change of venue, alleging the juvenile court judge could not give I.L. a fair trial and that the "established bias and prejudice of the Separate Juvenile Court of Lancaster County, Nebraska, against [I.L.] and the interests of the minor children, will prevent a fair and impartial trial . . . ."

An adjudication hearing was held on November 7, 1989. I.L. appeared with his attorney. The children's mother was served with notice but did not appear, and her counsel was permitted to withdraw. Before testimony began, I.L.'s motion for change of venue was considered by the court. Counsel for I.L. stated that he had no evidence on the motion and was willing to submit it "on the record." The court overruled the motion and the hearing proceeded. At this hearing, P.L. testified that on August 21, 1989, her father waved a knife in front of her face and threatened to cut her throat, calling her "an ungrateful bitch." The other children were present at the time. This testimony was corroborated by P.L.'s 20-year-old cousin. P.L. and S.L. each testified that they did not want to live with their father because he is violent most of the time.

An adjudication order was entered on November 28, 1989, finding that the minor children were juveniles within the meaning of § 43-247(3)(a) by reason of the lack of proper parental care through the fault and habits of their mother and their father, and through no fault of their father. The order also provided that the children be placed in the temporary legal custody of the Nebraska Department of Social Services pending disposition and set the matter for disposition on December 21, 1989. No appeal was taken from this order.

The disposition hearing was held on December 21, 1989. The mother was neither present nor represented by counsel at the hearing. I.L. was represented by counsel and was present before the hearing. However, he refused to consent to a search for weapons before entering the courtroom and as a result was involved in "an altercation resulting in [I.L.'s] being detained by deputies from the Lancaster County Sheriff's Office." All persons in attendance at the hearing were subjected to such a search. The hearing proceeded, with the provision that I.L. could later request a hearing and present modifications to the order resulting from the hearing.

The dispositional order directed that the three minor children be committed to the care and temporary legal custody of the Nebraska Department of Social Services and approved a plan submitted by the department. The order also provided that appellant should allow access to his past mental health history or submit to a psychiatric evaluation to determine his current mental health status, and that he have no contact with his children until a qualified mental health professional advised the court that he was not a threat to the safety of his children. The order further provided for conditional visitation of the children by I.L., and provided that the disposition would be reviewed on June 22, 1990, or "immediately upon the request of [I.L.] so that [I.L.] can present his plan to the Court." The plan was specifically approved by the guardian ad litem appointed to represent the children. I.L. apparently presented no plan to the juvenile court and timely appealed to this court from the December 21, 1989, order.

As noted above, the adjudication order was not appealed. It is settled that an adjudication order is an appealable order. *In re Interest of Z.R.*, 226 Neb. 770, 415 N.W.2d 128 (1987); *In re Interest of V.T. and L.T.*, 220 Neb. 256, 369 N.W.2d 94 (1985). The adjudication order was preceded by a hearing set out in 177 pages of the bill of exceptions. An examination of appellant's assignments of error shows that all of those alleged errors stem from the adjudication hearing. The errors set out on this appeal do not set out any matters properly before this court on this appeal from the order entered after the dispositional hearing.

As we stated in *In re Interest of J.S., A.C., and C.S.*, 227

Neb. 251, 263, 417 N.W.2d 147, 156 (1987):

> Thus, once there has been the adjudication that a child is a juvenile within the meaning of the act, the foremost purpose or objective of the Nebraska Juvenile Code is promotion and protection of a juvenile's best interests, with preservation of the juvenile's familial relationship with his or her parent(s) where continuation of such parental relationship is proper under the law.

Our review of a dispositional order is de novo on the record. No errors have been assigned concerning the dispositional hearing. We have, nonetheless, reviewed the entire record for plain error. "The juvenile court has broad discretion as to the disposition of children who are found to be neglected under § 43-247(3)(a)." *In re Interest of V.T. and L.T., supra* at 258, 369 N.W.2d at 96. Our review of the juvenile court's dispositional order satisfies us that there was no abuse of discretion in this case.

AFFIRMED.

ANGELITA MATA, APPELLANT, V. WESTERN VALLEY PACKING, APPELLEE.

462 N.W.2d 869

Filed November 16, 1990. No. 90-079.

1. **Workers' Compensation: Words and Phrases.** Total disability in the context of the workers' compensation law does not mean a state of absolute helplessness, but means disablement of an employee to earn wages in the same kind of work, or work of a similar nature, that he or she was trained for or accustomed to perform, or any other kind of work which a person of his or her mentality and attainments could do.
2. _____: _____. Total and permanent disability contemplates the inability of the worker to perform any work which he or she has the experience or capacity to perform.
3. **Workers' Compensation: Proof.** The worker has the burden to prove his or her claimed disability.

4. **Workers' Compensation.** Whether a worker's language ability may be disregarded in determining the extent of the worker's disability is initially a question of law. Whether a worker is deficient in language skills presents a question of fact.
5. _____. The ability to communicate in English, if relevant, should be considered in determining the magnitude of a worker's disability.
6. **Workers' Compensation: Appeal and Error.** The findings of fact made by the compensation court will not be set aside upon appeal unless clearly wrong. As the trier of fact, the compensation court is the sole judge of the credibility of the witnesses and the weight to be given their testimony.
7. _____: _____. Whether an injured worker is totally disabled is a question of fact to be determined by the compensation court, whose finding may be reversed upon appeal only if it is clearly wrong.

Appeal from the Nebraska Workers' Compensation Court. Reversed and remanded for further proceedings.

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

James M. Mathis, of Holtorf, Kovarik, Ellison & Mathis, P.C., for appellee.

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

FAHRNBRUCH, J.

Angelita Mata has appealed to this court, claiming primarily that as a result of a work-related accident she suffered a loss of earning power greater than that found by a three-judge Workers' Compensation Court panel. She also complains about other aspects of the award.

We reverse, and remand this cause to the Workers' Compensation Court for further proceedings.

Mata's assignments of error merge to allege that the compensation court panel erred in (1) failing to find that she was temporarily totally disabled indefinitely or permanently totally disabled; (2) determining the amount of penalties, interest, attorney fees, and costs and failing to make an award pursuant to the parties' stipulation; and (3) failing to permit Mata to proceed with this appeal without payment for a transcript and bill of exceptions.

Prior to the injury giving rise to this case, Mata was employed by Western Valley Packing (Western) to sort and pack

meat. On September 30, 1985, Mata, at the age of 39 years, slipped on grease at Western and fell to the floor, injuring her back and neck. The parties have stipulated that Mata's injuries arose out of and in the course of her employment with Western.

Due to her injury, Mata sought medical attention, and a myelogram revealed a discogenic problem at L5-S1. On March 10, 1986, back surgery was performed by Dr. Ernest Beehler, a neurosurgeon. Dr. Beehler did not find an extruded disk, but did perform an exploratory laminectomy. After surgery, Mata's condition improved initially, but the pain returned shortly thereafter. At a deposition taken on September 14, 1989, Mata testified that she was in constant pain, with the pain localized in her back and right leg, and that she was being treated by a chiropractor three times per week. From her work-related accident to the time of the hearing before the workers' compensation panel, Mata sought medical attention on a number of occasions for her back and leg pain.

In his most recent report, dated January 10, 1989, Dr. Beehler stated that

> [Mata] has continued to have guarded movements of the low back with limitation of straight leg raising and tenderness over the right sciatic foramen, as well as a loss of curve in the lumbar spine, suggesting a state of muscle spasm. This is objective, and of course lends validity to her complaints.

Dr. Beehler determined that in any future employment Mata should be restricted to lifting no more than 15 pounds in a nonrepetitious situation and that Mata's bending and stooping should also be limited.

Mata was born in Mexico and completed third grade schooling there. She has had no further formal education. While Mata is able to communicate some in the English language, the parties dispute the degree of Mata's proficiency in that language.

The evidence before the workers' compensation panel reflects that since the date of her accident, Mata has not worked and that she will not be able to return to the type of work which she previously performed for Western. Mata's employment history established that prior to her employment with Western,

she performed similar work for another employer, did seasonal fieldwork, made coils and wires, and sewed clothing. There was evidence that with respect to Mata's former jobs which she could still physically perform, one employer is no longer in business and the other implemented a policy requiring that its employees be able to read the English language. There was evidence that Mata's vocational limitations as to math, vocabulary, language usage, spelling, and comprehension were far below average. Her test scores for motor coordination and manual dexterity, for the most part, were also below average.

Western agreed to pay Mata's medical expenses incurred prior to the rehearing before the Workers' Compensation Court panel, and to pay all of Mata's future medical expenses arising out of her injury. No issue has been raised regarding the payment of Mata's medical expenses.

The parties stipulated that Mata's average weekly wage at the time of her work-related injury was $263.92 and that Mata was entitled to $175.95 per week for the period of temporary total disability. Western paid Mata $150.33 per week for the period commencing October 8, 1985, up to and including December 29, 1987. It was stipulated that Western would pay Mata $275 for a period of time in October 1985 and for 4 other days when she was not compensated and that Mata would waive the penalties, waiting time, attorney fees, and interest for those periods of time. From December 29, 1987, until February 14, 1989, Western compensated Mata at the rate of $15.03 per week for her permanent loss of earning power.

The compensation court panel found that Western should have paid Mata $175.95 per week, instead of the paid amounts of $150.33 per week, for $115\frac{2}{7}$ weeks for the period of October 8, 1985, through December 29, 1987, and assessed a waiting-time penalty for the difference in the amounts. Payments of $87.93 per week for $184\frac{5}{7}$ weeks were ordered by the compensation court panel, to compensate Mata for her permanent partial disability. Regarding Western's payments of $15.03 per week for Mata's permanent partial disability, the compensation court panel did not assess a penalty for the difference in the amounts, although the panel found that Mata's permanent partial disability was greater than

determined by Western. The compensation court panel declared that "[i]n determining the extent of plaintiff's permanent loss of earning power, the Court has disregarded and excluded the effect thereon, if any, of plaintiff's educational and English language deficiencies." The panel found that Mata is entitled to on-the-job training. The panel did not award interest or costs to Mata for the rehearing.

I. EXTENT OF DISABILITY

Dean Ventor, a vocational consultant, evaluated Mata's employability, including the relevancy of Mata's English language proficiency. The purpose of a vocational evaluation is to determine a subject's employability, taking into consideration job history, educational background, and medical limitations. Ventor testified that he could not find Mata any job because of her problems with the English language. He further testified that considering the doctor's restrictions placed upon Mata and her language limitations, Mata's earning loss in the Gering/Scottsbluff area "would be over 90 percent, it would be near total." Without the language deficiency, Ventor opined, Mata suffered a 50-percent loss of earning power.

As previously stated, in determining the extent of Mata's permanent loss of earning power, the compensation court panel "disregarded and excluded the effect thereon, if any, of [Mata's] English language deficiencies." Mata first argues that the compensation panel incorrectly disregarded her language difficulties and that when this consideration is also taken into account, her disability is total, as she is unemployable.

Whether a worker's language ability may be disregarded in determining the extent of the worker's disability is initially a question of law. Whether a worker is deficient in language skills presents a question of fact. From the "Award on Rehearing," it cannot be determined whether the compensation panel addressed the question of law or the question of fact in regard to Mata's language skills. We initially consider whether a worker's language skills can be disregarded as a matter of law.

> Total disability in the context of the workers' compensation law does not mean a state of absolute helplessness, but means disablement of an employee to

> earn wages in the same kind of work, or work of a similar nature, that he or she was trained for or accustomed to perform, or any other kind of work which a person of his or her mentality and attainments could do.

Luehring v. Tibbs Constr. Co., 235 Neb. 883, 890, 457 N.W.2d 815, 820 (1990); *Kleiva v. Paradise Landscapes*, 230 Neb. 234, 430 N.W.2d 550 (1988). Total and permanent disability contemplates the inability of the worker to perform any work which he or she has the experience or *capacity* to perform. *Krijan v. Mainelli Constr. Co.*, 216 Neb. 186, 342 N.W.2d 662 (1984). See, also, *Kleiva, supra* (stating that the record in the case did not support a conclusion that the plaintiff was unable to perform any work which he or she had the experience or capacity to perform). The worker has the burden to prove his or her claimed disability. *Briggs v. Consolidated Freightways*, 234 Neb. 410, 451 N.W.2d 278 (1990).

"Under the odd-lot doctrine, which is accepted in virtually every jurisdiction, total disability may be found in the case of workers who, while not altogether incapacitated for work, are so handicapped that they will not be employed regularly in any well-known branch of the labor market." 2 A. Larson, The Law of Workmen's Compensation § 57.51(a) at 10-164.68 (1989). Nebraska has adopted the odd-lot doctrine. See, e.g., *Brockhaus v. L. E. Ball Constr. Co.*, 180 Neb. 737, 145 N.W.2d 341 (1966); *Wheeler v. Northwestern Metal Co.*, 175 Neb. 841, 124 N.W.2d 377 (1963). In the context of this case, Professor Larson has further written:

> A considerable number of the odd-lot cases involve claimants whose adaptability to the new situation created by their physical injury was constricted by lack of mental capacity or education. This is a sensible result, since it is a matter of common observation that a man whose sole stock in trade has been the capacity to perform physical movements, and whose ability to make those movements has been impaired by injury, is under a severe disadvantage in acquiring a dependable new means of livelihood.

2 A. Larson, *supra,* §57.51(d) at 10-164.84(24), (37), and (38).

While this court has not addressed the precise issue at hand,

it is clear that our precedents dictate that the ability to communicate in English, if relevant, should be considered in determining the magnitude of a worker's disability. See, *Luehring, supra*; *Krijan, supra*. A number of cases from other jurisdictions have held that language skill is a factor to be considered in determining whether a claimant is totally disabled. See, e.g., *Guerrero v. Tico*, 436 So. 2d 1237 (La. App. 1983) (finding that the plaintiff's pain, in combination with her lack of work experience, language skills, and job training, rendered her totally and permanently disabled); *Pacheco v. State Accident Insurance Fund*, 34 Or. App. 979, 580 P.2d 208 (1978) (increasing the percentage of the claimant's disability in view of his age and more particularly his total lack of education and inability to speak English); *Germain v. Cool-Rite Corp.*, 70 N.J. 1, 355 A.2d 642 (1976) (holding that a worker's unfamiliarity with English and his psychiatric condition established a prima facie case of permanent disability under the odd-lot doctrine). Thus, it is clear that the compensation panel erred if it, as a matter of law, disregarded Mata's English-speaking skills in deciding the degree of her disability.

The findings of fact made by the compensation court will not be set aside upon appeal unless clearly wrong. As the trier of fact, the compensation court is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Canas v. Maryland Cas. Co.*, *ante* p. 164, 459 N.W.2d 533 (1990). Whether an injured worker is totally disabled is a question of fact to be determined by the compensation court, whose finding may be reversed upon appeal only if it is clearly wrong. *Sherwood v. Gooch Milling & Elevator Co.*, 235 Neb. 26, 453 N.W.2d 461 (1990); *Parker v. St. Elizabeth Comm. Health Ctr.*, 226 Neb. 526, 412 N.W.2d 469 (1987).

Since under our standard of review the compensation panel is the finder of fact on the instant question, we make no factual finding as to Mata's English-speaking ability. Because it is unclear whether the compensation panel decided as a matter of law or as a matter of fact to disregard Mata's alleged deficiencies in the English language, the cause is remanded so that the compensation panel may make a factual determination with respect to Mata's proficiency or lack thereof in the English

language.

II. AMOUNT OF AWARD

Mata contends that the compensation panel erred in determining the amount of her award and in failing to grant her a waiting-time penalty, attorney fees, interest, and costs. Upon remand, the Workers' Compensation Court may modify Mata's award and may review the matters contained in Mata's second assignment of error. It would be an exercise in futility for this court to address the questions that Mata raises in her second assignment of error.

III. COSTS OF THIS APPEAL

At the time she filed her notice of appeal from the Workers' Compensation Court, Mata filed a poverty affidavit, pursuant to Neb. Rev. Stat. § 48-182 (Reissue 1988), requesting that the cost of a transcript and bill of exceptions be waived. The compensation court, after reviewing Mata's affidavit, denied her request.

In her final assignment of error, Mata complains of the compensation court's refusal to have these costs waived. In relevant part, § 48-182 provides:

> The transcript and bill of exceptions shall be paid for by the party ordering the same, except that upon the affidavit of any claimant for workers' compensation, filed with or before the praecipe, that he or she is without means with which to pay, and unable to secure such means, payment may, in the discretion of the compensation court, be waived as to such claimant and the bill of exceptions shall be paid for by the compensation court in the same manner as other compensation court expenses.

The record reflects that before the three-judge Workers' Compensation Court panel, this case was tried on stipulations and exhibits. As a result, the bill of exceptions is only four pages in length and the court reporter has certified that there was no charge for the bill. A transcript was timely filed with this court. There is no showing in the record as to whether the cost of the transcript has been paid, whether Mata was required to pay for the transcript, or whether the cost of the transcript was waived. Under the circumstances, there is no justiciable issue before this

court in regard to the waiver of the costs of appeal, and Mata's assignment of error in relation thereto has no merit.

IV. CONCLUSION

The judgment is reversed and the cause remanded to the compensation panel to make a factual finding regarding Mata's ability to speak the English language and to enter an award consistent with that finding. Because the cause is remanded, this court does not reach the issues raised by Mata's second assignment of error. Mata's third assignment of error is without merit. No attorney fees for this appeal are granted, since Mata has failed to increase her award in this court. See, Neb. Rev. Stat. § 48-125 (Reissue 1989); *Carter v. Weyerhaeuser Co.*, 234 Neb. 558, 452 N.W.2d 32 (1990) (denying attorney fees despite possibility of increased award on remand because no increase was achieved in this court).

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

SHANAHAN, J., concurring in part, and in part dissenting.

Although the compensation court's decision must be reversed and this cause remanded for further proceedings, the compensation panel's language in its "AWARD" clearly communicates an egregious error which supplies the true reason for reversal and necessity for further consideration of Angelita Mata's claim for compensation. The compensation court's unfortunate and undeniable mistake of law is evident from the panel's expressions and the underlying record.

Angelita Mata's employment history has been that of heavy manual labor, such as hoeing beet fields, spending many hours winding electrical coils, and moving products in the meatpacking plant where she sustained the disabling injury on which her compensation claim is based. As a result of her injuries, Angelita Mata is unable to stoop, stand for a protracted period, or lift any significant weight.

However, Angelita Mata's limitations are not just physical. By stipulation, the parties have agreed that Angelita is "functionally illiterate," even though the majority, strangely enough, has concluded that "the parties dispute the degree of Mata's proficiency in [the English] language." Angelita is

unable to read a newspaper or understand a great deal of spoken English. After the accident at Western Valley Packing, Angelita enrolled in a course for basic English so that she might become "more hireable, more able to find employment." According to her language instructor, Angelita cannot "do all the basics in the English language," but she has been "sincere in her efforts" to learn basic English. The language course is comparable to English instruction at the first grade level and utilizes "pictures a lot" and "a lot of visual aid." During a vocational evaluation, Angelita Mata "[d]emonstrated a below average level of general learning ability."

Dean Ventor, a vocational consultant versed in questions of "employability" for manual labor, reviewed data concerning Angelita, including all medical information, and concluded that Angelita could not return to her work at Western Valley Packing. Ventor then expressed the opinion that some forms of "sedentary unskilled work" were open to a woman of Angelita's physical limitations, but "[w]hen you throw in [Angelita's] inability to converse in English, a large percentage of those jobs wouldn't work . . . . [T]here wouldn't be any jobs that she could do." Angelita's unemployability became an established fact "because of [her] problems with English." When only Angelita's physically injured condition was considered, she had sustained a 50-percent loss of earning power. However, when Angelita's language limitation was considered in combination with her physical condition, Angelita sustained an "earning power loss" which was, in Ventor's words, "over 90 percent, it would be near total." Consequently, Angelita, viewed from the standpoint of her physical impairment and language limitation, was, according to Ventor, "unemployable." As further expressed by Ventor, Angelita's unemployability is underscored by the fact that the "major employer of unskilled sedentary labor" in the vicinity of Angelita's home will not "hire anyone unless they have an understanding of the English language and can read the instructions that they have on the different machines that they tend as well as they want an ability to give the people instructions on jobs and make sure they understand them."

With that background entrenched in the evidence, the

majority ponders, puzzles, and settles into indecision about the meaning of the compensation panel's conclusion: "In determining the extent of plaintiff's permanent loss of earning power, the Court has disregarded and excluded the effect thereon, if any, of plaintiff's educational and English language deficiencies." When the compensation panel's somewhat serpentine syntax is uncoiled, the panel actually concluded: Although Angelita Mata has deficiencies in education and English language skill, we, the compensation panel, have elected to pay no attention whatsoever to such deficiencies in deciding the extent of Angelita Mata's loss of earning power. If the preceding language of the compensation panel was not clear enough concerning the effect of Angelita's educational and linguistic deficiencies, the panel further spoke through its action in finding that Angelita had a "50 per cent permanent loss of earning power," the exact percentage of loss resulting from an impairment of physical function only, and then calculating compensation benefits on the basis of the 50-percent loss of earning power. Any shadow of doubt about the panel's factual conclusion concerning the existence and effect of Angelita Mata's deficiencies in education and language skill vanishes in light of the panel's statement: "The plaintiff does not appear to be a fit subject for vocational rehabilitation via formal academic classwork or training." Therefore, although Angelita Mata's limitations in education and English language skill disqualified her from rehabilitation which required some form of schooling, the panel chose not to consider the effect of those deficiencies in relation to Angelita Mata's loss of earning power or unemployability which the panel found was evidentially established.

"An employee who is so injured that he can perform no services other than those which are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist, may well be classified as totally disabled." *Lee v. Minneapolis Street Railway Co.*, 230 Minn. 315, 320, 41 N.W.2d 433, 436 (1950).

Also, according to Professor Arthur Larson, "Compensable disability is generally defined as inability, as the result of a work-connected injury, to perform or obtain work suitable to

claimant's qualifications and training." 2 A. Larson, The Law of Workmen's Compensation § 57.22(a) at 10-129 (1989).

Hence, the test for a worker's employability after a compensable injury is whether the worker can compete in the open and normal labor market for the worker's services.

Among factors which must be considered in determining whether a worker is totally disabled are the worker's mental capability, see *Tilghman v. Mills*, 169 Neb. 665, 100 N.W.2d 739 (1960), and the worker's education or lack of education. See, *Sherwood v. Gooch Milling & Elevator Co.*, 235 Neb. 26, 453 N.W.2d 461 (1990); *Krijan v. Mainelli Constr. Co.*, 216 Neb. 186, 342 N.W.2d 662 (1984). See, also, *Guyton v. Irving Jensen Co.*, 373 N.W.2d 101, 103 (Iowa 1985): "Industrial disability means reduced earning capacity. Bodily impairment is merely one factor in gauging industrial disability. Other factors include the worker's age, intelligence, education, qualifications, experience, and the effect of the injury on the worker's ability to obtain suitable work."

Consequently, the composite worker, as a person with a compensable disability, must be considered in relation to the worker's employability in an established competitive labor market lest there be descent to the view that a worker's disability is gauged only in terms of mechanical malfunction in a machine, animated appliance, or automaton.

Unfortunately, the compensation court, notwithstanding its explicitly specific finding that Angelita Mata had deficiencies in education and English language skill, elected to pay no attention whatsoever to those deficiencies in Angelita Mata as a composite worker. Ordinarily, this court does not refer to the findings at the "one-judge" or initial hearing in the compensation court, but there is some reassurance garnered from the judge's expression at the first hearing, namely: "If [one] also takes into account the plaintiff's language limitations, her earning power loss . . . exceeds 90 per cent. It appears that the plaintiff's language limitations are real and the Court has little difficulty in determining that the plaintiff's earning power loss is complete."

The compensation panel's conclusion concerning Angelita Mata's loss of earning power clearly expresses a judicial election

to pay no attention to the factually established deficiencies in Angelita's education and language skill. That election is a disregard for Nebraska law pertaining to a worker's employability and thereby constitutes error as a matter of law. Even if the compensation panel had considered Angelita Mata's deficiencies in education and language and concluded that her deficiencies had no effect on her employability, such factual conclusion would have been clearly erroneous and would have necessitated a reversal in any event.

Therefore, the compensation court's decision must be reversed and Angelita Mata's cause remanded so that the compensation court can and shall consider the effect of Angelita Mata's deficiencies in education and English language skill in conjunction with her already established "50 per cent permanent loss of earning power."

RUTH ANN GIBILISCO, APPELLANT, V. THOMAS WILLIAM GIBILISCO, APPELLEE.

462 N.W.2d 434

Filed November 16, 1990. No. 90-249.

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

David L. Herzog, P.C., for appellant.

Tim J. Kielty for appellee.

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

PER CURIAM.

We have reviewed the district court's decree in this dissolution of marriage action de novo on the record. Finding no abuse of discretion therein, we affirm the same and decline to award either party an attorney fee.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. DAVID E. FORAL, APPELLEE.

462 N.W.2d 626

Filed November 16, 1990. No. 90-337.

1. **Sentences: Probation and Parole: Appeal and Error.** When the State appeals from a sentence, contending that it is excessively lenient, this court reviews the record for an abuse of discretion, and a grant of probation will not be disturbed unless there has been an abuse of discretion by the sentencing court.
2. **Sentences: Appeal and Error.** In the Nebraska Supreme Court's review of the record to determine whether the sentence imposed is excessively lenient, Neb. Rev. Stat. § 29-2322 (Reissue 1989) directs this court to have regard for (1) the nature and circumstances of the offense; (2) the history and characteristics of the defendant; (3) the need for the sentence imposed (a) to afford adequate deterrence to criminal conduct; (b) to protect the public from further crimes of the defendant; (c) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; and (d) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and (4) any other matters appearing in the record which the court shall deem pertinent.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Sentence vacated, and cause remanded for resentencing.

Ronald L. Staskiewicz, Douglas County Attorney, and Gregory R. Abboud for appellant.

Martin J. Kushner, of Kushner Law Office, for appellee.

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

PER CURIAM.

This is an appeal by the State under Neb. Rev. Stat. § 29-2320 (Reissue 1989).

After a plea of guilty to operating a motor vehicle while his license was suspended for life or 15 years, a Class IV felony punishable by a maximum term of imprisonment for 5 years, with no minimum specified; a $10,000 fine; or both, see Neb. Rev. Stat. § 28-105(1) (Reissue 1989), on March 30, 1990, the trial court sentenced the defendant, David E. Foral, to 5 years' imprisonment. Three days later, on April 2, 1990, the district court granted the defendant's motion to reduce the sentence and changed the sentence from 5 years' imprisonment to 5

years' probation, the terms of which included that the defendant totally abstain from alcohol and that the defendant not drive. The State contends that the sentence as reduced is excessively lenient.

According to the presentence report, the defendant's criminal record over a period of 20 years includes arrests or convictions for theft, possession of marijuana, possession of drug paraphernalia, negligent driving, willful reckless driving, leaving the scene of a property damage accident, numerous other traffic violations, disturbing the peace, disorderly conduct, public drunkenness, giving false information, and loitering/prowling.

Most notable regarding the defendant's record is that he has been convicted six times of driving while under the influence of alcoholic liquor and twice of driving during suspension, with several other charges of driving during suspension having been dismissed. For these offenses, the defendant has been on probation several times and served two separate terms in the Nebraska Penal and Correctional Complex. Furthermore, the defendant has been convicted twice of drunk driving while on probation for a drunk driving conviction.

The defendant is 34 years old, is married, and has four children. Prior to the arrest from which this charge arose, the defendant had been sober for 2 years. He was working and had recently purchased a house for his family and himself.

The circumstances leading to the defendant's arrest in this case occurred on November 25, 1989, when police officers responded to the report of a two-car collision at 36th and Q Streets in Omaha, Nebraska. Immediately before the accident, the defendant's vehicle had been observed speeding and being driven recklessly. Upon arriving at the scene of the accident, the officers found the defendant sitting on the sidewalk in what they believed to be an intoxicated state. Described by the officers as combative, belligerent, and profane, the defendant refused to submit to a test under the implied consent law.

The record contains no findings explaining why the defendant's sentence was reduced from 5 years' imprisonment to 5 years' probation. Although the trial court is not required to make findings of fact or specify a reason for reducing the

sentence, *State v. Jallen*, 218 Neb. 882, 359 N.W.2d 816 (1984), we are unable to perceive any reason from the record which would justify the reduction in the sentence.

When the State appeals from a sentence, contending that it is excessively lenient, this court reviews the record for an abuse of discretion, and a grant of probation will not be disturbed unless there has been an abuse of discretion by the sentencing court. *State v. Dobbins*, 221 Neb. 778, 380 N.W.2d 640 (1986). In reviewing such a case for an abuse of discretion,

> our review is governed by § 29-2322, which sets out the factors we are to consider in determining whether the sentence imposed is "excessively lenient." Additionally, we note that § 29-2260(2)(a), (b), and (c) sets out factors to be considered by a sentencing judge in determining if a defendant should be imprisoned, while § 29-2260(3)(a) through (k) sets out factors to be considered in the decision to withhold imprisonment. The sentencing judge's discretion is guided by all these factors. Our review of the alleged abuse of the sentencing judge's discretion, therefore, must recognize these statutory guidelines set out for the direction of the sentencing judge in imposing or withholding imprisonment.

State v. Jallen, supra at 884, 359 N.W.2d at 818.

Neb. Rev. Stat. § 29-2260 (Reissue 1989) provides in pertinent part:

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

correctional facility; or

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

(3) The following grounds, while not controlling the discretion of the court, shall be accorded weight in favor of withholding sentence of imprisonment:

(a) The crime neither caused nor threatened serious harm;

(b) The offender did not contemplate that his or her crime would cause or threaten serious harm;

(c) The offender acted under strong provocation;

(d) Substantial grounds were present tending to excuse or justify the crime, though failing to establish a defense;

(e) The victim of the crime induced or facilitated commission of the crime;

(f) The offender has compensated or will compensate the victim of his or her crime for the damage or injury the victim sustained;

(g) The offender has no history of prior delinquency or criminal activity and has led a law-abiding life for a substantial period of time before the commission of the crime;

(h) The crime was the result of circumstances unlikely to recur;

(i) The character and attitudes of the offender indicate that he or she is unlikely to commit another crime;

(j) The offender is likely to respond affirmatively to probationary treatment; and

(k) Imprisonment of the offender would entail excessive hardship to his or her dependents.

In considering the factors under subsection (2), it appears that the risk is substantial that during a period of probation the defendant would engage in additional criminal conduct. The defendant has demonstrated a disregard for the law. We believe the sentence of probation depreciates the seriousness of the defendant's crime and promotes disrespect for the law.

As to the factors under subsection (3), the only one that appears to apply to the defendant is (k).

In our review of the record to determine whether the sentence

imposed is excessively lenient, Neb. Rev. Stat. § 29-2322 (Reissue 1989) directs this court to have regard for:

(1) The nature and circumstances of the offense;

(2) The history and characteristics of the defendant;

(3) The need for the sentence imposed:

(a) To afford adequate deterrence to criminal conduct;

(b) To protect the public from further crimes of the defendant;

(c) To reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; and

(d) To provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and

(4) Any other matters appearing in the record which the court shall deem pertinent.

After a review of the standards set out in § 29-2322 and the guidelines set forth in § 29-2260, we find that the sentence to probation in this case was excessively lenient and that the district court abused its discretion in granting reduction from the original sentence.

The defendant was driving while intoxicated during a period when his driver's license had been suspended for 99 years. He has demonstrated a propensity to drive drunk during the suspension of his license. A sentence is needed in this case to protect the public from the potential deadly consequences of the defendant's driving during suspension and while intoxicated, to promote respect for the law, and to serve as an adequate deterrent to further criminal conduct. The sentence of probation does none of this and, as such, is excessively lenient, requiring this court to set it aside.

Neb. Rev. Stat. § 29-2323(1) (Reissue 1989) provides: "If [the Supreme Court] determines that the sentence imposed is excessively lenient, [it] shall set aside the sentence, and: (a) Remand the case for imposition of a greater sentence; (b) Remand the case for further sentencing proceedings; or (c) Impose a greater sentence."

The sentence as reduced is vacated, and the cause is remanded with directions to resentence the defendant to the

original sentence, with credit for any time served.

SENTENCE VACATED, AND CAUSE REMANDED FOR RESENTENCING.

JAMES E.S. LEWIS, D.D.S., APPELLANT, V. ROBERT R. CRAIG, D.D.S., APPELLEE.

463 N.W.2d 318

Filed November 30, 1990. No. 88-732.

1. **Judgments: Appeal and Error.** In the absence of a judgment or order finally disposing of a case, the Supreme Court has no authority or jurisdiction to act, and in the absence of such judgment or order the appeal will be dismissed.
2. **Actions: Words and Phrases.** A cause of action consists of the set of facts on which a recovery may be had.
3. **Actions: Pleadings.** Two or more claims in a petition arising out of the same operative facts and involving the same parties constitute separate legal theories, either of liability or damages, and not separate causes of action.
4. **Summary Judgment: Final Orders: Appeal and Error.** Where all of plaintiff's theories are based on the same operative facts and involve the same parties, summary judgment with regard to only some of the theories does not constitute a final, appealable order which this court may consider.

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

M.J. Bruckner and Michael K. High, of Bruckner, O'Gara, Keating, Sievers & Hendry, P.C., for appellant.

Edwin C. Perry and Gregory H. Perry, of Perry, Guthery, Haase & Gessford, P.C., for appellee.

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

GRANT, J.

In the amended petition of James E.S. Lewis, D.D.S., plaintiff-appellant herein, against Robert R. Craig, D.D.S., defendant-appellee, plaintiff alleged that he had been damaged when defendant "published defamatory information about the plaintiff to various doctors of dental surgery and to various

hospitals . . . ." As stated in plaintiff's brief, the amended petition "set forth six causes of action: 1. Libel and slander; 2. Intentional infliction of emotional distress; 3. Invasion of priavacy [sic]; 4. Trade libel; 5. Product disparagement; and 6. Interference with business relationship." Brief for appellant at 1.

In his first cause of action, plaintiff alleged, in part, as follows:

> 3. Commencing on or about April 4, 1986, the defendant published defamatory information about the plaintiff to various doctors of dental surgery and to various hospitals throughout the State of Nebraska. These recipients understood that this defamatory material was about the plaintiff. This defamatory information consisted of, but is not to be limited to, some of the following:
>
> a. Oral statements made . . . .
>
> b. A letter dated . . . .
>
> c. A telephone recording . . . .
>
> 4. All of the aforesaid defamatory statements were published by the defendant with actual malice.
>
> 5. On May 7, 1986, the plaintiff, by and through one of his attorneys, demanded a retraction of the April 15, 1986, letter in compliance with Neb. Rev. Stat. § 28-840.01 [sic]. The defendant refused to make a retraction.

Paragraphs 3, 4, and 5 were incorporated by reference in each cause of action except for the sixth, which incorporated only paragraph 3. In each cause of action except the second plaintiff prayed for "judgment against the defendant on his . . . Cause of Action for special damages, general damages as allowable by law, and costs of this action." In the second cause of action plaintiff prayed for "general damages as allowable by law, and costs of this action."

Defendant moved for summary judgment "on each of the plaintiff's claims . . . ." The court granted summary judgment with regard to the first and second causes of action, but denied the motion on the other four. The court found with regard to the first cause of action that, as a matter of law, the statements published by defendant were not defamatory as to plaintiff

because the statements were mere expressions of defendant's professional opinion and were privileged. The court also found that summary judgment was appropriate on the second cause of action because, as a matter of law, defendant's conduct and plaintiff's distress did not "even approach the conduct and emotional distress" required to support such an action, as set out in *Davis v. Texaco, Inc.*, 210 Neb. 67, 313 N.W.2d 221 (1981), and *Hassing v. Wortman*, 214 Neb. 154, 333 N.W.2d 765 (1983). The trial court overruled defendant's motion as to the remaining causes of action pled in the amended petition. Plaintiff appeals from the order insofar as it granted summary judgment.

Defendant alleges that this court is without jurisdiction to consider this matter because there is no final, appealable order. He alleges that the district court's granting of summary judgment on the first two causes of action is not a final, appealable order, because plaintiff may proceed on the other four. We review determinations made in the district courts only where there is "[a] judgment rendered or final order made by the district court . . . ." Neb. Rev. Stat. § 25-1911 (Reissue 1989). A final order is statutorily defined as an order which "determines the action and prevents a judgment" and as "[a]n order affecting a substantial right made in a special proceeding . . . ." Neb. Rev. Stat. § 25-1902 (Reissue 1989). We stated in *P. R. Halligan Post 163 v. Schultz*, 212 Neb. 329, 331, 322 N.W.2d 657, 658 (1982):

> In the absence of a judgment or order finally disposing of a case, the Supreme Court has no authority or jurisdiction to act, and in the absence of such judgment or order the appeal will be dismissed. *Knoell Constr. Co., Inc. v. Hanson*, 208 Neb. 373, 303 N.W.2d 314 (1981).
>
> When the substantial rights of the parties in the action remain undetermined and the cause is retained for further action, the order is not final. *Martin v. Zweygardt*, 199 Neb. 770, 261 N.W.2d 379 (1978).

In *Halligan*, we held that an order dismissing one cause of action while a second cause of action, arising out of the same "factual circumstances" and involving the same parties but asserting a different legal theory of recovery, remains pending

for trial does not constitute a final, appealable order. In the *Halligan* petition, the plaintiff alleged two causes of action seeking damages based upon a child's act in setting a building on fire. The first alleged that the parents of the child were statutorily liable for the willful and intentional acts of their child, while the second alleged they were liable in tort for negligently supervising their child. The first cause of action was dismissed on demurrer; the second was not. This court found that the appeal of the cause of action which had been dismissed was premature because the other remained pending before the district court.

Although the language in *Halligan* referred to separate "causes of action," only different theories of recovery based upon one set of facts were presented. We recognized this distinction in *Interholzinger v. Estate of Dent*, 214 Neb. 264, 268, 333 N.W.2d 895, 898 (1983), where we stated, "[A] cause of action consists of the set of facts on which a recovery may be had." In that case an attorney's estate was sued for the attorney's wrongly withholding money from a sale of property which belonged to the plaintiffs and for negligently performing certain legal services for plaintiffs.

This court found that because there were two separate and distinct factual occurrences, with separate and self-contained alleged breaches, there were in fact two separate causes of action. In the *Interholzinger* case, we held it proper to hear an appeal based on an order of summary judgment sustained as to only one of the causes of action. We distinguished *Halligan* on the ground that in *Halligan* there was only one set of operative facts, resulting in one cause of action.

In *Schoneweis v. Dando*, 231 Neb. 180, 183, 435 N.W.2d 666, 669 (1989), we reaffirmed the concept that two or more claims in a petition arising out of the same operative facts and involving the same parties constitute separate legal theories, either of liability or damages, and not separate causes of action, and summarized our holdings as follows:

> We have characterized a cause of action as the " 'judicial protection of one's recognized right or interest, when another, owing a corresponding duty not to invade or violate such right or interest, has caused a breach of that

> duty.' " *Ravenna Bank v. Custom Unlimited*, 223 Neb. 540, 544, 391 N.W.2d 557, 560 (1986). Accord *First Nat. Bank of Omaha v. State*, 230 Neb. 259, 430 N.W.2d 893 (1988). We have also said that in a general sense, a cause of action is the claim or subject matter upon which suit may be maintained. In short, a cause of action consists of the fact or facts which give one the right to judicial relief. *Interholzinger v. Estate of Dent*, 214 Neb. 264, 333 N.W.2d 895 (1983). See, also, *Schuyler State Bank v. Cech*, 228 Neb. 588, 423 N.W.2d 464 (1988), which states that with respect to a demurrer, a statement of " 'facts sufficient to constitute a cause of action,' " as contemplated by § 25-806(6), means " 'a narrative of the events, acts, and things done or omitted which show a legal liability of the defendant to the plaintiff.' " 228 Neb. at 593, 423 N.W.2d at 468.

The plaintiff in *Schoneweis* claimed that representations made by a bank to others concerning the plaintiff's financial condition constituted a breach of her right of privacy and a breach of the bank's separate duty not to disclose personal financial information to third parties. The defendants alleged there was a misjoinder of causes of action. We stated:

> Schoneweis' claims to judicial relief rest on but one body of facts, the essential feature of which is the alleged disclosure of her financial posture with First National to third persons. Thus, she seeks to recover under two legal theories which rest on that single body of facts . . . . Since both theories of recovery rest upon the same body of facts, Schoneweis has not misjoined causes of action.

Id. at 183-84, 435 N.W.2d at 669.

Plaintiff relies on the case of *Silence v. Journal Star Printing Co.*, 201 Neb. 159, 266 N.W.2d 533 (1978), in arguing that this case is properly before us on appeal. *Silence*, however, may be distinguished. In *Silence*, a restaurant in Lincoln sued a newspaper publishing company for libel based upon stories which alleged that coffee at the restaurant contained methamphetamine. Another short news item concluded the last article and related an incident in which a girl in Omaha was sold chocolate laced with LSD.

The plaintiffs' petition in *Silence* alleged five separate causes of action against the publisher. The first three dealt with the publication of the statement that the coffee contained methamphetamine. The fourth dealt with publication of an allegation that the coffee had been "dumped" in a way which implied that the plaintiffs had destroyed evidence before the police arrived. The fifth alleged that the item about chocolate laced with LSD implied that the chocolate was sold at the Lincoln restaurant.

The defendants moved for summary judgment on all five causes of action. The court granted the motion with regard to the fourth and fifth causes only. The plaintiffs then appealed the order to this court, where we treated the two causes of action which were dismissed as separate causes of action and affirmed the trial court's dismissal. The jurisdictional question was not presented in *Silence*, but it appears that the various aspects of the case, as in *Interholzinger*, were based upon separate and distinct facts.

It should be noted that *Silence* was decided before the adoption of Neb. Rev. Stat. ch. 20, art. 2 (Reissue 1987). Neb. Rev. Stat. § 20-209 (Reissue 1987) provides: "No person shall have more than one cause of action for damages for libel or slander or invasion of privacy or any other tort founded upon any single publication . . . ." Plaintiff herein, in his third cause of action, contends his rights under Neb. Rev. Stat. § 20-204 (Reissue 1987) were violated.

In the case at bar, although several statements were published, the damages resulting from the alleged defamation arose out of the same set of facts. We find that because all of plaintiff's theories are based on the same operative facts, summary judgment with regard to only two of the six theories does not constitute a final, appealable order which this court may consider. This appeal is dismissed as premature.

APPEAL DISMISSED.

GWENDOLYN PELZEK AND VICTORIA HUBBARD, APPELLANTS, V. THE AMERICAN LEGION, A CORPORATION, ET AL., APPELLEES.

463 N.W.2d 321

Filed November 30, 1990. No. 88-748.

Negligence: Alcoholic Liquors. Neb. Rev. Stat. § 53-180 (Reissue 1988) does not create a duty toward third parties, and, as such, the statute does not fix a standard of care, the violation of which could be proof of negligence in actions by third parties.

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

Kelle J. Westland, of Westland & Associates, P.C., and, on brief, Richard F. Welling and Alan M. Thelen, of Breeling & Welling, for appellants.

Eugene P. Welch, John W. Iliff, and Christopher J. Tjaden, of Gross, Welch, Vinardi, Kauffman & Day, P.C., for appellees American Legion and Pearson.

Joseph O. Kavan, of Kavan, Smart & Kampfe, for appellees Doepke and Dappen.

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

BOSLAUGH, J.

This was a suit for damages arising out of an automobile accident. The accident occurred on December 28, 1986, when an automobile operated by the plaintiff Gwendolyn Pelzek and owned by her mother, the plaintiff Victoria Hubbard, collided with a parked automobile. As a result of the accident the automobiles were damaged and Pelzek was seriously injured.

The petition alleged that before the accident, Pelzek had attended a party at The American Legion's Benson Post No. 112 Hall, which had been rented from the defendant The American Legion by the defendants Scott Doepke and Tim Dappen. The defendant Doyle Pearson was the manager of the Legion post's hall.

The petition further alleged that the party was open to the public and fees were charged for the consumption of alcohol. Pelzek was allowed to consume intoxicating liquors and

became physically and visibly intoxicated. After Pelzek left the party, and while she was driving the car owned by Hubbard, the car collided with a parked automobile. At the time of the accident Pelzek was a little over 18 years old.

The plaintiffs alleged that the defendants were negligent (1) in promoting the consumption of alcohol by a minor; (2) in failing to verify the majority of Pelzek; (3) in promoting the consumption of alcohol by a visibly intoxicated person; (4) in allowing Pelzek, a visibly intoxicated person, to leave the party and to operate an automobile; and (5) in permitting Pelzek to procure alcoholic liquor in violation of Neb. Rev. Stat. § 53-180 (Reissue 1988).

The defendants filed general demurrers to the petition which were sustained, and the action was dismissed. The plaintiffs have appealed. The sole assignment of error is that the trial court erred in sustaining the defendants' demurrers and dismissing the plaintiffs' cause of action.

The plaintiffs urge this court to recognize a minor's cause of action for common-law negligence against persons who provide the minor with intoxicating liquors subsequently causing an accident in which the minor suffers personal injury. They argue § 53-180, which prohibits the sale, gift, or procurement of any alcoholic liquors to or for minors or incompetents, supports a duty to protect these classes of persons from the harmful effects of alcohol.

Nebraska's liquor control act previously provided for dramshop liability in Comp. Stat. § 53-147 (1929). That act including the dramshop provisions was repealed in 1935 by the Nebraska Liquor Control Act, Comp. Stat. §§ 53-301 to 53-3,107 (Supp. 1935). This act, as amended, which is currently in effect, includes the § 53-180 prohibitions as stated above.

The repeal of the dramshop liability provisions was an expression of Nebraska public policy. The Legislature has not since reinstated dramshop liability.

In *Holmes v. Circo*, 196 Neb. 496, 499, 244 N.W.2d 65, 67 (1976), we stated:

> The present law prohibits the dispensing of intoxicating liquors to certain classes of persons, and is a comprehensive act to regulate the manufacture, sale, and

> distribution of alcoholic liquors.
>
> . . . [S]tatutes of this type do not create a civil remedy or impose a duty on the part of the bar or tavern operator toward injured third parties.

The plaintiffs in this case contend we should recognize a minor's common-law action for injuries he or she sustains by virtue of being served alcoholic liquors because "[t]he basis of the liability rests on the principle that any person who sells or distributes intoxicating liquors to a minor should be held accountable for their [sic] actions." Brief for appellants at 18.

The Legislature has provided how persons who sell or distribute intoxicating liquors to minors shall be held accountable for their actions. A violation of § 53-180 is a Class I misdemeanor, which is punishable by imprisonment for up to 1 year, by a $1,000 fine, or both. Minors who are in possession of alcoholic liquor in violation of Neb. Rev. Stat. §§ 53-180.01 to 53-180.04 (Reissue 1988) are also held accountable for their actions and are guilty of a Class III misdemeanor.

In refusing to recognize dramshop liability based on common-law negligence in *Holmes, supra* at 500-01, 244 N.W.2d at 68, we stated:

> At common law, and apart from statute, no redress existed against persons selling, giving, or furnishing intoxicating liquor, or their sureties, for resulting injuries or damages due to the acts of intoxicated persons, *whether on the theory that the dispensing of the liquor constituted a direct wrong or constituted actionable negligence.* This rule was based on the theory that the proximate cause of the injury was the act of the purchaser in drinking the liquor and not the act of the vendor in selling it.

(Emphasis supplied.)

Although selling liquor to a minor is a violation of § 53-180, it is not the proximate cause of any injuries that the minor might suffer. It is the negligent operation of an automobile after the drinking of liquor which causes the injury.

The plaintiffs argue that § 53-180 should be interpreted as an exception to the rule against common-law dramshop liability because the statute creates a class of persons whose purchase of liquor is prohibited because of their inability to handle liquor

responsibly. In *Gora v. 7-11 Food Stores*, 109 Ill. App. 3d 109, 440 N.E.2d 279 (1982), the Illinois Court of Appeals rejected this argument and denied a common-law cause of action to a minor who was injured after being served alcoholic beverages in violation of a statute forbidding the sale of liquor to minors. The court determined that extending liability for the sale or gift of liquor beyond the limits provided by statute was a function of the legislature, not the court. This court has likewise determined that whether to extend dramshop liability is a policy decision that is best left to the Legislature. *Holmes v. Circo, supra*. See, also, *Schroer v. Synowiecki*, 231 Neb. 168, 435 N.W.2d 875 (1989); *Arant v. G. H., Inc.*, 229 Neb. 729, 428 N.W.2d 631 (1988).

The plaintiffs also argue that violation of § 53-180 should be evidence of negligence. This argument was addressed in the *Holmes* decision, and we concluded that the violation of the statute did not constitute evidence of negligence because "[t]o rule otherwise would thwart the intention of the Legislature." *Holmes, supra* at 504, 244 N.W.2d at 70. Our position on this issue has not changed since that decision. See *Schroer v. Synowiecki, supra*.

We are aware that other jurisdictions have extended dramshop liability to situations similar to that of the plaintiffs, but we do not believe that to be the better rule. We conclude that it is a question of public policy which is better left to the Legislature.

The judgment of the district court is affirmed.

AFFIRMED.

SHANAHAN, J., dissenting.

Under Nebraska's common law, are those who participate in commercial profit from the sale of an alcoholic beverage to a minor immune from liability for injury proximately caused by the minor's consumption of alcohol? In the majority's opinion, absence of an articulated answer is deemed the appropriate response to the question.

According to the majority, repeal of Nebraska's dramshop act in 1935 was an "expression of Nebraska public policy." Conspicuous by its absence is the majority's explanation of just how a positive expression of public policy emanates from the

nothingness of a legislative void. Nevertheless, there are two consequences from repeal of Nebraska's dramshop act. First, no Nebraska statute prohibits a cause of action for injury resulting from the sale of alcoholic beverage to a minor. Second, the Legislature, through repeal of the dramshop act, has withdrawn the statutory cause of action for sale of alcohol to a minor and has thereby returned the cause of action to the domain of Nebraska's common law.

Before an examination of current common law in Nebraska, one cannot overlook Neb. Rev. Stat. § 53-180 (Reissue 1988): "No person shall sell, give away, dispose of, exchange, or deliver, or permit the sale, gift, or procuring of any alcoholic liquors, to or for any minor or to any person who is mentally incompetent." Underlying the preceding statute is the Legislature's recognition that minors usually are ill-equipped to handle the deleterious effects from consumption of alcohol. This is not to say that the years beyond minority necessarily supply the ability to cope with problems from alcohol. Life teaches otherwise. Nevertheless, § 53-180 expresses the Legislature's awareness that there is potential harm and a social detriment inherent in a minor's consumption of alcohol, although implicit in the majority's opinion is the singular and isolated notion that there is nothing harmful in the sale of alcohol to a minor. Putting aside the public policy expressed in § 53-180, the question is whether the Pelzek-Hubbard petition states a cause of action under Nebraska's common law, that is, judicially enunciated law distinguished from law embodied in a constitution or legislative enactment.

Since the question in this appeal arises from a sustained demurrer,

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

Security Inv. Co. v. State, 231 Neb. 536, 538, 437 N.W.2d 439, 442 (1989). Accord *Parrett v. Platte Valley State Bank, ante* p.

139, 459 N.W.2d 371 (1990). Consequently, this court must accept the facts alleged in the Pelzek-Hubbard petition.

In *Burns v. Veterans of Foreign Wars*, 231 Neb. 844, 851, 438 N.W.2d 485, 490 (1989), we stated: "For actionable negligence, there must be a defendant's legal duty to protect or not injure the plaintiff, a failure to discharge that duty, and plaintiff's damage proximately caused by such undischarged duty." Accord *Wilson v. F & H Constr. Co.*, 229 Neb. 815, 428 N.W.2d 914 (1988). " 'Foreseeability is a factor in establishing a defendant's duty, or, as expressed by Justice Cardozo in *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 394, 111 N.E. 1050, 1054 (1916): "[F]oresight of the consequences involves the creation of a duty . . . ." ' " *Union Pacific RR. Co. v. Kaiser Ag. Chem. Co.*, 229 Neb. 160, 173, 425 N.W.2d 872, 881 (1988). "To determine whether conduct constitutes negligence, the invariable standard is reasonable care, although reasonable care is directly proportional to the danger inherent in conduct and may vary depending on circumstances." *Lynn v. Metropolitan Utilities Dist.*, 225 Neb. 121, 126, 403 N.W.2d 335, 339 (1987). Accord *Prime Inc. v. Younglove Constr. Co.*, 227 Neb. 423, 418 N.W.2d 539 (1988). "The proximate cause of an injury is that cause which, in a natural and continuous sequence, unaccompanied by any efficient intervening cause, produces the injury, and without which the result would not have occurred." *Jensen v. Archbishop Bergan Mercy Hosp.*, *ante* p. 1, 9, 459 N.W.2d 178, 183 (1990). Accord *Zeller v. County of Howard*, 227 Neb. 667, 419 N.W.2d 654 (1988). "Determination of causation is, ordinarily, a matter for the trier of fact." *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 778, 408 N.W.2d 280, 285 (1987). Accord *Heiliger v. Walters & Heiliger Electric, Inc.*, *ante* p. 459, 461 N.W.2d 565 (1990).

If one's conduct, either an act or omission, constitutes an unreasonable risk of foreseeable harm to another and proximately causes injury to that other person, a negligence cause of action exists. Foreseeability, as a factor in causation, is usually a question for the fact finder and ordinarily is not a subject for judicial determination as a matter of law raised by a demurrer.

Long before the present appeals by Gwendolyn Pelzek and

Victoria Hubbard, this court enunciated the common-law principle that an owner of a vehicle may be liable for damages resulting from the owner's negligently lending or entrusting the vehicle to a driver known to be intoxicated. *Deck v. Sherlock*, 162 Neb. 86, 75 N.W.2d 99 (1956). In *Deck*, the court correctly concluded that the owner, by placing the vehicle's keys in the hands of a drunk driver, may be legally responsible for the accident caused by the drunk driver's operation of the vehicle. In the Pelzek-Hubbard case, we have a situation alleged wherein people placed alcohol in the hands of a minor who, having become intoxicated, later drove a vehicle which was involved in an accident. Thus, both *Deck* and the present appeal include conduct which placed an intoxicated person behind the wheel of a motor vehicle and the question whether that conduct constituted an unreasonable risk of foreseeable harm to another. In *Deck*, there was a cause of action; in the Pelzek-Hubbard case, according to the majority, there is no cause of action. The majority offers no legal basis and explanation for a different standard and disparate treatment between one who provides car keys to an intoxicated person who becomes a drunk driver and one who provides alcohol consumed by a minor who becomes a drunk driver.

The majority uses *Gora v. 7-11 Food Stores*, 109 Ill. App. 3d 109, 440 N.E.2d 279 (1982), to support the majority's position in the Pelzek-Hubbard appeal. In *Gora*, the court considered the Illinois Dramshop Act, Ill. Rev. Stat. ch. 43, para. 135 (1979), and whether one might maintain a cause of action based on common-law negligence notwithstanding the Dramshop Act. Although the Illinois court concluded that there was no common-law cause of action for injury caused by sale of alcohol to a minor, the basis for the *Gora* decision was the existence of the Illinois Dramshop Act, which preempted a common-law cause of action. Since Nebraska does not have a dramshop act, the *Gora* decision, being irrelevant to the question in the present appeal, is unpersuasive, to say the least. However, several courts throughout the United States have provided well-reasoned decisions, which are based on common-law principles concerning a cause of action for negligence and which support imposition of liability for

supplying an alcoholic beverage to a minor whose consumption of the alcohol results in injury; for example, see, *Haafke v. Mitchell*, 347 N.W.2d 381 (Iowa 1984); *Migliore v. Crown Liquors of Broward, Inc.*, 448 So. 2d 978 (Fla. 1984); *Sorensen v. Jarvis*, 119 Wis. 2d 627, 350 N.W.2d 108 (1984); *McClellan v. Tottenhoff*, 666 P.2d 408 (Wyo. 1983); *Morris v. Farley Enterprises, Inc.*, 661 P.2d 167 (Alaska 1983); *Walz v. City of Hudson*, 327 N.W.2d 120 (S.D. 1982); *Ono v. Applegate*, 62 Haw. 131, 612 P.2d 533 (1980); *Alegria v. Payonk*, 101 Idaho 617, 619 P.2d 135 (1980); *Miller v. City of Portland*, 288 Or. 271, 604 P.2d 1261 (1980); *Munford, Inc. v. Peterson*, 368 So. 2d 213 (Miss. 1979); *Trail v. Christian*, 213 N.W.2d 618 (Minn. 1973); *Adamian v. Three Sons, Inc.*, 353 Mass. 498, 233 N.E.2d 18 (1968); *Elder v. Fisher*, 247 Ind. 598, 217 N.E.2d 847 (1966); *Smith v. Clark*, 411 Pa. 142, 190 A.2d 441 (1963); *Rappaport v. Nichols*, 31 N.J. 188, 156 A.2d 1 (1959). Thus, in reaching today's result, the majority is foundering in a doctrinal backwater out of the mainstream in current negligence law throughout the country. Cf. *Fuller v. Standard Stations, Inc.*, 250 Cal. App. 2d 687, 58 Cal. Rptr. 792 (1967).

The majority still feels that "dramshop liability" is "best left to the Legislature." As previously noted, the Legislature returned the "sale to a minor" cause of action to the common law of Nebraska, but this court deferentially leaves the cause of action to the Legislature. Consequently, the particular cause of action has become part of an Alphonse and Gaston act. Moreover, in *Arant v. G.H., Inc.*, 229 Neb. 729, 428 N.W.2d 631 (1988), the majority displayed the same sentiment notwithstanding the serious constitutional implications involved in such deference. The specific constitutional considerations are detailed in *Arant* (Shanahan, J., dissenting) and, therefore, will not be reiterated at this time. Suffice it to say that, under the Nebraska Constitution, the judiciary is the constitutional custodian of the common law in Nebraska, not the Legislature. The scope of common-law tort liability is traditionally a judicial, not a legislative, function. Yet, today this court has reached a result without any clear-cut expression of common law and, hence, has reached a result without a reason outside the legislative possibility of a statutory cause of

action. The issue is not whether the Legislature can, could, should, or even would statutorily provide a cause of action to supply a remedy for the harm caused by the conduct alleged in the Pelzek-Hubbard petition. Also, whether Gwendolyn Pelzek and Victoria Hubbard are entitled to recover is not an issue presented by their appeal. Rather, the appeal simply asks whether Nebraska's common law authorizes a cause of action on account of the conduct alleged. Both common law and common sense demand an affirmative answer to that question. Unfortunately, failure to recognize a cause of action in the Pelzek-Hubbard case turns Nebraska's living body of common law on negligence into a juridical corpse.

The district court's decision should have been set aside and the Pelzek-Hubbard action allowed to continue consistent with common law.

WHITE, J., joins in this dissent.

ALICE L. LICHT, APPELLANT, V. ASSOCIATION SERVICES, INC., A NEBRASKA CORPORATION, ET AL., APPELLEES.

463 N.W.2d 566

Filed November 30, 1990. No. 88-861.

1. **Corporations: Notice: Parties.** A corporation's failure to give the notice required by Neb. Rev. Stat. §§ 21-2086 and 21-20,125 (Reissue 1987) of the filing of its statement of intent to dissolve does not void dissolution of the corporation as against parties involved in the process and who thus have actual knowledge of the dissolution and are therefore not prejudiced by the failure.
2. **Notice: Parties.** A party's actual knowledge of a fact fulfills the purpose of a statutory requirement that constructive notice be given of that fact.
3. **Corporations: Abatement, Survival, and Revival: Claims.** A certificate by the Secretary of State issued after the payment of fees under the provisions of Neb. Rev. Stat. § 21-2092 (Reissue 1987) attesting that a corporation has filed articles of dissolution constitutes a "certificate of dissolution" such as to begin the running of the survival period for claims by and against the dissolved corporation defined in Neb. Rev. Stat. § 21-20,104 (Reissue 1987).
4. **Actions: Time.** When the period within which an act is to be done in any action or proceeding is given in terms of months or years, the last day of the period is the appropriate anniversary of the triggering act or event, unless that anniversary falls on a Saturday, Sunday, or court holiday.
5. **Corporations.** Corporate existence ceases upon filing and recording articles of

dissolution, and the date of dissolution of a corporation is the date the certificate of dissolution is issued.

6. **Waiver: Words and Phrases.** Waiver is the voluntary and intentional relinquishment or abandonment of a known existing legal right, or conduct from which such a relinquishment can be inferred.
7. **Corporations: Abatement, Survival, and Revival: Claims.** Neb. Rev. Stat. § 21-20,104 (Reissue 1987) is a survival statute, not a statute of limitations, and, as such, gives life to claims which would otherwise be extinguished.
8. **Corporations: Abatement, Survival, and Revival.** Absent the survival statute, a dissolved corporation could not sue or be sued.
9. _____: _____. The rights created by Neb. Rev. Stat. § 21-20,104 (Reissue 1987) are the right of a corporation to sue during the survival period and the right of others to sue the corporation during that same period.
10. **Corporations: Abatement, Survival, and Revival: Actions.** One's notice and demand for payment from a dissolved corporation does not constitute the commencement of an "action" or "proceeding" as contemplated by Neb. Rev. Stat. § 21-20,104 (Reissue 1987).
11. **Actions: Pleadings: Time.** Under the provisions of Neb. Rev. Stat. § 25-217 (Reissue 1989), an action is commenced on the date the petition is filed with the court.
12. **Summary Judgment.** A party is entitled to summary judgment if the pleadings, depositions, and admissions on file, together with affidavits, show 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.
13. **Summary Judgment: Final Orders: Appeal and Error.** Although the denial of a motion for summary judgment is not a final order and thus not appealable, when adverse parties have moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over all the motions for summary judgment and may determine the controversy which is the subject of those motions, making an order specifying the facts that appear without substantial controversy and directing such further proceedings as it deems just.
14. **Demurrer: Appeal and Error.** The pendency of an unresolved demurrer precludes appellate review of whether a cause of action has been stated.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Donald B. Stenberg, of Stenberg Law Offices, for appellant.

Rick L. Williams, of Peterson Nelson Johanns Morris & Holdeman, for appellees.

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

CAPORALE, J.

Plaintiff-appellant, Alice L. Licht, seeks to recover damages from her former corporate employer, defendant-appellee Association Services, Inc., and from defendants-appellees Bob Patterson and Alan Croson, cotrustees of a fund the corporation established for the postdissolution adjustment of claims against it. More specifically, Licht seeks to recover for accrued but unused vacation pay and for services rendered at the request of the corporation and cotrustees in winding up the corporation's affairs. The corporation filed a motion for summary judgment seeking dismissal of Licht's suit, Licht filed a motion for summary judgment against all defendants, and the cotrustees each filed a general demurrer. The district court denied Licht's motion, granted the corporation's motion, and dismissed Licht's petition as to all defendants without ruling on the demurrers filed by the cotrustees. Licht asserts the district court erred in (1) sustaining the corporation's motion, thereby dismissing her suit against it, (2) overruling her motion, and (3) dismissing her action against the cotrustees. We affirm in part, and in part reverse and remand for further proceedings.

The corporation, which Licht had served as executive vice president, apparently filed its statement of intent to dissolve with the Secretary of State in early October 1985. On April 4, 1986, the corporation filed articles of dissolution with the Secretary of State, who in turn issued a certificate dated the same day reciting that such articles had been filed with his office. Neb. Rev. Stat. § 21-20,104 (Reissue 1987) reads, in relevant part:

> The dissolution of a corporation . . . by the issuance of a certificate of dissolution by the Secretary of State . . . shall not take away or impair any remedy available to or against such corporation . . . for any right or claim existing, or any liability incurred, prior to such dissolution if action or other proceeding thereon is commenced within two years after the date of such dissolution.

Licht filed her petition on Tuesday, April 5, 1988.

Concluding that Licht filed her petition 1 day after the survival period of § 21-20,104 had expired, the district court granted the corporation's motion for summary judgment. Licht

presents several challenges to the dismissal of her suit: first, that the corporation did not comply with the statutory requirements for dissolution and was therefore never dissolved; second, that the document which the district court concluded is a certificate of dissolution is not such a certificate; third, that the survival period ended on April 5 rather than April 4, 1988; fourth, that the district court failed to rule on whether the corporation "waived or extended its date of dissolution" by establishing the trust and providing that it remain in existence for 2 years 1 day after the filing of the corporation's articles of dissolution; and fifth, that the district court failed to rule on whether the submission of one or more of her claims with the corporation constituted commencement of an action or proceeding within the meaning of the survival statute.

The statutory provisions which Licht asserts the corporation failed to follow are Neb. Rev. Stat. §§ 21-2086 and 21-20,125 (Reissue 1987). Section 21-2086(1) requires that a corporation mail to known creditors notice that the corporation has filed and recorded its "statement of intent to dissolve" with the Secretary of State and the appropriate county clerk's office. The relevant portion of § 21-20,125 requires the corporation to publish notice of its statement of intent to dissolve. The corporation is required to file proof of publication of this notice with the Secretary of State and with the county clerk of the county in which the registered office of the corporation is located.

Licht has stated that, to the best of her knowledge, no notice was ever mailed to her. Neither the corporation nor the cotrustees have disputed this claim. There is no evidence that notice of the filing of the statement was ever published, and the Secretary of State has certified that no proof of publication was ever filed with his office.

Licht was, however, aware the corporation was dissolving, since she worked on the dissolution before October 1985 and continued to work on it through early March 1986. Indeed, as noted earlier, one of her claims is based upon services rendered in preparing the corporation for dissolution. The question before us, therefore, is: What is the effect of the corporation's failure to follow the notice procedures set out in §§ 21-2086 and

21-20,125 upon a claim filed by a party involved in the dissolution of the corporation? Licht proposes that this failure means the corporation did not fulfill all the prerequisites to dissolution and therefore was never legally dissolved. The corporation and cotrustees, on the other hand, contend that since Licht was already aware of the dissolution, she was not prejudiced by the corporation's inaction, and the failure to give notice should not defeat dissolution.

The question is one of first impression for this court. Other jurisdictions have held that the failure to comply with all of the provisions of the relevant corporate dissolution statutes voids the dissolution as to creditors whose rights have been prejudiced thereby. See, *Alpine Prop. Owners v. Mountaintop Dev.*, 365 S.E.2d 57 (W. Va. 1987); *DSS v. Winyah Nursing Homes, Inc.*, 282 S.C. 556, 320 S.E.2d 464 (1984). See, also, *Bonsall v. Piggly Wiggly Helms, Inc.*, 275 S.C. 593, 274 S.E.2d 298 (1981); 16A W. Fletcher, Cyclopedia of the Law of Private Corporations § 8007.1 (Supp. 1990). Although these courts were not faced with unprejudiced creditors, the clear implication is that the dissolution would be valid as against them.

The alternative approach championed by Licht is to void the dissolution in its entirety. She points to no cases from this or any other court adopting this approach but, rather, points to what she asserts is the main purpose of the dissolution statutes, the protection of creditors. The approach adopted in *Alpine Prop. Owners* and the other decisions cited above assures that creditors whose rights have been prejudiced by the corporation's failure to give notice will be protected; it thus satisfies the policy concern raised by Licht without voiding nonprejudicial dissolutions.

The notice which § 21-2086 requires be mailed to known creditors is notice that the corporation has filed and recorded a statement of intent to dissolve. Clearly, this notice is intended to inform the creditor that the corporation has begun the process of dissolution, so that the creditor can act on its claim before the survival period runs. Surely, Licht's involvement provided her with more detailed and current knowledge of the corporation's status than that which she would have gained had she received

only a notice of the October 1985 filing of the corporation's intent to dissolve.

Section 21-20,125 requires that the corporation publish notice of its dissolution, thus giving constructive notice of the dissolution to unknown creditors and to the world at large. Obviously, a party's actual knowledge of a fact fulfills the purpose of a statutory requirement that constructive notice be given of that fact. See *Universal C. I. T. Credit Corp. v. Vogt*, 165 Neb. 611, 86 N.W.2d 771 (1957). Under the circumstances, Licht's rights could not have been prejudiced by the corporation's failure to publish notice. Indeed, we note that Licht has framed her challenge in terms of the corporation's failure to meet a condition precedent to dissolution, rather than upon any claim of prejudice, and that she offered no evidence of having been prejudiced.

Because Licht had actual knowledge that the corporation was undergoing dissolution, her claim that the corporation's failure to mail and publish notice prevented its dissolution must be, and hereby is, rejected.

Licht next asserts that the document issued by the Secretary of State when the corporation filed its articles of dissolution is not, in law and fact, a certificate of dissolution as provided for in Neb. Rev. Stat. § 21-2092 (Reissue 1987) of the Nebraska Business Corporation Act. She contends that the document merely certifies that articles of dissolution were filed. However, an affidavit by the Secretary of State identifies the document as a certificate of dissolution. While this affidavit does not answer whether the certificate is sufficient as a matter of law to trigger the running of the survival period set forth in § 21-20,104, it does, since it is not rebutted, resolve the factual question as to whether the document was meant to serve as a certificate of dissolution.

As to the legal sufficiency of the document, § 21-2092 provides our only guidance. It sets out the following procedure by which a certificate of dissolution is issued:

> The original and a duplicate copy of such articles of dissolution shall be delivered to the Secretary of State, who shall, when all fees provided by law shall have been paid:

(1) File the original in his office;

(2) Return to the corporation or its representative the duplicate copy stamped with the date of filing in the office of the Secretary of State; and

(3) Issue a certificate of dissolution.

Nothing in the statutory scheme sets forth any requirements as to the form or contents of the certificate of dissolution. Given that the Secretary of State is required to issue the certificate upon the filing of articles of dissolution and the payment of the required fees, there is little reason to draw a distinction between a document which certifies that articles of dissolution were filed and a certificate of dissolution, particularly when the issuer did not intend to draw any such distinction. Accordingly, the district court did not err in its conclusion that the document in question, under the circumstances of this case, is a certificate of dissolution for the purpose of triggering the period of survival. Whether the dissolution is subject to being voided with respect to creditors who did not otherwise have notice is, as suggested earlier, a different question.

Licht next contends that the district court erred in computing when the survival period ended, claiming that "[t]wo years after April 4, 1986 is April 5, 1988—the date the Petition was filed herein." Brief for appellant at 36. She, however, ignores Neb. Rev. Stat. § 25-2221 (Reissue 1989), which provides the general rule for computing the passage of time. Thereunder,

> the period of time within which an act is to be done in any action or proceeding shall be computed by excluding the day of the act, event, or default after which the designated period of time begins to run. The last day of the period so computed shall be included unless it is a Saturday, a Sunday, or a day during which the offices of courts of record may be legally closed . . . .

In application, when the period is given in terms of months or years, the last day of the period is the appropriate anniversary of the triggering act or event, unless that anniversary falls on a Saturday, Sunday, or court holiday. Applied to the facts before us, this means that, as the district court determined, the statutory survival period expired April 4, 1988. See, *State v. Hayden*, 233 Neb. 211, 444 N.W.2d 317

(1989); *State v. Jones,* 208 Neb. 641, 305 N.W.2d 355 (1981). Cf. *State v. Oldfield, ante* p. 433, 461 N.W.2d 554 (1990) (applying *State v. Jones*).

Licht also claims that the corporation waived or extended its date of dissolution by establishing the trust with a life extending 2 years 1 day after the filing of the articles of dissolution. It is unclear exactly what she means by this, for corporate existence ceases upon filing and recording the articles of dissolution, and the date of dissolution of a corporation is the date the certificate of dissolution is issued. See §§ 21-2092 and 21-20,104. If Licht is asserting that the corporation was unaffected by the issuance of the certificate of dissolution or that establishing the trust somehow postponed the effect of the issuance of the certificate, she is arguing against the language of §§ 21-2092 and 21-20,104. If, on the other hand, she is contending that the corporation's actions waived the 2-year period contained in § 21-20,104, her position requires further scrutiny.

Waiver is the voluntary and intentional relinquishment or abandonment of a known existing legal right, or conduct from which such a relinquishment can be inferred. *Donaldson v. Farm Bureau Life Ins. Co.*, 232 Neb. 140, 440 N.W.2d 187 (1989); *Farmers State Bank v. Farmland Foods*, 225 Neb. 1, 402 N.W.2d 277 (1987). Section 21-20,104 is a survival statute, not a statute of limitations, and, as such, gives life to claims which would otherwise be extinguished. *Van Pelt v. Greathouse*, 219 Neb. 478, 364 N.W.2d 14 (1985). Absent the survival statute, a dissolved corporation could not sue or be sued. *Id.*; *Christensen v. Boss*, 179 Neb. 429, 138 N.W.2d 716 (1965). Therefore, the rights created by the statute are the right of the corporation to sue during the survival period and the right of others to sue the corporation during that same period. The only right available to the corporation to waive is its own right to sue. Since any waiver of this right would not extend the survival period of another's right to sue, it could not help Licht.

Licht next cites Neb. Rev. Stat. § 21-20,135 (Reissue 1987) to support her proposition that "[a] corporation may voluntarily extend the date of its dissolution." Brief for appellant at 28. The portion of the statute Licht relies upon creates a procedure for, in specified circumstances, the "extension, restoration, renewal

or revival" of a corporation's existence "before the expiration of the time limited for its existence." The statute does not, however, come into play, for even if the statute otherwise applies to the circumstances of this present case, a matter we need not and do not decide, there is no evidence that the corporation filed with the Secretary of State the certificate required by a portion of the statute to which Licht does not refer.

Finally, in regard to the corporation's motion, Licht asserts that notwithstanding her failure to file her petition until April 5, 1988, she nonetheless commenced an "action or other proceeding" within the meaning of § 21-20,104 by filing a claim with the corporation before the survival period had run. To support her position, she cites *Connors v. Darryll Waggle Const. Inc.*, 631 F. Supp. 1188 (D.C. 1986). *Connors* involved an action brought under the federal Employee Retirement Income Security Act of 1974 against a dissolved corporation. The court found that the plaintiff's notice and demand for payment constituted a commencement of action or other proceeding for the purposes of an Illinois survival statute essentially identical to § 21-20,104. *Connors*, however, is inapplicable, for in that case the notice and demand for payment was the first step in a claim resolution procedure required by the federal act and, as such, clearly constituted the commencement of a proceeding; in the case before us, Licht's notice to the corporation is not required by nor part of any statutory or contractual procedure. Neb. Rev. Stat. § 25-217 (Reissue 1989) tells us that an action is commenced on the date the petition is filed with the court.

A party is entitled to summary judgment if the pleadings, depositions, and admissions on file, together with affidavits, show 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. *Mason State Bank v. Sekutera, ante* p. 361, 461 N.W.2d 517 (1990). The foregoing determinations compel the conclusion that insofar as the corporation's motion is concerned, there exists no genuine issue as to any material fact or as to the ultimate inferences which may be drawn therefrom and that it is

entitled to judgment as a matter of law. It therefore necessarily follows that the district court did not err in sustaining the corporation's motion for summary judgment, thereby dismissing Licht's suit against it.

The second assignment of error, claiming the district court erred in overruling Licht's motion for summary judgment, is controlled by the rule that although the denial of such a motion is not a final order and thus not appealable, when adverse parties have moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over all the motions for summary judgment and may determine the controversy which is the subject of those motions, making an order specifying the facts that appear without substantial controversy and directing such further proceedings as it deems just. See *Mason State Bank v. Sekutera, supra.*

The determination that the corporation is entitled to summary judgment necessarily means that the district court did not err in overruling Licht's motion for summary judgment against the corporation.

Left for consideration is the third and final assignment of error, which questions the propriety of the district court's dismissal of Licht's suit against the cotrustees. Licht urges that action was erroneous because the cotrustees were not parties to the corporation's motion for summary judgment and because different factual and legal issues are implicated. She is correct.

Since the cotrustees did not file a motion for summary judgment against Licht, the overruling of her motion as to them is not a final order, and we are therefore without jurisdiction to review that ruling.

The matter pends against the cotrustees on unresolved demurrers. Thus, whether the expiration of the survival period prevents her from stating a cause of action against the cotrustees derived from claims against the corporation, or whether she has otherwise stated a cause of action against them based on their own independent acts, are questions not yet ripe for appellate review. See *Koll v. Stanton-Pilger Drainage Dist.*, 207 Neb. 425, 299 N.W.2d 435 (1980).

Accordingly, we affirm the district court's grant of the

corporation's motion for summary judgment, reverse its dismissal of the suit against the cotrustees, and remand for further proceedings consistent with this opinion.

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

ROBERT L. ANDERSON, APPELLANT, V. ASSOCIATION SERVICES, INC., A NEBRASKA CORPORATION, ET AL., APPELLEES.

463 N.W.2d 792

Filed November 30, 1990. No. 88-862.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Donald B. Stenberg, of Stenberg Law Offices, for appellant.

Rick L. Williams, of Peterson Nelson Johanns Morris & Holdeman, for appellees.

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

CAPORALE, J.

Plaintiff-appellant, Robert L. Anderson, seeks to recover damages from his former corporate employer, defendant-appellee Association Services, Inc., and from defendants-appellees Bob Patterson and Alan Croson, cotrustees of a fund the corporation established for the postdissolution adjustment of claims against it. More specifically, Anderson seeks to recover for accrued but unused vacation and sick leave, for services rendered at the request of the corporation and cotrustees in winding up the corporation's affairs, for severance pay promised when the corporation terminated his employment, and for the termination of his contract of employment. The corporation filed a motion for summary judgment seeking dismissal of Anderson's suit, Anderson filed

a motion for summary judgment against all defendants, and the cotrustees each filed a general demurrer. The district court denied Anderson's motion, granted the corporation's motion, and dismissed Anderson's petition as to all defendants without ruling on the demurrers filed by the cotrustees.

Anderson served the corporation as president and, as was true of the plaintiff in *Licht v. Association Servs., Inc.*, *ante* p. 616, 463 N.W.2d 566 (1990), had worked on the corporation's dissolution before it filed with the Secretary of State the statement of its intent to dissolve, and continued to work on the dissolution through early March 1986. Anderson's assignments of error and the other operative facts are also as set forth in *Licht*. As a consequence, this appeal is resolved by the same rules of law as were applied in *Licht*.

Accordingly, we affirm the district court's grant of the corporation's motion for summary judgment, reverse its dismissal of the suit against the cotrustees, and remand for further proceedings consistent with our opinion in *Licht*.

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

STATE OF NEBRASKA, APPELLEE, V. MIKE VALDEZ, APPELLANT.

463 N.W.2d 326

Filed November 30, 1990. No. 89-1218.

1. **Convictions: 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 that verdict.
2. **Criminal Law: Directed Verdict.** In a criminal case a court can direct a verdict only when (1) there is a complete failure of evidence to establish an essential element of the crime charged, or (2) evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained.

3. **Sentences: Appeal and Error.** A sentence within the statutorily prescribed limits will not be disturbed on appeal in the absence of an abuse of discretion.

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

Charles F. Fitzke, Scotts Bluff County Public Defender, and Robert L. Wolf for appellant.

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

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

BOSLAUGH, J.

After trial to a jury, the defendant, Mike Valdez, was convicted of failing to appear before the court after having been "released from custody under bail, recognizance, or a conditioned release," in violation of Neb. Rev. Stat. § 29-908 (Reissue 1989). He was sentenced to imprisonment for not less than 15 months nor more than 3 years, with credit for 126 days served.

He has appealed and contends that the evidence was insufficient to support the conviction because the State failed to prove a material element of the offense—that he "willfully" failed to appear in court at 8:30 a.m. on February 21, 1989—and that the sentence imposed by the district court constituted an abuse of discretion.

> "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. Lane, 227 Neb. 687, 691, 419 N.W.2d 666, 669 (1988); *State v. Sorbello*, 232 Neb. 486, 440 N.W.2d 696 (1989); *State v. Wickline*, 232 Neb. 329, 440 N.W.2d 249 (1989); *State v. Clancy*, 224 Neb. 492, 398 N.W.2d 710 (1987).

"In a criminal case a court can direct a verdict only when

> (1) there is a complete failure of evidence to establish an essential element of the crime charged, or (2) evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained."

State v. Lane, supra at 690-91, 419 N.W.2d at 669; *State v. Anderson*, 229 Neb. 427, 427 N.W.2d 764 (1988); *State v. Methe*, 228 Neb. 468, 422 N.W.2d 803 (1988).

The record shows that on September 21, 1988, the defendant was charged with felony assault with a knife, under Neb. Rev. Stat. § 28-309(1) (Reissue 1989). He was released from custody on December 23, 1988, after depositing 10 percent of a $7,500 bond. Prior to his release, the defendant signed a recognizance form promising to appear before the district court on February 21, 1989, at 8:30 a.m. The recognizance form, which was read to the defendant, set forth the maximum penalty for "willful failure to appear before the Court when ordered to do so, or to surrender within three days thereafter."

The defendant failed to appear for the jury trial at 8:30 a.m. on February 21, 1989, and he did not surrender himself within 3 days thereafter as he had been ordered. His bond was ordered forfeited, and a bench warrant was issued for his arrest. The defendant was arrested on May 3, 1989, and charged in a new information on May 11, 1989, with failure to appear. See § 29-908.

At the trial, the defendant testified that he was unable to get a ride to the courthouse on the morning of February 21, 1989, until about 11 or 11:30 a.m., when he was picked up by his mother and taken to the courthouse.

At the courthouse, the defendant met his attorney, who informed the defendant that his bond had been revoked as a result of his failure to appear. Hearing this, he decided to talk with the judge. He went to the courtroom and looked around, but no one was there. Since the defendant had the time, he decided to pick up food stamps. After he had picked up food stamps, he returned to the courtroom, but it was still empty. Instead of waiting, he decided to ride home with a friend who happened to be in the courthouse.

Over 2 months later, on May 3, 1989, the defendant was at

the home of Amelia De Los Santos. He was found hiding in an attic storage area of De Los Santos' house.

Section 29-908 provides in pertinent part:

> Whoever is charged with a felony and is released from custody under bail, recognizance, or a conditioned release and *willfully fails to appear before the court granting such release when legally required or to surrender himself within three days thereafter*, shall be guilty of a Class IV felony . . . .

(Emphasis supplied.) To sustain a conviction under § 29-908, the State must establish that (1) defendant was charged with a felony; (2) defendant was released from custody under bail, recognizance, or a conditioned release; and (3) defendant willfully failed (a) to appear before the court when legally required or (b) to surrender himself within 3 days thereafter.

The evidence shows that the defendant failed to arrive at the courthouse until around noon on February 21, 1989, and did not surrender himself at that time. Moreover, the evidence shows that the defendant was a fugitive for over 2 months and that he tried to avoid capture by moving to a new address and by hiding in an attic of a house. From this, the trial court could infer willfulness. The trial court could infer that the defendant willfully failed to appear before the court when legally required or to surrender himself within 3 days after his scheduled trial date. The evidence was sufficient to present a question for the jury.

The defendant's second assignment of error is that the sentence imposed by the district court constituted an abuse of discretion.

Failure to appear when one has been charged with a felony constitutes a Class IV felony. Under the provisions of Neb. Rev. Stat. § 28-105 (Reissue 1985), a Class IV felony is punishable by up to 5 years' imprisonment, up to a $10,000 fine, or both.

The defendant was sentenced to imprisonment for not less than 15 months nor more than 3 years, with credit for 126 days served. The sentence imposed was well within the statutory range.

A sentence within the statutorily prescribed limits will not be disturbed on appeal in the absence of an abuse of discretion.

State v. Garza, ante p. 215, 459 N.W.2d 747 (1990); *State v. Johnson*, 234 Neb. 110, 449 N.W.2d 232 (1989). The sentence imposed in this case was not an abuse of discretion. As the trial court stated at the sentencing hearing, a lesser sentence would depreciate the seriousness of the crime because "when you don't show up when you're told to and you're out on bond and the jury is waiting . . . you seriously disrupt the proceedings of the judicial system, the law enforcement system, the criminal justice system and that promotes disrespect for the law . . . ."

There being no error, the judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GARY A. KEITHLEY, APPELLANT.

463 N.W.2d 329

Filed November 30, 1990. No. 89-1298.

1. **Postconviction: Appeal and Error.** In an appeal from a denial of a motion for postconviction relief, the findings of the district court will not be disturbed unless they are clearly erroneous.
2. **Effectiveness of Counsel: Proof.** In order to sustain a claim of ineffective assistance of counsel and obtain reversal of a conviction, the defendant must prove that (1) his counsel's performance was deficient and (2) such deficient performance prejudiced the outcome of the defendant's case.
3. **Criminal Law: Limitations of Actions.** A person may not be prosecuted for an offense for which the statute of limitations has run.
4. **Homicide: Lesser-Included Offenses: Limitations of Actions: Jury Instructions: Waiver.** When in a prosecution for murder the statute of limitations bars a conviction for manslaughter, the defendant is not entitled to an instruction for manslaughter as a lesser-included offense of murder unless he elects to waive the defense of the statute of limitations.
5. **Trial: Effectiveness of Counsel.** The fact that a trial strategy adopted by defense counsel proves to be unsuccessful in that the defendant is convicted does not alone sustain a finding of ineffectiveness of counsel.

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

Martin J. Kushner for appellant, and, on brief, Gary A. Keithley, pro se.

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

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

BOSLAUGH, J.

On November 12, 1986, the defendant, Gary A. Keithley, was convicted of second degree murder in the stabbing death of William Weiner and was sentenced to 20 years' imprisonment. The judgment was affirmed in *State v. Keithley*, 227 Neb. 402, 418 N.W.2d 212 (1988). The facts are set forth in detail in *State v. Keithley, supra*.

On August 4, 1989, the defendant filed a motion for postconviction relief pursuant to Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1989). The motion alleged ineffective assistance of his trial counsel in failing to request a jury instruction on manslaughter, ineffective assistance of appellate counsel in failing to raise ineffective assistance of counsel on appeal, and error by the trial court in failing to instruct on manslaughter.

The district court found that the defendant at trial had freely, voluntarily, knowingly, intelligently, and understandingly declined such an instruction and that there was no basis for the defendant's claims of ineffective assistance of trial and appellate counsel, and dismissed the defendant's motion on October 10, 1989.

The defendant has appealed and contends that the district court erred in finding he had not been denied effective assistance of trial and appellate counsel and in denying his motion for postconviction relief.

In an appeal from a denial of a motion for postconviction relief, the findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Williams*, 234 Neb. 890, 453 N.W.2d 399 (1990).

In order to sustain a claim of ineffective assistance of counsel and obtain reversal of a conviction, the defendant must prove that (1) his counsel's performance was deficient and (2) such deficient performance prejudiced the outcome of the defendant's case. *Id.*

The defendant killed Weiner on December 24, 1959, but the

information charging the defendant with murder was not filed until February 10, 1986. At that time the statute of limitations barred a prosecution for manslaughter. Neb. Rev. Stat. § 29-110 (Reissue 1956) and its successors provide that a person may not be prosecuted for an offense for which the statute of limitations has run.

During the trial, the court advised the defendant that if the defendant wanted to waive the defense of the statute of limitations, the court would instruct the jury on manslaughter as a lesser-included offense. The record shows that the defendant refused to waive the statute of limitations and gave up his right to have the jury instructed that manslaughter was a lesser-included offense.

The defendant relies on *Jackson v. Olson*, 146 Neb. 885, 22 N.W.2d 124 (1946), and argues that he did not have to waive the statute of limitations in order to have the court instruct the jury as to manslaughter. In that case we said:

> "Where an information charges the crime of murder in the first degree, murder in the second degree and manslaughter are included in the charge, the degree ordinarily being for the jury; and where the evidence and circumstances of the killing are such that different inferences may properly be drawn therefrom as to the degree, the court should submit the different degrees to the jury for them to draw the inference."

Id. at 902, 22 N.W.2d at 133.

We also stated that "the statute limiting prosecutions for felonies, by its specific terms, does not apply to prosecutions for murder." *Id.* at 903, 22 N.W.2d at 134.

In effect, the defendant argues that § 29-110's 3-year limitation does not apply to manslaughter because manslaughter is a degree of murder. The argument is without merit.

In 1959, murder in the second degree was defined as the intentional and malicious killing of another without premeditation. Neb. Rev. Stat. § 28-402 (Reissue 1956). Manslaughter was defined as the unlawful killing of another without malice, either upon a sudden quarrel, or the unintentional killing of another while in the commission of an

unlawful act. Neb. Rev. Stat. § 28-403 (Reissue 1956). Murder and manslaughter were and are separate offenses, although they are sometimes referred to as different degrees of criminal homicide. See *State v. Archbold*, 217 Neb. 345, 350 N.W.2d 500 (1984). Depending upon the facts in a particular case, manslaughter may be a lesser-included offense of murder. *State v. Drew*, 216 Neb. 685, 344 N.W.2d 923 (1984).

Spaziano v. Florida, 468 U.S. 447, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984), dealt with the issue of whether a defendant is entitled to the benefit of both a lesser-included offense instruction and the defense of an expired period of limitations for that offense. In that case, the defendant was charged with and tried for first degree murder. There was no statute of limitations for capital offenses; however, the statute of limitations for noncapital offenses had expired. Following the close of the evidence, the trial court informed the defendant that it would instruct the jury on the lesser-included noncapital offenses of attempted first degree murder, second degree murder, third degree murder, and manslaughter, if the defendant would waive the statute of limitations as to those offenses. The defendant refused to waive the statute, the trial court instructed the jury only on capital murder, and the defendant was found guilty of first degree murder.

The U.S. Supreme Court held that as between the options of a mandatory waiver of an expired statute of limitations prior to receiving an instruction on lesser-included offenses on which the statute had run and of giving the defendant a choice between having the benefit of the lesser-included offense instruction or asserting the statute of limitations on the lesser-included offenses, "the better option is that the defendant be given the choice." 468 U.S. at 456.

In the *Spaziano* case, the defendant was given a choice as to whether to waive the statute of limitations on the lesser-included offenses of capital murder. The defendant knowingly chose not to waive the statute of limitations. The Court found that under those circumstances, the trial court did not err in refusing to instruct the jury on the lesser-included offenses.

In this case, the record shows that, in accord with the

Spaziano decision, there was a thorough discussion among the court, the defendant, and the defendant's attorney at the trial regarding whether a manslaughter instruction should be given. The defendant's trial counsel stated:

> I had a discussion with him, between Lew and myself and the client, and made a record that I had informed him of the option that he has to waive the statute of limitations and request the manslaughter instruction and request a lesser-included-offense conviction; and he has determined that he does not want to waive that and wanted no lesser-included Instruction.

Further, the trial court specifically asked the defendant on the record if he was aware that manslaughter could be a lesser-included offense, and if he wanted a manslaughter instruction. The defendant stated that he did not want an instruction on manslaughter and that he freely, voluntarily, knowingly, intelligently, and understandingly did not ask for an instruction on manslaughter.

The defendant and his trial counsel were faced with a strategic decision—whether to waive the statute of limitations. The defendant chose not to waive the statute of limitations and elected to waive the benefit of an instruction on manslaughter as a lesser-included offense. The fact that a trial strategy adopted by defense counsel proves to be unsuccessful in that the defendant is convicted does not alone sustain a finding of ineffectiveness of counsel. *State v. Williams*, 234 Neb. 890, 453 N.W.2d 399 (1990).

The defendant's assignments of error are without merit. The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CHARLES T. COOK, APPELLANT.

463 N.W.2d 573

Filed November 30, 1990. No. 89-1344.

1. **Trial: Testimony.** A trial judge may not exclude testimony merely because it offends him or her.
2. **Trial: Expert Witnesses.** A trial judge may not prohibit one expert from disagreeing with another.
3. **Criminal Law: Due Process: Sentences.** A criminal defendant is not accorded the same procedural protections during the sentence-determining phase as during the guilt-determining phase of trial.
4. _____: _____: _____. The sixth amendment right to be "confronted with the witnesses against" one is not applicable to the sentencing phase of a criminal trial.
5. _____: _____: _____. In the sentencing context the right of confrontation is subsumed in the principles of due process.
6. **Due Process.** A claim that one is being deprived of a liberty interest without due process of law is typically examined in three stages; the question in the first stage is whether there is a protected liberty interest at stake; if so, the analysis proceeds to the second stage, in which it is determined what procedural protections are required; upon the resolution of that issue, the analysis moves on to the third and final stage, in which the facts of the case are examined to ascertain whether there was a denial of that process which was due.
7. _____. The procedural protections required by the due process clause must be determined with reference to the rights and interests at stake in the particular case.
8. **Due Process: Mentally Disordered Sex Offender.** Although a convicted sex offender is entitled to adduce documentary evidence on the issue of whether he or she is mentally disordered and treatable, such an offender is not entitled to confront adverse witnesses or adduce testimony on that issue.
9. **Mentally Disordered Sex Offender: Appeal and Error.** Whether a convicted sex offender is mentally disordered and treatable is a question of fact and, as such, the determination of the trier of fact will not be disturbed absent an abuse of discretion.
10. **Trial: Expert Witnesses.** The opinion of any given expert witness is not binding on the trier of fact.

Appeal from the District Court for Keya Paha County: EDWARD E. HANNON, Judge. Affirmed.

Rodney J. Palmer, of Palmer & Kozisek, P.C., for appellant.

Robert M. Spire, Attorney General, and Alfonza Whitaker for appellee.

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

CAPORALE, J.

I. INTRODUCTION

Defendant, Charles T. Cook, pled guilty to a charge of sexual assault of a child, in violation of Neb. Rev. Stat. § 28-320.01(1) (Reissue 1989), and was so adjudged. He was thereafter sentenced to imprisonment for a period of not less than 1 1/2 nor more than 5 years, was fined $2,500, and, because the trial judge found that he is a treatable mentally disordered sex offender, was committed to the Lincoln Regional Center until he received the maximum treatment, served his sentence, or was discharged. Cook assigns two errors, claiming that the trial judge erred by (1) refusing to receive at the sentencing hearing the testimony of a psychiatrist challenging the result of an intelligence test administered by a psychologist, and (2) finding his status to be that of a treatable mentally disordered sex offender. We affirm.

II. FACTS

The record shows that Cook engaged in a sexual relationship resulting in at least 15 instances of intercourse with the eldest of his four stepdaughters during a 1- to 1 1/2-year period. He was 22 years old when the relationship began and 23 years 9 months old when it ended; the stepdaughter was 12 years old and 13 years 11 months old, respectively. After the relationship ended at the stepdaughter's request, Cook attempted on more than one occasion to reinitiate it. He also, during the year-plus that elapsed from the end of the relationship to the time it came to light, made a sexual advance toward another stepdaughter, who was then 11 years old.

The court below ordered Y. Scott Moore, a psychiatrist, and H.L. Balters, a clinical psychologist, to examine Cook and file written reports expressing whether, in each of their opinions, Cook is a mentally disordered sex offender. Moore and Balters each submitted a report stating that in his opinion, Cook is such a person and, in Moore's opinion at least, is treatable.

It is apparent, however, that Moore was somewhat mistaken as to the victim's age at the relevant time, for his report states that Cook "actively engaged in sex with a 10 to 12 year old girl over a year and a half," when in fact the victim was, as stated

earlier, a bit older. Moore's finding that Cook is a mentally disordered sex offender appears to be based on the facts that Cook engaged in regular sexual intercourse with a child over a period of 1 1/2 years, that he had that child perform oral sex on him, that he sexually approached the child's younger sister, and that he displayed a "rather cavalier [attitude] about the entire episode."

Balters had Cook submit to, among other things, an intelligence test, on the basis of which Balters concluded that Cook functioned within the superior range of intellect. This result was somewhat at odds with other test results, and as a consequence, Balters noted that "[p]robably the most that one can attribute to these actuarial scores is that [Cook] is somewhat more adept at being able to decipher abstract relationships than he is for contending with words and verbal concepts." There is no indication, other than the above-quoted reference, that any of the test results constituted a basis for Balters' conclusion that Cook is a mentally disordered sex offender.

After receiving the foregoing evaluations, Cook was permitted to obtain additional separate evaluations by Daniel K. Sturgis, a clinical psychologist, and J.N.L. O'Sullivan, a psychiatrist. Each rendered a report opining that Cook is not a mentally disordered sex offender.

Sturgis administered a different intelligence test than did Balters, the results of which indicated that Cook's intellectual ability fell within the average range, and Sturgis specifically questioned Balters' finding that Cook's intellectual ability fell within the superior range. Sturgis agreed, however, with Balters' interpretation of another test that Cook would have trouble following societal standards and that psychological treatment would be difficult. Sturgis also expressed the views that the program at the Lincoln Regional Center was in turmoil because of changes in the professional staff, that the facility was misused, and that Cook was not a good candidate for placement therein.

O'Sullivan observed that Cook claimed Balters had had him complete tests at home. While O'Sullivan did not conduct any formal intelligence tests on Cook, he was of the opinion that

Cook was "functioning in the low normal range of intellectual functioning." In O'Sullivan's opinion, it would be advisable, should Cook be incarcerated in the "Lincoln State Penitentiary," to have him participate "in whatever therapeutic programs are currently available there."

When asked at the sentencing hearing if he had any additions or corrections to the presentence report, which contained the four evaluations detailed above, Cook did not dispute any of the reported facts but did offer some letters of recommendation regarding his sentence. These letters were made a part of the presentence report.

Cook then called O'Sullivan as a witness and attempted to elicit testimony concerning the proper manner of administering the intelligence test given him by Balters. The trial judge, in response to the State's objections, refused to receive that evidence, saying:

> Nor do I care to have the doctor sit here and criticize the other doctors. Not only would I not like it, but it wouldn't be right.
>
> . . . .
>
> . . . I do not care to have the doctor's criticism of the other doctors' work. If we are going to do that, I have to get the other doctors here to defend themselves . . . .
>
> . . . .
>
> . . . I do not care for such testimony and will not listen to it. . . .
>
> . . . .
>
> . . . [U]nder Section 29-2913, the reports of the mentally disordered sex offender, of the defendant evaluations shall be made a part of the presentence and shall be filed with the court at least ten days prior to the date set for sentencing. Copies of such reports shall be furnished to the county attorney. The effect of [the] oral testimony is to expand that report as of the day of the sentencing. I do not think that is a fair procedure, and I do not think that it is one that will lend towards the quest for truth, but only the truth as one side sees it, and therefore I will not let you expand on the report except if there is some additional information relative to the defendant, and then I will, but

otherwise I will not hear it.

In later overruling Cook's motion for new trial, the trial judge stated that in his opinion Cook's experts, in discussing what was wrong with the system and advising as to the penalty the court should impose, had become advocates and had thereby destroyed their credibility with him.

III. RELEVANT STATUTES

The process of identifying and dealing with mentally disordered sex offenders is controlled by Nebraska's mentally disordered sex offender act, Neb. Rev. Stat. §§ 29-2911 through 29-2921 (Reissue 1989). Under the act the commission of, among other things, any felony in which the sexual excitement of the person committing the crime is a substantial motivational factor is a sexual offense. § 29-2911(1)(b). According to Neb. Rev. Stat. § 28-318(5) (Reissue 1989), sexual contact consists of the intentional touching of a

> victim's sexual or intimate parts or the intentional touching of the victim's clothing covering the immediate area of the victim's sexual or intimate parts. Sexual contact shall also mean the touching by the victim of the actor's sexual or intimate parts or the clothing covering the immediate area of the actor's sexual or intimate parts when such touching is intentionally caused by the actor. Sexual contact shall include only such conduct which can be reasonably construed as being for the purpose of sexual arousal or gratification of either party.

The "actor" is the "person accused of sexual assault." § 28-318(1).

Section 28-320.01(1) provides that one "commits sexual assault of a child if he or she subjects another person fourteen years of age or younger to sexual contact and the actor is at least nineteen years of age or older" and that such an assault is a felony.

It is therefore clear that by pleading guilty to sexual assault of a child, in violation of § 28-320.01, Cook admitted that he had engaged in conduct which involved sexual arousal and that he had thus committed a "sexual offense," as defined in § 29-2911(1)(b).

Section 29-2911(2) provides that one who has a mental disorder and who, because of that disorder, has been determined to be disposed to repeated commission of sexual offenses which are likely to cause substantial injury to the health of others is a mentally disordered sex offender.

Section 29-2912 requires that prior to sentencing a person convicted of a felony sexual offense, "the court . . . shall order a presentence investigation which shall include an evaluation to determine whether the defendant is a mentally disordered sex offender."

Section 29-2913 provides:

> To conduct the evaluation the court shall appoint a panel of two physicians, licensed to practice medicine and surgery who have had at least three years of special training in treatment of mental disorders or one such physician and one clinical psychologist who has had at least three years of special training in treatment of mental disorders, to conduct individual psychiatric examinations of the defendant. The panel shall file with the court a written report as to whether in its opinion, the defendant is a mentally disordered sex offender. Such reports shall include the facts on which the conclusions are based and shall be filed at least ten days prior to the date set for the sentencing of the defendant. Copies of the reports shall be furnished to counsel for the defendant. If the defendant, or counsel for the defendant, disagrees with the conclusions of the court-appointed panel he or she may file a motion with the court requesting an additional evaluation by two other physicians of the defendant's choice licensed to practice medicine who have had at least three years of special training in the treatment of mental disorders or one such physician and one clinical psychologist who has had at least three years of special training in treatment of mental disorders. . . . Such additional evaluation shall be made part of the presentence investigation and shall be filed with the court at least ten days prior to the date set for sentencing. . . .

Section 29-2915 provides:

> If the court determines that: (1) The defendant is a

mentally disordered sex offender based on the information and conclusions in the presentence investigation; (2) the disorder is treatable; and (3) such treatment is available in the state, the court shall, after first sentencing the defendant as provided by law for the offense for which he or she has been convicted, commit the defendant for treatment to one of the regional centers until such time as the court determines based on the report filed by the Sentencing Review Committee established under section 29-2916 that the defendant is no longer mentally disordered or until the defendant has received the maximum benefit of treatment, except that no sentence to treatment shall exceed the maximum length of such offender's sentence. If the defendant is sentenced to a county jail as a misdemeanant, he or she shall be entitled to have his or her jail sentence reduced while in the county jail or regional center pursuant to section 47-502. If the defendant is discharged from the regional center prior to the maximum length of such offender's sentence, further disposition shall be consistent with sections 29-2919 and 29-2920.

The entire proceeding to determine whether the defendant is a mentally disordered sex offender and treatable shall be deemed a critical stage of a criminal prosecution at which the defendant shall be accorded all the rights a defendant has in sentencing proceedings. The court's decision that the defendant is a mentally disordered sex offender and the decision to commit the defendant for treatment may be appealed. On appeal the presentence investigation shall be made part of the record of the court.

IV. ANALYSIS

1. Constitutional Claims

Cook contends in connection with the first assignment of error that the trial judge erred in refusing to receive O'Sullivan's testimony concerning the proper method of administering the intelligence test given by Balters. In apparent reliance upon *Vitek v. Jones*, 445 U.S. 480, 100 S. Ct. 1254, 63 L. Ed. 2d 552

(1980), he argues, in effect, that the trial judge's ruling offends the confrontation clause of the 6th amendment and the due process clauses of the 5th and 14th amendments to the Constitution of the United States. We know of no rule of law which permits a trial judge to exclude testimony merely because it offends him or her, nor one which permits a court to prohibit one expert from disagreeing with another. However, the real question is not whether it was appropriate for the trial judge to exclude O'Sullivan's testimony on those grounds, but whether Cook, at the subject phase of the proceeding, was entitled to confront the witnesses against him and to adduce testimony, for if he had no such rights, the trial judge ruled correctly, and the erroneous reasons become immaterial. See *State v. Bradley, ante* p. 371, 461 N.W.2d 524 (1990) (citing *Holt County Co-op Assn. v. Corkle's, Inc.*, 214 Neb. 762, 336 N.W.2d 312 (1983), for the proposition that the right result reached for the wrong reason will be affirmed).

That a criminal defendant is not accorded the same procedural protections during sentencing as during the guilt-determining phase of trial is a settled principle of constitutional law. *Williams v. New York*, 337 U.S. 241, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949). A five-member majority in *State v. Miller*, 221 Neb. 862, 865, 381 N.W.2d 156, 158 (1986), observed that "[a]lthough a defendant is entitled to due process upon sentencing, the Constitution does not require that he be given the full panoply of rights accorded when the issue is guilt or innocence," and held that a sex offender was not entitled to confront adverse witnesses on the issue of whether the offender is mentally disordered. In *State v. Shockley*, 231 Neb. 247, 435 N.W.2d 903 (1989), the same majority of this court refused to hold the subject act unconstitutional on the grounds it deprived an offender of his or her rights of due process, confrontation, and compulsory process, and held that the procedural protections afforded by the act were constitutionally adequate.

Nonetheless, Cook calls to our attention that in *Vitek*, the U.S. Supreme Court held unconstitutional, on due process grounds, Nebraska's practice of involuntarily transferring prisoners deemed mentally ill or defective, and not treatable in their current facility, to mental hospitals. The decision to

transfer was, under Neb. Rev. Stat. § 83-180(1) (Reissue 1987), discretionary with the Director of Correctional Services, who was to base his decision upon the report of a designated physician or psychiatrist. Any prisoner transferred could not be held in a mental hospital after his sentence had expired unless he was civilly committed. The *Vitek* Court ruled that any such transfer implicated a liberty interest which could be protected by providing the prisoner, prior to transfer, with written notice of the impending transfer; a hearing before an independent fact finder at which the evidence relied upon for the transfer is disclosed to the prisoner, and the prisoner, who is to be given competent assistance, is permitted, in the absence of a showing of good cause why such cannot be, to present the testimony of witnesses and to confront and cross-examine the State's witnesses; a written statement of the evidence relied on and the reasons for the transfer; and effective and timely notice of the foregoing rights.

Cook inferentially argues that the liberty interest of a sex offender not to be branded as mentally disordered and treatable and thus forced to undergo unwanted mental treatment is no different from that of a prisoner who does not wish to be labeled mentally ill and compelled to undergo undesired mental treatment. We must therefore assess whether the interest claimed by Cook is subject to confrontation and due process protections.

(a) Confrontation

The sixth amendment right to be "confronted with the witnesses against" one is not applicable to the sentencing phase of a criminal trial. *State v. Anderson and Hochstein*, 207 Neb. 51, 296 N.W.2d 440 (1980), *cert. denied* 450 U.S. 1025, 101 S. Ct. 1731, 68 L. Ed. 2d 219 (1981); *Williams v. New York, supra.* In the sentencing context the right of confrontation is subsumed in the principles of due process. See *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). Thus, we move on to a consideration of the due process criteria involved.

(b) Due Process

A claim that one is being deprived of a liberty interest without due process of law is typically examined in three stages.

The question in the first stage is whether there is a protected liberty interest at stake. If so, the analysis proceeds to the second stage, in which it is determined what procedural protections are required. Upon the resolution of that issue, the analysis moves on to the third and final stage, in which the facts of the case are examined to ascertain whether there was a denial of that process which was due. See, e.g., *Washington v. Harper*, ____ U.S. ____, 110 S. Ct. 1028, 108 L. Ed. 2d 178 (1990).

(i) Nature of Interest

In view of the determination we make in the second stage of this due process analysis, we assume that a sex offender has a liberty interest in not being branded as mentally disordered and treatable such as to entitle the offender to the protections of the due process clauses.

(ii) Procedural Protections Required

In embarking on the second stage of the analysis, we recall that "[t]he procedural protections required by the Due Process Clause must be determined with reference to the rights and interests at stake in the particular case." *Washington v. Harper, supra* at 110 S. Ct. at 1040-41. As noted in *Mathews v. Eldridge*, 424 U.S. 319, 334-35, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976):

> [R]esolution of the issue whether the . . . procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected. [Citations omitted.] More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: *First*, the private interest that will be affected by the official action; *second*, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and *finally*, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [Citation omitted.]

(Emphasis supplied.)

The first *Mathews* factor has been treated in part IV(1)(b)(i)

above. We thus embark on a consideration of the second *Mathews* factor, i.e., the risk of an erroneous deprivation of the protected interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards.

In *Vitek v. Jones*, 445 U.S. 480, 100 S. Ct. 1254, 63 L. Ed. 2d 552 (1980), there were virtually no procedural protections; the prisoner was given no opportunity to question the adverse opinion of the physician or psychologist designated by the administrator who operated the prison and sought to effect the transfer, and the decision to transfer the prisoner was made by that very same administrator.

By way of contrast, the subject act provides a number of procedural protections. Although the opinions need not be unanimous, see *State v. Todd*, 223 Neb. 462, 390 N.W.2d 528 (1986), the trial court must nonetheless solicit two written opinions from mental health experts; the reports and findings are furnished to the offender prior to the sentencing hearing; and if the offender disagrees with the conclusions of the court-appointed experts, he or she may obtain additional evaluations by two qualified mental health experts of the offender's choice. § 29-2913. Moreover, an independent judge makes the decision as to whether the offender is mentally disordered and treatable, not an administrator with an interest in the outcome. §§ 29-2914 and 29-2915. Finally, the act provides for periodic review of an offender's status as one who is treatably mentally disordered. §§ 29-2916 to 29-2918.

Therefore, the risk of an erroneous determination that a convicted sex offender is mentally disordered and treatable is far lower than the risk assessed in *Vitek*, and the additional safeguard provided by the adduction of testimonial evidence would not significantly reduce the present low risk of an erroneous determination. By first giving the offender access to the reports of the court-appointed experts and permitting the offender to then select other experts allows the offender a meaningful means to rebut any adverse opinion.

The final *Mathews* factor to consider when determining what process is due in a given situation is the governmental interest, "including the function involved and the fiscal and

administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge, supra* at 424 U.S. at 335. The *Vitek* Court recognized that the State's interest in placing the mentally ill prisoner in the facility best equipped to treat the prisoner's condition was strong. The State's interest in this case is even stronger, for the State is attempting not only to treat the specific condition which led to the commission of the specific sexual offense involved, but to render treatment calculated to reduce the likelihood of future repetition of such offenses. The State's interest in question is sufficiently strong and the likelihood of appreciably reducing the risk of an erroneous determination low enough that the State need not be burdened with greater expense and further consumption of judicial time.

(iii) Application of Principles

The foregoing determination brings us to the third and final stage of the due process analysis, an application of the due process principles developed in the preceding part of this opinion to the facts of the case at hand in order to determine whether there was a denial of the process due Cook. There was not.

In addition to the procedural protections against an erroneous status determination described in part IV(1)(b)(ii), the act itself put Cook on notice of his rights and assured, by designating the status hearing to be a "critical stage" of the proceeding, § 29-2915, that Cook was represented by counsel, *State v. True, ante* p. 274, 460 N.W.2d 668 (1990). Moreover, the very matter Cook wished to call to the trial judge's attention, O'Sullivan's disagreement with certain of Balters' testing methods, was made known to the trial judge.

2. DETERMINATION OF STATUS

We thus reach the second and last assignment of error, which challenges the trial judge's determination of Cook's status as a treatable mentally disordered sex offender. Whether a convicted sex offender is mentally disordered and treatable is a question of fact, *State v. Todd, supra*, and, as such, the determination will not be disturbed absent an abuse of discretion, *State v. Reddick*, 221 Neb. 322, 376 N.W.2d 797

(1985).

The trial judge was presented with two written reports stating that Cook was a mentally disordered sex offender and two written reports stating that he was not. At least one expert opined that Cook's condition is treatable. Since the opinion of any given expert witness is not binding on the trier of fact, *Way v. Hendricks Sodding & Landscaping, Inc., ante* p. 519, 462 N.W.2d 99 (1990), the trial judge was not obligated to accept the opinion of either Sturgis or O'Sullivan. Inasmuch as the combined opinions of Moore and Balters support the trial judge's finding that Cook is a treatable mentally disordered sex offender, it cannot be said the determination constitutes an abuse of discretion.

V. DECISION

The record failing to support either of Cook's assigned errors, we affirm.

AFFIRMED.

WHITE, J., concurs in the result.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM M. CLEAR, APPELLANT.

463 N.W.2d 581

Filed November 30, 1990. No. 89-1355.

1. **Sentences: Due Process.** Due process requires that a sentencing judge have relevant information as the basis for a sentence imposed on a convicted defendant.
2. **Sentences: Evidence.** In a sentence hearing, a court, generally, has broad discretion concerning the source of information and the type of information to be considered.
3. **Sentences: Evidence: Presentence Reports.** A sentencing judge may consider relevant information contained in a presentence report on the defendant to determine an appropriate sentence within the statutorily authorized penalty, punishment, or disposition applicable to the crime for which the defendant has been convicted.
4. **Sentences: Due Process.** A convicted defendant, even in a noncapital case, has a due process right to inquire into an incorrect assumption by the sentencing judge, untrue information materially affecting a prospective sentence, or other

misinformation which a court may use in determining what sentence will be imposed.

5. **Presentence Reports.** As a result of the qualified right to review the entire presentence report on the defendant, a convicted defendant, with counsel, may examine the presentence report subject to the court's supervision, which includes the court's redaction of any information deemed confidential or privileged.
6. **Waiver: Words and Phrases.** A waiver is the voluntary and intentional relinquishment of a known right, privilege, or claim, and may be expressed by word or inferred from, or demonstrated by, a person's conduct.
7. **Constitutional Law: Waiver: Records.** A voluntary waiver, knowingly and intelligently made, must affirmatively appear from the record, before a court may conclude that a defendant has waived a right constitutionally guaranteed or granted by statute.

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

Lorin C. Galvin for appellant.

Robert M. Spire, Attorney General, and Delores Coe-Barbee for appellee.

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

SHANAHAN, J.

In his motion for postconviction relief pursuant to Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1989), William M. Clear alleged that he was denied the constitutional right to effective assistance of counsel, see U.S. Const. amend. VI and Neb. Const. art. I, § 11, at Clear's hearing for sentencing on his conviction for attempted robbery. Clear claimed that he had ineffective counsel because his lawyer did not supply Clear with the complete presentence report used by the sentencing judge. After an evidential hearing, the district court for Douglas County denied postconviction relief to Clear, who appeals and claims that he was "denied of his due process rights to effective assistance of counsel because [Clear] was denied the opportunity to see and read his pre-sentence report [which] contained a letter which prejudiced [Clear] by containing materially untrue information accusing [Clear] of uncharged crimes." Brief for appellant at 1.

STANDARD OF REVIEW

> In an evidentiary hearing, as a bench trial provided by §§ 29-3001 et seq. for postconviction relief, the trial judge, as the "trier of fact," resolves conflicts in evidence and questions of fact, including witness credibility and weight to be given a witness' testimony. Cf. *State v. Craig*, 219 Neb. 70, 80, 361 N.W.2d 206, 214 (1985) ("In a bench trial of a criminal case, the court, as the 'trier of fact,' is the sole judge of the credibility of witnesses and the weight to be given to their testimony"). In an appeal involving a proceeding for postconviction relief, the trial court's findings will be upheld unless such findings are clearly erroneous. *State v. Pearson*, 220 Neb. 183, 368 N.W.2d 804 (1985).

State v. Williams, 224 Neb. 114, 116, 396 N.W.2d 114, 116 (1986).

BACKGROUND OF CLAIM

Initially, the State charged Clear with attempted robbery of a Ginn Oil food store and use of a firearm in the attempted robbery. Pursuant to a plea agreement, Clear pled guilty to attempted robbery, and the State dismissed the charge that Clear used a firearm in the attempted robbery. Two weeks before the sentence hearing, a probation officer sent a letter to Clear and his lawyer, notifying them that the presentence report on Clear was available for their review. When Clear contacted his lawyer and told him about the letter, the lawyer said that before Clear's sentence hearing, they would review the presentence report, which included a letter from William F. Ginn, president of Ginn Oil Company.

Although Clear's lawyer never showed Clear the presentence report before the sentence hearing, the lawyer did discuss the "contents" of the presentence report with Clear, including the Ginn letter. Consequently, before the sentence hearing, Clear never saw the letter from Ginn, but did visit with his lawyer regarding the letter and whether the letter's "allegations were true." Without examining Ginn's letter in the presentence report, Clear, nevertheless, denied the events mentioned in the letter.

At the sentence hearing, the court recounted some of the information in the presentence report containing the letter in which Ginn accused Clear of a prior armed robbery of a Ginn Oil food store, the attempted armed robbery involved in the present case, and intimidation of potential witnesses to prevent their testifying against Clear. Regarding the prior armed robbery, Ginn said that Clear "robbed our station on South 13th before [and] used the same gun . . . ." Concerning the present charge, Ginn stated that Clear, wearing a ski mask, entered the robbery site and

> was armed with a pellet gun which he aimed at our attendant Jim Allen and then demanded money. When our employee refused to give him any money [Clear] then lifted the hinge counter-top and went behind the counter where our employee was standing. While at gunpoint our employee managed to spray [Clear] in the face with MACE. [Clear] then tried to flee, but was unable to because our employee wrestled him to the ground outside of the building. [Clear] was held down on the ground until the police arrived at the scene of the crime. Sometime during the scuffel [sic], our employee was bitten by [Clear].

In the letter, Ginn also requested that the court sentence Clear to "jail where he needs to be to learn how to be a deserving citizen of our community."

When the court inquired whether there was "[a]nything either party wishes to say as regards the matter of sentencing in this particular case," Clear's lawyer responded:

> Yes, Judge.
>
> . . . .
>
> The owner of the station had submitted a letter to the Probation Office concerning their thoughts that Mr. Clear was involved in another robbery at the same station. That is inaccurate, Judge. Mr. Clear was not involved with any robbery of that station.
>
> They expressed some concern about the problems they had with their clerks leaving because of this.
>
> I ask the Court to consider only that Mr. Clear is charged with this one incident, attempted robbery, to

which he has pled guilty.

After the statements by Clear's lawyer, the court asked, "Anything you wish to say, Mr. Clear?" Clear answered:

> I know I broke the law, sir. I haven't been in trouble for a long time. I would like to have a chance and I'll never see the Court or a traffic ticket again.
>
> I know I broke the law. I'm not saying I didn't break the law. In fact, at the time I didn't know what I was arrested for.
>
> But I would like to have another chance. You won't see me on a traffic ticket, Your Honor.
>
> And I have been going to AA since I've been out and trying to help myself, Your Honor.

After the foregoing comments, Clear's statements to the court related, generally, to Clear's personal history, including his prior convictions, with no reference to or question concerning the circumstances of the attempted robbery or the contents of Ginn's letter which was in the presentence report and had been mentioned by Clear's lawyer during the sentence hearing.

After the court sentenced Clear to imprisonment for a term of 5 to 8 years, this court summarily affirmed the district court's judgment. See *State v. Clear*, 227 Neb. xxiv (case No. 87-916, Mar. 16, 1988).

SENTENCE HEARING

Due Process Considerations.

Due process requires that a sentencing judge have relevant information as the basis for a sentence imposed on a convicted defendant. *State v. Barker*, 231 Neb. 430, 436 N.W.2d 520 (1989); *State v. Goodpasture*, 215 Neb. 341, 338 N.W.2d 446 (1983); *State v. Porter*, 209 Neb. 722, 310 N.W.2d 926 (1981); *State v. Rose*, 183 Neb. 809, 164 N.W.2d 646 (1969). In a sentence hearing, a court, generally, has broad discretion concerning the source of information and the type of information to be considered. *United States v. Tucker*, 404 U.S. 443, 92 S. Ct. 589, 30 L. Ed. 2d 592 (1972); *Williams v. New York*, 337 U.S. 241, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949).

"A sentencing judge may consider relevant information

contained in a presentence report on the defendant to determine an appropriate sentence within the statutorily authorized penalty, punishment, or disposition applicable to the crime for which the defendant has been convicted." *State v. Bunner*, 234 Neb. 879, 889, 453 N.W.2d 97, 103 (1990).

"[A] convicted defendant, even in a noncapital case, has a due process right to inquire into an incorrect assumption by the sentencing judge, untrue information materially affecting a prospective sentence, or other misinformation which a court may use in determining what sentence will be imposed." *State v. Barker, supra* at 435, 436 N.W.2d at 523.

Presentence Report.

Neb. Rev. Stat. § 29-2261(6) (Reissue 1989) statutorily regulates access to a presentence report:

> Any presentence report or psychiatric examination shall be privileged and shall not be disclosed directly or indirectly to anyone other than a judge, probation officers to whom an offender's file is duly transferred, or others entitled by law to receive such information. The court may permit inspection of the report or examination of parts thereof by the offender or his or her attorney, or other person having a proper interest therein, whenever the court finds it is in the best interest of a particular offender. The court may allow fair opportunity for an offender to provide additional information for the court's consideration.

As a result of the qualified right to review the entire presentence report on the defendant, a convicted defendant, with counsel, may examine the presentence report subject to the court's supervision, which includes the court's redaction of any information deemed confidential or privileged. *State v. True, ante* p. 274, 460 N.W.2d 668 (1990).

Inspection of Presentence Report: Waiver.

A waiver is the voluntary and intentional relinquishment of a known right, privilege, or claim, and may be expressed by word or inferred from, or demonstrated by, a person's conduct. *State v. Kennedy*, 224 Neb. 164, 396 N.W.2d 722 (1986). "A voluntary waiver, knowingly and intelligently made, must

affirmatively appear from the record, before a court may conclude that a defendant has waived a right constitutionally guaranteed or granted by statute." *State v. Kennedy, supra* at 170, 396 N.W.2d at 726. See, also, *State v. Blue*, 223 Neb. 379, 391 N.W.2d 102 (1986); *State v. Miles*, 202 Neb. 126, 274 N.W.2d 153 (1979).

From the testimony of Clear's lawyer concerning his conference with Clear before the sentence hearing, the district court, in resolving a factual question, undoubtedly concluded that Clear and his lawyer thoroughly discussed the contents of Ginn's letter contained in the presentence report. Such conclusion by the district court is not only logical, but inescapable. At the sentence hearing, Clear's lawyer addressed the contents of Ginn's letter and explicitly denied that Clear had previously robbed a Ginn Oil store. Immediately after that denial through Clear's lawyer, the court very specifically and directly asked Clear whether he wished to say anything, an obvious inquiry whether Clear had any comment or question concerning information which had been presented at the sentence hearing, including the Ginn letter. Notwithstanding the court's inquiry, Clear never mentioned that he had not seen the Ginn letter and made no comment about the existence or contents of the letter, which was immediately and physically available to Clear. In reference to the Ginn letter and whatever transpired before the sentence hearing, the fact remains that the letter was available for Clear's inspection at the sentence hearing. Clear's failure to raise any question about the Ginn letter or his lawyer's statements concerning the letter demonstrated that Clear acknowledged the contents of Ginn's letter as related by Clear's lawyer and accepted his lawyer's statements as an accurate and sufficient response to the assertions in Ginn's letter. As affirmatively shown by the record, Clear's conduct regarding the Ginn letter was a waiver of any later complaint that Clear had not personally inspected the letter before sentence was imposed. Hence, the Clear waiver renders the assignment of error without merit.

Absence of Prejudice.

Moreover, notwithstanding Clear's qualified right to inspect

the Ginn letter as a part of the presentence report and assuming that Clear did not waive that right, Clear has not pointed to any prejudice from the absence of an inspection. As expressed in *State v. Hawthorne*, 230 Neb. 343, 347, 431 N.W.2d 630, 633 (1988):

> [T]o sustain a claim of ineffective assistance of counsel as a violation of the sixth amendment to the U.S. Constitution and thereby obtain reversal of a defendant's conviction, the defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense, that is, a demonstration of reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.

Assuming that appropriate legal representation required that Clear be shown the Ginn letter in the presentence report, Clear has failed to demonstrate in what manner he sustained detriment from the absence of his inspection of the letter or how Clear's inspection of Ginn's letter would have reasonably and probably resulted in a sentence different from that actually imposed. While acknowledging that his lawyer denied the contents of the Ginn letter, Clear never suggests that he would have addressed the contents of Ginn's letter any differently from his lawyer's action at the sentence hearing. Neither at his postconviction hearing nor in his appeal has Clear indicated that his personally inspecting the Ginn letter would have altered the course of the sentence hearing or affected information presented to the sentencing court beyond Clear's denial, through his lawyer, concerning the contents of the Ginn letter. Consequently, Clear has failed to establish the second component in the two-part test to prevail on a claim of ineffective assistance of counsel, that is, Clear has failed to show that the absence of his personal inspection of the Ginn letter prejudiced Clear's constitutional right to due process at his sentence hearing.

We find no error in the district court's denying postconviction relief to Clear.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ALLEN WESLEY CARTER, APPELLANT.

463 N.W.2d 332

Filed November 30, 1990. No. 89-1500.

1. **Postconviction: Appeal and Error.** If a defendant is denied his right to appeal because his lawyer fails, when requested, to timely file a notice of appeal, the proper means to attack that denial is by a postconviction relief action.
2. **Judgments: Appeal and Error.** Partial disposition of the issues in a lawsuit by the trial court, resulting in piecemeal appeals, is disfavored.
3. **Sentences: Waiver: Appeal and Error.** Where no objection is made at a sentencing hearing when a defendant is provided an opportunity to do so, generally, any claimed error is waived and is not preserved for appellate review.
4. **Final Orders: Appeal and Error.** Generally, when multiple issues are presented to a trial court for simultaneous disposition in the same proceeding and the court decides some of the issues, while reserving some issues for later determination, the court's determination of less than all the issues is an interlocutory order and is not a final order for the purpose of an appeal.
5. **Postconviction: Constitutional Law: Effectiveness of Counsel: Proof.** In a postconviction relief action, 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.
6. **Effectiveness of Counsel: Words and Phrases.** A reasonable probability is a probability sufficient to undermine confidence in the outcome.
7. **Effectiveness of Counsel: Proof.** A criminal defendant must demonstrate prejudice was suffered from ineffectiveness of counsel.
8. _____: _____. The defendant has the burden of demonstrating ineffective assistance of counsel, and the record must affirmatively support the claim.
9. **Effectiveness of Counsel: Conflict of Interest: Proof.** A defendant must show that his counsel actively represented conflicting interests and that the actual conflict of interest adversely affected the performance of the defendant's lawyer.
10. _____: _____: _____. A defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief.
11. _____: _____: _____. A conflict of interest must be actual rather than speculative or hypothetical before a conviction can be overturned on the ground of ineffective assistance of counsel.
12. **Sentences: Appeal and Error.** An order imposing a sentence within the statutorily prescribed limits will not be disturbed on appeal in the absence of an abuse of discretion.
13. **Sentences.** The seriousness of the offense is an important factor in the setting of the sentence, and information as to a defendant's life, character, or previous

conduct is highly relevant to the determination of a proper sentence.

14. _____. In imposing a sentence, a sentencing court may consider the effects of the crime upon the victim.

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

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

Allen Wesley Carter, pro se.

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

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

FAHRNBRUCH, J.

Allen Wesley Carter, age 61, through his counsel, appeals his 5- to 10-year sentence of imprisonment, which he received after he entered a plea of nolo contendere to attempted first degree sexual assault on a female who was under 16 years of age.

The defendant, in his pro se brief, in substance assigns as error (1) that the district court for Douglas County erred in considering only one of the paragraphs in his postconviction relief motion and in failing to grant an evidentiary hearing on the remaining paragraphs and (2) that the defendant was denied effective assistance of counsel at his resentencing hearing. We affirm.

Carter was initially charged with first degree sexual assault on a child, a Class II felony, Neb. Rev. Stat. § 28-319 (Reissue 1989), carrying a penalty of not less than 1 nor more than 50 years' imprisonment, Neb. Rev. Stat. § 28-105 (Reissue 1985). So far as relevant here, § 28-319 provides that any person who subjects another person to sexual penetration and the actor is 19 years of age or older and the victim is less than 16 years of age is guilty of sexual assault in the first degree. On February 16, 1989, with counsel from the Douglas County public defender's office representing him, Carter was arraigned and entered a not guilty plea to the initial charge. Because of a conflict of interest, the nature of which is undisclosed in the record, the public

defender's office was permitted to withdraw as Carter's counsel and an attorney not employed by the public defender's office was appointed to represent the defendant.

On May 16, 1989, pursuant to a plea agreement, with his substitute counsel present, Carter entered a plea of nolo contendere to an amended information charging him with attempted first degree sexual assault on a female who, at the time, was under 16 years of age. That charge is a Class III felony, Neb. Rev. Stat. § 28-201(4)(b) (Reissue 1989), carrying a penalty of not less than 1 nor more than 20 years' imprisonment, up to a $25,000 fine, or both, § 28-105. The court, after determining that Carter understood his constitutional rights as set forth in *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986), and after finding that a factual basis existed establishing that Carter committed the offense with which he was charged, accepted the defendant's plea and found him guilty.

Following acceptance of Carter's plea, the court, pursuant to Neb. Rev. Stat. § 29-2913 (Reissue 1989), ordered the defendant to be examined by two psychiatrists to determine whether he was a mentally disordered sex offender (MDSO). The examinations indicated that Carter did not qualify as an MDSO, and the court so found. Following a presentence investigation, with his non-public-defender counsel present, the defendant was sentenced to not less than 5 nor more than 10 years' imprisonment, with credit for 170 days served.

From the sparse transcript before this court, it can be determined that the defendant filed a motion with the court, which the defendant, in his pro se brief, claims was a motion for postconviction relief. The motion itself is not in the transcript. In an order dated October 17, 1989, the trial court stated that a hearing on the court's own motion was held on October 17 on paragraph 2f of defendant's motion to vacate judgment and sentence. The order further stated:

> The Court finds that the attorney appointed by the Court to represent the Defendant did after the sentencing of the Defendant and after determining that the previous conflict of interest no longer existed leave his file with the Douglas County Public Defenders' Office who accepted

same for the purpose of prosecuting an appeal if Defendant chose to do so. That office failed to contact Defendant regarding an appeal until its notice to Defendant dated September 11, 1989, some 57 days after sentencing and some 27 days after the time for filing the Notice of Appeal passed.

The case of Evitts v. Lucey, 105 S.Ct. 830, 469 U.S. 387, 83 L.Ed.2d 821 (1985) indicates that Defendant's first right to appeal may not be extinguished because the right of Defendant to effective assistance of Counsel has been violated.

It is here evident that the Public Defenders' office and/or possibly appointed Counsel dropped the ball (failed to notify Defendant of his right to appeal and time constraints to perfect the appeal) and thus Defendant has been denied his right to his first appeal by Counsel.

Defendant's right of appeal is contained within the language of Article I, Section 23 of the Nebraska Constitution, to wit: "In all cases of felony the Defendant shall have the right of appeal to the Supreme Court; ***."

The court then vacated the sentence imposed on July 14, 1989, and appointed the Douglas County public defender's office to represent Carter at a resentencing hearing. There is no indication in the record that the public defender's office, at that time, continued to have a conflict of interest. On November 29, 1989, the trial court, with the defendant and a public defender present, held a resentencing hearing. At that time, the defendant stated that there was no reason why sentence should not be imposed upon him. Thereupon, the defendant was resentenced to not less than 5 nor more than 10 years' imprisonment, the sentence to be deemed to have commenced July 14, 1989, and the defendant was granted 170 days' additional credit against the sentence for time already served.

I. POSTCONVICTION MOTION

Although neither Carter's motion to vacate judgment and sentence nor a bill of exceptions of the October 17 hearing has been made part of the record presented to this court, the record demonstrates that the trial court resolved only one of the issues

raised by Carter's motion. In the trial court's order to vacate its sentence, the court declared, "Hearing was held on the Court's own motion on October 17, 1989, on paragraph 2f of the Defendant's Motion to Vacate Judgment and Sentence filed on September 21, 1989." In the final paragraph of the order, it is stated that "the granting of paragraph 2f of Defendant's Motion to Vacate Judgment and sentence shall not prejudice the Defendant's right to proceed with the balance of said Motion after sentencing if Defendant so desires."

Carter, pro se, argues that the trial court did not have authority to consider only a portion of his motion and should have made disposition of his motion in its entirety. Initially, we conclude that Carter's motion to vacate his judgment and sentence under the Postconviction Act, Neb. Rev. Stat. §§ 29-3001 to 29-3004 (Reissue 1989), is a procedurally appropriate manner in which to challenge his sentence to have it vacated and set aside. See *State v. Halsey*, 195 Neb. 432, 238 N.W.2d 249 (1976) (holding that if a defendant is denied his right to appeal because his lawyer fails, when requested, to timely file a notice of appeal, the proper means to attack that denial is by a postconviction relief action).

Partial disposition of the issues in a lawsuit by the trial court, resulting in piecemeal appeals, is disfavored. See, *Federal Land Bank v. McElhose*, 222 Neb. 448, 384 N.W.2d 295 (1986) (stating that a trial court should limit itself to entering but one final determination of the rights of the parties in a case); *Gerber v. Gerber*, 218 Neb. 228, 353 N.W.2d 4 (1984) (ordering trial court on remand to determine all issues between the parties where the trial court bifurcated issues in a dissolution proceeding); *Swilling v. MacDougall*, 252 S.C. 571, 167 S.E.2d 432 (1969) (remanding cause to trial court where the trial court passed upon only one of the issues raised in a habeas corpus proceeding and reserved the others for later determination). In this case, the district court should have simultaneously resolved all the issues raised by Carter's motion for postconviction relief. Nonetheless, no reversible error was committed.

Where no objection is made at a sentencing hearing when a defendant is provided an opportunity to do so, generally, any claimed error is waived and is not preserved for appellate

review. See *State v. Shepherd*, 235 Neb. 426, 455 N.W.2d 566 (1990) (holding that defendant failed to preserve error regarding plea agreement which was breached by a prosecutor when he did not object to the prosecutor's recommendation even after the court asked him if he cared to respond); *State v. Battershaw*, 220 Neb. 661, 371 N.W.2d 313 (1985) (refusing to review assigned error regarding psychiatric evaluations, since the defendant failed to object at sentencing hearing when the evaluations were offered); *State v. Bevins*, 198 Neb. 761, 255 N.W.2d 284 (1977) (determining that where a defendant is advised by the trial court of information on which the court is relying at the time of sentencing, but does not object thereto, a contention by the defendant on appeal that the information was untrue will not be upheld).

The bill of exceptions from the resentencing hearing reflects that the court informed Carter that he had earlier pled no contest to a charge of attempted first degree sexual assault. Thereupon, the court specifically asked the defendant and his attorney if either had anything to say as to why judgment should not be passed against the defendant. Each responded in the negative. Despite an opportunity to do so, neither Carter nor his attorney brought to the court's attention the remaining issues raised by the postconviction motion. By failing to voice any objection, Carter waived his right to have the other issues determined, and any error in the court's failure to decide all issues in Carter's postconviction motion has not been preserved for appeal.

This court is aware that, generally, when multiple issues are presented to a trial court for simultaneous disposition in the same proceeding and the court decides some of the issues, while reserving some issues for later determination, the court's determination of less than all the issues is an interlocutory order and is not a final order for the purpose of an appeal. See *Huffman v. Huffman, ante* p. 101, 459 N.W.2d 215 (1990). In such cases, the normal course is to remand the cause for further proceedings. See *Gerber, supra*; *Swilling, supra*. However, this case is distinguishable, as Carter waived the issues reserved for later determination. This assignment of error by Carter is without merit.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

In a postconviction relief action, 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. *State v. Schneckloth*, 235 Neb. 853, 458 N.W.2d 185 (1990). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* A criminal defendant must demonstrate prejudice was suffered from ineffectiveness of counsel. *Id.* The defendant has the burden of demonstrating ineffective assistance of counsel, and the record must affirmatively support the claim. *State v. Domingus*, 234 Neb. 267, 450 N.W.2d 668 (1990).

1. Conflict of Interest

A defendant must show that his counsel actively represented conflicting interests and that the actual conflict of interest adversely affected the performance of the defendant's lawyer. *State v. Schneckloth, supra.* A defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief. *Id.* A conflict of interest must be actual rather than speculative or hypothetical before a conviction can be overturned on the ground of ineffective assistance of counsel. *Id.*

The basis of Carter's claim seems to be that because he alleged in his postconviction motion that his court-appointed appellate counsel, i.e., the public defender's office, initially failed to timely prosecute his appeal, a lawyer from that office could not render conflict-free representation at the defendant's resentencing hearing. We note in passing that although there seems to have been a conflict during the early stages of the proceedings which necessitated the appointment of substitute counsel, Carter assigns no error regarding that conflict. At any

rate, such a claim would fail, as the defendant has not presented a record to this court in connection with the earlier conflict of interest which affirmatively supports the claim. See *Domingus, supra*.

Turning to Carter's assigned error, the most that can be said from the record is that the public defender's office failed to timely file an appeal. We assume, without deciding, for purposes of this case that the alleged conflict of interest may be imputed to all attorneys in the Douglas County public defender's office. However, we fail to see the logic that solely because one has failed to timely appeal, he or she is unable to represent, free of a conflict of interest, his or her client at a hearing to remedy a failure to appeal. It would be more reasonable to assume that one who has failed to timely appeal would be conscientious when provided a chance to correct that dereliction. See *State v. Reddick*, 230 Neb. 218, 430 N.W.2d 542 (1988) (rejecting argument that defendant's complaints regarding his court-appointed attorney, coupled with his unsuccessful effort to have substitute counsel appointed, created conflict of interest, because the best defense against the defendant's allegations would have been to provide him with the very best defense to the charges). Any conflict of interest between Carter and his counsel at his resentencing hearing is purely speculative or hypothetical. This assignment of error is without merit.

2. Performance at Resentencing Hearing

When counsel was asked at the resentencing hearing if he had anything to say regarding why judgment should not be passed against Carter and the nature of the sentence that should be made, counsel replied that he did not. Carter further contends that, among other matters, this colloquy demonstrates that his counsel was ineffective at the resentencing hearing. Assuming, arguendo, that counsel's performance was deficient, we determine that Carter has failed to show prejudice. He has not demonstrated what his attorney could have said to the court that would have affected the resentencing. It is clear from the record that the main purpose of the resentencing hearing was to allow Carter a direct appeal. In view of our later discussion

regarding the alleged excessiveness of the defendant's sentence and the reason underlying the resentencing proceeding, there is no reasonable probability that, but for counsel's deficient performance, the result of the resentencing hearing would have been different.

III. EXCESSIVE SENTENCE

Through counsel, Carter assigns as error the excessiveness of his sentence. An order imposing a sentence within the statutorily prescribed limits will not be disturbed on appeal in the absence of an abuse of discretion. *State v. Garza, ante* p. 215, 459 N.W.2d 747 (1990). The sentence imposed upon Carter was well within the statutorily prescribed limits.

The seriousness of the offense is an important factor in the setting of the sentence, and information as to a defendant's life, character, or previous conduct is highly relevant to the determination of a proper sentence. *State v. Nelson*, 235 Neb. 15, 453 N.W.2d 454 (1990). In imposing a sentence, a sentencing court may consider the effects of the crime upon the victim. See *State v. Ritsch*, 232 Neb. 407, 440 N.W.2d 689 (1989).

The record reflects that Carter has not admitted any wrongdoing. He denied ever sexually assaulting the then 13-year-old female victim, claiming that his family was "getting back at him for his taking his son to court approximately ten years ago." The court-appointed psychiatrists and Carter's probation officer reported that during the presentence investigation, Carter was deceitful in his relations toward them. The victim impact statement reflects that Carter's victim has received extensive psychiatric/psychological counseling as a result of the defendant's actions and has requested the maximum sentence. Carter was once convicted of a Mann Act violation and placed on probation for 18 months. In view of the serious nature of the crime, the effect on the victim, the defendant's prior conviction, and his failure to acknowledge responsibility, the district court did not abuse its discretion in imposing the sentence it did on Carter.

The defendant's conviction and sentence are affirmed.

AFFIRMED.

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

463 N.W.2d 586

Filed November 30, 1990. No. 90-030.

1. **Parental Rights: Appeal and Error.** In an appeal from a judgment terminating parental rights, the Supreme Court tries factual questions de novo on the record, which requires the Supreme Court to reach a conclusion independent of the 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.** In the absence of any reasonable alternative and as the last resort to dispose of an action brought pursuant to the Nebraska Juvenile Code, termination of parental rights is permissible when the basis for such termination is proved by clear and convincing evidence.
3. **Parental Rights.** A juvenile's best interests are one of the primary considerations in determining whether parental rights should be terminated as authorized by the Nebraska Juvenile Code.
4. **Parental Rights: Due Process.** A proceeding to terminate parental rights, which parents are entitled to attend, must employ fundamentally fair procedures satisfying the requirements of due process.
5. **Juvenile Courts: Pleadings: Due Process.** In a juvenile matter, a petition for and a hearing on adjudication and disposition may be combined.
6. **Parental Rights: Proof.** An order terminating parental rights must be based on clear and convincing evidence.
7. **Evidence.** Clear and convincing evidence requires that the trier of fact must be firm in its belief or conviction that the evidence shows the existence of the fact to be proven.
8. **Parental Rights: Abandonment: Words and Phrases.** "Abandonment," as used in Neb. Rev. Stat. § 43-292(1) (Reissue 1988), has been defined as a parent's intentionally withholding from a child, without just cause or excuse, the parent's presence, care, love, protection, maintenance, and opportunity for displaying parental affection for the child.
9. **Abandonment: Intent.** The question of abandonment is largely one of intent, to be determined from all the surrounding facts and circumstances.
10. **Parental Rights: Abandonment.** Abandonment of a juvenile is not an ambulatory thing the legal effects of which a parent may dissipate at will by token efforts at reclaiming a discarded child.
11. _____: _____. Parental obligation requires a continuing interest in the child and a genuine effort to maintain communication and association with that child.

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

Audrey S. Ellison for appellant.

Ronald L. Staskiewicz, Douglas County Attorney, and Elizabeth G. Crnkovich for appellee.

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

HASTINGS, C.J.

E.S., the natural father of K.M.S., a minor, has appealed from the order of the separate juvenile court, which terminated his parental rights to the minor child. The father assigns as error that the court erred in finding that there was sufficient clear and convincing evidence to support termination of the father's parental rights and that the minor was a child within the meaning of Neb. Rev. Stat. § 43-292(1) (Reissue 1988), one whose parents have abandoned the juvenile for 6 months or more immediately prior to the filing of the petition. We affirm.

> "In an appeal from a judgment terminating parental rights, the Supreme Court tries factual questions de novo on the record, which requires the Supreme Court to reach a conclusion independent of the findings of the trial court, but, where evidence is in conflict, the Supreme Court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts rather than another. [Citations omitted.] In the absence of any reasonable alternative and as the last resort to dispose of an action brought pursuant to the Nebraska Juvenile Code . . . termination of parental rights is permissible when the basis for such termination is proved by clear and convincing evidence. [Citations omitted.] A juvenile's best interests are one of the primary considerations in determining whether parental rights should be terminated as authorized by the Nebraska Juvenile Code."

In re Interest of C.A., 235 Neb. 893, 894-95, 457 N.W.2d 822, 824 (1990); *In re Interest of J.L.M. et al.*, 234 Neb. 381, 451 N.W.2d 377 (1990); *In re Interest of T.C.*, 226 Neb. 116, 409 N.W.2d 607 (1987).

K.M.S. was born out of wedlock on January 21, 1986. The birth certificate listed E.S. as the father and D.C. as the mother; however, the birth certificate was never signed by E.S.

The father claims that he was present in the delivery room at the child's birth and that he visited the child daily while she was in the hospital. The child was removed from her mother's care and custody, at the hospital in January 1986, days after her birth, by Child Protective Services of the Nebraska Department of Social Services.

A detention hearing was held on February 28, 1986, to determine if the child should remain in the State's custody or be returned to her mother. The father attended the detention hearing. He had not been officially notified of the hearing because he was not a party. During the hearing, the court advised E.S. that it was up to him to establish any rights he had in the child. At the conclusion of the hearing, as the parties were being excused, the court recommended that E.S. get an attorney.

On August 9, 1989, the State filed a petition against the father in the separate juvenile court, alleging that the minor was within the definition of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988) and § 43-292(1). The petition alleged that the child had been abandoned by her father in that there had been no contact with the child, nor had the father provided any financial or emotional support for a period in excess of 6 months. An attorney was appointed for the father on September 6, 1989, and a summons and copy of the petition were served on the father on September 27, 1989.

The adjudication hearing had been set for September 28, 1989, but upon the filing of a motion for a continuance by the father's attorney, the hearing was continued to a later date. A second summons was served on the father on November 20, 1989, together with a notice of hearing for December 4, 1989.

The father filed a motion to allow visitation, which was heard on November 28, 1989, and taken under advisement until a complete adjudication was held on December 4, 1989.

The father testified that he did not know he had any rights in the child. He said that after the child was removed from the hospital, he contacted Ruth Ryberg, the Child Protective Services caseworker assigned to his daughter's case. The testimony concerning that conversation is conflicting. The father stated that he was led to believe he did not have any

parental rights in his child because the proper paternity papers had not been filed. The record does not disclose that he ever complied with the requirements of Neb. Rev. Stat. § 43-104.02 (Reissue 1988) regarding his claim to be the father. He asserted that he was named on the birth certificate and felt this was sufficient to establish paternity. He also stated that he signed something he believed to be a birth certificate, although, as previously stated, this did not happen. The caseworker testified that she did not tell the father that he did not have any rights in the child.

The father further testified that he was unable to afford an attorney to establish his paternity and he was informed by the Legal Aid Society that at that time it did not handle paternity cases. However, during this same time period, the father was able to retain an attorney, Gary Norton, when the father was accused and convicted of assault and battery. However, Norton testified that he was only partially paid for the representation of the father.

The father called Norton to testify. The court inquired of Norton if all attorney-client relationships had been dealt with, and Norton replied that they had. Norton then testified that the father had consulted with him regarding a paternity issue and establishing some type of relationship with his child, but that the father did not come up with the retainer which Norton had requested. However, Norton stated that he discussed with the father some of his rights and options concerning his child. When asked if he advised the father about possibly becoming a party to the juvenile court action at the time of the detention hearing, the attorney replied, "I think we discussed the full range of those."

Ryberg testified that she first interviewed the father in January 1986. According to her, he claimed to be the father and was aware that she was a Child Protective Services caseworker. She stated that at no time did the father ever inquire as to whether he could visit the child, nor did he make any requests to visit the child. She testified that he never provided any money, gifts, or anything directed for the child; that he was aware of the fact that the child was in foster care; and that she had no further contact with the father through September 1987.

Debbie Nicholson, who is a Child Protective Services supervisor and supervised this case from its inception in January 1986 until the time of trial, also testified. She stated that she determined from a review of the file that there was no record of any attempt by the father to contact the Department of Social Services between September 1987 and August 9, 1989, nor did the agency receive from the father any offer of financial aid for the child during that period of time.

Although the issue is not assigned as error or argued by the father, the court on its own motion makes inquiry as to whether the father was accorded due process, i.e., was he properly noticed or summoned?

Neb. Rev. Stat. § 43-263 (Reissue 1988) requires that in an adjudication hearing the person who has custody of the juvenile must be served with summons. In like manner, summons must be served before parental rights may be terminated. Neb. Rev. Stat. § 43-291 (Reissue 1988).

A proceeding to terminate parental rights, which parents are entitled to attend, must employ fundamentally fair procedures satisfying the requirements of due process. *In re Interest of D.L.S.*, 230 Neb. 435, 432 N.W.2d 31 (1988). It therefore may be argued that because the father was not made a party in the original detention and adjudication hearing, he was not afforded due process.

However, § 43-291 provides: "Facts may also be set forth in the original petition, a supplemental petition, or motion filed with the court alleging that grounds exist for the termination of parental rights." The petition filed against the father alleged that the juvenile "comes within the meaning of Nebraska Revised Statutes, 1943, Section 43-292 (1), being under the age of eighteen years, and having been abandoned by [the] natural father of said child, for a period in excess of six months immediately preceding the filing of said petition," and prayed that "the Court terminate the parental rights between [the] father and [the juvenile]." The petition, summons, and notice of hearing were properly served on the father. Thus, the adjudication and the dispositional hearing were combined as permitted by statute, and the State fully complied with the requirements of due process.

Turning to the merits of the case, we find that an order terminating parental rights must be based on clear and convincing evidence. Clear and convincing requires that the trier of fact must be firm in its belief or conviction that the evidence shows the existence of the fact to be proven. *In re Interest of T.E., ante* p. 53, 458 N.W.2d 753 (1990); *In re Interest of J.B. and A.P.*, 235 Neb. 74, 453 N.W.2d 477 (1990).

Section 43-292 provides in part as follows:

> The court may terminate all parental rights between the parents or the mother of a juvenile born out of wedlock and such juvenile when the court finds such action to be in the best interests of the juvenile and it appears by the evidence that one or more of the following conditions exist:
>
> (1) The parents have abandoned the juvenile for six months or more immediately prior to the filing of the petition.

"Abandonment," as used in § 43-292(1), has been defined as "a parent's intentionally withholding from a child, without just cause or excuse, the parent's presence, care, love, protection, maintenance, and opportunity for displaying parental affection for the child." *In re Interest of T.E., supra* at 56, 458 N.W.2d at 756; *In re Interest of J.L.M. et al.*, 234 Neb. 381, 451 N.W.2d 377 (1990). The question of abandonment is largely one of intent, to be determined from all the surrounding facts and circumstances. *In re Interest of T.E., supra*; *In re Interest of A.G.G.*, 230 Neb. 707, 433 N.W.2d 185 (1988).

In spite of the fact that the father claimed he did not know he had any right to this child, he insisted that his desires were to create a relationship with her. However, he made absolutely no efforts beyond January 1986 to secure these rights. He knew that the child was in foster care under the control of the Department of Social Services, yet made no contacts with that agency, nor did he ever make any attempt to provide financial assistance for his daughter.

This court has stated: "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 T.E., supra* at 57, 458 N.W.2d at 756; *In re Interest of J.M.D.*,

233 Neb. 540, 446 N.W.2d 233 (1989); *In re Interest of Z.D.D. and N.J.D.*, 230 Neb. 236, 430 N.W.2d 552 (1988). As previously stated, the father made little effort to reclaim his daughter.

Parental obligation requires a continuing interest in the child and a genuine effort to maintain communication and association with that child. *In re Interest of J.M.D., supra*; *In re Adoption of Simonton*, 211 Neb. 777, 320 N.W.2d 449 (1982). The father has not shown that continuing interest in his daughter. In the 2 or more years preceding his receipt of the petition for termination, he never contacted anyone concerning his child. He did not discuss the matter with an attorney or any of the child's caseworkers.

From a de novo review of the record, we conclude that the evidence is clear and convincing that this child is a child within the definitions of §§ 43-247(3)(a) and 43-292(1). Further, it is in the child's best interests to terminate the parental rights of the natural father. Accordingly, the order of the juvenile court terminating the parental rights is affirmed.

AFFIRMED.

IN RE APPLICATION A-16642.
NEBRASKA GAME AND PARKS COMMISSION, APPELLEE AND CROSS-APPELLEE, V. THE 25 CORPORATION, INC., APPELLANT, AINSWORTH IRRIGATION DISTRICT ET AL., APPELLEES AND CROSS-APPELLANTS, CITY OF LONG PINE, APPELLEE AND CROSS-APPELLEE, BROWN COUNTY BOARD OF COMMISSIONERS, APPELLEE.

463 N.W.2d 591

Filed November 30, 1990. No. 90-034.

1. **Constitutional Law: Statutes: Proof.** The party claiming a statute to be unconstitutional has the burden of establishing its unconstitutionality.
2. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality.

3. **Constitutional Law: Statutes.** The Nebraska Supreme Court is obligated to endeavor to interpret a statute in a manner consistent with the Constitution.
4. _____: _____. Unconstitutionality must be clearly established before a statute will be declared void.
5. _____: _____. Neither constitutional nor statutory provisions are open to construction as a matter of course.
6. **Constitutional Law.** Construction of a constitutional provision is appropriate only when it has been demonstrated that the meaning of the provision is not clear and that construction is necessary.
7. _____. Although the language of a constitutional provision is to be interpreted with reference to established laws, usage, and customs of the country at the time of its adoption, its terms and provisions are constantly expanded and enlarged to meet the advancing affairs of humankind.
8. _____. It is a principle of constitutional interpretation that each and every clause in a constitution has been inserted for some useful purpose.
9. **Constitutional Law: Waters.** The adoption of Neb. Const. art. XV, § 6, did not do away with riparian rights.
10. **Constitutional Law.** Constitutional provisions should receive a broad and liberal interpretation.
11. **Waters: Words and Phrases.** Unappropriated water is that water which is available for appropriation because it is not subject to an existing appropriative right.
12. **Administrative Law: Waters: Appeal and Error.** The Nebraska Supreme Court's review of factual determinations made by the Director of Water Resources is limited to whether the director's determinations are supported by competent and relevant evidence and are not arbitrary, capricious, or unreasonable.
13. **Waters.** Absolute dependability of a water supply is not required in order to justify an appropriation; the supply need only be fairly continuous and dependable.
14. **Administrative Law: Statutes: Appeal and Error.** The meaning of a statute is a question of law, and the Nebraska Supreme Court is obligated to reach its conclusions on such questions independent of the determination made by an administrative agency.
15. **Statutes.** The meaning of a statute is ascertained, when possible, from the language of the act.
16. _____. Statutory language is to be considered in its plain, ordinary, and popular sense.
17. **Statutes: Words and Phrases.** "Necessary," when used in a statute, may mean anything from "indispensable" to "convenient."
18. **Statutes: Appeal and Error.** In construing a statute, the Nebraska Supreme Court must look to the statute's purpose and give it a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.
19. **Trial: Expert Witnesses.** Determining the weight that should be given expert testimony is uniquely the province of the fact finder.
20. **Administrative Law.** Administrative bodies have only that authority specifically

conferred upon them by statute or by construction necessary to achieve the purpose of the relevant act.

21. **Administrative Law: Waters.** When an instream flow application requests different flow rates at different locations along a single stream segment, the denial of the application as to one location is to be viewed as a reduction in the requested rate of flow as authorized by Neb. Rev. Stat. § 46-2,115 (Reissue 1988); any reduction in the length of the stream segment occasioned by such a denial is but incidental to the flow reduction, and the Director of Water Resources may define the stream segment under Neb. Rev. Stat. § 46-2,118(1) (Reissue 1988) in such a way as to reflect the appropriations as granted.
22. **Administrative Law: Words and Phrases.** A decision is arbitrary when it is made in disregard of the facts or circumstances and without some basis which would lead a reasonable person to the same conclusion.
23. _____: _____. A capricious decision is one guided by fancy rather than by judgment or settled purpose; such a decision is apt to change suddenly; it is freakish, whimsical, humorsome.
24. _____: _____. The term "unreasonable" can be applied to an administrative decision only if the evidence presented leaves no room for differences of opinion among reasonable minds.
25. **Constitutional Law: Waters.** Neb. Rev. Stat. §§ 46-2,107 through 46-2,119 (Reissue 1988), permitting instream flow appropriations, do not offend Neb. Const. art. XV, § 4, 5, or 6.

Appeal from the Department of Water Resources. Affirmed.

Robert L. Lepp, of McGill, Gotsdiner, Workman & Lepp, P.C., and Richard L. Anderson, of Croker, Huck, Kasher, Lanphier, DeWitt & Anderson, P.C., for appellant.

William B. Cassel, of Cassel & Cassel, for appellees City of Ainsworth, Zwiebel, and Improvement Commission.

Rodney J. Palmer, of Palmer & Kozisek, P.C., for appellees Irrigation District and Development Association.

Dana V. Baker, of Barney, Carter, Johnson & Baker, P.C., for appellee City of Long Pine.

Robert M. Spire, Attorney General, and Linda L. Willard, and Rodney M. Confer, of Knudsen, Berkheimer, Richardson & Endacott, for appellee Nebraska Game and Parks Commission.

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

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

CAPORALE, J.

I. INTRODUCTION

This is a direct appeal from an order of the Director of Water Resources partially granting the permit requested by applicant-appellee, Nebraska Game and Parks Commission (applicant), for an instream flow appropriation at Long Pine Creek. Objector-appellant, The 25 Corporation, Inc. (25 Corporation), and objectors-appellees and cross-appellants, the City of Ainsworth (Ainsworth), the Ainsworth Irrigation District and the Niobrara River Basin Development Association (hereinafter collectively referred to as Irrigation District), and Donald E. Zwiebel and the Niobrara Basin Environmental Improvement Commission (hereinafter collectively Zwiebel), challenge the order. These objectors-appellees and cross-appellants and the objector-appellant are hereafter referred to as the "complaining objectors." (We note that although Ainsworth and Zwiebel designate themselves as appellants, the first notice of appeal was filed by 25 Corporation. Therefore, Ainsworth and Zwiebel are not appellants but, rather, are appellees and cross-appellants. See Neb. Ct. R. of Prac. 1C and 1E (rev. 1989).)

During the director's hearing, objector-appellee City of Long Pine (Long Pine) reached an understanding with the applicant, as the result of which Long Pine abandoned its objection in return for a stipulation and amendment of the application to reflect that, in accordance with their agreement, the water capable of being captured by Long Pine's municipal water supply facility is ground water and thus not subject to the applicant's appropriation. This stipulation and amendment was approved and accepted by the director over the objections of 25 Corporation and the Irrigation District. Although the Brown County Board of Commissioners objected to the application and is an appellee, it has filed no brief in this court; accordingly, we make no further reference to that entity.

After lengthy hearings, the director granted the application

in part, as more particularly set forth in part II below. Together, the complaining objectors have lodged 32 assignments of error, which can be summarized as claiming that (1) the statutory scheme authorizing instream appropriations, Neb. Rev. Stat. §§ 46-2,107 through 46-2,119 (Reissue 1988), is unconstitutional under Neb. Const. art. XV, §§ 4, 5, and 6; (2) the director misinterpreted and misapplied § 46-2,115(1), thereby erroneously finding that there was sufficient unappropriated water available to meet the application; (3) the director misinterpreted § 46-2,115(2), thereby erroneously determining that the appropriation was necessary to maintain the instream use for which it was sought; (4) the director misinterpreted § 46-2,115(4), thereby erroneously approving an appropriation in excess of that allowed by the statute; (5) the director misinterpreted and misapplied §§ 46-2,115(5) and 46-2,116, thereby erroneously concluding that the appropriation was in the public interest; (6) the director exceeded his authority by changing the upstream boundary of the stream segment from that set out in the application and by setting the new boundary in an arbitrary, capricious, and unreasonable manner; and (7) the director erred in agreeing to and in arbitrarily, capriciously, and unreasonably approving the stipulation between the applicant and Long Pine.

We hold the statutory scheme authorizing instream appropriations to be constitutional and affirm the director's order.

II. BACKGROUND

The application in question, A-16642, was filed on April 29, 1988. Therein, the applicant seeks a permit for an instream appropriation of water to maintain a naturally reproducing rainbow and brown trout fishery in Long Pine Creek. The creek is a 33-mile-long cold-water tributary of the Niobrara River and is the longest self-sustaining trout stream in Nebraska.

More specifically, the applicant seeks an instream flow appropriation for a segment of the creek between the confluence of Bone Creek and the boundary of Ranges 20 and 21 West, in Township 29 North, Brown County, Nebraska. Three different flows were requested, to be measured at

different points along the segment. The measuring points are referred to as the upper, middle, and lower study sites. The director denied an appropriation at the upper site but granted a 50-cubic-foot-per-second (cfs) appropriation at the middle site and a 60-cfs appropriation at the lower site, as the applicant requested. This is the first instream flow appropriation granted in this state.

III. ANALYSIS

1. Constitutionality of Statutes

With the foregoing brief background, we reach the constitutional challenges presented by the first summarized assignment of error, namely, that the statutory scheme permitting instream flow appropriations, §§ 46-2,107 through 46-2,119, violates Neb. Const. art. XV, §§ 4, 5, and 6.

The questioned statutes provide:

> The Legislature finds that the maintenance, conservation, management, storage, and timely release of the waters of the natural streams within the State of Nebraska are in the public interest and are practices essential to the well-being of present and future generations. In furtherance of these practices, the public interest demands the recognition of instream uses for fish, recreation, and wildlife. The Legislature also finds that proposals for future water development should fully consider multiple uses, including instream flows whether from natural flow or from reservoir releases, and recognizes the positive impact of impoundments which can provide significant instream flow benefits.

§ 46-2,107.

> As used in sections 46-2,107 to 46-2,119, unless the context otherwise requires, instream appropriation shall mean the undiverted application of the waters of a natural stream within or bordering upon the state for recreation or fish and wildlife purposes. An instream appropriation may be obtained only by the Game and Parks Commission or a natural resources district and only for that amount of water necessary for recreation or fish and wildlife. The instream use of water for recreation or fish

and wildlife shall be considered a beneficial use of water.

§ 46-2,108.

Each natural resources district and the Game and Parks Commission shall conduct studies to identify specific stream segments which the district or commission considers to have a critical need for instream flows. Such studies shall quantify the instream flow needs in the identified stream segments. Any district or the Game and Parks Commission may request the assistance of the Conservation and Survey Division of the University of Nebraska, the Nebraska Natural Resources Commission, the Game and Parks Commission, the Department of Environmental Control, the Department of Water Resources, or any other state agency in order to comply with this section.

§ 46-2,109.

Following notice and a public hearing, any natural resources district or the Game and Parks Commission may file with the Director of Water Resources an application for a permit to appropriate water for instream flows in each stream segment identified pursuant to section 46-2,109. The application shall include the locations on the stream at which the need for instream flows begins and ends and the time of year when instream flows are most critical. The application shall also provide a detailed description of the amount of water necessary to provide adequate instream flows.

§ 46-2,110.

Prior to taking action on an application for an instream appropriation, the Director of Water Resources shall conduct any studies he or she deems necessary to evaluate the application and shall publish notice of such application at least once a week for three consecutive weeks in a newspaper of general circulation in the area of the stream segment and also in a newspaper of statewide circulation. The notice shall state that any person having an interest may in writing object to and request a hearing on the application. Any such objection and request for hearing shall be filed with the Department of Water

Resources within two weeks of final publication of the notice.

§ 46-2,114.

An application for an instream appropriation shall be approved by the Director of Water Resources if he or she finds that:

(1) There is unappropriated water available to provide for the instream appropriation;

(2) The appropriation is necessary to maintain the instream use or uses for which the appropriation has been requested;

(3) The appropriation will not interfere with any senior surface water appropriation;

(4) The rate and timing of the flow is the minimum necessary to maintain the instream use or uses for which the appropriation has been requested; and

(5) The application is in the public interest.

The application may be granted for a rate of flow that is less than that requested by the applicant or for a shorter period of time than requested by the applicant.

§ 46-2,115.

In determining whether an application for an instream appropriation is in the public interest, the director shall consider the following factors:

(1) The economic, social, and environmental value of the instream use or uses including, but not limited to, recreation, fish and wildlife, induced recharge for municipal water systems, and water quality maintenance;

(2) The economic, social, and environmental value of reasonably foreseeable alternative out-of-stream uses of water that will be foregone or accorded junior status if the appropriation is granted; and

(3) Whether the application is consistent with any applicable state goals for water resource use adopted pursuant to section 2-15,113.

§ 46-2,116.

If the Director of Water Resources determines that there is insufficient unappropriated natural flow available for an application for an instream appropriation and if the

applicant consents, the director shall request the Nebraska Natural Resources Commission to conduct a study to determine whether the instream flow needs can be met through the use of stored water in new storage facilities. The study shall address the availability of storage sites, the estimated cost of providing any required storage, whether storage options would be consistent with the state goals for water resource use adopted pursuant to section 2-15,113, and such other findings and conclusions as the commission deems appropriate.

§ 46-2,116.01.

If the Nebraska Natural Resources Commission determines that instream flow needs can be met through the use of stored water in new storage facilities, the applicant may request financial assistance for the construction of necessary storage facilities from the Nebraska Resources Development Fund or the Nebraska Water Management Fund. The cost of the project may be shared with any other users of the stored water.

§ 46-2,116.02.

An instream appropriation shall be reviewed by the Water Management Board when a project sponsor files an application which meets the criteria of section 2-15,114 and where the project after construction could be denied water for the benefit of the existing instream appropriation.

The Water Management Board shall recommend to the Director of Water Resources whether the state's interest demands the modification of the instream appropriation.

The Director of Water Resources may modify the instream appropriation only in the manner recommended by the Water Management Board, except that the director may find the instream appropriation should not be modified.

§ 46-2,117.

(1) All water used to provide instream flows shall be applied only to that segment of the stream for which the appropriation is granted. The stream segment and the determination of a reasonable and necessary amount of

water required for instream flow purposes shall be defined specifically by the Director of Water Resources in the permit.

(2) After the water allowed for instream flows has passed through the defined stream segment, all rights to such water shall be deemed relinquished and the water shall be available for appropriation.

§ 46-2,118.

Instream appropriations shall be administered in the same manner as prescribed by Chapter 46, article 2, for other appropriations, except that existing reservoirs shall not be required by the Director of Water Resources to release impounded water for instream appropriations. Instream flow appropriations shall not be superior to existing storage rights as provided in section 46-241. Instream appropriations may be canceled as provided in section 46-229.04.

§ 46-2,119.

Before proceeding further, we pause to remind ourselves of the applicable rules of statutory construction. The first of these is that the party claiming a statute to be unconstitutional has the burden of establishing its unconstitutionality. *State v. Crowdell*, 234 Neb. 469, 451 N.W.2d 695 (1990); *State v. LaChapelle*, 234 Neb. 458, 451 N.W.2d 689 (1990). Moreover, a statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *Distinctive Printing & Packaging Co. v. Cox*, 232 Neb. 846, 443 N.W.2d 566 (1989). As a corollary of this rule, we are obligated to endeavor to interpret the statute in a manner consistent with the Constitution. *In re Application U-2*, 226 Neb. 594, 413 N.W.2d 290 (1987). Finally, unconstitutionality must be clearly established before a statute will be declared void. *State v. Kipf*, 234 Neb. 227, 450 N.W.2d 397 (1990).

The complaining objectors essentially make two constitutional attacks: (a) that an instream flow appropriation, as authorized by the statutes, is not an "appropriation" within the meaning of the Nebraska Constitution; and (b) that certain features of the instream appropriations authorized "directly conflict with the constitutional provisions regulating

appropriations." Brief for Zwiebel at 11. The relevant provisions of article XV are:

> The necessity of water for domestic use and for irrigation purposes in the State of Nebraska is hereby declared to be a natural want.

Neb. Const. art. XV, § 4.

> The use of the water of every natural stream within the State of Nebraska is hereby dedicated to the people of the state for beneficial purposes, subject to the provisions of the following section.

Neb. Const. art. XV, § 5.

> The right to divert unappropriated waters of every natural stream for beneficial use shall never be denied except when such denial is demanded by the public interest. Priority of appropriation shall give the better right as between those using the water for the same purpose, but when the waters of any natural stream are not sufficient for the use of all those desiring to use the same, those using the water for domestic purposes shall have preference over those claiming it for any other purpose, and those using the water for agricultural purposes shall have the preference over those using the same for manufacturing purposes. Provided, no inferior right to the use of the waters of this state shall be acquired by a superior right without just compensation therefor to the inferior user.

Neb. Const. art. XV, § 6.

(a) Appropriation without Physical Diversion

It is clear that nothing in these provisions expressly prohibits appropriations for instream use. The complaining objectors would imply a prohibition from the definition of appropriation. Although they realize that the Constitution does not define the word, they would have us read "[t]he right to divert unappropriated waters of every natural stream for beneficial use" as such a definition. From this, they would then have us conclude that a physical diversion is an essential element of any appropriation, and then reach the further conclusion that because of this, § 6 must be read as prohibiting

instream appropriations.

Before proceeding with an analysis of this argument, it is fitting to recall that neither constitutional nor statutory provisions are open to construction as a matter of course. *Muller v. Thaut*, 230 Neb. 244, 430 N.W.2d 884 (1988); *Gaffney v. State Department of Education*, 192 Neb. 358, 220 N.W.2d 550 (1974). Thus, construction of a constitutional provision is appropriate only when it has been demonstrated that the meaning of the provision is not clear and that construction is necessary. *State ex rel. Spire v. Public Emp. Ret. Bd.*, 226 Neb. 176, 410 N.W.2d 463 (1987).

The complaining objectors assert their reading of § 6 as limiting appropriations to out-of-stream uses reflects what the framers "plainly intended." Brief for Zwiebel at 12. To shore up their view, the complaining objectors turn to the customs of miners in the early days of water appropriations in the West. In that connection we are constrained to observe that there probably was not much mining going on in Nebraska and that the customs of miners in other jurisdictions are not a compelling ground for overturning a statute. Be that as it may, it appears that in those days an actual diversion of water away from the stream was considered necessary before a use could be perfected into a protected right. We recognize that there are many cases and authorities which still define an appropriation in terms of a physical diversion of water applied to a beneficial use. See, e.g., *Simons v. Inyo Cerro Gordo Co.*, 48 Cal. App. 524, 192 P. 144 (1920); 1 W. Hutchins, Water Rights Laws in the Nineteen Western States ch. 7 at 366 (1971). The complaining objectors urge that this was the view of the framers when § 6 was adopted and that § 6 must therefore be read as requiring such a diversion.

We agree with the complaining objectors' reading of § 6 so far as it recognizes the framers' intent to adopt the doctrine of prior appropriation. This does not, however, mean that we accept the argument that § 6 was intended to prohibit instream appropriations.

Although the language of a constitutional provision is to be interpreted with reference to established laws, usage, and customs of the country at the time of its adoption, its "terms

and provisions . . . 'are constantly expanded and enlarged by construction to meet the advancing affairs of men.' " *State ex rel. Spire v. Public Emp. Ret. Bd., supra* at 179, 410 N.W.2d at 465, quoting *State ex rel. State Railway Commission v. Ramsey*, 151 Neb. 333, 37 N.W.2d 502 (1949).

We have long recognized that §§ 4, 5, and 6 grant constitutional protection to the doctrine of prior appropriation. *Wasserburger v. Coffee*, 180 Neb. 149, 141 N.W.2d 738 (1966), *modified in other respects* 180 Neb. 569, 144 N.W.2d 209. This doctrine was adopted by our Legislature via the irrigation act of 1895, parts of which were later incorporated into Neb. Const. art. XV, §§ 4, 5, and 6. *Wasserburger, supra.*

Prior to the adoption of the appropriation system, water rights in Nebraska were governed by the common-law system of riparian rights. Under the riparian system, only those landowners whose property is adjacent to a body of water have a right to use that water. The rights of all riparians along a given body of water are equal, regardless of when they began using the water. Riparian proprietors could not divert significant flows out of the natural channel of a stream without returning that water to the channel, nor could they apply that water to nonriparian lands. See, generally, *Meng v. Coffee*, 67 Neb. 500, 93 N.W. 713 (1903); *Crawford Co. v. Hathaway*, 67 Neb. 325, 93 N.W. 781 (1903), *overruled*, *Wasserburger v. Coffee, supra*; 1 R. Clark, Waters and Water Rights §§ 16, 16.1, and 16.2 (1967); 1 H. Farnham, The Law of Waters and Water Rights §§ 62 to 64b (1904); 3 H. Farnham, The Law of Waters and Water Rights §§ 602 to 606 (1904). While this doctrine was well suited to "England's green and pleasant land," where ample rains watered crops and most uses were nonconsumptive, it soon became apparent to settlers that pure riparianism would hinder development in the more arid regions of the American West. See, generally, *Meng v. Coffee, supra*; *Crawford Co. v. Hathaway, supra*; 1 S. Wiel, Water Rights in the Western States §§ 110 to 118 (3d ed. 1911). Nebraska responded to this "natural want" of water by adopting the doctrine of prior appropriation.

The attributes of the appropriative doctrine which

distinguish it from riparianism are its focus on the application of the water to a beneficial use, rather than on the ownership of riparian land, and its use of a first-in-time, first-in-right approach to conflicts between users, as opposed to the riparian system's equality among riparians. The appropriative system permits water use on lands where the riparian system would deny it and protects senior, more established water uses in times of shortage. Adoption of the appropriative system permitted the acquisition of a right to the beneficial use of water based on the seniority of the use, independent of the riparian or nonriparian nature of the land.

Obviously, some type of diversion is necessary in order to use water on nonriparian land; the crucial question, however, is this: Do the laws of Nebraska require a diversion when one is not required by the laws of physics?

As this is the first instream flow appropriation granted, this is the first time this court has been asked to determine whether a diversion is a necessary prerequisite to a valid appropriation. Although a number of courts and authorities have stated that a diversion is a prerequisite, this view has been criticized as being obsolete. See, Comment, *Minimum Streamflows: The Legislative Alternatives*, 57 Neb. L. Rev. 704 (1978); Comment, *The Prerequisite of a Man-Made Diversion in the Appropriation of Water Rights—State ex. rel. Reynolds v. Miranda*, 13 Nat. Resources J. 170 (1973); Note, *Arizona Water Law: The Problem of Instream Appropriation for Environmental Use by Private Appropriators*, 21 Ariz. L. Rev. 1095 (1980). The diversion requirement traditionally served two functions. First, it provided notice to others of the intent to appropriate and, once the appropriation was perfected, of the existence of the appropriation. Comment, 57 Neb. L. Rev. 704, *supra*, citing C. Meyers, A Historical and Functional Analysis of the Appropriation System 7 (1971). Second, the capacity of the diversion works established the maximum amount a user could claim to have appropriated. See, e.g., *Vonburg v. Farmers Irrigation District*, 132 Neb. 12, 270 N.W. 835 (1937).

Since the permit system provides a surer method of providing lasting notice of the existence and quantity of valid appropriative rights, requiring a diversion as a prerequisite

serves no useful purpose. Nebraska's permit system predates the adoption of the constitutional provisions under discussion. Given the principle of constitutional interpretation that each and every clause in a constitution has been inserted for some useful purpose, *Anderson v. Tiemann*, 182 Neb. 393, 155 N.W.2d 322 (1967), *appeal dismissed* 390 U.S. 714, 88 S. Ct. 1418, 20 L. Ed. 2d 254 (1968), we must conclude that the use in § 6 of the term "divert" serves some purpose other than to prohibit nondiversionary appropriations. It seems more likely that the framers chose to use "divert" in order to stress that the appropriative right was independent of riparian ownership. Since § 6 sets forth the other key aspects of the appropriative right, that the water must be put to beneficial use and that priority of appropriation gives the better right, it is reasonable to conclude that "divert" was intended to express the third aspect of the appropriative right, to wit, the ability to take the water away from the stream's locale.

Our conclusion that diversions are not constitutionally required for all appropriations is not aberrant. Of the nine other Western States with constitutional provisions protecting prior appropriation, only two mention diversion: Colorado and Idaho. Comment, 57 Neb. L. Rev. 704, *supra* at 722. Article 15, § 3, of the Idaho Constitution provides that "[t]he right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power purposes." Article XVI, § 6, of the Colorado Constitution provides that "[t]he right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied."

Both Idaho and Colorado have faced the question now before us and have rejected the complaining objectors' argument. The Idaho Supreme Court in *State, Dept. of Parks v. Idaho Dept. of Water Admin.*, 96 Idaho 440, 530 P.2d 924 (1974), upheld an instream appropriation against an identical challenge, as did the Colorado Supreme Court in *Colo. Riv. Wtr. v. Colo. Wtr.*, 197 Colo. 469, 594 P.2d 570 (1979).

The Colorado court was unanimous in its determination that a diversion was not required by its constitution. It noted that the

diversion requirement is court-made and that the "reason and thrust" of the constitutional use of "divert" "was to negate any thought that Colorado would follow the riparian doctrine . . . ." *Id.* at 474, 594 P.2d at 573. The Colorado high court was also able to point to earlier cases which indicated that the need to divert was not of constitutional import. *Id.*, citing *Thomas v. Guiraud et al.*, 6 Colo. 530 (1883), and *Larimer Co. R. Co. v. People ex rel.*, 8 Colo. 614, 9 P. 794 (1885) (*Thomas* involved a dam which caused overflow irrigation of a meadow and *Larimer* the storage of surplus waters in the natural channel of the stream; both contain dicta to the effect that an actual diversion is not a prerequisite to finding a valid appropriation).

The Idaho Supreme Court was divided when it determined the constitutionality of Idaho's instream flow appropriation statute. Both the plurality and concurring opinions rejected the notion that physical diversion is a constitutional requirement. The plurality concluded that although the prior statutory scheme "contemplated an actual physical diversion," the instream flow statute created an exception to that requirement. *State, Dept. of Parks v. Idaho Dept. of Water Admin., supra* at 444, 530 P.2d at 928. The concurring opinion spent more time examining the nature of the appropriative right in comparison to riparian doctrine and concluded that the constitutional reference to diversion was intended to recognize the supremacy of the appropriation doctrine over riparianism and not as a limit on the methods of perfecting a water right. *State, Dept. of Parks, supra* (Bakes, J., concurring specially). Two justices dissented, but only one addressed the question of whether diversion was a constitutional requirement. This dissent focused on earlier Idaho cases which spoke of the need to divert water and apply it to a beneficial use; the existing statutory application, permit, and licensing requirements; and the use of the conjunctive in the constitutional grant of the right to "divert *and* appropriate." *Id.* at 451, 530 P.2d at 935 (McQuade, J., dissenting).

Even if we were to conclude that the framers of article XV, § 6, intended to give constitutional protection only to appropriations made by means of a physical diversion, we would not be forced to conclude that such protection prohibits

the Legislature from creating other means of acquiring rights to water. There is nothing in the language of the Constitution which indicates that § 6 is the exclusive means of acquiring a water right. Indeed, we have long held that the adoption of § 6 did not do away with riparian rights. *Wasserburger v. Coffee*, 180 Neb. 149, 141 N.W.2d 738 (1966), *modified in other respects* 180 Neb. 569, 144 N.W.2d 209. Just as Nebraska originally adopted the appropriation doctrine by statute (1895 Neb. Laws, ch. 69, p. 244), the Legislature can, subject to constitutional limitations, including those set forth in § 6, provide for the acquisition of nondiversionary appropriative rights to public water.

(b) Effects of Instream Appropriation

This brings us to the complaining objectors' second constitutional challenge to the instream appropriation statutes. They argue that the statutes work to deprive them of their constitutional right to divert unappropriated water. They base their argument on Justice McFadden's dissent in *State, Dept. of Parks v. Idaho Dept. of Water Admin.*, 96 Idaho 440, 530 P.2d 924 (1974), and on the similarities between the relevant provisions of the Nebraska and Idaho Constitutions.

The short and perhaps overly simplistic answer to that argument is that the Constitution only protects the right to divert unappropriated water, and once there has been an instream appropriation, that water is no longer "unappropriated." The more complete answer is that Justice McFadden's approach is inapplicable to Nebraska law.

The complaining objectors argue that the instream appropriation statutes permit the state to withdraw water from appropriation in violation of the command of § 6 that "[t]he right to divert unappropriated waters . . . for beneficial use shall never be denied except when such denial is demanded by the public interest." They rely on the following language from Justice McFadden's dissent:

> I recognize that the state, acting in its proprietary capacity, may appropriate water without offending Article 15, section 3; but as in the case of private appropriators, the state's appropriative right depends

upon the application of water to a "beneficial use." In this case, however, the state agency is directed to hold unappropriated waters "in trust for the people of the state" for "scenic beauty and recreational purposes." [Citation omitted.] If the state were to hold unappropriated waters in trust for these purposes, it certainly would not be acting in a proprietary capacity; it would be doing nothing more than it already had a duty to do in its sovereign capacity. [Citations omitted.]

"[T]he title to the public waters of the state is vested in the state for the use and benefit of all the citizens of the state * * *. This is not, however, an interest or title in the proprietary sense, but rather in the sovereign capacity *as representative of all the people for the purpose of guaranteeing that the common rights of all shall be equally protected* and that no one shall be denied his proper use and benefit of this common necessity." [Citation omitted.]

. . . In my view, the in-stream use of a natural stream for recreational purposes and for scenic beauty is a public beneficial use which inheres in the state's sovereign ownership of such water. Therefore, since the state already has the right to so use the water, it cannot acquire the right to "appropriate" the water for these purposes.

. . . To allow the state to in effect reserve water from appropriation in furtherance of non-proprietary, non-power purposes—when the framers of the Constitution contemplated that private beneficial users could appropriate water being held by the state in its sovereign capacity—amounts to nothing less than a denial of the constitutional right to appropriate the "unappropriated waters" of any natural stream. "In other words, the state cannot by legislative act authorize its own agency to *monopolize or withdraw the very rights that section 3 of article 15 of the Constitution says 'shall never be denied' the people of the state*." [Citation omitted.]

(Emphasis in original.) *State, Dept. of Parks, supra* at 452-53, 530 P.2d at 936-37.

This reasoning is inapplicable to Nebraska law for several reasons. First, the cases supporting the propositions upon

which Justice McFadden relies are all Idaho cases and are not precedent in Nebraska. The complaining objectors have failed to demonstrate that there are any analogous Nebraska precedents. Second, the statutory scheme before us does not provide for the holding of "unappropriated waters 'in trust for the people of the state' " but, rather, authorizes an instream appropriation of the public water for particular beneficial uses. Third, and most important, Nebraska's Constitution expressly provides for a public interest exception to the right to divert. Justice McFadden's conclusion that the Idaho statute was unconstitutional was based on the fact that the Idaho Constitution, "[u]nlike the constitutions of some other western states . . . makes an exception [to the right to appropriate] only for power purposes—*not for the demands of the public interest* . . . ." (Emphasis supplied.) *Id.* at 453, 530 P.2d at 937.

Unlike that of Idaho, Nebraska's constitutional right to appropriate can and must be limited by the demands of the public interest. Neb. Const. art. XV, § 6. The instream flow appropriation statutes can be viewed as a mechanism for determining whether the public interest demands that the right to appropriate water from a given stream should be denied. This view is supported by the fact that the statutory scheme includes a legislative finding that "the public interest demands the recognition of instream uses for fish, recreation, and wildlife," § 46-2,107, and requires the Director of Water Resources to find that the instream flow appropriation is in the public interest. §§ 46-2,115 and 46-2,116.

Anticipating this conclusion, the complaining objectors argue that § 6 requires a new and independent weighing of the public interest each time a new appropriation is requested and does not permit the state to make a determination of the public interest which would bind future applicants for appropriations. They assert that the statutory scheme "adopts a permanently fixed notion of the public interest contrary to Article XV, section 6 of the Nebraska Constitution." Reply brief for Zwiebel at 14. This "notion of the public interest" is not as "permanently fixed" as the complaining objectors seem to believe, nor do the instream appropriations granted under the statutes enjoy a permanent status, as they assert. Like any other

appropriation, an instream appropriation can be canceled. See § 46-2,119 (subjecting instream appropriations to cancellation provisions of Neb. Rev. Stat. § 46-229.04 (Reissue 1988)). In addition, an instream flow appropriation can be modified in favor of water development projects which meet the criteria of Neb. Rev. Stat. § 2-15,114 (Reissue 1987), if the state's interest demands a modification. See § 46-2,117.

Additionally, the complaining objectors fail to consider the possibility of the state's abandoning or relinquishing its right to a particular appropriation if the public interest so demands. They also seem to overlook that the instream appropriation is a statutory creature, and, as such, its attributes can be amended by statute. If the Legislature should one day determine that the public interest has changed and no longer requires instream appropriations, it can return to the individualized determinations championed by the complaining objectors.

The view that § 6 demands individual, case-by-case determinations of the public interest for each new application is a narrow and parsimonious interpretation of the constitutional language and, as such, conflicts with the rule that constitutional provisions should receive a broad and liberal interpretation. *Nebraska P. P. Dist. v. Hershey School Dist.*, 207 Neb. 412, 299 N.W.2d 514 (1980). The language of § 6 does not compel a continuing, case-by-case determination. The relevant clause of § 6 simply permits the state to deny appropriations based upon the dictates of the public interest. It does not prescribe the manner by which the public interest is to be determined nor the mechanisms by which it may be accomplished.

The complaining objectors also claim that permitting instream appropriations conflicts with § 6 by granting "large water appropriators the right to request modifications, while denying that right to smaller appropriators who would otherwise have a higher priority." Brief for Zwiebel at 17. However, they do not specify how this conflict is created. If they are attempting to raise an equal protection argument, the claim, since no suspect or quasi-suspect classification is involved, would be subject to rational basis review. The Legislature can rationally determine that the public interest in a project which will cost over $10 million and which seeks state

funding (two of the criteria of § 2-15,114) is more likely to outweigh the public interest in an instream flow appropriation than would a smaller, private appropriator's use.

Finally, the complaining objectors assert that the public interest test of § 46-2,116 fails to meet the level of necessity required by the Constitution. It does not do so, in their view, because it does not require that the economic, social, and environmental value of the instream use exceed that of the reasonably foreseeable out-of-stream uses forgone or afforded to junior appropriators, but merely requires that the director consider these factors. This argument is unpersuasive. First, the Legislature has already found that the public interest demands the recognition of instream uses for piscatorial and other purposes. § 46-2,107. The complaining objectors do not challenge this finding. Second, the director must consider other factors besides the relative value of the uses; he must also consider whether the application is consistent with state goals for water resources use. § 46-2,116(3). The complaining objectors' interpretation ignores this consideration, even though it is a valid factor in determining the weight of the public interest in the appropriation.

For all the reasons set out above, the complaining objectors have failed to satisfy their burden of demonstrating the questioned statutes to be unconstitutional, and, therefore, their constitutional challenges fail.

2. Availability of Unappropriated Water

The second summarized assignment of error asserts that as the result of his misinterpretation and misapplication of § 46-2,115(1), the director erroneously found there was sufficient unappropriated water available to meet the application.

The U.S. Geological Survey has two gauges measuring discharge along Long Pine Creek: the Riverview gauge and the Long Pine gauge. Discharge records for the Riverview gauge date back to 1948, while those for the Long Pine gauge date back to 1979. The discharge records for the Riverview gauge show that the creek's discharge rate has increased since the development of the Irrigation District in the 1960s. This

increase varies from 10 to 15 cfs in the winter to over 25 cfs in the spring and summer. The Irrigation District advised at oral argument that it has never attempted to recapture this seepage or presented to the Department of Water Resources any claim for the seepage.

Using the data from the Long Pine and Riverview gauges and from flow measurements at various other sites along the creek, the applicant was able to compute the flows at the study sites. The average annual flow at the middle site is 85 cfs, while that at the lower site is 108 cfs. These flows are subject to five senior appropriations, totaling 12.14 cfs.

The Irrigation District's water comes from Merritt Reservoir via a 52.8-mile canal, under a contract with the U.S. Bureau of Reclamation. Article 7c of this contract states:

> The United States claims all of the waste, seepage, and return flow water derived from water delivered pursuant to this contract and the same is hereby reserved and retained by the United States for beneficial use on the Ainsworth Unit or any other unit of the Missouri River Basin Project which employs the water of the Niobrara River and its tributaries for irrigation purposes.

Framing their assignment as a question of statutory interpretation, the complaining objectors assert that the director erred in determining that there was sufficient unappropriated water. As noted previously in part III(1)(a), constitutional and statutory provisions are not open to construction as a matter of course; it must be demonstrated that the meaning is not clear and that construction is necessary.

As applied to the facts before us, there is nothing unclear in the statutory language. Section 46-2,115(1) requires that the director determine that "[t]here is unappropriated water available to provide for the instream appropriation" before the application can be granted. In *In re Application A-15738*, 226 Neb. 146, 154, 410 N.W.2d 101, 107 (1987), we stated that " 'unappropriated water' is that water which is available for appropriation because it is not subject to an existing appropriation right." In the case before us the director determined the amount of unappropriated water available by subtracting the amount of senior appropriations from the

average annual flow at the two relevant study sites. Since the amounts of unappropriated water thus determined exceed the amounts sought to be appropriated at those sites, the director concluded that more than enough unappropriated water is available to meet the appropriation he granted. Using the same computation based upon the record low flow at the Long Pine gauge, he determined that even during periods of low flow, sufficient unappropriated water is available.

The complaining objectors further argue that the director committed error by failing to consider whether potential future uses of ground water or possible changes in climatic circumstances may diminish the amount of water available to the instream use in the future. They urge us to interpret § 46-2,115(1) as requiring consideration of these factors. In all their discussion of this issue, the only basis the complaining objectors offer to demonstrate that the director failed to consider these factors is the fact that the director found that there is unappropriated water available, despite the testimony of their witnesses. Although the complaining objectors attempt to frame this as a question of law, it is in truth a factual question. Thus, our review is limited to whether the director's determination is supported by competent and relevant evidence and is not arbitrary, capricious, or unreasonable. *In re Applications T-61 and T-62*, 232 Neb. 316, 440 N.W.2d 466 (1989).

Simple mathematics shows that there is unappropriated water in the creek which exceeds the amount requested in the portion of the application granted. There is copious evidence of the creek's rate of discharge; for one point along the creek the records date back to 1948. There is evidence that the lowest monthly median discharge at the middle site is 71 cfs, while that at the lower site is 94 cfs. Subtracting the senior appropriative rights of 12.14 cfs leaves a lowest monthly median discharge of 58.86 cfs at the middle site and 81.86 cfs at the lower site, 8.86 cfs and 21.86 cfs more than the amounts requested for the respective sites. Although there may be occasions when the flow drops below that requested, absolute dependability is not required; the supply need only be "fairly continuous and dependable." *In re Application A-15738, supra* at 156, 410

N.W.2d at 108. The foregoing evidence demonstrates a fairly continuous and dependable historical flow in excess of that requested.

The evidence concerning the aquifer which feeds the creek is sufficient to support a determination that the water supply in the creek will remain reasonably dependable even in the face of drought and increased ground water withdrawals. The applicant's hydrologist testified as to the size and thickness of the aquifer and gave his opinion that a "very substantial" drought or a "very exceedingly large amount of groundwater pumping" would be needed before there would be any significant water level declines. Although the director's order does not mention this testimony in his discussion of the availability of unappropriated water, it is quoted in the public interest discussion where the director concluded that these statements "were not effectively disputed by other witnesses."

We therefore conclude that the director's determination that there is sufficient unappropriated water available for the instream appropriation is supported by the evidence. We should stress that we are not deciding whether the statute requires a finding that the availability of water for the instream appropriation will not be adversely affected by subsequent events; such a decision must await a case where the issue is determinative of the propriety of an appropriation.

The Irrigation District argues that it has a right to the seepage and return flow from its operations, that these flows amount to approximately 20 to 25 cfs, and that this amount should have been subtracted from the amount of unappropriated water available for the instream appropriation. It points to its contract with the U.S. Bureau of Reclamation in which the United States claims all the waste, seepage, and return flow from the water it delivers. The provision appears to be a relinquishment by the Irrigation District to the United States of any right the Irrigation District might have to seepage. How the Irrigation District has come to view this as granting it a right to the seepage is not made apparent. The United States is not a party to this action and, as far as the record reveals, is not attempting to exercise its contractual right against the Irrigation District. Even if the Irrigation District were able to stand in the

shoes of the United States, its rights as against anyone not a party to the contract are defined by state law, not by the terms of the contract, for federal law specifically defers to state appropriation laws in determining the right of the United States to appropriate water within a state. See, 43 U.S.C. § 383 (1988); *Northport Irr. Dist. v. Jess*, 215 Neb. 152, 337 N.W.2d 733 (1983); *California v. United States*, 438 U.S. 645, 98 S. Ct. 2985, 57 L. Ed. 2d 1018 (1978). Therefore, any right the Irrigation District may have to the seepage and return flows must be based solely on state law.

The Irrigation District cites *United States v. Tilley*, 124 F.2d 850 (8th Cir. 1941), to support its claim to the seepage and return flow. In *Tilley*, the United States claimed that Nebraska had no right to interfere with its collection and reapplication of seepage from the North Platte Irrigation Project. The eighth circuit court agreed and reversed a lower court's denial of an injunction. This court, however, dismissed a similar injunction in *Northport Irr. Dist. v. Jess, supra*. The Irrigation District claims its situation "is nearly . . . identical" to that in *Tilley*, brief for Irrigation District at 35, while the applicant finds *Northport* to be more on point. The main factual difference between the situations in *Tilley* and *Northport* was that *Tilley* involved collection of seepage from drains and ditches on the land connected with the project, while *Northport* involved collection directly out of a watercourse. In the situation before us, the Irrigation District has not yet attempted to recapture and reapply the seepage upon which the applicant is relying, either from ditches in the district or from the creek itself. *Northport* stands for the principle that once seepage reaches a watercourse via natural means, it becomes public water and is subject to appropriation. *Northport, supra*. That Long Pine Creek is a watercourse is not disputed. Clearly, any seepage which affected the director's determination of the available flow had already reached the stream. As such, it is available for appropriation.

Whether the Irrigation District may recapture the seepage before it reaches the creek is a matter which is best left for later adjudication. Since no attempt to recapture has been made and no attempts have been made to prevent the Irrigation District

from recapturing seepage, the issue is not ripe. In addition, it is possible that there are downstream appropriators who have been relying on the return flows; if so, they would be necessary parties to any determination of the Irrigation District's rights to the return flow. See *Northport, supra*.

Complaining objector Irrigation District also asks that this court "provide proportional benefits according to the legislative directives in Section 46-295 and make such provisions for the . . . Irrigation District as [the court] deem[s] necessary, basic and fair under the circumstances." Brief for Irrigation District at 40. We are at a loss to find any legislative directive to provide proportional benefits in Neb. Rev. Stat. § 46-295 (Cum. Supp. 1990), which recites a variety of legislative findings. So far as we can glean from its brief, the Irrigation District's request rests on the following language found in § 46-295:

> The Legislature acknowledges that rights to water intentionally or incidentally stored underground and rights to withdrawal of such water should be formally recognized and quantified and recognizes the propriety of all beneficiaries proportionately sharing, to the extent of potential benefit from intentional underground water storage, in the financial obligations necessary for construction, operation, and maintenance of water projects which cause intentional underground water storage.

The first clause of this sentence simply concedes that rights to this water should be recognized. The remainder of the sentence states that it is proper for beneficiaries of intentionally stored ground water to share the costs of such storage. The Irrigation District focuses on the phrase "the propriety of all beneficiaries proportionately sharing" and then reads "propriety" as "property." Research shows that propriety was once synonymous with property; however, such usage is now obsolete. The most recent example of this usage, cited in XII The Oxford English Dictionary 655 (2d ed. 1989), is dated 1827, which predates the subject statute by some 156 years.

The statute does, however, voice a legislative finding that rights to intentionally and incidentally stored ground water

should be recognized and quantified. The Irrigation District claims the director failed to recognize its rights to incidentally stored ground water. Neb. Rev. Stat. §§ 46-226.01, 46-226.02, and 46-297 (Reissue 1988) provide procedures for the recognition of such rights. The Irrigation District has not attempted to follow these procedures and has failed to demonstrate how granting the appropriation would adversely affect these claimed rights, were they recognized. In light of this, the Irrigation District has no basis for claiming that the director's failure to recognize its purported rights was arbitrary, capricious, or unreasonable.

3. Necessity of Appropriation

The third summarized assignment of error claims the director misinterpreted § 46-2,115(2) and thus erroneously determined that the appropriation was necessary to maintain the instream use for which it was sought.

There was unchallenged evidence of the existence of adult trout and trout reproduction in the area of the lower and middle study sites. There was also testimony from a number of witnesses, including some of the applicant's, that there was no imminent threat to these trout and their reproductive efforts.

Before an application for an instream appropriation can be approved, the director must determine that "[t]he appropriation is necessary to maintain the instream use or uses for which the appropriation has been requested." § 46-2,115(2). The complaining objectors contend that the director misinterpreted the statute when he concluded that it did not require a showing of an imminent threat to the use. The applicant, on the other hand, contends that such a reading would defeat the very purpose of the statute.

The meaning of a statute is a question of law, *State v. Ewing*, 221 Neb. 462, 378 N.W.2d 158 (1985), and this court is obligated to reach its conclusions on such questions independent of the determination made by an administrative agency, see *Hillcrest Country Club v. N.D. Judds Co., ante* p. 233, 461 N.W.2d 55 (1990). The meaning of a statute is ascertained, when possible, from the language of the act. *Peterson v. Minden Beef Co.*, 231 Neb. 18, 434 N.W.2d 681

(1989). The language is to be considered in its plain, ordinary, and popular sense. *Georgetowne Ltd. Part. v. Geotechnical Servs.*, 230 Neb. 22, 430 N.W.2d 34 (1988).

Unfortunately, "necessary," particularly when used in a statute, may mean anything from "indispensable" to "convenient." *Banks v. Board of Education of Chase County*, 202 Neb. 717, 277 N.W.2d 76 (1979). In order to construe the statute, we must look to its purpose and give the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it. See *Nuzum v. Board of Ed. of Sch. Dist. of Arnold*, 227 Neb. 387, 417 N.W.2d 779 (1988). Clearly, the purpose of the statutory scheme before us is to provide a means for protecting instream uses for fish, recreation, and wildlife.

Would application of the complaining objectors' construction defeat this purpose? If an instream flow appropriation could only be obtained after showing an imminent threat to the use to be protected, the use may well be irreparably harmed or even destroyed before an application is granted. In the case before us, the application was filed in April 1988. The director's order granting the application was entered in December 1989, 1 year 8 months later. If we add to this the amount of time consumed in making the studies to justify the appropriation, the timelag becomes even greater. If the applicant had waited until there was an imminent threat to the fishery before making its application, there would be few trout left in the stream to protect. In addition, when the threat is one due to or exacerbated by overappropriation, once the water is appropriated out of stream it is too late. The instream appropriation can preserve only unappropriated water; it cannot undo existing appropriations. For these reasons it is apparent that the complaining objectors' construction would defeat the very purpose of the statute, and because of this it must be rejected.

A more reasonable interpretation in light of the purposes of the legislation is to read § 46-2,115(2) as requiring a finding of a sufficient causal link between maintaining the flow and maintaining the use for which the flow is requested. This appears to be the approach the director used in his analysis. He

determined that "[b]ecause use of the upper study site by adult trout is very limited and habitat for trout reproduction is nearly absent," the applicant failed to show that that portion of the application was "necessary to maintain a naturally reproducing trout fishery." As to the remaining reach of the application, the director found that the existence of trout reproduction was undisputed and that "at least some instream flow is unquestionably necessary" to maintain naturally reproducing trout habitat.

The director applied the proper standard, and there is no basis for finding his factual conclusions erroneous. The complaining objectors' contention that the director erred in determining that the appropriation is necessary to maintain the use is therefore without merit.

4. Minimum Necessary Flow

In the fourth summarized assignment of error, the complaining objectors assert the director misinterpreted the meaning of the words "minimum necessary" in § 46-2,115(4) and, because of this misinterpretation, granted an appropriation in excess of that permitted by the statute. Section 46-2,115(4) requires the rate and timing of the flow to be "the minimum necessary to maintain the instream use or uses for which the appropriation has been requested." The complaining objectors assert that this means the flow granted must be the least amount "indispensably required for the continued survival of the fishery," brief for Ainsworth at 20, and that the director instead read "minimum necessary" as meaning appropriate for the use requested. We are again confronted with that protean term "necessary." In this instance, however, it is not necessary for us to construe its meaning. The complaining objectors contend that by granting an appropriation which, under one method for measuring instream flows, would provide "optimum to outstanding" trout habitat rather than mere "survival" habitat, the director approved a flow which was more than the minimum necessary for the use requested. However, the real issue is not what minimum necessary means but, rather, what is the nature of the use for which the appropriation is requested. If the use is to provide a survival

habitat, the director has erred. If, however, the use is to provide for the maintenance of the fishery at its present habitat quality, then the minimum necessary flow is the lowest flow rate which would assure no degradation in the quality of the habitat, and the director's determination is correct if supported by the evidence.

According to a report which accompanied the application, the purpose of the application is to "protect . . . natural flow required to maintain the present fishery." A fishery resource specialist for the applicant testified that the application is intended "primarily to preserve the fishery habitat." From this, it is clear that the use sought to be maintained is not merely the survival of some trout in the stream, but the continued existence of the present fishery. By using words such as "maintain" and "preserve," it is likewise apparent that the application is intended to keep the quality of the fishery from degrading. The rate of flow which is the minimum necessary for the use before us is therefore the lowest rate which would assure no degradation in the quality of the fishery habitat. Clearly, this is something more than the survival habitat proposed by the complaining objectors.

The director notes in his order that his interpretation of the phrase "minimum necessary" is based, in part, on his personal recollections of his own involvement in the drafting and passage of the instream flow statutes. Because the analysis set out above does not rely on the legislative history, we need not reach the propriety of the director's rationale. As we have often said, a correct result will not be set aside merely because it was based upon incorrect reasoning. *Parker v. St. Elizabeth Comm. Health Ctr.*, 226 Neb. 526, 412 N.W.2d 469 (1987).

This brings us to the complaining objectors' contentions regarding the director's determination that the flows requested meet this standard. They contend that the director rejected the applicant's method of determining the required flows and therefore "erred in continuing to review the application and applying a different methodology . . . ." Brief for 25 Corporation at 18.

The fact is, however, that the director was presented with evidence as to the necessary flows based on several different

methodologies, including negotiated or institutionally prescribed settlements based upon scientific studies, historical evidence, and professional judgment and observations. Although the majority of the testimony centered on the one particular methodology advocated by the applicant, it was by no means the only methodology discussed in the record, nor were these methodologies the only evidence presented on minimum necessary flow.

Several of the experts discussed the methodology used by the director. One of the exhibits laid out the theory, explaining what information is needed for its application. It appears therefrom that in order to apply the director's methodology, the average annual flow of the stream segment must be determined. The record contains sufficient information to make this determination. The average annual flow is then multiplied by a percentage corresponding to the desired habitat quality. The resulting figure represents the flow regime which would sustain that habitat quality. The range of percentages developed by this methodology is from 60 to 100 percent for the "optimum range," 40 percent from October to March and 60 percent from April to September for "outstanding," 30 percent from October to March and 50 percent from April to September for "excellent," 20 percent from October to March and 40 percent from April to September for "good," 10 percent from October to March and 30 percent from April to September for "fair, degrading," 10 percent for "poor, minimum," and under 10 percent for "severe degradation." Since the existing flow is in the optimum range, it follows that any flow regime which reduces the habitat quality below that range would not be preserving or maintaining the existing fishery at its present quality. The director found that the 60-percent figure yielded results nearly identical to the flows requested by the applicant. Since the 60-percent figure represents the lowest end of the optimum range, there is nothing improper in the director's finding concerning it.

We also note that the director relied on more than this single method in reaching his conclusion that the requested flows were the minimum necessary to maintain the fishery. His order devotes considerable discussion to the evidence of a fish kill

attributed to high water temperatures resulting, in part, from a period of low stream flow. He observed that the flows during this period exceeded those requested by the applicant and that the applicant's experts stood by the 50 cfs and 60 cfs requests despite the fact that they would feel more comfortable with a higher rate. It is only after recounting this evidence that the director expressed the view that the requested flows are "in reasonable harmony" with the results obtained by the methodology he employed. Had the application sought to appropriate the entire unappropriated flow, the evidence of the fish kill might have been sufficient to support a finding that that was the flow necessary to maintain the fishery. However, the director is not empowered to grant a larger appropriation than that requested. In light of his reliance on the evidence concerning the fish kill, the director's application of the methodology he selected simply constitutes confirmation that the requested flows are appropriate under the statute even if the other factors which led to the fish kill never reappear.

Determining the minimum necessary flow for the maintenance of the use is a factual determination which, as noted earlier in part III(2), will not be disturbed unless it is unsupported by the evidence or is arbitrary, capricious, or unreasonable. In truth, the complaining objectors' thesis is not that there is no evidence concerning the methodology used by the director but that there is more evidence concerning the applicant's methodology. The relevant inquiry, however, is not the comparative volume of testimony concerning the two methods, see *Hillcrest Country Club v. N.D. Judds Co., ante* p. 233, 461 N.W.2d 55 (1990), but, rather, whether there is sufficient evidence to support the director's determination. Since there is, it cannot be said that the flow granted by the director is arbitrary, capricious, or unreasonable.

5. PUBLIC INTEREST

In the fifth summarized assignment of error, the complaining objectors assert the director misinterpreted and misapplied §§ 46-2,115(5) and 46-2,116, thereby erroneously concluding that the appropriation was in the public interest.

As discussed in parts III(1), (2), (3), and (4) of this opinion,

§ 46-2,115 requires the director to approve the application if certain specified requirements are met. The requirement set out in subsection (5) thereof is that the application be in the public interest. Section 46-2,116 sets forth the factors the director must consider in making that determination, namely, "[t]he economic, social, and environmental value of the instream use . . ."

A public interest evaluation prepared for the applicant addressed the social, economic, and environmental value affected by the requested appropriation. A person involved in preparing the evaluation testified as to the factors she considered in reaching her conclusion that the application was in the public interest. These included balancing the present value of the instream flow to fish and wildlife, waste dilution and disposal, and recreation against the value of foreseeable out-of-stream uses which could be adversely affected by the appropriation. This evaluation did not attempt to quantify all of the social and environmental value into economic terms. Her conclusion was challenged by the complaining objectors' economist, who offered a purely economic analysis of the public interest.

Various members of the public testified; some recounted the benefits they have reaped as a result of the fishery, others voiced concerns and uncertainty about the requested appropriation, and still others simply aired their general distrust of and dissatisfaction with the applicant.

Complaining objector Zwiebel, a local farmer and representative of the Improvement Commission, testified as to his concerns about erosion in the drainage area and expressed the view that this job should be addressed "before we worry about the water in [Long] Pine Creek." Zwiebel stated that "the reason I bring [erosion] up is because the corrective action that needs to be done in that area might not be compatible with trout fishing or the instream flow right. I do not know. I could not pass judgment on that." Other witnesses confirmed the existence of erosion on the creek and mentioned possible control measures. Zwiebel and others also testified as to the use of surface water and ground water for irrigation in the area.

After finding that the use had positive social, economic, and

environmental value, the director considered the effect granting the appropriation would have on reasonably foreseeable alternative out-of-stream uses for the water. He concluded that because of the extensive and more easily exploitable ground water supply, there "is no evidence . . . that reasonably foreseeable alternative out-of-stream uses will be foregone or accorded junior status" if the application were approved.

The complaining objectors first argue that the director's determination was erroneous because "the majority of the testimony centered around what was omitted, unfinished or unstudied, rather than that which was covered in" the public interest evaluation study prepared for the applicant. Brief for Irrigation District at 26. Determining the weight that should be given expert testimony is uniquely the province of the fact finder. See *Hillcrest Country Club v. N.D. Judds Co., ante* p. 233, 461 N.W.2d 55 (1990). What one particular expert omitted from her consideration is irrelevant to our review if the record, as a whole, supplies sufficient competent evidence to support the director's conclusions.

The Irrigation District focuses on the study's "failure" to quantify the environmental and social value of the appropriation in dollar amounts, a quantification the Irrigation District apparently feels is required under § 46-2,116(1). To conclude that § 46-2,116(1) requires that all the factors considered be reduced to economic terms is, given the statutory language, simply untenable.

In its discussion of the public interest, the Irrigation District also asserts that all the appropriators along the stream were not made parties to this action and that they are necessary parties. This bald statement is the extent of its discussion of this issue; it does not provide any legal support for the assertion that these are necessary parties, nor does the Irrigation District attack the adequacy of the public notice given in accordance with § 46-2,114.

Complaining objectors Zwiebel and the Improvement Commission focus on the director's alleged failure to consider the effects of erosion and proposed erosion control measures on the value of the instream use. It is their contention that § 46-2,116(1) requires the director to offset the value of

alternative instream uses against the proposed instream use. If the alternative instream use is one which is likely to be pursued and is totally incompatible with the proposed use, then there is some merit to their position. The complaining objectors claim that the director misconstrued the statute and failed to perform this offsetting. To support this claim, they simply reargue the evidence and conclude that because the director reached an unfavorable result, error was committed. The determinations of whether an alternative instream use is likely to be pursued and whether it is incompatible with the requested use are, of course, questions of fact. The director was presented with the evidence relied upon by the complaining objectors, weighed it, and concluded that there was "no *significant* evidence of a negative nature [regarding the value of the instream use]." (Emphasis supplied.)

Thus, the several arguments of the complaining objectors are nothing more than attempts to entice this court into reweighing the evidence. However, as repeated before, when presented with an appeal from an order of the Director of Water Resources, this court does not reweigh the evidence; its review is limited to a search for errors appearing in the record.

6. Boundaries

In the sixth summarized assignment of error, the complaining objectors assert that (1) the director lacked the authority to change the upstream boundary from that requested in the application, and (2) even if the director does have the authority to decrease the length of the stream segment, he exercised that authority in an arbitrary, capricious, and unreasonable manner. In assessing these contentions, we first note that administrative bodies have only that authority specifically conferred upon them by statute or by construction necessary to achieve the purpose of the relevant act. *Nape v. Game & Parks Comm.*, 220 Neb. 883, 374 N.W.2d 46 (1985). We also note that the director and the Department of Water Resources are given broad authority over the appropriation and use of water in Nebraska. See, *In re Application U-2*, 226 Neb. 594, 413 N.W.2d 290 (1987); Neb. Rev. Stat. § 46-209 (Reissue 1988).

Section 46-2,109 empowers the applicant to "conduct studies to identify specific stream segments which [it] considers to have a critical need for instream flows." Section 46-2,110 requires applications for instream flow appropriations to "include the locations on the stream at which the need for instream flows begins and ends . . . ." As noted in part II of this opinion, the beginning and ending points of the segment for which the application was requested are the confluence of Bone Creek and the boundary of Ranges 20 and 21 West, in Township 29 North, Brown County, with three different flow rates at different sites along the creek. Several times during the hearing, the applicant's witnesses testified that the application consisted of a single stream segment with flows measured at three points, rather than three separate segments. In granting the application, the director, because of his denial of the requested flow at the upper study site, moved the upstream boundary from the boundary of Ranges 20 and 21 West several miles downstream to the Highway 20 bridge crossing.

We have already discussed the criteria for approving an instream flow application set forth in § 46-2,115, including the requirement that the rate and timing of the flow be the minimum necessary to maintain the use. The final sentence of § 46-2,115 permits the director to reduce this rate and timing and thus gives him the ability to grant a reduced appropriation rather than deny the application in its entirety.

Section 46-2,118(1) limits application of the instream appropriation to "that segment of the stream for which the appropriation is granted" and states that the segment "shall be defined specifically by the Director . . . in the permit."

The complaining objectors contend that once the director determined that the requested flow at the upper site should be denied, he should have denied the entire application. Although there is nothing in the statutory language expressly authorizing the director to reduce the length of the stream segment, the complaining objectors' all-or-nothing approach contravenes the policy behind the final sentence of § 46-2,115. By permitting the director to reduce the requested rate and timing of the flow, the Legislature implicitly rejected the complaining objectors' approach in order to avoid the denial of a needed

appropriation simply because the application asked for too much. The reason is clear: rather than being forced to deny an excessive appropriation, the director may limit the appropriation to the extent required by the public interest. This way, an instream use that requires protection will not be left unprotected simply because the applicant asked for a flow which the director later determines is greater than that which is the minimum necessary.

Here, the director was faced with an application which asked for too much. Under § 46-2,115, the director could have "reduced" the application's requested rate of flow at the upper site to zero, kept the requested rates for the remainder of the segment at the requested levels, and left the segment boundaries as they were in the application. Instead, he "denied" the application for the upper site and moved the segment boundary downstream. The net effect is essentially the same, except that the director's method avoids the fiction that the upper reach is part of the protected stream segment. Had the director taken the first approach, the complaining objectors would be in no better position. We therefore hold that when an instream flow application requests different flow rates at different locations along a single stream segment, the denial of the application as to one location is to be viewed as a reduction in the requested rate of flow as authorized by § 46-2,115. Any reduction in the length of the stream segment occasioned by such a denial is but incidental to the flow reduction, and the director may define the stream segment under § 46-2,118(1) in such a way as to reflect the appropriations as granted.

Having thus determined that the director did not exceed his authority in diminishing the length of the stream segment, we turn to the question of whether his determination of the new upstream boundary was arbitrary, capricious, or unreasonable. A decision is arbitrary when it is made in disregard of the facts or circumstances and without some basis which would lead a reasonable person to the same conclusion. *Percival v. Department of Correctional Servs.*, 233 Neb. 508, 446 N.W.2d 211 (1989); *In re Application of Renzenberger, Inc.*, 225 Neb. 30, 402 N.W.2d 294 (1987). A capricious decision is one guided by fancy rather than by judgment or settled purpose; such a

decision is apt to change suddenly; it is freakish, whimsical, humorsome. *United States v. Carmack*, 329 U.S. 230, 67 S. Ct. 252, 91 L. Ed. 209 (1946); II The Oxford English Dictionary 869 (2d ed. 1989). The term "unreasonable" can be applied to an administrative decision only if the evidence presented leaves no room for differences of opinion among reasonable minds. *South Cent. Bell Tel. v. Public Serv. Com'n*, 702 S.W.2d 447 (Ky. App. 1985). The issue, therefore, is whether the record provides the director with a rational basis for choosing the Highway 20 bridge crossing as the upstream boundary of the stream segment.

As part of a 1978 study analyzing different instream flow methodologies on the creek, one of the applicant's experts divided the creek into reaches with essentially homogeneous characteristics. The Highway 20 bridge was the upstream boundary of one of these reaches. The applicant's middle study site, the measuring point for the 50 cfs instream appropriation, is in the middle of this reach. Just upstream from the bridge, there are stream improvement structures which the expert indicated produced an environment sufficiently different from that of the reach downstream from the bridge as to require separate analysis, an analysis which was never made. The data from the 1978 study were used in formulating the appropriations requested by the applicant. Since the Highway 20 bridge marks a change between the area represented by the middle site (where the requested 50 cfs flow was approved) and the upper reaches of the stream (where the requested flow was denied), the director's choice of the bridge as the upstream boundary was not arbitrary, capricious, or unreasonable.

The complaining objectors caution us not to confuse the segmentation performed as part of the applicant's methodology to study the instream flows with the statutory segment designation provisions. Whether this dichotomy is meaningful is a matter we need not decide, for we can, and do, assure the complaining objectors we are not confusing the two. We merely recognize that some of the reasons which led the applicant's experts to choose the Highway 20 bridge as a boundary also provide a rational basis for the director's choice of the bridge as the upstream boundary of the designated

stream segment.

7. STIPULATION

The crux of the seventh and final assignment of error is the complaining objectors' contention that the director committed an arbitrary act by agreeing to and approving the stipulation between the applicant and objector-appellee Long Pine and the resulting amendment to the application described in part I. They contend that the director

> allowed [Long Pine and the applicant] to treat the spring water used by . . . Long Pine as ground water, to the exclusion of all other springs feeding Long Pine Creek, and that he had no reasonable basis to separate the springs that supply the water for . . . Long Pine or differentiate those springs from all other springs that feed Long Pine Creek.

Brief for Irrigation District at 32. "Ground water" is defined as water which moves, seeps, filters, or percolates through the ground under the surface of the land. Neb. Rev. Stat. § 46-635 (Reissue 1988).

First, we must make clear that, contrary to the complaining objectors' contentions, the stipulation does not "exclude" other springs from being treated as ground water, nor does it "determine that one spring is and the next spring isn't ground water." Brief for Irrigation District at 34. The stipulation is silent as to how other springs are to be treated. Having corrected the complaining objectors' misimpression concerning the treatment of springs, we turn to the reasonableness of the director's action.

The complaining objectors assert in this regard that there is no reasonable basis for singling out Long Pine's municipal facility from other springs along the creek. This is not the case. First, the complaining objectors do not point to any party seeking a similar stipulation. Second, the Long Pine facility is distinguishable from the natural springs which are tributary to the creek. Long Pine's municipal facility taps several springs below ground, collects that water into an underground chamber, and then pumps the water into its pumphouse. The water is captured before it ever has an opportunity to become

surface water. There is no evidence that the facility is capable of capturing water in any other manner. The facility is registered as a well with the Department of Water Resources. These facts are sufficient to provide a rational basis for treating the water captured by the Long Pine facility as ground water. The complaining objectors do not claim that there are other, similar facilities that are being treated as capturing surface water, but they do complain that there was no determination made as to the classification of all the various springs along the creek. They do not demonstrate why such a determination should be necessary or why water captured in a municipal well should be treated in the same manner as water which reaches the surface via a natural spring. Finally, they fail to demonstrate any prejudicial effect flowing from the director's acceptance of the stipulation.

IV. DECISION

The statutes permitting instream flow appropriations, §§ 46-2,107 through 46-2,119, not offending Neb. Const. art. XV, § 4, 5, or 6, and the record failing to sustain the summarized errors assigned to the director, we affirm.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JEFF M. PONEC, APPELLANT.

463 N.W.2d 793

Filed November 30, 1990. No. 90-541.

Pleas. Before accepting a plea of guilty the court must inform the defendant of the nature of the charge and examine the defendant to determine that he or she understands the nature of the charge.

Appeal from the District Court for Douglas County, JERRY M. GITNICK, Judge, on appeal thereto from the County Court for Douglas County, ROBERT C. VONDRASEK, Judge. Judgment of District Court reversed, and cause remanded for further proceedings.

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

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

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

PER CURIAM.

Upon pleas of guilty to theft by unlawful taking and destruction of property in violation of ordinances of the city of Omaha, the defendant, Jeff M. Ponec, was sentenced by the county court to concurrent terms of 45 days in the county jail. Upon appeal to the district court the judgment was affirmed.

The factual basis for the pleas was contained in the police reports, which show that at 1:15 a.m. on January 17, 1990, the defendant stole a stereo radio from an automobile, damaging the car's dashboard in the process.

The defendant has appealed to this court and has assigned as error the county court's failure to advise him of the nature of the charges and its failure to determine whether he understood the charges.

Prior to the county court's acceptance of the defendant's pleas, the record shows, the following transpired:

> MR. WINCHESTER [prosecutor]: This is the State of Nebraska against Jeff M. Ponec, M90-1065. He's charged with theft by unlawful taking and destruction of property on January 17, 1990.
>
> THE COURT: Good morning. Are you Jeff Ponec?
>
> MR. PONEC: Yes.
>
> . . . .
>
> THE COURT: How old are you?
>
> MR. PONEC: Nineteen.
>
> THE COURT: You have the right to be represented by an attorney. If you are indigent and cannot afford to hire an attorney you are entitled to have a public defender appointed to represent you. Would you like to consult with or have an attorney present before you are required to

plead to this charge?

MR. PONEC: No, sir.

THE COURT: How do you wish to plead?

MR. PONEC: Guilty.

THE COURT: Maximum sentence for each of the offenses is six months in jail, a $500 fine, or both. There is no minimum sentence, so you could be fined as small as $1. Do you understand that?

MR. PONEC: Yes, sir.

THE COURT: You have the right to have a trial. The fact that these complaints have been filed against you is not evidence. You are presumed to be innocent until proven guilty. You don't have to prove anything. The State has the burden of proving your guilt beyond a reasonable doubt. Now if you plead guilty and admit the complaints there will be absolutely no reason for a trial and you'll be found guilty this afternoon without a trial. Do you understand that?

MR. PONEC: Yes, sir.

THE COURT: If there were a trial, the State would call their witnesses before the Court; they'd testify under oath; you or your lawyer would have the right to cross-examine the witnesses. You'd have the right to remain silent. You could not be compelled to testify against yourself or make any admissions concerning the matter. You'd have the right to the compulsory attendance of any witnesses that would assist you in your defense. Now there will be absolutely no reason for a trial if you plead guilty and admit these complaints. Do you want a trial?

MR. PONEC: No, sir.

THE COURT: I'll receive into evidence the police reports concerning the matter. I'm reviewing RB Number 3711E.

. . . .

THE COURT: I find that the basis for the complaints to be [sic] valid and that the pleas are voluntarily and intelligently tendered. They will be accepted and you will be found guilty. What explanation do you have for doing this?

MR. PONEC: It's just a stupid mistake, sir.

The court then sentenced the defendant to serve two concurrent terms of 45 days in jail and to pay the costs of prosecution.

In *State v. Irish*, 223 Neb. 814, 820, 394 N.W.2d 879, 883 (1986), regarding acceptance of guilty or no contest pleas, we said:

> 1. The court must
>
> a. inform the defendant concerning (1) the nature of the charge; (2) the right to assistance of counsel; (3) the right to confront witnesses against the defendant; (4) the right to a jury trial; and (5) the privilege against self-incrimination; and
>
> b. examine the defendant to determine that he or she understands the foregoing.
>
> 2. Additionally, the record must establish that
>
> a. there is a factual basis for the plea; and
>
> b. the defendant knew the range of penalties for the crime with which he or she is charged.
>
> We conclude that the taking of the foregoing steps is sufficient to assure that a plea represents a voluntary and intelligent choice among the alternative courses of action open to a criminal defendant, the ultimate standard by which pleas of guilty or nolo contendere are to be tested.

The State relies upon *State v. Clark*, 217 Neb. 417, 418, 350 N.W.2d 521, 523 (1984), in which the court informed the defendant that he was charged with robbery, and argues that the nature of the offense was adequately made known to the defendant under the circumstances of the case. In the *Clark* case, the defendant was represented by counsel, had been charged with only one offense, and had discussed the matter with his attorney.

In *State v. Walker*, 235 Neb. 85, 453 N.W.2d 482 (1990), the defendant, like the defendant in this case, was not represented by an attorney and had been charged with two offenses in violation of Omaha city ordinances. Under those circumstances, this court stated:

> Since we are dealing in criminal cases with human liberty, shortcuts from the *Irish* requirements will not be

> tolerated. The appellant was entitled to be informed of the nature of the charges and to a court determination that she understood them. She was not accorded that right. Therefore, the convictions must be reversed.

Id. at 89, 453 N.W.2d at 484.

Although the prosecutor's statement of the charges in this case may have been sufficient, the record fails to show that the trial court "examine[d] the defendant to determine" that he *understood* the nature of the charges.

The failure of the county court to inform the defendant concerning the nature of the charges and to examine him to determine that he understood the nature of the charges, as required by *State v. Irish, supra*, requires that the judgment be reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

OTTO A. KOSTAL, APPELLEE, V. BOB D. HAWTHORNE AND CHARLOTTE K. HAWTHORNE, APPELLANTS.

463 N.W.2d 615

Filed December 7, 1990. No. 88-655.

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

Gene C. Foote II for appellants.

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

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

PER CURIAM.

Bob D. Hawthorne and Charlotte K. Hawthorne appeal from the summary judgment entered for Otto A. Kostal in the district court for Adams County, Nebraska. Summary

judgment was entered for Kostal in his action against the Hawthornes for a money judgment on account of Hawthorne's debt which was paid by Kostal pursuant to his guaranty for the Hawthorne debt.

> 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 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.

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

After our review of the record, we find no error in the district court's summary judgment for Kostal. Therefore, the judgment of the district court is affirmed.

AFFIRMED.

GRETNA STATE BANK, A NEBRASKA CORPORATION, APPELLANT AND CROSS-APPELLEE, V. CORNBELT LIVESTOCK COMPANY, A NEBRASKA CORPORATION, APPELLEE AND CROSS-APPELLANT.

463 N.W.2d 795

Filed December 7, 1990. No. 88-677.

1. **Security Interests.** A security interest continues in collateral notwithstanding sale, exchange, or other disposition thereof unless the disposition was authorized by the secured party in the security agreement or otherwise.
2. **Security Interests: Waiver: Estoppel.** Performance under a security agreement, including the failure of the secured party to rebuke the debtor or object to the debtor's conduct in selling collateral in violation of the terms of the security agreement, may amount to a waiver of the lender's contractual right to require its written consent to a sale of collateral.
3. _____: _____: _____. Consent to the sale of collateral without prior written

permission may be established expressly or by implication arising from a course of conduct, and such consent operates as a waiver of the security interest.

4. **Directed Verdict.** Where the evidence at trial is not in conflict and reasonable minds cannot differ as to the conclusion to be drawn from the evidence, it is the duty of the trial court, when requested, to direct a verdict in accordance with such conclusion.

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

E. Terry Sibbernsen, of Welsh & Sibbernsen, for appellant.

Victor J. Lich, Jr., and John M. Vodra, of Lich, Herold & Mackiewicz, for appellee.

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

BOSLAUGH, J.

This is an action in conversion by the plaintiff, Gretna State Bank (Bank), against the defendant, Cornbelt Livestock Company. The petition alleged that from April 3 through December 5, 1985, the defendant, which is a marketing agency, sold dairy cattle owned by Gordon Schuemann in which the plaintiff had a perfected security interest. The defendant's answer alleged, among other defenses, that the plaintiff had consented to and authorized the sales of Schuemann's cattle.

The defendant's motion for a directed verdict was overruled, and the case was submitted to the jury. The jury found for the defendant. The plaintiff has appealed, and the defendant has cross-appealed.

The record shows that the important facts involved in this appeal are undisputed. The Schuemanns, who operated a dairy farm near Gretna, Nebraska, had been customers of the Bank since the 1970s, and had borrowed money from the Bank for their farming operations. These loans were secured pursuant to several security agreements which granted the Bank a secured interest in all of the Schuemanns' crops, livestock, farm products, machinery, and equipment, and in all proceeds from, substitutions, additions, and accessions to the collateral.

The security agreements expressly prohibited the sale of the collateral without the prior written consent of the Bank.

However, this provision was never enforced by the Bank, and the practice was for the Schuemanns to sell cows from time to time and deposit the proceeds in their checking account at the plaintiff Bank or their checking account at the Bank of the Midlands. The proceeds from the sale of the cattle were used to pay Schuemanns' farm operating expenses.

Ronald Suhr, who had been employed by the Bank since 1959 and was its president from 1983 until he left in 1985, testified that the Schuemanns retired their debt through milk assignments.

According to Suhr, the Bank's policy in 1985 regarding sale of collateral subject to a security interest was to have the debtor notify the Bank by telephone or personally discuss the matter prior to sale and apply the proceeds to the debtor's loan. However, the Bank did not enforce this policy and did not require the debtor to obtain permission in advance to sell livestock, although it expected the policy would be complied with. Other Bank borrowers sold secured collateral without permission and were not rebuked for the sales.

The Bank's records regarding the Schuemanns show significant numbers of cattle missing from year to year between 1977 and 1985. The Bank never objected to the missing cattle as long as the herd stayed around 60 head. The Bank never required Schuemanns to account for the proceeds from sales of those missing cattle from year to year.

The Bank never discussed with the Schuemanns its policy of requiring permission prior to selling collateral; however, the Bank told them the proceeds should come to the Bank.

On September 15, 1978, the Schuemanns' financial statement to the Bank showed that there were 60 cows on hand. On the December 1, 1979, financial statement there were shown 50 cows. The Bank did not object to the missing cows in that case. On the September 1, 1980, financial statement, there were listed 35 cows. There was no objection by the Bank to the 15 missing cows, and the Bank did not ask Schuemanns to account for the proceeds from sale of those cows. On the October 1, 1981, financial statement, there were listed 52 cows, 5 heifers, 18 calves, and 1 bull, for a total of 76 head. There was no financial statement for 1982. On the April 1, 1983, financial

statement there were shown 55 cows and 1 bull. The Bank did not object to the sale of the missing cattle or ask the Schuemanns to account for the proceeds.

The Bank's credit file memorandum also shows that on August 31, 1983, there were 84 cows. On the September 1, 1984, financing statement there were listed 60 cows, 5 heifers, 1 calf, and 1 bull, for a total of 67 head. The Bank did not ask the Schuemanns to account for those 24 missing cows.

The Bank's memorandum does not show any significant death loss. It does not show any request by the Schuemanns to sell the cows, and it does not show that the Bank received any proceeds from the sale of missing cows. Furthermore, it does not show that the Bank ever rebuked Schuemanns for failing to account for those cows.

The Bank knew the Schuemanns were selling cows; however, as long as there was a minimum herd, the Bank did not care whether they sold cows because it was relying on the milk assignments to repay the Schuemanns' notes.

Randall Helgren, who was president of the Bank from August 1985 to June 1986, testified that he conducted an inspection on October 15, 1985, because he had not seen a livestock inspection in the Schuemanns' file. During that inspection, the Schuemanns did not discuss the sale of any of the cows and did not ask permission to sell any of the cows. The inspection showed there were 65 cows and 30 calves. Based on that inspection, the Bank renewed the Schuemanns' note on January 22, 1986.

Helgren also testified that the Bank never enforced its policy of written or oral permission prior to sale of collateral in which it had a security interest. About 80 percent of the Bank's debtors sold collateral without obtaining permission first.

Helgren was not aware of anyone at the Bank discussing with the Schuemanns the Bank's policies regarding the sale of collateral. He assumed that there were sales being made by the Schuemanns, and to his knowledge no one from the Bank ever made them account for those sales until February 1986, when he conducted another inspection which showed the herd had been reduced to 19 cows and 30 calves.

No one at the Bank rebuked the Schuemanns for 25 cows

missing between November 7, 1984, and January 3, 1985.

In December 1985 and January 1986, the Bank did not receive full payments from the milk proceeds. The Bank did not declare the Schuemanns in default but, instead, renewed their loan on January 22, 1986, and did not check the collateral prior to renewing the loan.

According to Helgren, the milk assignments were the primary source of repayment for the Schuemanns' loans.

Gordon Schuemann testified that he had always sold cows and calves in his operation and that he had used Cornbelt as his marketing agent for 25 years. He had no discussions with the Bank about the Bank's policy of requiring permission prior to taking the cows to market, and did not ask the Bank for permission to sell his cattle. The Bank did not express concern about the sales he had made throughout his relationship with it, and the Bank did not ask him to account for proceeds of those sales. Milk assignments were used to reduce the balance on his debts with the Bank.

The Bank never told Schuemann not to sell the cows, and prior to 1986, the Bank did not object to the sales he had made.

The Bank's course of conduct in this case constituted a waiver of the Bank's security interest in the cattle as a matter of law.

Neb. U.C.C. § 9-306(2) (Reissue 1980) states in relevant part: "[A] security interest continues in collateral notwithstanding sale, exchange or other disposition thereof unless the disposition was authorized by the secured party in the security agreement or otherwise . . . ."

The "otherwise" language in § 9-306(2) includes a prior course of conduct constituting authority to sell pledged collateral. *Farmers State Bank v. Farmland Foods*, 225 Neb. 1, 402 N.W.2d 277 (1987); *Ottumwa Prod. Cred. v. Heinhold Hog Mark.*, 340 N.W.2d 801 (Iowa App. 1983); *Hedrick Savings Bank v. Myers*, 229 N.W.2d 252 (Iowa 1975).

In *Farmers State Bank v. Farmland Foods, supra* at 9, 402 N.W.2d at 282, we held:

> [P]erformance under a security agreement, including the failure of the secured party to rebuke the debtor or object to the debtor's conduct in selling collateral in violation of

> the terms of the security agreement, may amount to a waiver of the lender's contractual right to require its written consent to a sale of collateral.

Consent to the sale of collateral without prior written permission may be established expressly or by implication arising from a course of conduct, and such consent operates as a waiver of the security interest.

The Bank argues that even if it consented to the Schuemanns' sale of cattle through its prior course of conduct, its authorization was limited to selling cows from the herd for culling purposes. The Bank contends that the sales in question were part of a course of conduct by the Schuemanns to liquidate the herd.

The sales in question took place from April 3, 1985, through December 5, 1985. A total of 39 cows were sold, with no more than 5 cows being sold on any single occasion.

On October 15, 1985, the Bank inspected the Schuemanns' operation. On that date there were 65 milk cows and 30 calves. According to the testimony of both of the Bank's presidents, the collateral on that date was within the acceptable limits for producing milk for the assignments on which the Bank relied for repayment of the Schuemanns' loans.

The evidence shows that from the October 15, 1985, inspection through December 5, 1985, only seven cows were sold. The course of conduct for the sales in question was no different from that established during the time between 1978 and 1985, when, at times, the herd was reduced below the 60-head figure which the Bank preferred.

In *Farmers State Bank v. Farmland Foods, supra*, the evidence showed that despite a provision in the security agreement prohibiting the sale of collateral without prior written consent, the debtor sold his hogs on over 130 occasions over a 6-year period without first obtaining prior consent from the bank; the bank was aware of the sales; the bank never requested compliance with the consent provision; the bank never reprimanded or rebuked the debtor for his actions; and the bank was aware of its right to require the prior written consent for the sale of collateral, but it acted to waive its rights thereunder. This court held the bank's course of performance

with the debtor constituted an amendment to the security agreement waiving its right to require its written consent prior to any sale by the debtor. *Farmers State Bank, supra.*

The evidence in this case shows the Bank knew the Schuemanns were selling cows without prior written permission; however, as long as the herd remained at about 60 head, the Bank did not care that the Schuemanns were selling their cows without prior written permission because the Bank relied on the milk assignments to repay the Schuemanns' notes; the Bank never discussed with the Schuemanns its policy of requiring permission prior to selling collateral; although the Schuemanns were told the proceeds should come to the Bank, the Bank never made the Schuemanns account for the proceeds of the cattle they sold; and the Bank never reprimanded or rebuked the Schuemanns for the sale of the cows. The Schuemanns were not declared in default until February 26, 1986, when the herd had been reduced to 19 cows and 30 calves. It is apparent that the default was declared because the Schuemanns had failed to maintain the herd at an adequate number for milk production in order to repay their loans with the milk assignments, not because of the sales of cattle which had taken place during the dates in question.

Where the evidence at trial is not in conflict and reasonable minds cannot differ as to the conclusion to be drawn from the evidence, it is the duty of the trial court, when requested, to direct a verdict in accordance with such conclusion. *Vermaas v. Heckel*, 170 Neb. 321, 102 N.W.2d 647 (1960). Based on the documents and admissions by the Bank's presidents that the Bank did not care whether the Schuemanns sold cows as long as the herd remained at about 60 head, there was no disputed issue of fact regarding the Bank's course of performance establishing the Schuemanns' authority to sell the cattle pledged as security for their notes.

In *Neu Cheese Co. v. Fed. Deposit Ins. Corp.*, 825 F.2d 1270 (1987), the U.S. Court of Appeals for the Eighth Circuit held, under similar facts, that a factual finding to the contrary was clearly erroneous and that as a matter of law the bank had waived its security interest by its conduct. The evidence in this case establishes as a matter of law a waiver by the Bank of its

security interest in the cattle sold by the Schuemanns.

The trial court should have sustained the defendant's motion and directed a verdict in favor of the defendant, as the evidence established it was entitled to judgment as a matter of law.

It is unnecessary to consider the assignments of error relating to the instructions or the other errors assigned in the cross-appeal.

The judgment for the defendant is affirmed.

AFFIRMED.

MELISSA WILLIAMS, BY AND THROUGH HER MOTHER AND GUARDIAN, RITA WILSON, APPELLEE AND CROSS-APPELLANT, V. GERING PUBLIC SCHOOLS, ALSO KNOWN AS SCHOOL DISTRICT NO. 79-0016, APPELLANT AND CROSS-APPELLEE, AND NEBRASKA DEPARTMENT OF EDUCATION, APPELLEE.

463 N.W.2d 799

Filed December 7, 1990. No. 88-800.

1. **Motions for New Trial: Time.** Under Neb. Rev. Stat. § 25-1143 (Reissue 1989), a motion for new trial must be made within 10 days after the complained-of order was entered, except where unavoidably prevented.
2. **Motions for New Trial: Time: Final Orders: Jurisdiction: Appeal and Error.** It is required by Neb. Rev. Stat. § 25-1912 (Reissue 1989) that in order to vest the Supreme Court with jurisdiction, a notice of appeal must be filed within 30 days of the entry of the final order or the overruling of a motion for new trial. The timely filing of such notice of appeal is jurisdictional.
3. **Motions for New Trial: Time: Appeal and Error.** In general, the timely filing of a motion for new trial extends the time within which a notice of appeal must be filed to a period of 30 days following the overruling of that motion; however, a motion for new trial which is not filed within the time constraints required by statute is a nullity and does not extend the time within which a notice of appeal may be filed.
4. **Rules of the Supreme Court: Appeal and Error.** A cross-appeal, as distinguished from the perfection of a direct appeal, exists in this state only by virtue of the rules of this court. There is no statutory authorization for the procedure.
5. _____: _____. In order to perfect a cross-appeal, an appellee need comply only with the rules of the Nebraska Supreme Court.
6. **Special Education: Administrative Law: Courts: Appeal and Error.** In a proceeding under Neb. Rev. Stat. § 79-3354 (Reissue 1987), judicial review shall

be conducted by the district court without a jury. The district court shall receive the records of the administrative proceedings, hear additional evidence at the request of a party, base its decision on the preponderance of the evidence, and grant such relief as the court determines is appropriate.

7. _____: _____: _____: _____. An aggrieved party may secure a review of any final judgment of the district court under Neb. Rev. Stat. § 79-3354 (Reissue 1987) by appeal to the Supreme Court. Such appeal shall be taken in the manner provided by law for appeals to the Supreme Court in civil cases and shall be heard de novo on the record.

8. **Appeal and Error.** In a trial de novo on the record, the Supreme Court resolves issues of fact independently of the findings of the trial court; however, where the evidence is in conflict, it considers and may give weight to the trial court's observation of the witnesses and acceptance of one version of the facts rather than another.

9. **Special Education.** A state satisfies the requirement to provide a handicapped child with a free appropriate public education by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.

10. _____. The Education of the Handicapped Act, 20 U.S.C. §§ 1400 et seq. (1988), does not authorize residential care merely to enhance an otherwise sufficient day program.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Affirmed in part, and cross-appeal dismissed in part.

Donn C. Raymond, of Simmons, Raymond, Olsen, Ediger, Selzer & Ballew, P.C., for appellant.

Randal B. Brown, of Nebraska Advocacy Services, for appellee Williams.

Robert M. Spire, Attorney General, and Harold I. Mosher for appellee Department.

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

GRANT, J.

Appellee Melissa Williams is a multihandicapped child, as defined by Neb. Rev. Stat. § 79-3309(6) (Reissue 1987), who was born on November 15, 1971. Rita Wilson, who is Melissa's mother and guardian, initiated this action by filing a petition with the Nebraska Department of Education (Department) against the Gering Public Schools, also known as School

District No. 79-0016 (District), and the Department, alleging that Melissa had been denied a free appropriate public education. The subject of the dispute was an individual education plan (IEP) in which the District recommended that Melissa receive a 9-month school year at Educational Service Unit No. 13 (ESU-13) and no residential placement.

Wilson's amended petition, filed on June 1, 1987, alleged that residential placement at the Martin Luther Home, Inc., in Mitchell, Nebraska, was necessary for Melissa and that the Child Development Center (CDC) in Scottsbluff, Nebraska, was also more appropriate than ESU-13 because CDC provided a 12-month program designed to meet Melissa's special educational needs. Wilson thus proposed that Melissa reside at the Martin Luther Home in Mitchell and be educated at CDC in Scottsbluff.

In its answer, the District denied that Melissa required residential placement in order to receive a free appropriate public education and further alleged that a 12-month school year was not necessary and that ESU-13 was an appropriate educational placement. The Department denied in its answer that residential placement was necessary or appropriate.

Pursuant to Neb. Rev. Stat. § 43-662 (Cum. Supp. 1986), later amended and codified as Neb. Rev. Stat. § 79-3350 (Reissue 1987), the Department appointed a hearing officer, and a 3-day administrative hearing began on September 2, 1987.

The issues presented at the administrative hearing were (1) whether Melissa was entitled, as a part of her special educational services, to a residential placement, and, if so, the location of that residential placement, and (2) the length of the school year for Melissa and where her schooling should take place.

The hearing officer filed his final decision and order on September 25, 1987, together with an order nunc pro tunc dated September 29, 1987, denying Wilson's request for residential placement as a part of Melissa's individualized special education program, but ordering the District to prepare an individualized special education program providing for Melissa's placement in a 12-month program at CDC. Because

the hearing officer found that residential care was not a necessary part of Melissa's IEP, Wilson's petition was dismissed as to the Department.

The District then filed a petition for judicial review, and Wilson filed an answer and cross-petition for judicial review. In her cross-petition, Wilson named both the District and the Department as parties. On August 5, 1988, the district court for Scotts Bluff County entered a final order affirming the decision of the hearing officer. The District filed a motion for new trial on August 12, 1988, and Wilson filed a motion for new trial on August 29, 1988. Both motions were overruled on August 29, 1988. The District filed its notice of appeal on September 21, 1988, and Wilson filed her notice of appeal on September 26, 1988.

In its appeal, the District contends the district court erred (1) in affirming the hearing officer's final decision and order requiring a 12-month school year and placement at CDC, (2) in finding that the hearing officer's order requiring 12-month placement was supported by the evidence, and (3) in finding that the hearing officer's order requiring placement at CDC was supported by the evidence.

In her cross-appeal, Wilson contends the district court erred (1) in finding that Melissa did not require a residential educational placement in order to benefit from her special education program, (2) in failing to order that a residential educational placement was a necessary component of Melissa's individualized special education program, and (3) in dismissing the Department as a party to the action.

In its brief, the Department claims it is no longer a proper party to these proceedings, and it has filed a motion to dismiss the cross-appeal for want of jurisdiction. The Department contends this court lacks jurisdiction to determine issues concerning the Department because Wilson did not timely file her notice of appeal in the district court.

The record shows that the district court rendered its final decision on August 5, 1988, but that Wilson's motion for new trial was not made until August 29, 1988, more than 10 days after the court's final order. In *In re Interest of C.M.H. and M.S.H.*, 227 Neb. 446, 448, 418 N.W.2d 226, 227 (1988), we

said:

> A motion for a new trial must be made within 10 days after the complained-of order was entered, except where unavoidably prevented. Neb. Rev. Stat. § 25-1143 [Reissue 1989]. It is required by Neb. Rev. Stat. § 25-1912 [Reissue 1989] that in order to vest this court with jurisdiction a notice of appeal must be filed within 30 days of the entry of the final order or the overruling of a motion for a new trial. The timely filing of such notice of appeal is jurisdictional.

In general, the timely filing of a motion for new trial extends the time within which a notice of appeal must be filed to a period of 30 days following the overruling of that motion. *In re Interest of C.M.H. and M.S.H., supra.* However, a motion for new trial which is not filed within the time constraints required by statute is a nullity and does not extend the time within which a notice of appeal may be filed. *Id.* See, also, *In re Interest of B.M.H.*, 233 Neb. 524, 446 N.W.2d 222 (1989).

This case presents a different question, however, because it involves the filing of a cross-appeal. A cross-appeal, as distinguished from the perfection of a direct appeal, exists in this state only by virtue of the rules of this court. There is no statutory authorization for the procedure. *Edquist v. Commercial Sav. & Loan Assn.*, 191 Neb. 618, 217 N.W.2d 82 (1974). Therefore, in order to perfect a cross-appeal, an appellee need comply only with the rules of the Nebraska Supreme Court. *Id.*

At the time Wilson's right to cross-appeal vested, Neb. Ct. R. of Prac. 1E (rev. 1986) provided: "The filing of an appeal shall vest in an appellee the right to a cross-appeal, *but only as to the appellant or appellants*. The cross-appeal need only be asserted in appellee's brief . . . ." (Emphasis supplied.) Rule 1E was amended on October 24, 1988, and now provides: "The proper filing of an appeal in the Supreme Court shall vest in an appellee the right to a cross-appeal *against any other party to the appeal*. The cross-appeal need only be asserted in the appellee's brief as provided by rule 9D(4)." (Emphasis supplied.) Neb. Ct. R. of Prac. 1E (rev. 1989).

Our rule in effect prior to October 24, 1988, and two cases

decided under the old rule are controlling in this matter. In *Buffalo County v. Richards*, 212 Neb. 826, 326 N.W.2d 179 (1982), this court held that a cross-appeal may not be asserted by one appellee against another appellee, and dismissed the cross-appeal because the cross-appellant sought no relief against the appellant in the case. Similarly, in *Maricle v. Spiegel*, 213 Neb. 223, 329 N.W.2d 80 (1983), we again noted that an appellee could not cross-appeal against another appellee, but we elected to treat what the plaintiff-appellee denominated a cross-appeal as an appeal because the plaintiff properly filed a notice of appeal against the other appellee. See, also, *Western Fertilizer v. BRG*, 228 Neb. 776, 424 N.W.2d 588 (1988).

The record in this case shows that the appeal of the District was timely filed and vested in Wilson the right to cross-appeal, but only against the appellant. Because the District was the only appellant in this case, it was necessary for appellee Wilson to timely file a notice of appeal to preserve her rights against the Department, another appellee. See *Maricle v. Spiegel, supra.* Since Wilson failed to do so, the Department's motion to dismiss the cross-appeal as to the Department for lack of jurisdiction is sustained.

Dismissal of the Department does not result in dismissal of Wilson's cross-appeal in its entirety, because Wilson has also cross-appealed against the District, appellant herein, and that procedure was authorized by the case law and rules of this court in effect at the time Wilson's right to cross-appeal vested.

Since the District had the duty to develop a proper IEP for Melissa, Wilson is entitled to contend that the IEP must include residential placement. The issue is not resolved by the dismissal of the Department and will be discussed later herein.

The District's petition for judicial review was filed pursuant to Neb. Rev. Stat. § 79-3354 (Reissue 1987), which provides in part:

> (5) Judicial review shall be conducted by the [district] court without a jury. The court shall receive the records of the administrative proceedings, hear additional evidence at the request of a party, base its decision on the preponderance of the evidence, and grant such relief as the court determines is appropriate.

> (6) An aggrieved party may secure a review of any final judgment of the district court under this section by appeal to the Supreme Court. Such appeal shall be taken in the manner provided by law for appeals to the Supreme Court in civil cases and shall be heard de novo on the record.

In a trial de novo on the record, the Supreme Court resolves issues of fact independently of the findings of the trial court; however, where the evidence is in conflict, it considers and may give weight to the trial court's observation of the witnesses and acceptance of one version of the facts rather than another. *In re Interest of D.S. and T.S., ante* p. 413, 461 N.W.2d 415 (1990).

In this case, therefore, the record consists of the record of the administrative hearing together with the additional evidence presented by the parties in the district court. The issues before the court are (1) the length of the school year for Melissa and where her schooling shall take place, and (2) whether Melissa is entitled, as a part of her special educational services, to a residential placement, and, if so, the location of that residential placement.

The record shows that Melissa Williams was born on November 15, 1971. Her family first became aware Melissa was disabled when she was approximately 2½ weeks old and started to have seizures. It is likely that Melissa has been disabled since birth, except for certain heart and liver problems which have since developed.

Melissa has severe mental and physical handicaps. She is profoundly mentally retarded, with a current developmental age of 6 months or less. She has congenital blindness in both eyes, but does show some ability to track a light. Melissa has spastic quadriplegia, with some voluntary movement of her right arm and hand. She also has a dislocated left hip, severe scoliosis, contractions in both hands and feet, and cerebral palsy. As a result of these disabilities, she is nonambulatory, essentially is nonverbal, and requires total assistance with feeding and hygiene. Her senses of hearing, touch, taste, and smell are not impaired. At the time of the district court hearing, Melissa weighed approximately 50 pounds.

Melissa's family moved from Sidney, Nebraska, to Gering in 1977. Prior to this time, Wilson testified, Melissa had received

special education services in San Diego and El Cajon, California, and in Sidney, Nebraska. In July 1977, Melissa began to receive special educational services through the District and has received special educational services from the District since then.

In July 1977, Melissa was enrolled at CDC in Scottsbluff. She remained at CDC until August 1978, when her placement was changed to ESU-13 as a result of an individual educational program conference held by the District. While at ESU-13, Melissa had a 9-month school year and resided at home. Her mother, Wilson, acted as Melissa's primary care provider.

In August 1985, in response to her dissatisfaction with Melissa's educational process at ESU-13, as well as to the strain placed upon the family caused by the amount of care required for Melissa, Wilson arranged for Melissa to be placed in the Bethphage Mission (Bethphage) at Axtell, Nebraska, located approximately 270 miles from Gering. Bethphage is a licensed intermediate care facility for the mentally retarded and is the westernmost such facility in Nebraska.

Melissa remained at Bethphage until April 1987. While she was at Bethphage, the District contracted with and paid Bethphage for Melissa's educational program, which provided a 12-month school year. Melissa's residential placement was paid through federal title 19 funding.

During the fall of 1986, Bethphage adopted a goal of reducing its patient load by approximately 60 patients. The main purpose of this goal was to have children educated as close to their homes as possible. Bethphage did not terminate Melissa's placement. Instead, Wilson unilaterally removed Melissa from residential care at Bethphage and placed her at the Martin Luther Home in Mitchell, Nebraska, where she has resided to date.

On May 4, 1987, another meeting was held for the purpose of determining Melissa's educational placement. Attending the meeting were Wilson, representatives of the District and the Department, and others. By agreement of the parties, Melissa was placed at ESU-13 for a 30-day evaluation. After the evaluation, an IEP was proposed for Melissa which provided for a 9-month school year at ESU-13 with no residential care.

Because of her dissatisfaction with this proposal, Wilson unilaterally placed Melissa at CDC. Pursuant to Neb. Rev. Stat. § 43-661 (Cum. Supp. 1986), later amended and codified as Neb. Rev. Stat. § 79-3349 (Reissue 1987), on June 1, 1987, Wilson filed an amended petition with the Department, contesting the special education program and placement which the District proposed for Melissa.

We first consider the appropriate length of the school year for Melissa. In its appeal, the District contends that Melissa is entitled only to a 9-month educational program offered by ESU-13, rather than a 12-month program at CDC.

The education of handicapped children is governed by both federal and state legislation. As this court noted in *Adams Central School Dist. v. Deist*, 214 Neb. 307, 334 N.W.2d 775 (1983), *supp. op.* 215 Neb. 284, 338 N.W.2d 591, *cert. denied* 464 U.S. 893, 104 S. Ct. 239, 78 L. Ed. 2d 230, the Education for All Handicapped Children Act of 1975, 20 U.S.C. §§ 1401 et seq. (1976), now the Education of the Handicapped Act, 20 U.S.C. §§ 1400 et seq. (1988), represents the federal body of law. The care and education of handicapped children are also provided for at the state level pursuant to the Special Education Act, Neb. Rev. Stat. §§ 79-3301 et seq. (Reissue 1987).

The requirements of the federal act are discussed at length in *Hendrick Hudson Dist. Bd. of Ed. v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982). As we noted in *Adams Central School Dist. v. Deist, supra*, the act is a funding statute under which the federal government supplies financial assistance to the states for the education of handicapped children. By accepting federal funds, the state implicitly agrees to meet certain criteria and requirements. The act requires each state that accepts these funds to provide all handicapped children with a "free appropriate public education." 214 Neb. at 314, 334 N.W.2d at 780; 20 U.S.C. § 1412(1).

The term "free appropriate public education" is defined in 20 U.S.C. § 1401(18) (1982) as

> special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate

> preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under [20 U.S.C. § 1414(a)(5)].

"Special education" means "specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions." 20 U.S.C. § 1401(16). The language of § 79-3314 is identical to that of § 1401(16).

The U.S. Supreme Court has held that a state satisfies the requirement to provide a handicapped child with a free appropriate public education

> by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.

Hendrick Hudson Dist. Bd. of Ed. v. Rowley, supra at 458 U.S. at 203-04. We adopted this standard in the supplemental opinion in *Adams Central School Dist. v. Deist*, 215 Neb. 284, 338 N.W.2d 591 (1983).

The record shows that Melissa has a very limited capacity to learn and receive educational benefit. She has never reached a level where her instruction could be considered to "approximate the grade levels used in [Nebraska's] regular education." She is, however, entitled to an IEP from which she can receive educational benefit appropriate to her condition. *Hendrick Hudson Dist. Bd. of Ed. v. Rowley, supra*; *Adams Central School Dist. v. Deist*, 215 Neb. 284, 338 N.W.2d 591 (1983).

The type of education Melissa receives is calculated to enhance her basic living skills. Melissa is being trained to open her mouth to receive food, to swallow food, and to tolerate a wet washcloth to her face. She has met her program objective for coactive reaching, can retain her grasp for 20 seconds, and has learned to activate a switch to turn on music. Melissa also participates in a visual tracking program and a toileting program.

Melissa's skills are quite likely to regress if her educational routine is interrupted. The record shows that each time Melissa has been moved and her educational program interrupted, she has suffered a regression. Given the nature of Melissa's handicapping conditions, Melissa would suffer undue regression with a 3-month lapse in programming, and her recoupment time would be much longer than for a normal child. Accordingly, in order for Melissa to receive a free appropriate public education, she must have a 12-month school year.

As noted by the hearing officer, Melissa's history supports this conclusion. The record shows that while Melissa was at ESU-13 from 1978 through 1985, she made no progress, regressed in her eating and drinking skills, and generally deteriorated both educationally and physically. Melissa made progress while participating in a 12-month school year at Bethphage, and received educational benefit from her program during her 20 months at Bethphage. Although her progress was small and intermittent, even that progress was an improvement in her condition.

Having determined that Melissa is entitled to a 12-month school year, we must next decide the issue of where Melissa's 12-month educational program should take place. Again, we agree with the hearing officer and find that CDC is the more appropriate facility.

The record shows that, in general, ESU-13 provides only a 9-month program. In order for the District to provide a 12-month education for Melissa through ESU-13, it would be necessary to provide 9 months of schooling at ESU-13, then contract for an alternate placement for the remaining 3 months, and then arrange for resumption of the 9-month school period.

This type of interruption would result in a 2- to 4-week adjustment period accompanied by regression during the two annual changes. This result is inappropriate. There is also evidence that the ESU-13 facility, unlike CDC, is geared to higher functioning children, and not toward the profoundly handicapped.

We determine that Melissa needs to be in one facility where she can receive her education on a year-round basis and that Melissa's educational placement should be at the Child Development Center in Scottsbluff, where year-round service is available.

Since we have dismissed Wilson's appeal against the Department for lack of jurisdiction, we consider the issue of residential placement only as it affects the cross-appellee, the District.

The District does not contend that the residential placement sought herein is a necessary "medical service," but recognizes that the question is whether residential placement is a "related service" required to be furnished in this case as part of a "free appropriate public education." We are not faced with the type of situation in *Timothy W. v. Rochester, N.H., School Dist.*, 875 F.2d 954 (1st Cir. 1989), where the school district, in effect, stonewalled the request of a severely handicapped child to obtain an appropriate public education by contending that Timothy W. was so handicapped that he was not entitled to the benefits provided by the federal act. The Rochester district contended that Timothy W. was so handicapped that he could not be educated at all. The District herein has not taken that position, but is contesting the limits of the free appropriate public education it recognizes it must furnish to Melissa.

As stated above, Melissa is entitled to receive special education *and* sufficient related services to permit her to benefit educationally from that instruction. *Hendrick Hudson Dist. Bd. of Ed. v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982); *Adams Central School Dist. v. Deist*, 215 Neb. 284, 338 N.W.2d 591 (1983); 20 U.S.C. § 1401(18).

Under the federal act, the term "related services" includes transportation and such developmental, corrective, and other supportive services (including speech pathology and audiology,

psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education. 20 U.S.C. § 1401(17). Similarly, § 79-3310 provides:

> Related services shall mean transportation services and such developmental, corrective, and other supportive services, including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, as may be required to assist a handicapped child to benefit from special education and shall include the early identification and assessment of handicapping conditions in children. Medical services shall be for diagnostic and evaluation purposes only.

"Residential care" is defined in § 79-3312 as "food and lodging and any other related expenses which are not a part of the education program, but such care shall not include expenditures for medical and dental services." Under § 79-3312, medical and dental services are the responsibility of the child's parents or legal guardian.

In *Irving Independent School Dist. v. Tatro*, 468 U.S. 883, 104 S. Ct. 3371, 82 L. Ed. 2d 664 (1984), the Court held that clean intermittent catheterization (CIC) was a "related service" under the federal act. In so holding, the Court noted several limitations which would tend to minimize the burdens feared by the school district, including the following:

> [O]nly those services necessary to aid a handicapped child to benefit from special education must be provided, regardless how easily a school nurse or layperson could furnish them. For example, if a particular medication or treatment may appropriately be administered to a handicapped child other than during the school day, a school is not required to provide nursing services to administer it.

468 U.S. at 894.

The issue in *Irving Independent School Dist. v. Tatro, supra*, was whether CIC was a "related service," as opposed to an

excluded medical service under the act. In contrast, this court has been asked to determine whether residential placement, as a related service, would help Melissa to benefit from special education.

The U.S. Supreme Court held that the language of the act in question "contains no requirements . . . that States maximize the potential of handicapped children 'commensurate with the opportunity provided to other children.' " *Hendrick Hudson Dist. Bd. of Ed. v. Rowley, supra* at 458 U.S. at 189-90.

We agree with the analysis set out in *Abrahamson v. Hershman*, 701 F.2d 223, 227 (1st Cir. 1983):

> It follows from *Rowley* that the Act does not authorize residential care merely to enhance *an otherwise sufficient* day program. A handicapped child who would make educational progress in a day program would not be entitled to placement in a residential school merely because the latter would more nearly enable the child to reach his or her full potential.

In the case before us, a good-faith effort has been made to "mainstream" Melissa, and under the record in this case, residential placement (which in this case would amount to institutionalization of Melissa) is not necessary for educational purposes. While we do not agree with everything found by the hearing examiner as to the ease or difficulty of caring for Melissa, we agree fully with his finding that a residential placement is not required for Melissa to benefit educationally from her IEP. A residential placement may well be necessary for other reasons, but not for educational purposes.

Bearing in mind the *Rowley* Court's admonition that reviewing courts should not substitute their own notions of sound educational policy for those of the school authorities which they review, we hold that the IEP proposed by the District, with respect to the 9-month school year, was not reasonably calculated to enable Melissa to receive a free appropriate public education. We further find that residential placement is not necessary in the context of this case.

The judgment of the district court, affirming the decision of the hearing officer, is affirmed. The Department's motion to dismiss Wilson's cross-appeal for lack of jurisdiction in this

court is sustained.

AFFIRMED IN PART, AND CROSS-APPEAL DISMISSED IN PART.

STATE OF NEBRASKA, APPELLEE, V. STEAVE BALTIMORE, APPELLANT.

463 N.W.2d 808

Filed December 7, 1990. No. 89-770.

1. **Trial: Evidence.** Responsibility for maintaining the balance between the probative and the prejudicial effect of evidence is largely within the discretion of the trial court.
2. **Trial: Evidence: Appeal and Error.** As to evidence which is relevant, the decision of the trial court as to whether "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence," Neb. Rev. Stat. § 27-403 (Reissue 1989), will not be disturbed on appeal unless there has been an abuse of discretion.
3. **Evidence: Words and Phrases.** Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
4. **Evidence.** To be relevant, evidence must be rationally related to an issue by a likelihood, not a mere possibility, of proving or disproving the issue to be decided.
5. _____. Probative value is a relative concept; the probative value of a piece of evidence involves a measurement of the degree to which the evidence persuades the trier of fact that the particular fact exists and the distance of the particular fact from the ultimate issues of the case.
6. **Criminal Law: Evidence: Appeal and Error.** Error in admitting evidence in a criminal case is prejudicial unless the State proves that the error was harmless beyond a reasonable doubt.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Reversed and remanded for a new trial.

Thomas M. Kenney, Douglas County Public Defender, and Brian S. Munnelly 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, Steave Baltimore, appeals a jury verdict finding him guilty of two counts of unlawful possession with intent to deliver a controlled substance, contrary to Neb. Rev. Stat. § 28-416 (Cum. Supp. 1988). One count was a Class III felony, the other a Class IV felony. The defendant was sentenced to two concurrent terms of imprisonment for 5 years.

Defendant assigns as error (1) the admission of evidence contrary to Neb. Rev. Stat. § 27-403 (Reissue 1989), (2) the sustaining of the State's motion in limine regarding the introduction of alleged exculpatory evidence, (3) the allowing of a strike by the prosecutor of a black prospective juror from the jury panel, (4) the denying of defendant's motion for a mistrial, and (5) the excessiveness of the sentences. We reverse.

Undercover Police Officer Kevan Barbour testified that on the evening of August 31, 1988, at approximately 9 o'clock, he was walking past a residence located at 2517 Burdette Street in Omaha. He stated that the defendant, who was sitting on the front porch, called him, Barbour, off the street. The defendant said to "come over to this side." Barbour asked the defendant "if anything was happening," at which time the defendant produced a rolled-up cigarette package and asked Barbour what he needed. Barbour replied that he wanted a 50-cent piece, street talk for a $50 "rock" of crack cocaine. The defendant put the cigarette package away and told Barbour that he did not sell crack.

Barbour then walked away, but knew that soon afterward members of the narcotics unit would execute a search warrant at this same residence. Later that evening, Barbour was directed by his commanding officer to conduct a "reverse sting operation" at that same residence. This is a procedure whereby undercover police officers locate themselves at an area where they believe parties are coming to buy illegal drugs and then the officers make the sales. Barbour returned to the Burdette Street

residence, seated himself on the same porch, and at approximately 10:15 p.m. sold two Ritalin and two Talwin tablets, both controlled substances, to a third party, Eric McGee. The defendant was no longer at this location. This testimony was received over the objection of the defendant as to "relevancy, foundation, relief under 403."

On cross-examination Barbour admitted that he did not know if the utilities at the residence were registered to the defendant, nor did he know who owned the particular property. There was no evidence that the defendant permanently resided at these premises.

On redirect examination Barbour was permitted to testify over objection that in street terms the phrase "Is anything happening?" as used by people in the drug culture means "are you—do you have any type of drugs for sale, or are you in pocket?" His testimony in this regard was based on his experience in police work for over 5 years, with participation in approximately 75 setup drug sales.

According to a stipulation between the parties, if a certain representative of the Omaha Public Power District were called to testify, that testimony would be that service was provided to this particular residence and billed to a party by the name of Lola Harris.

William Ihm, a chemist, identified certain pills or tablets contained in an envelope marked exhibit 5 as Ritalin and Talwin, both controlled substances.

Kurt Sorys, an Omaha police officer, testified that he was part of the team which executed a search warrant at 2517 Burdette Street on August 31, 1988. As Sorys approached the house, he saw the defendant and two women on the porch. He shined his flashlight at them and saw the defendant drop his right arm and with his hand make a "little kind of a toss or flicking action and an object left his hand." Another officer, Dennis Clark, came to the scene in about 5 or 10 seconds and was told by Sorys about the incident. Clark went over to the area right below the porch and retrieved a cigarette package.

Officer Clark testified as to his involvement in the execution of the search warrant and how he searched for and found the cigarette package on the ground. He identified that cigarette

package as the one placed in the envelope marked exhibit 5.

The defendant did not testify. He did call as a witness a physician, an internal specialist, Jack Lewis, who testified to the fact that from his examination of the defendant he would not have been able to "toss, flip or throw an object with his right hand."

By way of rebuttal, Dora McDavis was called by the State and testified that she saw the defendant once a month. She did not testify as to what her occupation might be or what was the occasion of her meetings with the defendant. However, defense counsel moved for a mistrial on the theory that "the testimony of Mrs. McDavis is that he has now shown a pattern of reporting, which is a kissing cousin to a probation officer inquiry and regiment." The motion was overruled. McDavis testified that she observed the defendant write and smoke with his right hand. She admitted on cross-examination that defendant's fingers did not move the pen; rather, his hand moved the pen.

We deal first with the reverse sting operation. Defendant argues that evidence of such an operation was prohibited by § 27-403, which provides as follows: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

The responsibility for maintaining the balance between the probative and the prejudicial effect of evidence is largely within the discretion of the trial court. *State v. Ryan*, 233 Neb. 74, 444 N.W.2d 610 (1989). We have also said innumerable times that a trial court's ruling on the relevancy of evidence will not be disturbed on appeal unless there has been an abuse of discretion. *State v. Porter*, 235 Neb. 476, 455 N.W.2d 787 (1990). We take this opportunity to amplify or clarify this rule to state that as to evidence which is relevant, the decision of the trial court as to whether "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative

evidence," § 27-403, will not be disturbed on appeal unless there has been an abuse of discretion.

However, the issue in this instance is purely one of relevance within Neb. Rev. Stat. § 27-401 (Reissue 1989): "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

The State contends that Officer Barbour's testimony presented facts from which a logical inference could be drawn that defendant was in the business of selling drugs. Defendant was at a particular location, 2517 Burdette Street, and whether or not he lived there or had any substantial interest in the premises, it was obvious that he was operating from that location on that occasion. Whether a location is one where drugs may customarily be purchased may also be determined by way of inference from stated facts, according to the State's argument. In this instance, the third party who purchased drugs from Officer Barbour voluntarily came over to the front porch of the house and engaged in a dialogue with Barbour which resulted in the purchase of drugs.

> There are two components to relevant evidence: materiality and probative value. Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case. If the evidence is offered to help prove a proposition which is not a matter in issue, the evidence is immaterial. What is "in issue," that is, within the range of the litigated controversy, is determined mainly by the pleadings, read in the light of the rules of pleading and controlled by the substantive law. . . .
>
> The second aspect of relevance is probative value, the tendency of evidence to establish the proposition that it is offered to prove. . . .

McCormick on Evidence § 185 at 541 (E. Cleary 3d ed. 1984).

> [T]he function of the doctrine of relevance is to require that there be some rational connection between the evidence offered by a litigant and the legal rule on which he claims a right to recover. . . . "Relevancy . . . exists only as a relation between an item of evidence and a matter

properly provable in the case."

22 C. Wright & K. Graham, Federal Practice and Procedure: Evidence § 5164 at 37 (1978) (quoting Notes of Advisory Committee on Proposed Rules, Fed. R. Evid. 401). To be relevant, evidence must be rationally related to an issue by a likelihood, not a mere possibility, of proving or disproving the issue to be decided. *State v. Robertson*, 219 Neb. 782, 366 N.W.2d 429 (1985).

Barbour's testimony regarding the sale to McGee was neither material nor probative. By the charge against Baltimore, the issue was whether he possessed Ritalin and Talwin with intent to distribute, deliver, or dispense the controlled substances. The sting operation at the house to which Baltimore had no connection, other than his sitting on the porch, did not tend to prove the issues in the prosecution, namely, Baltimore's unlawful possession of a controlled substance and intent to distribute the controlled substance, and supplied no rational connection to a violation of the criminal statute under which the State sought Baltimore's conviction.

Besides being immaterial, evidence concerning the sting operation lacked probative value, the second inquiry involved in a relevance determination.

> "Probative value is a relative concept; the probative value of a piece of evidence involves a measurement of the degree to which the evidence persuades the trier of fact that the particular fact exists and the distance of the particular fact from the ultimate issues of the case."

State v. Bostwick, 222 Neb. 631, 639, 385 N.W.2d 906, 912 (1986) (quoting Dolan, *Rule 403: The Prejudice Rule in Evidence*, 49 S. Cal. L. Rev. 222 (1976)). Quite obviously, evidence of the sting operation was offered to prove Baltimore's involvement in similar controlled substance transactions at the Burdette Street residence. However, evidence of a controlled substance sale to an individual who had no association with Baltimore did not tend to prove Baltimore's involvement in other controlled substance transactions which may have occurred at the residence where Barbour encountered Baltimore. Evidence of the sting operation presented facts which were far removed from the ultimate issues in the charge

against Baltimore, which evidence, lacking probative value, was, therefore, irrelevant. "In sum, relevant evidence is evidence that in some degree advances the inquiry." McCormick on Evidence, *supra* at 544. Here, the evidence did not.

In *State v. Robertson, supra* at 791, 366 N.W.2d at 435, we stated: "Our system of criminal justice does not recognize mere association as a premise for guilt." The evidence about the sting operation was erroneously admitted.

Assuming, without deciding, that there was sufficient evidence to convict Baltimore of possession with intent to distribute or deliver, without the evidence of the reverse sting, we cannot say that the admission of the evidence of the reverse sting was harmless beyond a reasonable doubt in view of the minimal quality of that remaining evidence bearing on defendant's intent. Error in admitting evidence in a criminal case is prejudicial unless the State proves that the error was harmless beyond a reasonable doubt. *State v. Donaldson*, 234 Neb. 683, 452 N.W.2d 531 (1990); *State v. Cox*, 231 Neb. 495, 437 N.W.2d 134 (1989).

We sustain the first assignment of error, and because this requires a reversal and new trial, we need not consider the other assigned errors, as they may not be involved in a second trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

HASTINGS, C.J., dissenting.

In my opinion, the description of the sting operation made more probable the State's assertion that a pattern of drug activity surrounded this residence. The drug activity encompassing 2517 Burdette Street provided the defendant the opportunity to participate in this drug activity. Whether or not he lived there or went there on a regular basis, the evidence disclosed that he operated in a more than happenstance fashion. The testimony tended to show that McGee, the third-party purchaser, had purchased drugs at this location on other occasions or knew that drugs could be purchased there. Also, this testimony was relevant because it made it more probable that the drugs found at the residence and held by the defendant were held for delivery or distribution.

I would have affirmed the judgment of the district court.

BOSLAUGH, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. HAROLD A. ZITTERKOPF, APPELLANT.
STATE OF NEBRASKA, APPELLEE, V. STACY ZITTERKOPF, ALSO KNOWN AS STACY BELL, APPELLANT.

463 N.W.2d 616

Filed December 7, 1990. Nos. 89-1252, 89-1253.

1. **Convictions: Circumstantial Evidence: Proof.** A defendant may be convicted by circumstantial evidence which establishes the defendant's guilt beyond a reasonable doubt. The State is required to establish the defendant's guilt for the crime charged, but is not required to disprove every hypothesis consistent with the defendant's presumed innocence.
2. **Controlled Substances: Evidence: Circumstantial Evidence: Proof.** Constructive possession of an illegal substance may be proved by direct or circumstantial evidence, and may be shown by the accused's proximity to the substance at the time of arrest or by a showing of dominion over the substance.
3. **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.
4. **Controlled Substances: Circumstantial Evidence: Intent.** Circumstantial evidence may support a finding that a defendant intended to distribute, deliver, or dispense a controlled substance in the defendant's possession.
5. _____: _____: _____. Circumstantial evidence to establish that possession of a controlled substance was with intent to distribute or deliver may consist of the quantity of the substance, the equipment and supplies found with it, the place it was found, the manner of packaging, and the testimony of witnesses experienced and knowledgeable in the field.
6. _____: _____: _____. Possession of a quantity of a controlled substance in a form customarily used for delivery or distribution will support an inference of possession with intent to deliver or distribute.

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

Charles F. Fitzke, Scotts Bluff County Public Defender, and Robert L. Wolf for appellants.

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

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

SHANAHAN, J.

Harold A. Zitterkopf and Stacy Zitterkopf, formerly Stacy

Bell, appeal from their convictions and sentences for possession of cocaine, in violation of Neb. Rev. Stat. § 28-416(3) (Cum. Supp. 1988), and intending to distribute, deliver, or dispense marijuana which each possessed, in violation of § 28-416(1)(a). After Zitterkopfs were convicted in a consolidated jury trial, see Neb. Rev. Stat. § 29-2002 (Reissue 1989), in which the same counsel represented both Zitterkopfs, the district court sentenced Harold Zitterkopf to concurrent terms of imprisonment, that is, 1 year on the cocaine conviction and 4 to 5 years on the marijuana conviction, with credit for time in custody pending disposition of the charges. The court sentenced Stacy Zitterkopf to concurrent prison terms of 1 year on her cocaine conviction and 2 years on her marijuana conviction, with credit for custodial time.

Stacy Bell, her children, and Harold Zitterkopf lived in a house north of Scottsbluff, Nebraska. Pursuant to a search warrant, law enforcement officers entered the Bell-Zitterkopf residence. After this incident, Stacy Bell married Harold Zitterkopf and in this opinion is designated "Stacy Zitterkopf."

When Detective Robert Kinsey of the Scottsbluff Police Department entered the Zitterkopf residence and announced that he was a police officer with a search warrant, Detective Kinsey observed Stacy Zitterkopf, who was sitting in a living room chair, make a movement toward the end table next to her. On the end table were two straws and a razor blade sitting atop a framed mirror. Investigator Alex Moreno, trained by the Drug Enforcement Administration (DEA) and familiar with controlled substances cases, identified the items on the table as common implements used for "snorting" cocaine. Also on the table were a metal tube, which was later chemically analyzed and found to contain cocaine; cigarette papers; and a radio "scanner" for monitoring police radio communications.

On the floor beside the end table, officers found a sheet designating police radio frequencies and a "10 code" list for interpretation of police radio communications and for deciphering the "code that law enforcement people use for radio transmissions." Zitterkopfs used the scanner to select transmissions "over the police radio" and "listen to the police traffic on the radio." Detective Kinsey, who had received DEA

training and had investigated over 100 cases involving criminal possession and distribution of cocaine and marijuana, testified that one frequency which appeared on the Zitterkopfs' list was a "secured channel" used for confidentiality during police investigations in controlled substances cases. The officers also seized from the floor beside the end table a box of sandwich baggies; a pile of currency totaling $775, mostly in $20 bills; a folded plastic baggie later determined to contain 2.481 grams of cocaine; and a brown glass vial containing a substance later chemically determined to be cocaine. Near the table, officers found two plastic bags which, according to a subsequent chemical analysis, contained a total of 271.2 grams, or approximately 9.56 ounces, of marijuana, a quantity customarily used for repackaging. Marijuana for personal consumption is usually packaged in 1/4-ounce quantities. The last item seized from the Zitterkopfs' living room was an electronic scale, a type "commonly found during narcotic investigations" because it measures to a fraction of an ounce and thus assures drug buyers that they are purchasing a specific quantity of a substance. Although police had seized an electronic and a balance scale from the Zitterkopf residence in February 1989, Harold Zitterkopf replaced the scales within a month.

As the officers moved throughout the Zitterkopf house, they continued to find other items containing quantities of or residue from suspected controlled substances. In a bathroom closet, the officers discovered a spoon with a residue later tested and ascertained to be cocaine. A search of the master bedroom resulted in seizure of a brown glass vial which was used to store, measure, and "snort" cocaine and which contained cocaine residue. The officers also seized from the bedroom a heart-shaped tin container which was filled with plastic bags containing later-identified cocaine residue. Both Harold and Stacy Zitterkopf claimed that Harold owned the plastic bags found in the heart-shaped tin, while Stacy owned the tin itself. Stacy Zitterkopf was aware that Harold used the tin as a container to prevent the Bell children's access to cocaine kept in the tin.

Harold Zitterkopf testified that the $775 found in the living

room was his "spending money" and represented a portion of the wages he earned by working at a sugar factory, as well as money received from the recent sale of three dogs which he had raised. He admitted ownership of the two bags of marijuana found in the living room and claimed that he had received one bag as a gift from a friend and had purchased the other for his "own private use" without intent to sell the marijuana.

Both Stacy and Harold Zitterkopf testified that the electronic scale belonged to Stacy, who was a coin collector and used the scale to identify certain coins; for example, "They manufactured two different dimes in 1982 and the only way you can tell the difference is by weighing them." Stacy Zitterkopf was aware of the two bags of marijuana in the living room, but denied possession of the marijuana.

At the conclusion of all the evidence, Harold Zitterkopf moved for a directed verdict on the marijuana charge, contending there was insufficient evidence to prove his intent to distribute the marijuana. Stacy Zitterkopf made an identical motion regarding the marijuana distribution charge against her, but also requested a directed verdict on the charge that she possessed cocaine and marijuana. The court overruled the motions for directed verdicts.

On appeal, the Zitterkopfs claim the district court erred by overruling their motions for directed verdict and imposing excessive sentences. The defense attorney's multiple representation in defending Harold and Stacy Zitterkopf is not raised as an issue.

MOTIONS FOR DIRECTED VERDICT

> "In a criminal case a court can direct a verdict only when (1) there is a complete failure of evidence to establish an essential element of the crime charged, or (2) evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained."

State v. Pettit, 233 Neb. 436, 462, 445 N.W.2d 890, 906 (1989) (quoting *State v. Pierce*, 231 Neb. 966, 439 N.W.2d 435 (1989)). Accord *State v. Lane*, 227 Neb. 687, 419 N.W.2d 666 (1988).

> 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). Accord, *State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990); *State v. Loveless*, 234 Neb. 463, 451 N.W.2d 692 (1990).

> 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). Accord, *State v. Reynolds, supra*; *State v. Loveless, supra*.

" 'A defendant may be convicted by circumstantial evidence which establishes the defendant's guilt beyond a reasonable doubt. The State is required to establish the defendant's guilt for the crime charged, but is not required to disprove every hypothesis consistent with the defendant's presumed innocence.' " *State v. Oldfield, ante* p. 433, 444, 461 N.W.2d 554, 562 (1990) (quoting *State v. Blue Bird*, 232 Neb. 336, 440 N.W.2d 474 (1989)). Accord *State v. Loveless, supra*.

"Constructive possession of an illegal substance may be proved by direct or circumstantial evidence, and may be shown by the accused's proximity to the substance at the time of arrest or by a showing of dominion over the substance." *State v. Salas*, 231 Neb. 471, 474, 436 N.W.2d 547, 549 (1989).

When the officers entered Stacy Zitterkopf's home to execute the search warrant, she was sitting in a living room chair near which the officers found two bags of marijuana and a folded plastic baggie, a metal tube, and a brown glass vial, all of which contained cocaine. On account of Stacy Zitterkopf's proximity to the cocaine and marijuana, and the other circumstances at the time of the search, we cannot conclude that there is a complete failure of evidence to prove possession

or that the evidence lacked probative value so that a finding of guilt is unsustainable. Therefore, the evidence presented a submissible issue for the jury on the question of Stacy Zitterkopf's possession of cocaine and marijuana; hence, the district court was correct in overruling the motion for a directed verdict on Stacy Zitterkopf's claim that the evidence failed to establish her possession of cocaine and marijuana.

Harold and Stacy Zitterkopf also moved for directed verdicts on the issue of intent to distribute, deliver, or dispense marijuana. " '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. Oldfield, supra* at 444, 461 N.W.2d at 562 (quoting *State v. Hoffman*, 227 Neb. 131, 416 N.W.2d 231 (1987)). Accord *State v. Blue Bird, supra*. Therefore, circumstantial evidence may support a finding that a defendant intended to distribute, deliver, or dispense a controlled substance in the defendant's possession. *State v. Salas, supra*; *State v. Britt*, 228 Neb. 201, 421 N.W.2d 791 (1988); *State v. Lee*, 227 Neb. 277, 417 N.W.2d 26 (1987).

> "Circumstantial evidence to establish that possession of a controlled substance was with intent to distribute or deliver may consist of the quantity of the substance, the equipment and supplies found with it; the place it was found; the manner of packaging; and the testimony of witnesses experienced and knowledgeable in the field."

State v. Oldfield, supra at 445, 461 N.W.2d at 562 (quoting *State v. Turner*, 192 Neb. 397, 222 N.W.2d 105 (1974)). " ' "Possession of a quantity of a controlled substance in a form customarily used for delivery or distribution will support an inference of possession with intent to deliver or distribute." ' " *State v. Oldfield, supra* at 445, 461 N.W.2d at 562 (quoting *State v. Eary*, 235 Neb. 254, 454 N.W.2d 685 (1990)).

As detailed above, at the Zitterkopf residence officers seized a box of plastic sandwich baggies found near two bags of marijuana totaling 9.56 ounces. According to Detective Kinsey, baggies are often used for marijuana distribution because marijuana is usually purchased by the dealer in bulk, then

divided into 1/4-ounce quantities and placed in smaller plastic baggies for a street sale price of approximately $30. In the vicinity where the marijuana and baggies were found, officers also located a sophisticated electronic scale commonly used in sales of controlled substances.

On account of the quantity of marijuana found at the Zitterkopf residence, the type of marijuana packaging, the equipment and supplies found near the marijuana, and the testimony of officers who are trained and experienced in enforcing the laws regarding controlled substances, the district court properly overruled the motions for directed verdicts on the issue of the Zitterkopfs' intent to distribute the marijuana found in the Zitterkopf residence.

EXCESSIVE SENTENCES

In Zitterkopfs' second assignments of error, both contend that the district court imposed excessive sentences on them. The Zitterkopfs were prosecuted for violations of § 28-416(3), possession of cocaine, a Class IV felony, and § 28-416(1)(a), possession of marijuana with intent to deliver, a Class III felony. Class IV felonies are punishable by a maximum 5-year term of imprisonment, a $10,000 fine, or both such imprisonment and fine, with no minimum penalty prescribed. Class III felonies carry a maximum punishment of 20 years' imprisonment, a $25,000 fine, or both such imprisonment and fine, with a minimum term of 1 year in prison. Neb. Rev. Stat. § 28-105 (Reissue 1985).

"A sentence imposed within the statutory limits will not be disturbed on appeal unless the sentencing court has abused its discretion in the sentence imposed." *State v. Kitt*, 232 Neb. 237, 240, 440 N.W.2d 234, 236 (1989). Accord *State v. Blue Bird*, 232 Neb. 336, 440 N.W.2d 474 (1989). This court has also said:

> [I]n considering a proper sentence, the trial court is not limited in its discretion to any mathematically applied set of factors. It is necessarily a subjective judgment and includes the observations of the sentencing judge as to the demeanor, attitude, and all facts and circumstances surrounding the life of the defendant.

State v. Stranghoener, 208 Neb. 598, 603, 304 N.W.2d 679, 682 (1981). Whether the sentence imposed is probation or

incarceration is a matter within the discretion of the trial court, whose judgment denying probation will be upheld in the absence of an abuse of discretion. *State v. Brown*, 225 Neb. 418, 405 N.W.2d 600 (1987); *State v. Lane*, 227 Neb. 687, 419 N.W.2d 666 (1988).

We have reviewed the presentence report on each of the Zitterkopfs and the record of the sentence hearing, all in the light of the Zitterkopfs' convictions for violations of the statutes prohibiting criminal conduct related to controlled substances. Since the sentences in the present case are well within the statutory limits for each offense, we cannot state that the sentences imposed are an abuse of discretion.

The convictions and sentences of Stacy Zitterkopf and the convictions and sentences of Harold Zitterkopf are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RICHARD L. HAMAN, APPELLANT.

463 N.W.2d 621

Filed December 7, 1990. No. 89-1488.

Appeal from the District Court for Douglas County, STEPHEN A. DAVIS, Judge, on appeal thereto from the County Court for Douglas County, WALTER H. CROPPER, Judge. Judgment of District Court affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Cheryl M. Kessell for appellant.

Robert M. Spire, Attorney General, and Wynn Clemmer for appellee.

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

PER CURIAM.

The district court for Douglas County affirmed the judgment of the county court finding appellant guilty of operating a motor vehicle while his operator's license was suspended, second offense. The appellant was sentenced to a term of 90 days in the Douglas County Corrections Center and ordered to pay a fine of $500, and his license was suspended for 730 days. Credit was given for pretrial jail time.

A single error is assigned, that the evidence is insufficient to support the verdict. The assignment is without merit.

Without objection, the court received certified copies of a previous counseled conviction of appellant for driving under suspension and a certificate of the Department of Motor Vehicles that on the date of the offense the license had not been reinstated. The testimony of the owner of the car that she was a passenger while the appellant operated the car on the date of the offense is challenged by the appellant as not believable because of the breakup of her previous intimate relationship with the appellant. The court found the owner's testimony credible.

We do not reweigh facts in a criminal case. *State v. Wyatt*, 234 Neb. 349, 451 N.W.2d 84 (1990). Since there is sufficient evidence to support the judgment, we affirm.

AFFIRMED.

JAMES V. ELWOOD, APPELLANT, V. PANHANDLE CONCRETE CO. AND THE ST. PAUL PROPERTY AND LIBERTY INSURANCE CO., APPELLEES.

463 N.W.2d 622

Filed December 7, 1990. No. 90-147.

1. **Workers' Compensation: Appeal and Error.** The findings of fact made by the compensation court after rehearing shall have the same 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 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.** As the trier of fact, the Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given their testimony.
4. **Workers' Compensation: Expert Witnesses: Appeal and Error.** When testimony from medical experts conflicts, the Supreme Court will not substitute its judgment for that of the compensation court.
5. **Trial: Pretrial Procedure: Pleadings.** Issues specified at a pretrial conference control the course of an action and constitute the issues on which the case is tried. Issues delineated in an unaltered pretrial order supplant the issues raised in the pleadings.
6. **Workers' Compensation: Attorney Fees: Costs.** The Nebraska workers' compensation statutes provide for attorney fees and expenses in four instances: (1) when the employer refuses payment or neglects to pay compensation for 30 days after an employee's injury, (2) when an employer files an application for rehearing before the compensation court from an award of a single judge of that court and does not obtain a reduction in the award, (3) when an employee applies for a rehearing from the order of a single judge denying any award and obtains an award on rehearing, and (4) when an employee applies for a rehearing from an award of a single judge and increases the award on rehearing.
7. **Workers' Compensation: Attorney Fees: Notice.** Attorney fees in workers' compensation cases are allowable only pursuant to statutory authorization. The concept of the presence of a reasonable controversy applies only in cases where an employer has erroneously refused to make payments after having been given 30 days' notice of disability.
8. **Workers' Compensation: Attorney Fees: Costs.** When a reasonable attorney fee is allowed the employee against the employer as provided in Neb. Rev. Stat. § 48-125 (Reissue 1988), the compensation court shall further assess against the employer the cost of depositions admitted into evidence, and may further assess against the employer the fees and mileage for witnesses necessary to the employee. Neb. Rev. Stat. § 48-172 (Reissue 1988).

Appeal from the Workers' Compensation Court. Affirmed in part, and in part reversed and remanded.

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

Stephen W. Kay, of Kay & Kay, for appellees.

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

WHITE, J.

James V. Elwood, the plaintiff, has appealed from an award on rehearing by a three-judge panel of the Workers'

Compensation Court. The defendants, Panhandle Concrete Co. (Panhandle) and The St. Paul Property and Liability Insurance Co., were ordered to pay benefits and medical expenses. Elwood asserts that the compensation court's award was contrary to the law and evidence concerning the extent of his disability, the period of his temporary total disability, and the failure to order the defendants to pay future medical bills. Elwood also assigns as error the court's failure to award penalties, interest, attorney fees, and costs, including expert witness fees. We affirm in part and reverse in part.

"The findings of fact made by the compensation court after rehearing shall have the same effect as a jury verdict in a civil case and will not be set aside unless clearly wrong." *Martinez v. Nebraska Dupaco*, 235 Neb. 720, 721, 457 N.W.2d 285, 286 (1990). "In testing the sufficiency of evidence to support 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." *Id.* at 721, 457 N.W.2d at 287.

Elwood began working for Panhandle in September 1986 as a block machine operator. On October 13, 1987, as he was moving concrete blocks off a table to stack them, he felt a severe pain in his back, "shooting down to the low back and to the left." Elwood testified that later that day he reported the incident to his supervisor.

Elwood stated that his pain increased during the day and that he went to the Torrington, Wyoming, Community Hospital that evening. No x rays were taken, but the doctor manipulated his back, prescribed pain medication, and advised Elwood not to return to work for several days. Elwood visited the doctor again on October 16, 1987, and was given authorization to return to work on October 19. Upon his return to work, Elwood continued to run a block machine and also drove a Redimix truck.

On December 4, Elwood was laid off by Panhandle. He has not had substantial employment since that time. He testified that he received unemployment benefits and attended school, but failed or withdrew from several classes. Prior to his employment with Panhandle, Elwood had worked in Wyoming

mines for 22 years. His formal education ended with the 10th grade, but he has received a GED.

Elwood consulted with physicians about his back in May 1988, when x rays and a CAT scan were taken. He testified that he did not visit a doctor earlier because he lacked funds. At the time of the rehearing, Elwood testified that he could lift about 20 pounds and go up and down stairs slowly, but he could not stoop, crawl, or bend to touch his toes. He said he could sit for about an hour at a time and could stand for a few minutes before changing positions due to discomfort. He could walk 5 to 10 minutes before experiencing discomfort and could lie down for 45 minutes to 1 hour before discomfort occurred.

Conflicting testimony was received from two physicians, each of whom based his opinion on a reasonable degree of medical certainty. Dr. Bruce Claussen, a nonpracticing orthopedic surgeon, examined Elwood at the request of the defendants. His diagnosis was that Elwood suffers from chronic low back syndrome, and he suggested that Elwood was entitled to an impairment rating of 5 percent of the body as a whole, based on the 1987 accident. Claussen's conclusion was reached after he compared x rays which were taken in 1986 for a preemployment physical with those taken in May 1988. Elwood had reported no other falls or accidents during this period, but had stated that he had a truck accident in 1969 or 1970. Claussen testified that he believed the degenerative changes which he saw in Elwood were secondary to the truck accident.

Although Claussen had no opinion as to the cause of further wedging of the vertebra evident in the 1988 x rays, he said that he would add 5 percent to the previous impairment, for a total impairment of 10 percent.

The deposition of Dr. Richard Southwell, an orthopedic surgeon, was received on Elwood's behalf. He testified that he had examined Elwood on four occasions, beginning on May 24, 1988. He diagnosed Elwood as suffering from a lumbosacral strain superimposed upon degenerative back disease and testified that he believed Elwood sustained an accidental injury on October 13, 1987.

Southwell also examined the 1986 x rays and found a normal bone structure. He testified that the later x rays showed a

compression fracture, a partial collapse of the bone structure, which occurred after the 1987 injury. His conclusion was a 15-percent whole-body medical impairment from the 1987 injury and a total impairment of 28 percent. He recommended that Elwood refrain from bending, lifting, twisting, riding on machinery or vehicles that cause vibration, and prolonged sitting or standing.

Southwell testified that Elwood could not return to his previous type of employment and that he is likely to require further medical treatment intermittently throughout his life.

Upon rehearing, the panel modified the original award by increasing the period that Elwood was entitled to temporary total disability from $^{5}/_{7}$ of a week to $18^{6}/_{7}$ weeks. His benefits were increased from $176.21 for $^{5}/_{7}$ of a week and $17.62 for $299^{2}/_{7}$ weeks, to $176.21 for $18^{6}/_{7}$ weeks and $26.43 for $281^{1}/_{7}$ weeks. The defendants were ordered to pay $777.15 in medical and hospital expenses. Elwood's permanent partial disability was increased from 10 to 15 percent.

While the testimony of the two medical experts disagrees, the compensation court's award on rehearing for temporary total disability benefits and for permanent partial disability is supported by the evidence. "As the trier of fact, the Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given their testimony." *Martinez v. Nebraska Dupaco*, 235 Neb. 720, 723, 457 N.W.2d 285, 288 (1990). When testimony from medical experts conflicts, "[t]his court will not substitute its judgment for that of the compensation court . . . ." *Martinez, supra* at 724, 457 N.W.2d at 288.

The plaintiff also assigns as error the failure of the compensation court to order future medical expenses paid by the defendants. The defendants assert that this question is not properly before us because future medical expenses were not mentioned in the pretrial order.

Plaintiff's petition identified the matters in dispute, which included "[f]uture medical expense under the provisions of the Act." The initial award by a single judge did not address future medical expenses. In Elwood's application for rehearing, he did not specifically identify failure to award future medical

expenses as an error of the court. The pretrial order, which identifies the issues to be determined upon rehearing, also fails to specifically mention future medical expenses.

We have held that a pretrial conference is conducted to simplify and narrow the issues to be presented in a case. " 'Issues specified at a pretrial conference control the course of an action and, unless altered by the court, constitute the issues on which the case is tried. [Citation omitted.] Generally, issues delineated in an unaltered pretrial order supplant the issues raised in the pleadings. [Citation omitted.]' " *Bituminous Casualty Corp. v. Deyle*, 234 Neb. 537, 540, 451 N.W.2d 910, 913 (1990), quoting *Bump v. Firemens Ins. Co.*, 221 Neb. 678, 380 N.W.2d 268 (1986).

Under the rules of procedure of the Workers' Compensation Court,

> one of the objectives of the settlement conference is to narrow and reduce the number of issues and to limit the rehearing to matters which are essential and material to the issues to be decided on appeal. The rule [rule XXIV] further provides that the pretrial order shall supersede all other pleadings and shall set forth a statement of the issues to be determined.

Beavers v. IBP, Inc., 222 Neb. 647, 652, 385 N.W.2d 896, 899 (1986).

The question of Elwood's future medical expenses was not mentioned in the pretrial order, the application for rehearing, or the award, and it is not properly before us now.

Elwood has also asserted error in the failure of the compensation court to award additional costs and fees. We agree in part and remand to the Workers' Compensation Court for the determination of appropriate fees and costs.

Under the Nebraska workers' compensation statutes, see Neb. Rev. Stat. § 48-125 (Reissue 1988), attorney fees and expenses are provided for in four instances:

> (1) A reasonable fee shall be awarded, both in the compensation court and in this court, when the employer refuses payment, or neglects to pay compensation for 30 days after an employee's injury, and the compensation court later makes an award (this award of fees is

> authorized in connection with the proviso in the statute that "fifty percent shall be added for waiting time for all delinquent payments after thirty days' notice has been given of disability"); (2) a reasonable fee shall be awarded when an employer files an application for rehearing before the compensation court from an award of a single judge of that court and does not obtain a reduction in the award; (3) a reasonable fee may be awarded when an employee applies for a rehearing from the order of a single judge denying any award and obtains an award on rehearing; and (4) a reasonable fee may be awarded when an employee applies for a rehearing from an award of a single judge and increases the award on rehearing.

Behrens v. American Stores Packing Co., 234 Neb. 25, 31, 449 N.W.2d 197, 201 (1989).

Elwood's case fits neatly into the fourth category—he applied for a rehearing from an award of a single judge and the award was increased. However, a majority of the three-judge panel held that he was not entitled to an attorney fee because a "reasonable controversy" existed as to the nature and extent of the injury.

In *Behrens, supra*, we attempted to unravel the "reasonable controversy" standard, which had been applied unevenly in workers' compensation cases. We noted that the "reasonable controversy" concept had blurred the distinction between penalties and attorney fees.

> [T]he awarding of attorney fees in compensation cases is purely statutory. . . .
>
> The concept of the presence of a reasonable controversy is to be applied only to the determination as to whether an employee is entitled to the statutory penalties, not including attorney fees, as set out in § 48-125.
>
> Attorney fees are allowable only pursuant to statutory authorization. [Citations omitted.] Whether there is a reasonable controversy or not has nothing to do with the award of attorney fees in workers' compensation cases, except in cases where an employer has erroneously refused to make payments after having been given 30 days' notice of disability. In every case tried before the compensation

> court, there is a reasonable controversy as to some facts before the court. Section 48-125 provides when fees are to be awarded.

Behrens, supra at 32-33, 449 N.W.2d at 201-02. Accord *Snyder v. IBP, inc.*, 235 Neb. 319, 455 N.W.2d 157 (1990).

Elwood increased his award on rehearing, and may therefore be entitled to a reasonable attorney fee in the compensation court. He is also entitled to a fee in this court and is awarded the sum of $1,500 for attorney fees in this court. We remand to the compensation court to determine the amount of the fee, if any, in that court.

We also agree with Elwood that he should be allowed compensation for his costs, as required by Neb. Rev. Stat. § 48-172 (Reissue 1988), which provides in part:

> When a reasonable attorney's fee is allowed the employee against the employer as provided in section 48-125, the compensation court shall further assess against the employer as costs of the employee, the cost of depositions if admitted into evidence, and may further assess against the employer the fees and mileage for necessary witnesses attending the proceedings at the instance of the employee.

The deposition of Dr. Southwell was admitted into evidence, and Elwood should be compensated for its cost. The statute also requires that the necessity for the witness and the reasonableness of the fees shall be approved by the compensation court. On remand, the compensation court should also determine these expenses.

The findings of fact and subsequent award are supported by sufficient evidence, and those findings are not clearly wrong. The judgment of the Workers' Compensation Court as to the extent of Elwood's disability and the period of his temporary total disability is affirmed. The order of the compensation court denying attorney fees and costs is reversed, and the cause is remanded on that issue.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

J.L. HEALY CONSTRUCTION COMPANY, APPELLANT, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLEE.

463 N.W.2d 813

Filed December 14, 1990. No. 88-659.

1. **Jurisdiction: Appeal and Error.** Whether or not a question is raised by the parties concerning jurisdiction of the lower court or tribunal, it is not only within the power but the duty of an appellate court to determine whether such appellate court has jurisdiction over the subject matter.
2. **Pleadings: Actions: Contracts: Torts.** To determine whether an action is based on a contract or a tort, a court must examine and construe a petition's essential and factual allegations by which the plaintiff requests relief, rather than the legal terminology utilized in the petition or the form of a pleading.

Appeal from the District Court for Sheridan County: PAUL D. EMPSON, Judge. Remanded with directions.

Mark F. Enenbach and Steven P. Case, of McGrath, North, Mullin & Kratz, P.C., for appellant.

Robert M. Spire, Attorney General, John E. Brown, and Robert G. Avey for appellee.

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

GRANT, J.

J.L. Healy Construction Company (hereinafter Healy), a South Dakota corporation, filed a petition in the district court for Sheridan County, Nebraska, against the State of Nebraska's Department of Roads (hereinafter DOR), seeking judgment in the amount of $725,719.28. The damages prayed for were based on Healy's allegations that DOR had breached its "duties to Healy" by "negligently failing to perform and administer with care, skill, reasonable expediency and faithfulness" a "contract" between Healy and Sheridan County and "agency agreements" between Sheridan County and DOR. Before the Sheridan County-Healy contract, the county had entered into an agreement with DOR that DOR, as the county's agent, would "supervise . . . all construction work" in connection with the contract. Healy appeals from a judgment of the Sheridan County District Court finding that DOR was negligent only in failing to timely test certain samples and that such negligence

resulted in damages of $4,000, but that DOR generally did not negligently violate any other duties it owed to Healy.

The record shows that Healy filed a claim with the State Claims Board, alleging that DOR was negligent as set out above. The claims board denied Healy's claim. Healy then filed this action. During a 5-day trial, Healy adduced evidence regarding 19 specific ways in which it felt DOR negligently breached contractual duties owed to Healy. Central to these claims is Healy's assertion that the supervisory personnel of DOR who worked on the project were inexperienced and incompetent. Healy argues that this incompetence was apparent through actions such as requiring grossly excessive mixing of asphaltic oil in the roadbed and requiring frequent halting of construction until samples could be taken and test results received from a laboratory in Lincoln.

The parties requested specific findings of fact. The trial court made 53 such findings. Several of those findings supported allegations made by Healy. The court held, however, that in general DOR was not negligent. As stated above, the trial court rendered judgment for $4,000 in favor of Healy, based upon one 8-day delay in receiving results of test samples from a Lincoln lab, and denied any other damages. Healy appeals from that judgment, contending primarily that the specific findings of fact are inconsistent with the court's conclusions of law and that Healy is entitled to a substantially larger amount of damages.

Healy brought this action on a tort theory of "negligent breach of contract." Relying upon language in *Lincoln Grain v. Coopers & Lybrand*, 216 Neb. 433, 345 N.W.2d 300 (1984), Healy pled in its petition that DOR had breached its duties to Healy by "negligently failing to perform and administer with care, skill, reasonable expediency and faithfulness the contract and agency agreements . . . ." Healy contends that a negligent failure to observe any of the contractual conditions is a tort as well as a breach of contract.

Lincoln Grain was an action by the plaintiff company against its auditing firm for failure of the firm to perform its contractual auditing duties, as set out in an "engagement letter," for an audit "in accordance with generally accepted

auditing standards." *Id.* at 434, 345 N.W.2d at 303. The action was between two private corporations. In *Lincoln Grain, supra*, we set out general rules for determining the line between tort actions and breach of contract actions. We also stated that "to the extent there is a choice . . . the parties elected to try this case as if it were one in tort. Ordinarily, as we do in this case, we will dispose of a case on appeal on the theory on which it was presented in the lower court." (Citations omitted.) *Id.* at 438, 345 N.W.2d at 305.

This case differs from *Lincoln Grain* in at least two respects: (1) Healy has sued a department of the State of Nebraska, and, thus, this action is not one between private corporations, and (2) in this case, while Healy elected to try the case as if it were one in tort, DOR did not so elect and indeed objected to such a treatment throughout the case until this appeal.

With regard to the first difference, the basis for an action against the State must rest on the State's waiver of its immunity from suit. That waiver is conditional and set out in statutory provisions establishing procedures that must be followed to give a court jurisdiction of an action against the State. If Healy's action was a tort action, Neb. Rev. Stat. § 81-8,212 (Reissue 1987) requires that a claim be filed with the State Claims Board, and Neb. Rev. Stat. § 81-8,214 (Reissue 1987) provides that an action on such claim is to be heard by the district court of the county where the alleged tort occurred. On the other hand, if Healy's action was a breach of contract action, Neb. Rev. Stat. § 81-1170 (Reissue 1987) requires that a claim be filed with the Director of Administrative Services. An action on such a claim is to be heard "in the district court of the county wherein the capital is situated . . . ." Neb. Rev. Stat. § 25-21,206 (Reissue 1989). In waiving its governmental immunity from suit, the State of Nebraska set out the foregoing procedures which must be followed. The subject matter jurisdiction of the district court is decided by a correct determination of whether the claim is a tort or contract action. See *L.J. Vontz Constr. Co. v. State*, 230 Neb. 377, 432 N.W.2d 7 (1988).

We note that procedural changes have been made in the pertinent Nebraska statutes since the inception of this case, but

those changes do not affect the decision in this case. See Neb. Rev. Stat. §§ 81-8,302 et seq. (Cum. Supp. 1990).

With regard to the second difference, there was no agreement between the parties as to the theory on which the case was to be tried. As stated above, Healy contended that the action was one in tort. DOR alleged in its answer and contended in its opening argument in the trial court that the case properly belonged in contract. At the conclusion of Healy's case in the trial court, DOR made a motion to dismiss "based primarily on the jurisdiction of the Court which, in fact, the evidence has proved that this is a contract claim for the action." The motion was denied. DOR does not present this jurisdictional contention in this court, probably because of a pragmatic conclusion by DOR that it is satisfied with the disposition of the claim as determined by the trial court.

This court has a duty to determine issues of jurisdiction which are apparent from the record. We have said:

> "Whether a question is raised by the parties concerning jurisdiction of the lower court or tribunal, it is not only within the power but the duty of an appellate court to determine whether such appellate court has jurisdiction over the subject matter." *Glup v. City of Omaha*, 222 Neb. 355, 359, 383 N.W.2d 773, 777 (1986). "Where lack of subject matter jurisdiction in the original tribunal is apparent on the face of the record, yet the parties fail to raise that issue, it is the duty of the reviewing court to raise and determine the issue of jurisdiction sua sponte." *Id.*

In re Interest of L.D. et al., 224 Neb. 249, 256, 398 N.W.2d 91, 97 (1986).

If this action rests in contract, the district court in Sheridan County was without jurisdiction to hear the case because a contract claim against a state agency must be heard in the district court for Lancaster County, after such a claim is first submitted to the Director of Administrative Services. This claim, described by Healy as a tort claim, was submitted to the State Claims Board and was heard in Sheridan County. The determination as to whether the present claim rests in tort or in contract determines the jurisdiction of the Sheridan County District Court, and this court, to consider Healy's petition.

The principle determinative of this issue was set out most recently in a case decided after the trial in this case, but before the briefs were filed herein. In *L.J. Vontz Constr. Co. v. State, supra* at 382, 432 N.W.2d at 11, we said: "[T]o determine whether an action is based on a contract or a tort, a court must examine and construe a petition's essential and factual allegations by which the plaintiff requests relief, rather than the legal terminology utilized in the petition or the form of a pleading."

We have also said: "It is recognized that if an action is not maintainable without pleading and establishing the contract, if the gist of the action is the breach of the contract, either by malfeasance or nonfeasance, it is in substance, whatever may be the form of the pleading, an action on the contract." *Fuchs v. Parsons Constr. Co.*, 166 Neb. 188, 193, 88 N.W.2d 648, 652 (1958). See, also, *In re Appeal Roadmix Construction Corporation*, 143 Neb. 425, 9 N.W.2d 741 (1943); *McNeel v. State*, 120 Neb. 674, 234 N.W. 786 (1931).

The trial court in this case, in its conclusions of law, stated that DOR's "duties to Healy, including the universal duty of performance in a reasonable manner, all arise out of the contract. No contract, no duty." It is clear that DOR's duties to Healy existed solely because of the contractual relationship between Healy and Sheridan County. DOR's alleged contractual-tort liability to Healy is further attenuated by the fact that DOR has no contract with Healy, and DOR's tort or contract liability can be based only on its status as an agent of Sheridan County.

In *L.J. Vontz Constr. Co. v. State*, 230 Neb. 377, 432 N.W.2d 7 (1988), the contractor had entered into a contract with DOR. In the present case, the contractor Healy entered into a contract with Sheridan County, which in turn entered into a contract, or agency agreement, with DOR. Nonetheless, the facts and issues in *Vontz* are similar to those in this case. The contractor in *Vontz* alleged that DOR was negligent in that it "furnished inadequate and misrepresented engineering and design for the projects, which resulted in substantial project delays and increased Vontz' costs to complete the projects" and because DOR "failed to properly administer the contracts." *Id.* at 383,

432 N.W.2d at 12. The *Vontz* court first determined that the action belonged in contract and not in tort. We said:

> Contract actions, which arise from a breach of a duty imposed on one by an agreement, protect a plaintiff's interest in or right to performance of another's promises, whereas tort actions, which arise from a breach of a duty imposed by law, protect a plaintiff's interest or right to be free from another's conduct which causes damage or loss to the plaintiff's person or property.

Id. at 382-83, 432 N.W.2d at 11.

In this case, as in *Vontz*, there were no allegations of damage or loss to person or property, but simply allegations of a failure in the performance of another's promises. Attached to Healy's petition and adduced as evidence in the trial herein was the 74-page contract between Healy and Sheridan County, including various amendments and change orders. Referred to in the petition and adduced as evidence was the nine-page agreement between Sheridan County and DOR. DOR's contractual duties to Healy can only be those spelled out in those contractual agreements. This case is not a tort case, but an action in contract, unless we are to create new torts by recognizing that Healy may recover damages in tort, based on allegations, among others, in its petition that DOR was negligent when it, "without reason, imposed liquidated damages upon Healy and imposed other penalties in a manner not contemplated by the contract."

Healy's action was improperly brought in tort when its remedy, if any, exists in an action for breach of the construction contract, which outlines the parties' respective duties and obligations. We need not consider whether Healy's pleadings are sufficient to raise a contract claim, because the district court had no jurisdiction to hear a contract claim against an agency of the State without prior submission of the claim to the Director of Administrative Services pursuant to § 81-1170. See *Vontz, supra*.

The order of the district court is vacated and the cause remanded to the district court with directions to dismiss Healy's petition.

REMANDED WITH DIRECTIONS.

WHITE, J., concurs.

JOSEPH HEITING AND SONS, A PARTNERSHIP, APPELLANT, V. JACKS BEAN COMPANY, A COLORADO CORPORATION, APPELLEE.

463 N.W.2d 817

Filed December 14, 1990. No. 88-774.

1. **Summary Judgment.** Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record show that no genuine issue exists as to any material fact or as to the ultimate inferences that may be drawn from any material fact and that, as a matter of law, the moving party is entitled to judgment.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, we view the evidence in a light most favorable to the party against whom the judgment is granted and give such party the benefit of all reasonable inferences deducible from the evidence.
3. **Contracts: Offers to Buy or Sell.** A fundamental concept in contract law is that to create a contract there must be both an offer and an acceptance. There must also be a meeting of the minds or a binding mutual understanding between the parties to the contract.
4. **Contracts: Summary Judgment.** Summary judgment is not proper if conflicting evidence is presented to show whether a contract existed.
5. **Offers to Buy or Sell.** The mere statement of the price at which property is being held cannot be understood as an offer to sell.
6. **Contracts: Offers to Buy or Sell.** Acceptance of an offer may be expressed in a variety of forms. Acceptance may be illustrated by words, conduct, or acquiescence.
7. _____: _____. Acceptance of an offer by an alleged act, words, or conduct is determined by a reasonable person standard.
8. _____: _____. Acceptance of an offer may also be indicated by the silence and inaction of an offeree.
9. **Uniform Commercial Code: Statute of Frauds.** As a general rule, exceptions to the provisions of the statute of frauds found in the Uniform Commercial Code cannot be enlarged by usage in the trade.
10. **Uniform Commercial Code: Sales: Words and Phrases.** Acceptance of goods under Neb. U.C.C. § 2-606(1)(c) (Reissue 1980) occurs when the buyer does any act inconsistent with the seller's ownership.
11. **Uniform Commercial Code: Contracts: Sales.** When, under an alleged contract of sale, the buyer cannot return the original goods, that may be a factor to consider in determining whether a sale has been made.
12. **Uniform Commercial Code: Sales: Vendor and Vendee: Words and Phrases.** Delivery by a seller generally occurs when the seller has done everything necessary to put goods completely and unconditionally at the buyer's disposal.
13. **Uniform Commercial Code: Contracts: Statute of Frauds.** Where the conduct that is relied upon for part performance is consistent with a contract, such conduct may be sufficient to take the contract out of the statute of frauds even though the conduct is not inconsistent with some other arguable possible arrangement between the parties.

14. **Uniform Commercial Code: Contracts: Sales: Evidence: Trial.** Where the evidence as to receipt and acceptance under the Uniform Commercial Code is not conclusive, the question is one of fact to be resolved by the fact finder.

Appeal from the District Court for Sheridan County: PAUL D. EMPSON, Judge. Reversed and remanded for further proceedings.

Peter C. Wegman, of Rembolt Ludtke Parker & Berger, for appellant.

Paul W. Snyder, of Van Steenberg, Chaloupka, Mullin, Holyoke, Pahlke, Smith, Snyder & Hofmeister, for appellee.

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

HASTINGS, C.J.

The plaintiff, Joseph Heiting and Sons (Heiting), has appealed the order of the district court which entered summary judgment in favor of the defendant, Jacks Bean Company (Jacks). Heiting had filed suit for damages for breach of an alleged oral contract for the sale of its beans to Jacks. Heiting assigns as error that the court incorrectly determined that there were no genuine issues of material fact and failed to find that an exception to the statute of frauds provision of Neb. U.C.C. § 2-201 (Cum. Supp. 1990) applied to the facts of this case. We reverse and remand for further proceedings.

Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record show that no genuine issue exists as to any material fact or as to the ultimate inferences that may be drawn from any material fact and that, as a matter of law, the moving party is entitled to judgment. Neb. Rev. Stat. § 25-1332 (Reissue 1989); *First Nat. Bank v. Chadron Energy Corp., ante* p. 199, 459 N.W.2d 736 (1990); *Rosnick v. Dinsmore*, 235 Neb. 738, 457 N.W.2d 793 (1990). In reviewing a summary judgment, we view the evidence in a light most favorable to the party against whom the judgment is granted and give such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

Jacks is a Colorado corporation with headquarters in Holyoke, Colorado. Jacks purchases beans at its warehouse,

processes the beans, and eventually sells the beans. Jacks has a procedure in receiving the beans. A grower brings the beans to Jacks' facility in Sheridan County, Nebraska. The manager of the facility, Richard Schneider, takes a 500-gram sample from the load of beans and grades the beans on a scale of 1 to 5 based on the amount of split beans, stems, dirt, and other debris (tare) in the sample. Grade 1 is the highest and grades 4 and 5 are substandard.

If the grade assigned is acceptable to the grower, the beans are dumped into a bin at Jacks' facility and are commingled with beans from other growers. When the bins are full, the beans are transported to Jacks' processing plant, where the beans are processed. The beans are considered stored if the grower and Jacks have not reached an agreement for sale and purchase within 30 days despite the fact that a grower's particular beans may have already been processed. The storage charge to the grower is $0.003 per hundredweight per day.

Schneider receives a daily call from Jacks' headquarters in Holyoke, Colorado, advising Schneider of the prices for the various types of beans to be purchased by Jacks that day. The prices generally remain the same throughout the day, but the prices are subject to change. The daily prices are posted in the grading room at Jacks' facility, published in the Scottsbluff, Nebraska, newspaper, and broadcast over the Alliance, Nebraska, radio station. Ordinarily, the process of calling in and selling the beans previously delivered to Jacks is not in writing.

Joseph Heiting and Sons is a partnership consisting of Joseph Heiting and his sons, Steve and Tim. The partnership is engaged in farming. The partners each have a one-third interest in the partnership; however, Joseph Heiting (Mr. Heiting) does the selling. Heiting delivered its beans to Jacks from September 18 to September 29, 1987. Each load was graded, weighed, and receipted for by delivery of a scale ticket. During that time, Heiting delivered 12 loads of beans for a total of 2,837.75 hundred-pound bags, each assigned grade 1. The beans were commingled at Jacks' facility in Sheridan County with beans from other producers and shipped to Jacks' processing facility.

On September 30, 1987, Mr. Heiting called and told

Schneider that he wanted to sell Heiting's beans. The posted price was $19. Mr. Heiting was told by Schneider that he would "call them in." Mr. Heiting construed this to mean that the beans were sold at $19. Mr. Heiting believed Jacks could purchase all the beans Heiting had to sell at the posted price because he was never informed that there was limited buying.

Schneider did not recall if he or Cheryl Johnson, the bookkeeper and receptionist for Jacks, had spoken to Mr. Heiting. Schneider later stated that he had told Mr. Heiting of the limited buying when Mr. Heiting called Jacks to sell the beans.

Mr. Heiting discovered 1 or 2 days after September 30 that Jacks had not purchased the beans. The price had dropped to $18 per bag. Mr. Heiting made no attempt to sell at that price. The beans were sold in March 1988 at a price of $15 per bag. Mr. Heiting was not called back for verification of the purchase.

Although the beans were not purchased by Jacks until March 1988, Heiting received a separate check in 1987 as a freight payment of $0.25 per hundredweight for all beans delivered to Jacks. Schneider testified that the freight payment is due when a load of beans is hauled to Jacks' facility.

Heiting brought this action based on an alleged oral contract between the parties to purchase all the beans stored at Jacks for $19 per bag.

A fundamental concept in contract law is that to create a contract there must be both an offer and an acceptance. There must also be a meeting of the minds or a binding mutual understanding between the parties to the contract. See *Woods v. Woods*, 177 Neb. 542, 129 N.W.2d 519 (1964). A contract may be written or oral and can be shown by circumstantial evidence. See *Woods, supra*.

Summary judgment would not be proper if conflicting evidence is presented to show whether a contract existed. See *Robert Johnson Grain Co. v. Chem. Interchange Co.*, 541 F.2d 207 (8th Cir. 1976). When the issue is whether an acceptance of an offer was sufficient to create a contract, the issue is one of fact and summary judgment is not proper. See, *Hansen v. Hill*, 215 Neb. 573, 340 N.W.2d 8 (1983); *Duplex Mfg. Co. v. Atlas Leasing Corp.*, 184 Neb. 294, 166 N.W.2d 732 (1969); *Fay*

Smith & Associates, Inc. v. Consumers P. P. Dist., 172 Neb. 681, 111 N.W.2d 451 (1961).

Heiting has alleged that the posting of a price was an offer which it accepted. Heiting argues in the alternative that Heiting offered the beans for sale and the offer was accepted. In considering the first alternative it is necessary to look at the case of *Nebraska Seed Co. v. Harsh*, 98 Neb. 89, 152 N.W. 310 (1915). In *Harsh*, a letter was sent by Harsh to Nebraska Seed Company indicating that Harsh wanted to sell a quantity of seed and the price at which he would sell the seed. Nebraska Seed Company sent a letter to Harsh accepting the offer. Harsh failed to deliver the seed. This court concluded that Harsh's letter was not an offer but rather a proposal to make an offer. We stated that " '[t]he mere statement of the price at which property is held cannot be understood as an offer to sell.' " *Id.* at 91, 152 N.W. at 311 (quoting *Knight v. Cooley*, 34 Iowa 218 (1872)). The posting of the price on the grading room wall is similar to Harsh's letter. The posting is not an offer. The posting was merely an offer to negotiate directed at the bean growers.

Negotiations began when Mr. Heiting contacted Jacks in an effort to sell Heiting's beans. Mr. Heiting informed Jacks that he was willing to sell all Heiting's beans stored at Jacks for the price posted on the wall. The quantity and price were in the offer.

The offer was communicated to Schneider or Johnson at Jacks' facility. At the time the offer was communicated, Mr. Heiting was told that the sell orders would be called in. The sell orders were the offers to sell the quantity on hand at the posted price. Mr. Heiting did not learn until 1 or 2 days after September 30 that the beans had not been purchased.

Acceptance of an offer may be expressed in a variety of forms. Acceptance may be illustrated by " 'words, conduct, or acquiescence indicating agreement.' " *Overman v. Brown*, 220 Neb. 788, 791, 372 N.W.2d 102, 105 (1985) (quoting 17 C.J.S. *Contracts* § 41 (1963)). Acceptance by an alleged act, words, or conduct is determined by a reasonable person standard. *Overman v. Brown, supra* (citing *In re Mapes Enterprises, Inc.*, 15 Bankr. 192 (D. Nev. 1981)). Acceptance may also be indicated by the silence and inaction of an offeree. *David City*

Hospital v. Gilmore, 184 Neb. 342, 167 N.W.2d 397 (1969).

Heiting offered to sell its beans at the posted price on September 30, 1987. Mr. Heiting was never informed of acceptance or rejection of the offer. When Heiting eventually did sell its beans to Jacks in March 1988, the purchase was not verified. Heiting was not informed of the acceptance or rejection of the offer. Thus, in March, the acceptance was by silence. Whether the offer was accepted in September by silence or inaction is an issue of material fact as to the existence of the alleged oral contract; therefore, summary judgment was not proper on the issue of whether a contract existed.

Next, we consider whether § 2-201, the statute of frauds, applies. The statute reads in pertinent part:

> (1) Except as otherwise provided in this section a contract for the sale of goods for the price of five hundred dollars or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his or her authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.
>
> . . . .
>
> (3) A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable
>
> . . .
>
> (c) with respect to goods for which payment has been made and accepted or which have been received and accepted (Section 2-606).

Although Schneider's deposition testimony suggests that when a producer calls in and says he wants to sell a quantity of beans and the offer is accepted there is nothing in writing between the parties to consummate the sale, exceptions to the provisions of the statute of frauds found in the Uniform Commercial Code cannot be enlarged by usage in the trade. *Farmers Cooperative Ass'n of Churchs Ferry v. Cole*, 239

N.W.2d 808, 814 (N.D. 1976) ("exceptions to the Statute of Frauds cannot be enlarged by usage in the trade, such as a consistent failure of grain dealers to utilize written agreements in their dealings with farmers").

The statute of frauds clearly applies in this case. The sale of beans constitutes the sale of goods. The price involved is in excess of $500. Therefore, the contract for the sale and purchase of the beans is required to be in writing, or enforcement of the contract may be barred by the statute of frauds. In this case, we are concerned with the exception regarding receipt and acceptance of goods as evidence of a contract.

Heiting delivered its beans to Jacks' warehouse. The beans were commingled with beans from other growers, stored in bins, shipped to Jacks' processing facility, and eventually processed. Heiting urges the court to consider these acts as receipt and acceptance of the goods under § 2-201(3)(c), which would make the statute of frauds inapplicable to the alleged agreement.

Heiting argues that the goods have been received and accepted as defined by the Nebraska Uniform Commercial Code. Receipt of goods is defined as "taking physical possession of them." Neb. U.C.C. § 2-103(1)(c) (Reissue 1980). Acceptance occurs when the buyer "does any act inconsistent with the seller's ownership . . . ." Neb. U.C.C. § 2-606(1)(c) (Reissue 1980).

This court has examined the issue of receipt and acceptance of goods on several occasions. In the case of *In re Estate of Nelsen*, 209 Neb. 730, 311 N.W.2d 508 (1981), we noted that delivery alone is not sufficient to take an oral contract for the sale of goods at a price of $500 or more out of the statute of frauds. The goods must be " 'received and accepted' " to render the statute of frauds inapplicable. *Id.* at 733, 311 N.W.2d at 510. Thus, delivery of the beans to Jacks' warehouse would not be enough. There must have been an acceptance.

In *Johnson v. Holdrege Coop. Equity Exchange*, 206 Neb. 568, 293 N.W.2d 863 (1980), an oral contract was entered into before the grain was delivered. At the time of delivery, the grain was tested and commingled with other grain. The grower's

particular grain was impossible to recover. We noted that the actions of the warehouse were inconsistent with the grower's ownership. This court concluded that the actual delivery of goods at a time the price was capable of being made definite may be sufficient to constitute an acceptance. See *Rotterman v. General Mills, Inc.*, 245 Iowa 229, 61 N.W.2d 718 (1953). We held that there was an issue of fact and that therefore summary judgment was not proper.

The grower's grain in *Johnson* was commingled with grain of a lesser quality. Heiting's beans were commingled with beans of the same quality as those delivered. However, in both cases the particular goods delivered could not be returned in the same condition as the goods were in when delivered. The Iowa Supreme Court has stated that when the original goods cannot be returned it may be a sale. See *Rotterman, supra*. Heiting's original beans could not be returned. Although this is not conclusive on the issue of acceptance of the goods, it does offer some support to that proposition.

"Acceptance," as it is used in § 2-201(3)(c), could be evidenced by the following:

(1) Heiting could do nothing further to deliver or present the beans for acceptance. The beans were out of Heiting's control. Delivery occurs when the seller does everything necessary to put goods completely and unconditionally at the buyer's disposal. *Goosic Constr. Co. v. City Nat. Bank of Crete*, 196 Neb. 86, 241 N.W.2d 521 (1976).

(2) Jacks could do nothing further to indicate acceptance of the beans except to pay for the beans. Jacks had already exercised complete control over the beans. See, generally, *O'Day v. George Arakelian Farms, Inc.*, 24 Ariz. App. 578, 540 P.2d 197 (1975) (holding that lettuce was received and accepted because buyer did acts inconsistent with seller's ownership).

(3) The particular beans of Heiting's could not be returned. See, generally, *Rotterman, supra* (finding that where seller cannot get the original grain back, it may be a sale).

There is an issue as to whether or not the receipt and acceptance of the goods were sufficient to bar the application of the statute of frauds. Therefore, summary judgment was not proper.

The North Dakota Supreme Court has stated that "where the conduct that is relied upon for part performance is consistent with the contract, such conduct is sufficient to take the contract out of the statute of frauds even though the conduct is not inconsistent with some other arguable possible arrangement between the parties." *Hofmann v. Stoller*, 320 N.W.2d 786, 791 (N.D. 1982). The conduct of the parties could be perceived as consistent with an oral contract.

In *Wilson v. Remmel Cattle Co., Inc.*, 542 S.W.2d 938 (Tex. Civ. App. 1976), the appellants, the Wilsons, delivered to and placed in a separate pen on the premises of Remmel Cattle Co., Inc., a commercial feedlot engaged in feeding and marketing cattle, a quantity of Wilsons' cattle. The agreement was that the Wilsons would feed and medically attend to their cattle, furnishing the necessary feed and medicine. For the use of the pen, the Wilsons were to perform custom cattle work for Remmel.

Later, Remmel Cattle Co. and Charles Kent Remmel, the manager of the feedlot, sued the Wilsons for feed and care of the cattle, and the Wilsons counterclaimed, alleging an oral agreement pursuant to which the Remmels orally agreed to purchase these cattle. A jury failed to find that the Wilsons agreed with the Remmels to furnish feed and maintenance for the cattle, but found that the Remmels agreed to purchase the cattle for a certain amount, and returned a verdict in a dollar amount for the Wilsons. The trial court denied the Wilsons' motion for judgment on the verdict, but granted Remmels' motion for judgment notwithstanding the verdict. The Wilsons appealed.

In reversing the judgment and remanding the cause, the Texas appeals court stated:

> In our view and contrary to the respective positions of the Wilsons and the Remmels, neither receipt and acceptance nor non-receipt and non-acceptance was established by the evidence as a matter of law. The fact that the cattle were located in the feedlot at the time of the pleaded oral contract does not, under the description of the agreement placing them there, either establish physical possession in the Remmels so as to foreclose their taking physical

> possession under a later contract of sale or ripen into their receipt and acceptance of the cattle upon the mere showing of an oral contract. . . . Their [the parties'] testimony, which only scantly described their dealings, was neither undisputed nor so clear as to conclusively show whether the Remmels did or did not receive and accept the cattle pursuant to an oral contract, and merely raised that factual issue for resolution by the jury.

Id. at 941-42.

We agree that where the evidence as to receipt and acceptance under the Uniform Commercial Code is not conclusive, the question is one of fact to be resolved by the fact finder.

It cannot be said that there exist no genuine issues of material fact. Summary judgment was inappropriate in this instance. The judgment of the district court is reversed, and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

JAMES E. PROKOP, SR., APPELLANT, V. JACKS BEAN COMPANY, A COLORADO CORPORATION, APPELLEE.

463 N.W.2d 628

Filed December 14, 1990. No. 88-775.

Appeal from the District Court for Sheridan County: PAUL D. EMPSON, Judge. Reversed and remanded for further proceedings.

Peter C. Wegman, of Rembolt Ludtke Parker & Berger, for appellant.

Paul W. Snyder, of Van Steenberg, Chaloupka, Mullin, Holyoke, Pahlke, Smith, Snyder & Hofmeister, for appellee.

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

HASTINGS, C.J.

Plaintiff-appellant, James E. Prokop, Sr., brought this action against Jacks Bean Company to recover damages for breach of an alleged oral contract for the sale of Prokop's beans to Jacks. Prokop has appealed the order of the district court which entered summary judgment in favor of Jacks.

This case involves the same defendant as in *Joseph Heiting & Sons v. Jacks Bean Co., ante* p. 765, 463 N.W.2d 817 (1990), as well as a similar set of facts and identical questions of law. Accordingly, because *Heiting* is controlling, the judgment herein is reversed and the cause is remanded for further proceedings consistent with our opinion in *Heiting*.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

DANIEL W. BIRCHEM, APPELLANT, V. RANDAL C. EGGERS, APPELLEE.

463 N.W.2d 824

Filed December 14, 1990. No. 89-220.

1. **Motor Vehicles: Right-of-Way.** A car approaching an intersection is not in a favored position and entitled to proceed regardless of the circumstances merely because the car is on the right of the other car.
2. **Motor Vehicles: Negligence.** A driver approaching a blind intersection must do so at such a speed as will afford him a reasonable opportunity to make effective observations of cars approaching on the intersecting road and give him a reasonable opportunity to properly react to the situation and take what steps are necessary to avoid a collision.
3. _____: _____. Drivers approaching a blind intersection must approach the intersection at such speed that the drivers may effectively exercise an option as to how to proceed as may be indicated by the circumstances when they reach a point where they can see.

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

William E. Gast, of Gast & Peters, and Dennis E. Koley for appellant.

Ray C. Simmons for appellee.

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

BOSLAUGH, J.

This is an action for damages which arose out of a collision between trucks operated by the plaintiff, Daniel W. Birchem, and the defendant, Randal C. Eggers, while driving on intersecting county roads in Cuming County, Nebraska.

The defendant's answer admitted that one of the proximate causes of the collision was his negligence in failing to keep a proper lookout, in failing to maintain his vehicle under reasonable control, and in driving at a speed which was excessive under the circumstances. The defendant further alleged that the plaintiff's negligence, which was more than slight in comparison to that of the defendant, was also a proximate cause of the collision.

Each of the parties moved for summary judgment. The motions were submitted upon the pleadings and the depositions of the parties. The district court sustained the defendant's motion and dismissed the plaintiff's petition. The plaintiff has appealed, assigning as error the granting of summary judgment to the defendant.

The record shows that at about 10:30 a.m. on October 13, 1986, the plaintiff was traveling south on county Road 9 at a speed of 40 to 50 miles per hour. At about the same time, the defendant was traveling west on county Road K at 45 to 50 miles per hour. The roads were dry, and the defendant said he could see clearly.

There was a "Road Closed" sign facing west located on the south side of Road K, 5 feet east of the intersection with Road 9. There was another "Road Closed" sign facing east located on the north side of Road K, 1 mile east of the intersection with Road 9.

Prior to the collision, the defendant was driving west on the 1-mile section of Road K that had been closed for work on a bridge. The defendant had driven on Road K to see if Lorrin Toelle was home. The defendant had worked part time for Toelle in the winters, and the defendant wanted to talk to him

regarding the upcoming winter and to pay a social call.

There was an unharvested cornfield at the northeast corner of the intersection of the county roads. The corn stood at full height and obscured the vision of each driver toward the direction from which the other was traveling.

In his deposition, the plaintiff did not recall whether he looked to the left or right upon approaching the intersection. He stated that at about 10 feet from the intersection he would have been able to see what was coming from the east; however, he did not see the defendant's truck before the collision occurred.

The defendant testified in his deposition that he was 10 to 15 feet from the intersection when he first saw the plaintiff's truck. He could see the side of the plaintiff's face, and the plaintiff was looking straight ahead.

Both men stated that they were familiar with the intersection. The plaintiff had driven through it at least once a day each way since Road K had been closed. He also stated that he was aware that two farm families lived on the section of Road K which had been closed.

Both drivers slowed their vehicles as they entered the intersection. The plaintiff entered the intersection at 20 to 25 miles per hour. The defendant was driving 35 to 40 miles per hour at the time of the collision. The defendant testified that he did not apply his brakes at the time of the collision, and the plaintiff does not recollect whether he applied his brakes.

In *Hodgson v. Gladem*, 187 Neb. 736, 742-43, 193 N.W.2d 779, 783 (1972), this court stated the following rule:

> A car approaching an intersection is not in a favored position and entitled to proceed regardless of the circumstances merely because he is on the right of the other car. His favored position and the right to proceed arising thereunder may be forfeited because of excessive speed under the circumstances. . . .
>
> In this case the undisputed facts show the plaintiff approached a blind, unprotected intersection where he could not see to the left until almost at the intersection and where he had to realize that any car approaching on his left *at whatever speed* could not see him until it was almost in

> the intersection, and he did so at a speed which left him no alternative but to enter the intersection irrespective of whatever his observations might disclose when he reached a position where he could see to his left. Under these circumstances he was guilty of contributory negligence more than slight as a matter of law in that he took no precautions whatever for his safety. We hold that a driver approaching an unprotected intersection where he knows and can readily observe that his view is obstructed must do so at such a speed as will afford him a reasonable opportunity to make effective observations for cars approaching on the intersecting road and give him a reasonable opportunity to properly react to the situation he then observes or could observe, and where his view is completely obstructed and his speed is such that he has given himself no opportunity at all to observe and react appropriately he may, where the facts are undisputed, be found negligent as a matter of law.

(Citation omitted.) (Emphasis supplied.) Accord, *Crink v. Northern Nat. Gas Co.*, 200 Neb. 460, 263 N.W.2d 857 (1978); *Schenk v. Yosten*, 229 Neb. 691, 428 N.W.2d 510 (1988).

Although the facts in this case are undisputed, the plaintiff contends that the *Hodgson* rule is not applicable because the intersection in this case was not an unprotected or uncontrolled intersection, since the road on which the defendant approached the intersection had been closed. Relying on Neb. Rev. Stat. § 39-609(5) (Reissue 1988), which provides that one driving on a closed road must do so with extreme care, the plaintiff argues that a motorist approaching an intersection on a closed road has the duty to slow for or, if necessary, yield the right-of-way to a motorist approaching the intersection on a road unburdened by any traffic control device. Moreover, the plaintiff asserts that a motorist approaching an intersection on an open road has the right to assume that any motorist approaching the intersection on a clearly posted closed road will slow for or, if necessary, yield the right-of-way to such motorist.

Section 39-609(5) applies to the operation of an automobile while it is on that part of the road which is closed, and requires extreme caution so as to avoid the additional hazards that may

be incident to the reason why the road has been closed.

In addition to § 39-609(5), the plaintiff relies on *Hall v. Kolb*, 374 S.W.2d 854 (Ky. 1964), and *Rester v. T. L. James Const. Co.*, 415 So. 2d 272 (La. App. 1982), in support of his argument. However, the Kentucky and Louisiana cases did not involve accidents at intersections which were blind intersections. In the *Hodgson* case and the Nebraska cases following it, the determinative fact is that the intersections involved were blind, not that they were unprotected.

In *Hodgson v. Gladem*, 187 Neb. 736, 740, 193 N.W.2d 779, 782 (1972), we stated:

> The underlying purpose of right-of-way rules is, of course, to prevent collisions and they must be applied, together with the other applicable rules relating to the exercise of due care, in such a way that if the rules are observed they will tend to have this result.
>
> In the case of an intersection with a completely obstructed view, known to be such by the drivers, there are only two alternatives which can have the desired effect. Either the driver of the automobile not having the directional right-of-way must approach the intersection at such a speed that he can observe down the favored road and can stop if necessary before entering and crossing and the driver on the right be deemed to have an absolute right-of-way and have no duty whatever to keep a lookout to his left, assuming he is traveling within the prima facie lawful speed limit, or *both drivers must approach the intersection at such speed that each may effectively exercise an option on how to proceed as may be indicated by circumstances when they reach a point where they can see.* The latter we believe is the more acceptable principle.

(Emphasis supplied.) The latter is the principle applicable to the facts in this case.

Regardless of what the duty is of a motorist approaching a blind intersection from a closed road, a motorist approaching a blind intersection from an open road has the duty to do so at a speed that will afford the motorist a reasonable opportunity to make effective observations for cars approaching on the intersecting road and give such motorist a reasonable

opportunity to properly react to the situation he or she then observes or could observe. Where the motorist's view is completely obstructed and his speed is such that he has given himself no opportunity at all to observe and react appropriately, the motorist is negligent as a matter of law where the facts are undisputed. *Hodgson v. Gladem, supra.*

In this case, although the defendant admitted that he was negligent in approaching the intersection, because the plaintiff approached the intersection at a speed which was too fast to permit him to make a reasonably careful observation and, if required, take reasonable action to avoid a collision, the plaintiff's negligence was more than slight as a matter of law and barred any recovery he might otherwise be entitled to arising out of the accident.

As we said in *Schenk v. Yosten*, 229 Neb. 691, 428 N.W.2d 510 (1988), it is the negligence of the plaintiff in approaching and entering the intersection at a speed too fast to permit reasonably careful observation and, if required, reasonable action to prevent a collision that bars the plaintiff's right to recovery as a matter of law.

The judgment dismissing the action is affirmed.

AFFIRMED.

GRANT, J., dissenting.

I respectfully dissent.

This case, while very similar to *Hodgson v. Gladem*, 187 Neb. 736, 193 N.W.2d 779 (1972), presents controlling additional facts. Here, both parties were familiar with the intersection. Defendant was proceeding on a road closed to traffic. Plaintiff knew that the road on which defendant was traveling was marked "Road Closed," and, although plaintiff ordinarily used that road, he had not used it for at least a month before the accident. The majority opinion states: "The defendant had driven on Road K to see if Lorrin Toelle was home." The record shows that defendant may have chosen to use the closed road as an open road, and not merely for the purpose of calling on residents just west of the point where the road was marked closed. This may present a question of fact concerning Neb. Rev. Stat. § 39-609(5) (Reissue 1988), cited in plaintiff's brief. My search does not show what "Road Closed"

means, but if we reduce the question to consideration of the language itself, perhaps defendant should not have used the road at all, except for the statutorily stated purposes.

Defendant's deposition shows that he was returning to his home from Beemer. He went north from Beemer and turned west on graveled Road K. From the point he turned west, it was 2 miles to the accident site. One mile after his turn, defendant saw the first "Road Closed" sign as he proceeded west. He ignored it. Defendant knew that some "bridge work" was being done on the road, but "could see clearly the bridge was done." This bridge was about seven-eighths of a mile east of the accident site. Defendant stated that the road was "passable" and that he treated it as a "main road." He traveled cautiously over the bridge at about 25 to 30 miles per hour, then sped up to "a normal type status," and then "slowed down" to a speed of 35 to 40 miles per hour as he entered the intersection. When he was 50 to 75 feet from the intersection, defendant could see the back of another "Road Closed" sign, controlling entrance to the road on which defendant was traveling. As defendant approached the intersection, cornfields at both the northeast and southeast corners of the intersection blocked his view both to the north and to the south. The intersection was a "blind" intersection for defendant.

The evidence also shows that plaintiff was going south and entered the intersection at 20 to 25 miles per hour. No corn was planted at the northwest corner of the intersection, and the view of the intersecting road to the west was not blocked. The cornfield at the northeast corner blocked plaintiff's view to the east, as it blocked defendant's view to the north, but plaintiff knew the road to the east was "closed." The intersection might be considered as a "partially blind" intersection for plaintiff. The front of defendant's vehicle struck the door on the driver's side of plaintiff's vehicle.

On these facts, the trial court found: "Plaintiff's negligence in failing to slow and look to the east before entering the intersection is more than slight and bars his recovery as a matter of law." The majority opinion holds to the same effect.

The dispositive question is whether plaintiff's negligence was more than slight *as compared to defendant's negligence*. Neb.

Rev. Stat. § 25-21,185 (Reissue 1989).

Our interpretation of this statute is established. We have said:

> In Roby v. Auker, 151 Neb. 421, 37 N.W.2d 799 (1949), this court interpreted section 25-1151, R.R.S. 1943 [now § 25-21,185 (Reissue 1989)], as follows: "The statute by the use of the words 'when the contributory negligence of the plaintiff was slight and the negligence of the defendant was gross in comparison' clearly intended the words 'in comparison' as qualifying both of the clauses immediately preceding. The words 'slight' and 'gross' as used in the statute are comparative terms and the intent of the statute is that the negligence of the parties shall be compared one with the other in determining questions of slight and gross negligence." See, also, Andelt v. County of Seward, 157 Neb. 527, 60 N.W.2d 604 (1953).

C. C. Natvig's Sons, Inc. v. Summers, 198 Neb. 741, 747, 255 N.W.2d 272, 276 (1977).

When such a comparison is made, it is clear to me that there are fact questions as to the degree of each party's negligence. Plaintiff entered an intersection at 20 to 25 miles per hour when he could see the intersecting road to his right and knew the intersecting road to his left was "closed." Defendant entered the same intersection from a road that he and the other driver knew was marked "closed" at a speed of 35 to 40 miles per hour when he could see neither to his right nor to his left.

We have said:

> "It should be noted here that the final provision of the comparative negligence statute requires that 'all questions of negligence and contributory negligence shall be for the jury.' While that language obviously does not affect the court's right to decide a case as a matter of law, it does emphasize the fact that the determination of questions of negligence and contributory negligence *and the comparative measuring of them are basically factual issues which are generally for determination by the jury*."

(Emphasis in original.) *C. C. Natvig's Sons, Inc. v. Summers, supra* at 747-48, 255 N.W.2d at 277.

Summary judgment is an extreme remedy and is difficult to

use in many tort cases. I do not believe it should be used in this case because fact questions are present. I would reverse the judgment and remand the cause for further proceedings.

WHITE and SHANAHAN, JJ., join in this dissent.

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

463 N.W.2d 829

Filed December 14, 1990. No. 89-1259.

1. **Due Process.** A claim that one is being deprived of a liberty interest without due process of law is typically examined in three stages. The question in the first stage is whether there is a protected liberty interest at stake. If so, the analysis proceeds to the second stage, in which it is determined what procedural protections are required. Upon the resolution of that issue, the analysis moves on to the third and final stage, in which the facts of the case are examined to ascertain whether there was a denial of that process which was due.
2. **Constitutional Law: Mentally Disordered Sex Offender.** A liberty interest is at stake in the determination of whether a defendant is a mentally disordered sex offender under Nebraska's mentally disordered sex offender statutes.
3. **Mentally Disordered Sex Offender: Sentences.** Under Nebraska's mentally disordered sex offender statutes, a defendant must first be sentenced for the sexual offense of which he was convicted. It is only after a mentally disordered sex offender defendant has been sentenced that the court may commit him to a regional center for treatment.
4. **Constitutional Law: Mentally Disordered Sex Offender: Sentences.** The liberty interest a mentally disordered sex offender has, after being sentenced for the sexual crime he or she committed, is the same as that of a prisoner who is transferred from a prison to a mental hospital.
5. **Prisoners: Mental Health: Due Process.** The transfer of a prisoner from a prison to a mental hospital must be accompanied by appropriate procedural protections.
6. **Mentally Disordered Sex Offender: Proof.** For a court to commit a criminal defendant to a regional center under Nebraska's mentally disordered sex offender act, the State must prove by clear and convincing evidence (1) that the defendant is a mentally disordered sex offender, (2) that the defendant is treatable, and (3) that treatment is available in this state.
7. **Mentally Disordered Sex Offender.** Whether a defendant is a mentally disordered sex offender is a question of fact to be determined by the trial court. There is no statutory requirement that the opinion of the examiners be

unanimous.

8. **Sentences: Appeal and Error.** An order imposing a sentence within statutorily prescribed limits will not be disturbed on appeal absent an abuse of discretion.

Appeal from the District Court for Box Butte County: ROBERT R. MORAN, Judge. Affirmed.

Dean S. Forney, Box Butte County Public Defender, for appellant.

Robert M. Spire, Attorney General, and Steven J. Moeller for appellee.

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

FAHRNBRUCH, J.

In this appeal, Lawrence E. Harris, age 54, in substance claims that the trial court erred (1) in basing its finding that he is a mentally disordered sex offender upon "clear and convincing" evidence, rather than upon evidence beyond a reasonable doubt; (2) in finding that he in fact is a mentally disordered sex offender; and (3) in imposing an excessive sentence.

We affirm the application by the district court for Box Butte County of a "clear and convincing evidence" standard in finding that Harris is a mentally disordered sex offender (MDSO) and the 20-month to 5-year sentence imposed upon him for sexually assaulting a child. The defendant was credited with 55 days on said sentence for time served.

Harris was initially charged with two crimes: (1) first degree sexual assault on his 7-year-old stepgranddaughter, a violation of Neb. Rev. Stat. § 28-319 (Reissue 1989), a Class II felony carrying a penalty of not less than 1 nor more than 50 years' imprisonment, Neb. Rev. Stat. § 28-105 (Reissue 1985), and (2) sexual assault of a child, in violation of Neb. Rev. Stat. § 28-320.01 (Reissue 1989), a Class IV felony carrying a penalty of up to 5 years' imprisonment, up to a $10,000 fine, or both, § 28-105.

First degree sexual assault involving a child requires "sexual penetration," which means "sexual intercourse in its ordinary meaning . . . or any intrusion, however slight, of any part of the

. . . victim's body or any object manipulated by the actor into the genital . . . [opening] of the victim's body . . . ." Neb. Rev. Stat. § 28-318 (Reissue 1989). A person commits sexual assault of a child if he or she subjects another person 14 years of age or younger to sexual contact and the actor is at least 19 years of age or older. § 28-320.01. "Sexual contact" means the intentional touching of the victim's sexual or intimate parts or the intentional touching of the victim's clothing covering the immediate area of the victim's sexual or intimate parts when the touching may reasonably be construed as being for the purpose of sexual arousal or gratification of either party. § 28-318.

Pursuant to a plea agreement, Harris entered a plea of guilty to the charge of sexual assault of a child, and the charge of first degree sexual assault was dismissed. The bill of exceptions filed with this court contains only the sentencing hearing and not the hearing in which the defendant entered his guilty plea. The presentence investigation reveals that Harris' wife, who had been doing housework, went into a bedroom of the couple's home about 9 p.m. on May 31, 1989. There she found her husband and his 7-year-old stepgranddaughter sitting on a bed. The child was dressed in her nightgown and underpants. Mrs. Harris observed that her husband was kissing his stepgranddaughter on the neck in a "passionate manner."

While her husband fell asleep, Mrs. Harris questioned the child, who reported that Harris had touched her genitals with his hand, in addition to kissing her on the neck. The child also said this had occurred at other times in the past. When asked whether Harris had ever put anything inside her, the child said he had used his finger. The child told a police officer that Harris had touched her private parts 19 to 20 times previously, and would on occasion put his tongue in her mouth while kissing her.

When Harris was interviewed by an Alliance police officer, he admitted rubbing the victim's crotch area with his fingers, but denied reaching inside the victim's panties to fondle her genital area on the night in question. Harris did admit that on an earlier occasion he had reached inside the child's shorts and rubbed her genital area. Throughout the interview, the defendant maintained that he was in a drunken state and really

did not remember what happened the night of May 31. Harris accused the 7-year-old of being "sexually promiscuous."

Upon acceptance of Harris' guilty plea, the trial court, as required by Neb. Rev. Stat. § 29-2912 (Reissue 1989) and *State v. Klappal*, 218 Neb. 374, 355 N.W.2d 221 (1984), ordered an evaluation to determine whether the defendant was an MDSO. A "mentally disordered sex offender" means any person who has a mental disorder and who, because of the mental disorder, has been determined to be disposed to repeated commission of sexual offenses which are likely to cause substantial injury to the health of others. Neb. Rev. Stat. § 29-2911(2) (Reissue 1989).

The two psychiatrists who examined Harris came to different conclusions. Their reports were received in evidence without objection at the MDSO hearing. Dr. John Baldwin diagnosed the defendant as being a chronic alcoholic, as opposed to being an MDSO. Harris told both doctors that he normally drank 8 beers per day, but on the night of May 31 he had drunk 22 beers. Dr. Baldwin thought that the offense in question did not arise out of any kind of mental disorder other than "characterologic poor self-control." He predicted that if Harris was sufficiently punished, Harris would not repeat a sexual offense. "He has an inclination to act out sexually when he gets drunk, and I think if he were sufficiently punished for this, this would not be likely to occur," Dr. Baldwin wrote. Conversely, Dr. Y. Scott Moore diagnosed the defendant to be an MDSO and his mental disorder to be pedophilia. Dr. Moore found that Harris had committed a sexual offense in a repeated fashion "which is likely to cause harm to the victim." The psychiatrist found that treatment was available at the sexual offender's program at the Lincoln Regional Center and predicted that treatment would be ineffective unless it lasted 3 1/2 to 4 years.

As was its prerogative as a fact finder, the trial court obviously rejected Dr. Baldwin's diagnosis and accepted Dr. Moore's diagnosis. See *State v. Todd*, 223 Neb. 462, 390 N.W.2d 528 (1986). The court found that the evidence was clear and convincing that Harris was an MDSO and that he could benefit from treatment. A maximum confinement sentence was imposed upon Harris.

In defendant's first assignment of error, he claims only that the proper standard of proof in determining whether a defendant is an MDSO is proof beyond a reasonable doubt and that any lesser standard of proof falls short of providing the level of due process required by the Nebraska and U.S. Constitutions.

A claim that one is being deprived of a liberty interest without due process of law is typically examined in three stages. The question in the first stage is whether there is a protected liberty interest at stake. If so, the analysis proceeds to the second stage, in which it is determined what procedural protections are required. Upon the resolution of that issue, the analysis moves on to the third and final stage, in which the facts of the case are examined to ascertain whether there was a denial of that process which was due. *State v. Cook, ante* p. 636, 463 N.W.2d 573 (1990). See, e.g., *Washington v. Harper,* ____ U.S. ____, 110 S. Ct. 1028, 108 L. Ed. 2d 178 (1990).

Without question, a liberty interest is at stake in the determination of whether a defendant is an MDSO under Nebraska's MDSO statutes. If a person is found to be a treatable MDSO and there is treatment available, he or she may be confined not in a prison, but in a mental facility for involuntary treatment for his or her mental disorder. Moreover, a social stigma attaches because of an MDSO label. Thus, during MDSO proceedings, a defendant is entitled to at least minimum procedural due process protection. See *Vitek v. Jones*, 445 U.S. 480, 100 S. Ct. 1254, 63 L. Ed. 2d 552 (1980).

Having determined that a liberty interest is implicated, we must next determine the question, what process is due? In that regard, Harris questions only the clear and convincing standard of proof employed by the trial court in determining whether a defendant is an MDSO. Harris maintains that due process mandates that the proper standard of proof for an MDSO designation requires evidence beyond a reasonable doubt. Neither the *Vitek* Court nor Nebraska's statutes specifically express what standard of proof due process requires in commitments by a court under Nebraska's MDSO statutes.

Harris relies upon *People v. Burnick*, 14 Cal. 3d 306, 535 P.2d 352, 121 Cal. Rptr. 488 (1975), to support his contention

that to meet due process requirements, the State must prove a criminal defendant's MDSO status beyond a reasonable doubt.

Under the *Burnick* case in California, and in several other states utilizing the "beyond a reasonable doubt" standard of proof in determining whether a defendant is an MDSO, the defendant is subjected to indefinite and even lifetime incarceration in a mental institution. Indeed, the California court has recognized that one reason proof beyond a reasonable doubt is required in that state's scheme is "because of possible indeterminate confinement in a prison-like state mental institution." *McComb v. Commission on Judicial Performance*, 19 Cal. 3d Spec. Trib. Supp. 1, 11, 564 P.2d 1, 6, 138 Cal. Rptr. 459, 464 (1977). See, also, Colo. Rev. Stat. § 16-13-211 (1990) (beyond a reasonable doubt), and Colo. Rev. Stat. § 16-13-203 (1990) (indeterminate term of a minimum of 1 day and a maximum of the MDSO's natural life); Ill. Rev. Stat. ch. 38, para. 105-3.01 (Supp. 1990) (beyond a reasonable doubt), Ill. Rev. Stat. ch. 38, para. 105-8 (1980) (committed until the person has recovered), and *People v. Sly*, 82 Ill. App. 3d 742, 403 N.E.2d 72 (1980) (indefinite incarceration); Mass. Gen. L. ch. 123A, § 5 (1986) (if court finds upon such hearing that the person is a sexually dangerous person, MDSO may be committed for indeterminate period of a minimum of 1 day and a maximum of such person's natural life), and *In re Andrews*, 368 Mass. 468, 334 N.E.2d 15 (1975) (beyond a reasonable doubt).

At the other end of the burden of proof pendulum is the preponderance of the evidence standard employed by New Jersey. See *State v. Howard*, 110 N.J. 113, 539 A.2d 1203 (1988). Its MDSO scheme basically coincides with that of Nebraska. In justification of its use of a preponderance of the evidence standard, the *Howard* court declared: "When sentencing a convicted sex offender, the court does not choose between freedom and commitment of the defendant, but only between commitment at one state correctional facility or another." *Id.* at 130-31, 539 A.2d at 1212.

Oregon's intermediate evidential standard in MDSO determinations falls between the standards of proof beyond a reasonable doubt and by a preponderance of the evidence. Its MDSO statute provides for commitment to a mental hospital

based upon clear and convincing evidence. Or. Rev. Stat. § 426.675(2) (1989).

Under Nebraska's MDSO statutes, a defendant must *first* be sentenced for the sexual offense of which he was convicted. It is only after an MDSO defendant has been sentenced that the court may commit him to a regional center for treatment. Neb. Rev. Stat. § 29-2915(3) (Reissue 1989). That commitment is not indefinite in duration. It is only until a court determines, based upon the report of a reviewing panel, that a defendant is no longer mentally disordered or until the defendant has received the maximum benefit of treatment, provided, however, that such confinement in a regional center may not extend beyond the maximum length of the defendant's sentence without a further hearing before a mental health board. The reviewing panel consists of an attorney, a psychologist, two physicians licensed in Nebraska to practice medicine and surgery who have had at least 3 years of special training in treatment of mental disorders, and a layperson. The panel must annually, or upon motion of an MDSO, review all records of mentally disordered sex offenders and file a written report with the committing judge. See, Neb. Rev. Stat. §§ 29-2913 to 29-2918 (Reissue 1989); *State v. Sell*, 213 Neb. 437, 329 N.W.2d 361 (1983). As will be discussed later in this opinion, at the initial commitment hearing before the court, insofar as the burden of proof is concerned, the liberty interest of a subject who has been convicted of a sexual crime is no greater than the liberty interest of a subject who is civilly committed to a mental hospital. The U.S. Supreme Court has held that the burden of proof in a civil commitment of a mentally ill person may be by "clear and convincing evidence." Any lesser burden of proof would deny the mentally ill person due process of law. *Addington v. Texas*, 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979).

The liberty interest an MDSO has, after being sentenced for the sexual crime he or she committed, is the same as that of a prisoner who is transferred from a prison to a mental hospital. In *Vitek v. Jones*, 445 U.S. 480, 491, 493-94, 100 S. Ct. 1254, 63 L. Ed. 2d 552 (1980), the U.S. Supreme Court held:

> [T]he transfer of a prisoner from a prison to a mental hospital must be accompanied by appropriate procedural

> protections. . . .
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> . . . .
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> . . . [I]nvoluntary commitment to a mental hospital is not within the range of conditions of confinement to which a prison sentence subjects an individual. . . . A criminal conviction and sentence of imprisonment extinguish an individual's right to freedom from confinement for the term of his sentence, but they do not authorize the State to classify him as mentally ill and to subject him to involuntary psychiatric treatment without affording him additional due process protections.
>
> . . . [H]ere, the stigmatizing consequences of a transfer to a mental hospital for involuntary psychiatric treatment, coupled with the subjection of the prisoner to mandatory behavior modification as a treatment for mental illness, constitute the kind of deprivations of liberty that requires procedural protections.

In this state, a civil commitment impacts a mentally ill person's liberty interest much more than does an initial commitment by a court under Nebraska's MDSO statutes. Under the Nebraska Mental Health Commitment Act, Neb. Rev. Stat. §§ 83-1001 to 83-1081 (Reissue 1987), in a civil proceeding, where the burden of proof is by clear and convincing evidence, a mentally ill person may be subjected to an indefinite or even lifetime commitment. In an MDSO commitment by a court, a commitment to a mental hospital is, at worst, limited by the length of the penal sentence imposed upon the MDSO. § 29-2915.

An MDSO's commitment to a mental facility in Nebraska can thus be analogized to a prisoner's being transferred from a prison to a mental facility because of a mental illness, which is somewhat similar to a civil commitment. Nebraska, in its civil mental commitment statutes, has determined that a clear and convincing standard of proof is sufficient to deprive a mentally ill person of his liberty indefinitely if the subject continues to be a mentally ill dangerous person. § 83-1038. Mentally ill dangerous person means "any mentally ill person . . . who presents: (1) A substantial risk of serious harm to another person or persons within the near future as manifested by

evidence of recent violent acts or threats of violence or by placing others in reasonable fear of such harm . . . ." § 83-1009. By comparison, § 29-2911 provides that "[m]entally disordered sex offender shall mean any person who has a mental disorder and who, because of the mental disorder, has been determined to be disposed to repeated commission of sexual offenses which are likely to cause substantial injury to the health of others." That an MDSO may be confined to a regional center for his or her malady under the civil commitment procedure is established in Neb. Rev. Stat. § 29-2920 (Reissue 1989). That statute provides:

> Ninety days prior to the release from custody of any mentally disordered sex offender who has (1) previously been adjudged untreatable and sentenced pursuant to section 29-2914, (2) been determined to have received the maximum benefit from treatment and sentencing pursuant to section 29-2919, (3) been sentenced to treatment pursuant to section 29-2915, but whose time in treatment will, within ninety days, exceed the maximum length of time such offender could have been sentenced on the underlying criminal conviction, the Board of Parole, Department of Correctional Services, or other unit of government having final release authority shall give notice to the county attorney who prosecuted the underlying criminal charge that the release of such offender is so pending. Upon receipt of such notice from the releasing authority, the county attorney shall cause mental health commitment proceedings to be commenced on behalf of such offender pursuant to the Nebraska Mental Health Commitment Act.

The Nebraska Mental Health Commitment Act is the vehicle for a civil commitment proceeding.

For a court to commit a criminal defendant to a regional center under Nebraska's MDSO act, the State must prove by clear and convincing evidence (1) that the defendant is an MDSO, (2) that the defendant is treatable, and (3) that treatment is available in this state. Here, the district court for Box Butte County applied a clear and convincing standard of proof in determining whether Harris was an MDSO. The court,

therefore, met the federal due process clause burden of proof required by *Vitek v. Jones*, 445 U.S. 480, 100 S. Ct. 1254, 63 L. Ed. 2d 552 (1980), and *Addington v. Texas*, 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979). Nebraska's Constitution requires no greater burden of proof. Harris' first assignment of error is meritless.

In his second assignment of error, Harris claims the trial court erred in finding that in fact Harris was an MDSO.

Whether a defendant is an MDSO is a question of fact to be determined by the trial court. *State v. Bovill*, 223 Neb. 764, 393 N.W.2d 715 (1986). In *Addington v. Texas, supra* at 441 U.S. at 429, the U.S. Supreme Court found: "Whether the individual is mentally ill and dangerous . . . turns on the *meaning* of the facts which must be interpreted by expert psychiatrists and psychologists." Likewise, in MDSO cases the fact finder must rely upon expert interpretation of the facts. In Harris' case, one psychiatrist found that Harris was an MDSO, while the second psychiatrist found that he was not an MDSO. The fact that two psychiatrists disagree as to whether a defendant is an MDSO does not invalidate such a finding by a court. There is no statutory requirement that the opinion of the examiners be unanimous. *State v. Todd, supra*. Here, the trial court adopted the diagnosis of the psychiatrist who found Harris to be an MDSO and rejected the diagnosis of the other psychiatrist, who found that Harris was an alcoholic with "characterologic poor self-control." The opinion of the second psychiatrist that Harris is not an MDSO was not binding upon the trial judge, who was the fact finder in this case. See *Way v. Hendricks Sodding & Landscaping, Inc., ante* p. 519, 462 N.W.2d 99 (1990). The opinion of the psychiatrist who found Harris to be an MDSO, the defendant's repeated sexual assaults on the victim, and the defendant's guilty plea to sexual assault of a child were sufficient for the trial court to find by clear and convincing evidence that Harris is an MDSO. There is no merit to the defendant's second assignment of error.

In his last assignment of error, Harris contends that his sentence is excessive. He argues that he is in his fifties, has no prior criminal record, has a good family history, and has an average marital, educational, and employment history.

We have repeatedly held that an order imposing a sentence within statutorily prescribed limits will not be disturbed on appeal absent an abuse of discretion. *State v. Garza, ante* p. 215, 459 N.W.2d 747 (1990). Harris' sentence is within the prescribed statutory limits.

The defendant's presentence investigation report reflects that he committed sexual assaults on the victim as many as 20 times; that during an evaluation, the defendant showed no remorse for the sexual offense to which he pled guilty and in fact vehemently denied any wrongdoing; and that an evaluation team recommended that if the defendant was found to be an MDSO, he be given a maximum sentence. The defendant was found to be an MDSO.

Taking into consideration the seriousness of the crime Harris committed and its repetitiveness, and the material and recommendations contained in the presentence report, we cannot say that the trial court abused its discretion in sentencing Harris within the statutorily prescribed limits.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. KARRIE L. GERJEVIC, APPELLEE.

463 N.W.2d 914

Filed December 28, 1990. No. 90-788.

1. **Motor Vehicles: Police Officers and Sheriffs: Probable Cause: Search and Seizure.** When police officers have probable cause to believe there is contraband inside an automobile that has been stopped on the road, the officers may conduct a warrantless search of the vehicle, even after it has been impounded and is in police custody.
2. **Motor Vehicles: Police Officers and Sheriffs: Arrests: Probable Cause: Search and Seizure.** Neither the passage of several hours between the arrest and the search nor the immobilization of the vehicle by placing it in police custody invalidates the probable cause basis for conducting a warrantless automobile search.

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

Ronald L. Staskiewicz, Douglas County Attorney, and Donald L. Schense for appellant.

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

BOSLAUGH, J.

This is an interlocutory appeal by the State pursuant to Neb. Rev. Stat. § 29-824 (Reissue 1989) to review the order of the district court sustaining defendant-appellee Karrie L. Gerjevic's motion to suppress.

On March 26, 1990, the Omaha police were involved in a narcotics investigation concerning Gerjevic. They had received information from a reliable confidential informant that the defendant was selling cocaine packaged in "snow seals." The informant had observed the defendant in possession of cocaine and had purchased cocaine from the defendant in the past. The informant further advised the police that (1) the defendant drove a "Silver 1988 Isuzu I-Mark" four-door vehicle, with the "Iowa license plate PLM479," (2) the defendant's sister resided at 3118 Cass Street, apartment No. 1, (3) the defendant worked in the area where her sister lived, and (4) the defendant sold cocaine at her place of employment. Upon receiving this information, the police arranged for a controlled purchase of cocaine from the defendant.

On March 29, 1990, sometime between 11:50 a.m. and 12:50 p.m., the informant went to the residence at 3118 Cass Street, met with defendant, and purchased one-quarter gram of cocaine from her. After making the purchase, the informant met with the police for a debriefing and informed the police that the defendant would be in her silver Isuzu, going to work somewhere near the 3118 Cass Street residence, and implied that the defendant would be transporting cocaine in her vehicle to her place of employment.

Based on this information, the police conducted a surveillance of the 3118 Cass Street residence. At approximately 12:50 p.m., the officers observed two parties, one of whom was defendant, leave the 3118 Cass Street residence and enter the 1988 silver Isuzu. The officers followed the Isuzu vehicle to 33d and Dodge Streets, where the vehicle

stopped at the curb in front of Mutual of Omaha.

The officers approached the vehicle and identified themselves. The driver was identified as Kimberly Jacobs, and the passenger was the defendant. The officers asked Jacobs, the sister of the defendant, for permission to search the vehicle, stating that they had probable cause to believe that narcotics were being transported in the vehicle. Jacobs said that she could not give them permission to search the vehicle because it belonged to her sister, the defendant. The officers then asked the defendant for permission to search the vehicle. The defendant became nervous, told the officers she had to go to work, and attempted to walk away. The officers then placed the defendant under arrest.

The officers did not search the defendant, her handbag, or her vehicle at the scene. Instead, after arresting the defendant, the officers took her to the police station and had the Isuzu towed to an impound lot. The police then completed an affidavit and application for a search warrant for the search of the person of Gerjevic, her handbag, and her vehicle. The search warrant, however, authorized only the search of the person of Gerjevic.

After obtaining the search warrant, the officers searched defendant Gerjevic's person but found no contraband. Then, without the authority of a search warrant, the officers searched the defendant's handbag and her vehicle. The vehicle search revealed 12 cocaine-filled snow seals; a gram scale; and a plastic straw, suspected to be a "snorting" tube.

Following her arrest, the defendant was charged with possession of cocaine with intent to distribute, in violation of Neb. Rev. Stat. § 28-416(1)(a) (Reissue 1989). Prior to trial, the defendant moved to suppress the evidence found in her vehicle. She argued that the warrantless search of her vehicle at the impound lot violated her constitutional rights. After an evidential hearing, the district court sustained the motion to suppress. From that order the State has appealed.

The State contends that the warrantless search of the defendant's vehicle at the impound lot was justified because they had probable cause to believe the vehicle contained contraband at the time it was stopped. According to the State,

the probable cause which entitled the officers to search her vehicle at the time it was stopped continued to exist at the impound lot and, thus, justified the warrantless search of defendant's vehicle.

It is well recognized that "when police officers have probable cause to believe there is contraband inside an automobile that has been stopped on the road, the officers may conduct a warrantless search of the vehicle, even after it has been impounded and is in police custody." *Michigan v. Thomas*, 458 U.S. 259, 261, 102 S. Ct. 3079, 73 L. Ed. 2d 750 (1982). Accord, *Texas v. White*, 423 U.S. 67, 96 S. Ct. 304, 46 L. Ed. 2d 209 (1975); *Chambers v. Maroney*, 399 U.S. 42, 90 S. Ct. 1975, 26 L. Ed. 2d 419 (1970).

The U.S. Supreme Court has made it abundantly clear that neither the passage of several hours between the arrest and the search nor the immobilization of the vehicle by placing it in police custody invalidates the probable cause basis for conducting a warrantless automobile search. See, *Florida v. Meyers*, 466 U.S. 380, 104 S. Ct. 1852, 80 L. Ed. 2d 381 (1984); *Michigan v. Thomas, supra.*

The critical issue, therefore, is whether, at the time Gerjevic's vehicle was stopped, the police had "probable cause" to believe there was contraband inside her vehicle. If the police had probable cause to search the vehicle at the time it was stopped, then they could constitutionally search it later at the impound lot without obtaining a warrant. *Michigan v. Thomas, supra*; *Texas v. White, supra*; *Chambers v. Maroney, supra.*

A police officer with probable cause to believe that an automobile is carrying contraband ordinarily possesses authority for a warrantless search of the automobile. *State v. Dillwood*, 183 Neb. 360, 160 N.W.2d 195 (1968); *State v. Hoer*, 231 Neb. 336, 436 N.W.2d 179 (1989).

When probable cause exists for the arrest of an accused in his motor vehicle and at that time probable cause for the search of his vehicle exists as well, a search of the vehicle a short time later at a different location while the vehicle is still in police custody is not unreasonable, even though it is made without a warrant. *State v. McGuire*, 218 Neb. 511, 357 N.W.2d 192 (1984); *State v. Franklin*, 194 Neb. 630, 234 N.W.2d 610 (1975).

The search of an automobile is not unreasonable if based on facts that would justify the issuance of a warrant, even though a warrant has not actually been obtained. *State v. Hoer, supra* (citing *United States v. Ross*, 456 U.S. 798, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982), and *Carroll v. United States*, 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543 (1925)).

This court has stated that

> " 'probable cause is a flexible, common-sense standard. It merely requires that the facts available to the officer would "warrant a man of reasonable caution in the belief," [citation omitted] that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false. A "practical, nontechnical" probability that incriminating evidence is involved is all that is required.' "

State v. Parmar, 231 Neb. 687, 696, 437 N.W.2d 503, 509 (1989) (quoting *State v. Haselhorst*, 218 Neb. 233, 353 N.W.2d 7 (1984), quoting *Texas v. Brown*, 460 U.S. 730, 103 S. Ct. 1535, 75 L. Ed. 2d 502 (1983)).

Here, there was probable cause to search defendant Gerjevic's vehicle at the scene of her arrest. This finding is amply supported by the evidence and validates the search at the impound lot.

The reliable confidential informant had informed the police that the defendant was selling cocaine. The informant stated that (1) the informant had observed the defendant in possession of cocaine, (2) the informant had purchased cocaine from the defendant in the past, (3) the informant knew the defendant drove a 1988 silver Isuzu I-Mark four-door vehicle, with the Iowa license plate No. PLM479, (4) the defendant had a sister who resided at 3118 Cass Street, (5) the defendant worked in that area, and (6) the defendant sold cocaine at her place of employment.

After receiving this information, the police arranged for the controlled purchase of cocaine from the defendant. After making the purchase, the informant advised the officers that defendant would be leaving the 3118 Cass Street residence shortly in her silver Isuzu, and possibly would be transporting

narcotics in the vehicle to her place of employment.

The officers subsequently conducted a surveillance of the 3118 Cass Street residence and saw the defendant leave with her sister in the silver Isuzu. The surveillance officers followed the silver Isuzu to 33d and Dodge Streets, where the vehicle stopped at the curb in front of Mutual of Omaha. When the officers approached the vehicle, identified themselves, and told the defendant that they had probable cause to believe she was transporting narcotics in her vehicle, the defendant became nervous, said she had to go to work, and attempted to walk away.

At this point, the facts warranted a person of reasonable caution to believe that the 1988 silver Isuzu contained contraband. In other words, the officers had probable cause to believe that defendant's vehicle contained narcotics and, therefore, had probable cause to search the vehicle. Under *Michigan v. Thomas*, 458 U.S. 259, 102 S. Ct. 3079, 73 L. Ed. 2d 750 (1982), the probable cause factor that then existed still existed at the impound lot. Therefore, although the Isuzu was searched several hours after it was impounded, the warrantless search of the defendant's vehicle was authorized. The order of the district court suppressing the evidence found in the defendant's automobile was erroneous and must be reversed.

It is unnecessary to consider the other contentions of the State.

REVERSED.

KAREN L. WIDGA, PERSONAL REPRESENTATIVE OF THE ESTATE OF BRANDON DALE WIDGA, DECEASED, APPELLANT, V. ELWOOD SANDELL, APPELLEE.

464 N.W.2d 155

Filed January 4, 1991. No. 88-887.

1. **Demurrer: Pleadings.** When considering a general demurrer, that is, one which challenges the sufficiency of the allegations to state a cause of action, the petition is to be liberally construed, and if as so construed the petition states a

cause of action, the demurrer is to be overruled.

2. _____: _____. In ruling on a general demurrer, a court must accept the truth of the facts well pled and the factual and legal inferences which may reasonably be deduced from such facts, but does not assume the truth of the pleader's conclusions; nor may a court assume the existence of any facts not alleged, find facts in aid of the pleading, or consider evidence which may be introduced at trial.
3. **Actions: Words and Phrases.** A cause of action consists of the fact or facts which give one the right to judicial relief.
4. **Negligence.** To state a cause of action for negligence, one must plead facts from which it can be inferred that the defendant owed a legal duty to protect the plaintiff from injury, that the defendant failed to discharge that duty, and that damage proximately resulted from that undischarged duty.
5. **Negligence: Minors: Invitor-Invitee: Licensee: Trespass.** The duty of a possessor of land, insofar as it pertains to children of tender years, does not depend upon whether the child is an invitee, licensee, or trespasser.
6. **Negligence: Liability: Minors: Trespass: Nuisances.** A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if (1) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, (2) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, (3) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, (4) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and (5) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.
7. **Negligence.** A possessor of land is not an insurer of all who come upon the land.
8. **Negligence: Liability: Minors: Nuisances.** A possessor of land has no liability to a child of tender years for an artificial condition on the land unless the possessor knows or has reason to know of the condition in question.
9. **Negligence: Evidence.** Under the doctrine of res ipsa loquitur, when an instrumentality under the exclusive control and management of the alleged wrongdoer produces an occurrence which would not, in the ordinary course of things, come to pass in the absence of the negligence of the one having such management and control, the occurrence itself, in the absence of explanation by the alleged wrongdoer, affords evidence that the occurrence arose as the result of the alleged wrongdoer's negligence.

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

Raymond E. Baker, of Law Offices of Raymond E. Baker, P.C., for appellant.

Ray C. Simmons for appellee.

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

CAPORALE, J.

Following sustainment of defendant-appellee Elwood Sandell's general demurrer to her third amended petition, plaintiff-appellant Karen L. Widga, personal representative of the estate of her deceased son, Brandon Dale Widga, elected to stand on that operative pleading. The district court thereupon dismissed the suit. Plaintiff asserts the dismissal was erroneous because in determining that the operative petition did not state a cause of action, the court failed to apply the special rules relating to trespassing children and failed as well to apply the rules pertinent to the res ipsa loquitur doctrine. We affirm.

By the operative petition, plaintiff, as personal representative, seeks to recover for the claimed wrongful death of her then 15-month-old son, along with the damages asserted to have been sustained by his estate. In addition, she, in her own right and as the assignee of decedent's 8 1/2-year-old sister's rights, seeks to recover those damages allegedly occasioned as a result of the mental anguish plaintiff and the sister experienced in being subjected to decedent's suffering.

We begin by noting that when considering a general demurrer, that is, one which challenges the sufficiency of the allegations to state a cause of action, the petition is to be liberally construed, and if as so construed the petition states a cause of action, the demurrer is to be overruled. *Weimer v. Amen*, 235 Neb. 287, 455 N.W.2d 145 (1990). So construed, the balance of the operative petition avers that land owned, possessed, and controlled by defendant is located directly across from land occupied by plaintiff's family, adjacent to an alley which separates the two premises; that after the death of plaintiff's son, there was found in a garage on defendant's land a partial bag of an extremely toxic pesticide which is inherently dangerous to humans even in minute quantities; and that defendant knew of the pesticide's poisonous nature. Defendant regularly used the pesticide and had, prior to the death of plaintiff's child, assisted his own son in applying it to the latter's

fields. Defendant maintained an incinerator on his land in an area near the alley where defendant knew decedent and other children played. While decedent and his sister were playing on defendant's land and as a proximate result of defendant's negligence, the decedent ingested some of the aforedescribed pesticide, began to have respiratory difficulties, appeared to experience convulsions, and died 3 days later. The operative petition further alleges that in the normal course of events, decedent would not have died but for the negligence of defendant's son.

Our analysis is further controlled by the requirement that in ruling on a general demurrer, a court must accept the truth of the facts well pled and the factual and legal inferences which may reasonably be deduced from such facts, but does not assume the truth of the pleader's conclusions. *Parrett v. Platte Valley State Bank, ante* p. 139, 459 N.W.2d 371 (1990); *S.I.D. No. 272 v. Marquardt*, 233 Neb. 39, 443 N.W.2d 877 (1989). Nor may a court assume the existence of any facts not alleged, find facts in aid of the pleading, or consider evidence which may be introduced at trial. *Security Inv. Co. v. State*, 231 Neb. 536, 437 N.W.2d 439 (1989). See *Moore v. Grammer*, 232 Neb. 795, 442 N.W.2d 861 (1989).

At this point we recall that a cause of action consists of the fact or facts which give one the right to judicial relief. *S.I.D. No. 272 v. Marquardt, supra*; *Schoneweis v. Dando*, 231 Neb. 180, 435 N.W.2d 666 (1989). Each theory of recovery pled in this case sounds in negligence. The longstanding rule is that to state a cause of action for negligence, one must plead facts from which it can be inferred that the defendant owed a legal duty to protect the plaintiff from injury, that the defendant failed to discharge that duty, and that damage proximately resulted from that failure. See, *First Nat. Bank of Omaha v. State*, 230 Neb. 259, 430 N.W.2d 893 (1988); *Topil v. Hub Hall Co.*, 230 Neb. 151, 430 N.W.2d 306 (1988); *Ring v. Kruse*, 158 Neb. 1, 62 N.W.2d 279 (1954).

The duty of a possessor of land, insofar as it pertains to children of tender years, does not depend upon whether the child is an invitee, licensee, or trespasser. See *Davis v. Cunningham*, 196 Neb. 8, 241 N.W.2d 343 (1976). Rather, a

possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if (1) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, (2) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, (3) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, (4) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and (5) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children. *Gubalke v. Estate of Anthes*, 189 Neb. 385, 202 N.W.2d 836 (1972); Restatement (Second) of Torts § 339 (1965).

Yet, a possessor of land is not an insurer of all who come upon the land. See *Syas v. Nebraska Methodist Hospital Foundation*, 209 Neb. 201, 307 N.W.2d 112 (1981). In the case of an invitee we have held that it is the superior knowledge the invitor has or should have which is the foundation of liability; absent such superior knowledge, no liability exists. *Bray v. Kate, Inc.*, 235 Neb. 315, 454 N.W.2d 698 (1990); *Kliewer v. Wall Constr. Co.*, 229 Neb. 867, 429 N.W.2d 373 (1988). Such also is the case with respect to the duty of a possessor of land to children of tender years, for, as we said in *Gubalke, supra*, a possessor cannot be expected to make the land completely "childproof." Thus, a possessor of land has no liability to a child of tender years for an artificial condition on the land unless the possessor knows or has reason to know of the condition in question. The Restatement, *supra*, comments *g.* and *h.*

Consequently, even if we indulge in the inference for which plaintiff contends, that the decedent ingested the pesticide at the site of the incinerator where defendant knew children were wont to play, no facts have been pled from which we can reasonably infer that defendant knew or should have known of the presence of the pesticide at that location. That a partial bag

of the substance was stored in defendant's garage and that he had used it on his son's fields at an undisclosed location do not lead to an inference that defendant spilled or otherwise placed the pesticide at the place where decedent found it or that defendant knew or had reason to know that someone else had done so.

Thus, the controlling question becomes whether plaintiff has properly pled the doctrine of res ipsa loquitur. Under this doctrine, when an instrumentality under the exclusive control and management of the alleged wrongdoer produces an occurrence which would not, in the ordinary course of things, come to pass in the absence of the negligence of the one having such management and control, the occurrence itself, in the absence of explanation by the alleged wrongdoer, affords evidence that the occurrence arose as the result of the alleged wrongdoer's negligence. *Maly v. Arbor Manor, Inc.*, 225 Neb. 276, 404 N.W.2d 419 (1987); *Beatty v. Davis*, 224 Neb. 663, 400 N.W.2d 850 (1987); *Fynbu v. Strain*, 190 Neb. 719, 211 N.W.2d 917 (1973); *McCall v. St. Joseph's Hospital*, 184 Neb. 1, 165 N.W.2d 85 (1969); *Security Ins. Co. v. Omaha Coca-Cola Bottling Co.*, 157 Neb. 923, 62 N.W.2d 127 (1954); *Miratsky v. Beseda*, 139 Neb. 229, 297 N.W. 94 (1941). Literally, the "thing speaks for itself."

Whatever may be the limits of the requirement that the management and control of the instrumentality exclusively be in the alleged wrongdoer, plaintiff's allegation that in the normal course of events her child would not have died but for the negligence of defendant's son forecloses an inference that defendant had control and management of the instrumentality in question (the pesticide) at the time it found its way, by whatever means, to the location at which it is claimed to have caused the death. At the minimum, that much control in the alleged wrongdoer is required. *Victory Park Apartments, Inc. v. Axelson*, 367 N.W.2d 155 (N.D. 1985) (doctrine not available to landlord in action against tenant where evidence showed cigarette which ignited couch could have been under control of any one of three smokers). See, also, *Asher v. Coca Cola Bottling Co.*, 172 Neb. 855, 112 N.W.2d 252 (1961) (evidence that drink container in which deleterious substance found was

sealed by manufacturer held sufficient to permit application of doctrine to manufacturer notwithstanding that drink was sold by another); *Benedict v. Eppley Hotel Co.*, 159 Neb. 23, 65 N.W.2d 224 (1954) (doctrine held to apply against operator of hotel when chair it provided collapsed while patron was sitting on it). Thus, even if we assume the effort to plead res ipsa loquitur is not otherwise defective, the attempt is unsuccessful because of the failure to plead any degree of control and management in defendant.

Being correct, the judgment of the district court is affirmed.

AFFIRMED.

ANTELOPE PRODUCTION COMPANY, A CORPORATION, APPELLANT, V. SHRINERS HOSPITAL FOR CRIPPLED CHILDREN, A COLORADO CORPORATION, APPELLEE.

464 N.W.2d 159

Filed January 4, 1991. No. 88-896.

1. **Oil and Gas: Leases: Consideration: Words and Phrases.** A "bonus" is the payment made by the lessee of an oil and gas lease as consideration for the lessor's execution of the lease; a "delay rental" is the consideration paid by the lessee to the lessor in return for permission to delay drilling or production.
2. **Oil and Gas: Leases.** There are four distinct incidents to ownership of a mineral estate which relate to leases: the right or power to lease (the executory right), the right to bonuses, the right to delay rentals, and the right to royalties; these rights may be separately alienated.
3. **Deeds: Parties: Intent.** In construing a deed, it is the duty of the courts to carry into effect the true intent of the parties as far as it can be ascertained from the entire instrument and as far as that intent is consistent with the rules of law. Neb. Rev. Stat. § 76-205 (Reissue 1990).
4. **Oil and Gas: Leases: Intent.** In the absence of a clear expression of an intent to the contrary, the grant or reservation of the bonus and delay rental rights does not imply a grant or reservation of the executive right.
5. **Property: Conveyances: Intent.** Under the provisions of Neb. Rev. Stat. § 76-106 (Reissue 1990), an otherwise effective reservation of property by the grantor reserves the interest the grantor had prior to the conveyance unless an intent to reserve a different interest is effectively manifested.

Appeal from the District Court for Kimball County: JOHN D. KNAPP, Judge. Affirmed.

Brian Cook, of O'Brien, Huenergardt & Cook, for appellant.

George P. Burke, of Van Steenberg, Myers, Burke & Wilson, for appellee.

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

CAPORALE, J.

Appellant, Antelope Production Company, brought a declaratory judgment action to determine whether a certain deed conveyed to defendant-appellee, Shriners Hospital for Crippled Children, the right to execute oil and gas leases. The district court determined that the deed gave Shriners Hospital such a right; Antelope Production has appealed, claiming that the district court erred in so ruling. We affirm.

This case calls upon us to interpret language contained in a warranty deed to a tract of land in Kimball County, Nebraska, executed on September 27, 1965. Shriners Hospital is the successor in interest to an undivided one-third of the grantor's reserved or excepted interest. Antelope Production holds an oil and gas lease from the successors in interest of the grantee. This lease applies to one-third of the tract conveyed in 1965. Antelope Production's lease has been ratified by the successors of the remaining interest of the grantor, but not by Shriners Hospital.

The deed contains the following provision:

> Grantor expressly reserving unto themselves an undivided one-half interest in the oil, gas and other minerals in, on and under said real estate provided, however, grantee, its successors and assigns, shall have the right to have and receive all of the bonuses and delay rentals which may result from the oil and gas leases executed on and after August 12, 1960 with reference to the real estate above described or any portion thereof and such shall be true notwithstanding the reservation herein of an undivided one-half interest in the oil, gas and other

minerals by the grantor . . . .

In the oil and gas field, a "bonus" is the payment made by the lessee as consideration for the lessor's execution of the lease. H. Williams & C. Meyers, Oil and Gas Terms (6th ed. 1984). A "delay rental" is the consideration paid by the lessee to the lessor in return for permission to delay drilling or production. *Id.*

It is generally recognized that there are four distinct incidents to ownership of a mineral estate which relate to leases. These are the right or power to lease (the executory right), the right to bonuses, the right to delay rentals, and the right to royalties. 1 E. Kuntz, A Treatise on the Law of Oil and Gas § 15.1 (1987); R. Hemingway, The Law of Oil and Gas §§ 2.2 through 2.5 (2d ed. 1983). These rights may be separately alienated. See, e.g., *Westbrook v. Ball*, 222 Miss. 788, 77 So. 2d 274 (1955).

In construing a deed, it is the duty of the courts to carry into effect the true intent of the parties as far as it can be ascertained from the entire instrument and as far as that intent is consistent with the rules of law. Neb. Rev. Stat. § 76-205 (Reissue 1990); *Elrod v. Heirs, Devisees, etc.*, 156 Neb. 269, 55 N.W.2d 673 (1952); *Maxwell v. Hamel*, 138 Neb. 49, 292 N.W. 38 (1940). The only evidence we have of the parties' intent is the language of the provision in the deed and the essentially identical language contained in the sales contract and in the minutes of the grantee corporation. While deposition testimony attests that the sales contract was either prepared or reviewed by one of the owners of the grantee corporation, who had experience with oil and gas law, the nature of the testimony is so tentative that it, even if a proper part of the evidence, sheds little or no light on the intent of the parties. We therefore base our determination solely on the language of the deed.

The issue before us is whether, under a deed excepting from its operation an undivided interest in minerals in, on, and under a tract of land, which exception expressly gives the grantee "the right to . . . all of the bonuses and delay rentals" but is silent as to the right to execute oil and gas leases for the grantor's interest, the right to execute such leases is held by the grantor or the grantee. To put this in simpler terms, does a grant of the rights to bonuses and delay rentals raise an inference that the

right to execute oil and gas leases was also conveyed?

Although courts in other jurisdictions have addressed this question, this is the first time this court has been faced with interpreting such a provision. The courts which have explored this area have reached conflicting results and were so doing before the deed in this case was drafted. Some of these courts have determined that a grant or reservation of the right to bonuses and delay rentals carries with it the right to execute oil and gas leases. See, e.g., *Anderson v. Mayberry,* 661 P.2d 535 (Okla. App. 1983); *Hudgins v. Lincoln National Life Insurance Company,* 144 F. Supp. 192 (E.D. Tex. 1956); *McVey v. Hines,* 385 P.2d 432 (Okla. 1963). Others have concluded that the grant or reservation of the bonus and delay rental rights does not imply a grant or reservation of the executive right. See, e.g., *Day & Co. v. Texland Petroleum,* 786 S.W.2d 667 (Tex. 1990); *Thornhill v. System Fuels, Inc.*, 523 So. 2d 983 (Miss. 1988); *Martin v. Snuggs*, 302 S.W.2d 676 (Tex. Civ. App. 1957); *Westbrook v. Ball, supra.* Jurisdictions which imply the grant of the executive right incident to a grant of bonus and delay rental rights will, however, permit the separation of these rights if the instrument clearly indicates such an intention. 1 E. Kuntz, *supra*, § 15.7.

Commentators support the *Westbrook* line of cases and argue that the executive power (as well as the other incident rights) should be assumed to remain with the mineral interest unless expressly severed or excluded. See, R. Hemingway, *supra*, § 2.7(I); 1 E. Kuntz, *supra*, § 15.7; H. Williams & C. Meyers, Oil and Gas Law § 304.10 (abridged ed. 1984); Blass & Richey, *An Analysis of the Rights and Duties of the Holder of the Executive Right*, 41 Miss. L.J. 189 (1970). This approach is consistent with the provisions of Neb. Rev. Stat. § 76-104 (Reissue 1990), which states that an otherwise effective conveyance of property transfers the entire interest of the grantor unless an intent to transfer a lesser interest is effectively manifested, and with the provisions of Neb. Rev. Stat. § 76-106 (Reissue 1990), that an otherwise effective reservation of property by the grantor reserves the interest the grantor had prior to the conveyance unless an intent to reserve a different interest is effectively manifested. Since the rule that in the

absence of a clear expression of intent to the contrary the executory right remains with the interest to which it is incident is supported both by our statutory guidelines for the construction of deeds and by scholarly opinion, it is the rule we should, and do, adopt.

Applying this rule to the deed before us, we conclude that the executory right as to the grantor's undivided one-half interest remained with that interest and was not transferred to the grantee incident to the grant of the rights to bonuses and delay rentals. Shriners Hospital, as a successor in interest to the grantor, holds the executive power for its interest.

The judgment of the district court, being correct, is accordingly affirmed.

AFFIRMED.

KATHLEEN SEYMOUR FROELICH, APPELLANT AND CROSS-APPELLEE, V. WILLIAM J. FROELICH, JR., AND NANCY FROELICH BERIGAN, PERSONAL REPRESENTATIVE OF THE ESTATE OF WILLIAM J. FROELICH, DECEASED, APPELLEES, OTOE COUNTY NATIONAL BANK, A NATIONAL BANKING ASSOCIATION, INTERVENOR-APPELLEE AND CROSS-APPELLANT.

464 N.W.2d 310

Filed January 4, 1991. No. 88-916.

1. **Foreign Judgments: Jurisdiction: States.** A judgment rendered by a court of a sister state which had jurisdiction is to be given full faith and credit and has the same validity and effect in this state as in the state rendered.
2. **Jurisdiction: States: Presumptions.** The jurisdiction of a sister state's court over the party is presumed.
3. **Judgments.** A judgment must be sufficiently certain in its terms as to enable enforcement in the manner provided by law.
4. **Foreign Judgments: States: Final Orders.** A judgment for the payment of money will not be enforced in other states unless the amount to be paid has been finally determined under the local law of the state of rendition.

Appeal from the District Court for Holt County: EDWARD E. HANNON, Judge. Affirmed.

William W. Griffin for appellant.

Victor J. Lich, Jr., of Lich, Herold & Mackiewicz, for intervenor-appellee.

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

CAPORALE, J.

Via a creditor's bill, plaintiff-appellant, Kathleen Seymour Froelich, seeks to impress a lien against the interest of her former husband, defendant-appellee William J. Froelich, Jr., in the estate of his late father, William J. Froelich, administered by the personal representative, defendant-appellee Nancy Froelich Berigan. Although neither the former husband nor the personal representative has filed a brief in this court, the intervenor-appellee, Otoe County National Bank, in an endeavor to preserve the present favored position of its own lien, has filed a brief in support of the district court's judgment of dismissal. Plaintiff assigns as error the district court's failure to find a foreign decree sufficient to support the requested lien. Inasmuch as we affirm the judgment of dismissal, we do not reach the bank's assignments of error on cross-appeal, which question the district court's rulings concerning the timeliness and adequacy of plaintiff's petition.

Plaintiff's action is founded on a dissolution of marriage decree entered by the district court of Sedgwick County, Kansas. As originally entered on January 6, 1972, the decree provided that the former husband pay plaintiff both fixed and contingent child support payments for each of their two children and that he further pay her both fixed amounts for her own support over a period of 10 years and additional amounts to vary in accordance with his earned income. On December 4, 1975, the decree was modified so as to terminate the former husband's child support obligation with respect to one child and to increase the support as to the other. On October 9, 1978, the decree was again modified by substituting for the variable-income-based payments a fixed monthly payment to be adjusted each year in accordance with changes to a specified consumer price index. The Kansas court has made no determination of the amount due under its decree either as of the date this action was filed or as of the date of trial.

There is no question but that a judgment rendered by a court of a sister state which had jurisdiction is to be given full faith and credit and has the same validity and effect in this state as in the state rendered. *Gruenewald v. Waara*, 229 Neb. 619, 428 N.W.2d 210 (1988); U.S. Const. art. IV, § 1. Moreover, the jurisdiction of the sister state's court over the party is presumed. *Gruenewald v. Waara, supra.*

However, a judgment must be sufficiently certain in its terms as to enable enforcement in the manner provided by law. We so held in *Brandt v. Brandt*, 227 Neb. 325, 417 N.W.2d 339 (1988), and thus modified as unenforceable because of indefiniteness a dissolution decree requiring one party to pay the other a fixed sum plus a percentage of designated expenses. Such holding was foreshadowed by *Lenz v. Lenz*, 222 Neb. 85, 382 N.W.2d 323 (1986), wherein we affirmed the refusal of the lower court to enforce an indefinite provision of the dissolution decree purporting to require the payment of all special schooling expenses of a hearing-impaired child.

Earlier, in *Cockle v. Cockle*, 204 Neb. 88, 281 N.W.2d 392 (1979), we denied registration to a foreign judgment rendered in a dissolution action which called for the payment of variable amounts of a percentage of the judgment debtor's retirement pay. In so ruling, we relied in part on the declaration in Restatement (Second) of Conflict of Laws § 108 at 321 (1971) that a "judgment for the payment of money will not be enforced in other states unless the amount to be paid has been finally determined under the local law of the state of rendition."

Inasmuch as the decree on which plaintiff relies lacks definiteness and the amount due thereunder has not been finally determined under the law of Kansas, no lien may be obtained thereon in this action.

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

AFFIRMED.

IN RE APPLICATION OF GERALD K. KILTHAU, DOING BUSINESS AS KILTHAU TRANSPORT.
GERALD K. KILTHAU, DOING BUSINESS AS KILTHAU TRANSPORT, APPELLANT, V. MOLASSES HAULERS, INC., APPELLEE.

464 N.W.2d 162

Filed January 4, 1991. No. 88-957.

1. **Public Service Commission: Appeal and Error.** In an appeal to the Supreme Court from an order of the Nebraska Public Service Commission, the only questions to be determined are whether the Public Service Commission acted within the scope of its authority and whether the order complained of is reasonable and not arbitrarily made.
2. **Public Service Commission: Motor Carriers.** A certificate of public convenience and necessity is required to engage in common carrier intrastate transportation of property on Nebraska highways.
3. **Public Service Commission: Appeal and Error.** Whether this court agrees or disagrees with the decision of the Public Service Commission is immaterial. It is not the province of this court to weigh or resolve conflicts in the evidence or the credibility of witnesses. The Supreme Court does not act as an appellate public service commission but will sustain the action of the Public Service Commission if there is evidence in the record to support the findings.
4. **Public Service Commission: Jurisdiction.** The Public Service Commission has original jurisdiction and sole power to grant, amend, deny, revoke, or transfer common carrier certificates of public convenience and necessity, and such proceedings are administrative and legislative in character.
5. **Public Service Commission.** The determination of issues of public convenience and necessity is one peculiarly within the province of the Public Service Commission.
6. _____. In determining public convenience and necessity, the deciding factors are (1) whether the operation will serve a useful purpose responsive to a public demand or need, (2) whether this purpose can or will be served as well by existing carriers, and (3) whether it can be served by the applicant in a specified manner without endangering or impairing the operations of existing carriers contrary to the public interest.
7. **Public Service Commission: Appeal and Error.** The issues of public convenience and necessity are ordinarily issues of fact, and where there is evidence in the record to sustain the Public Service Commission's order, this court cannot find the order unreasonable and arbitrary.
8. **Public Service Commission: Motor Carriers.** Regarding public demand or need, the question of adequacy of service of existing carriers is implicit in the issue of whether public convenience and necessity demand the service of an additional carrier in the field. The existence of an adequate and satisfactory service by motor carriers already in the area is complete negation of public need and demand for added service by another carrier.

Appeal from the Nebraska Public Service Commission. Affirmed.

Marshall D. Becker for appellant.

Bradford E. Kistler, of Heron, Burchette, Ruckert & Rothwell, for appellee.

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

FAHRNBRUCH, J.

This is an appeal from the Nebraska Public Service Commission in which the appellant, Gerald K. Kilthau, doing business as Kilthau Transport, seeks reversal of an order denying his application for a certificate to transport molasses between points in western Nebraska over irregular routes. We affirm.

In an appeal to the Supreme Court from an order of the Nebraska Public Service Commission (PSC), the only questions to be determined are whether the PSC acted within the scope of its authority and whether the order complained of is reasonable and not arbitrarily made. *In re Application of Slack*, 234 Neb. 704, 452 N.W.2d 538 (1990).

The record reflects that the appellant has operated a trucking business since 1981. Kilthau is authorized by the Interstate Commerce Commission to transport general commodities interstate and by the PSC to transport fertilizer intrastate. In 1987, Kilthau began shipping molasses interstate, between Nebraska and Colorado, for Western Sugar Company (Western), the shipper supporting appellant's application. In the latter part of 1987, Kilthau approached Western with the idea of transporting Western's shipments of molasses intrastate. On December 10, 1987, Kilthau filed his intrastate application with the PSC. Although the application was originally protested by six companies, upon amendment of the application by Kilthau, only Molasses Haulers, Inc., remained a protestant.

On May 19, 1988, the PSC held a hearing on Kilthau's amended application for a permit to transport inedible molasses between all Nebraska points on and west of U.S.

Highway 281. Witnesses in support of the application were Kilthau; Scott Anderson, Western's manager of special product sales; and Jeanette Wilcox, Western's agricultural secretary. Witnesses opposing the application were Conrad Scholl, owner and president of Molasses Haulers, and Edward Foy, Molasses Haulers' operations manager.

Western, whose primary business is sugar manufacturing, operates four Nebraska facilities, which are located in Scottsbluff, Bayard, Mitchell, and Gering. Byproducts of sugar production include three grades of molasses: (1) NS molasses, which is used as part of a second-tier sugar extraction process and which is shipped solely as interplant transfers between Western's Nebraska locations; (2) BE molasses, which is a final byproduct after an additional extraction process and which is shipped from the Scottsbluff facility directly to feed mix vendors, feedlots, and dairies; and (3) CSF molasses, which is produced in a small quantity and which is shipped both interplant and directly to customers. Of the 70,000 tons of molasses manufactured each year, 35,000 tons are sent as interplant shipments. Of the remaining tonnage, 15,000 to 20,000 tons are shipped directly to customers by Western, with the balance shipped to buyers f.o.b. plant.

Witnesses supporting Kilthau's application claimed that (1) there were several times when storage tanks overflowed because of a failure to move a sufficient quantity of molasses the day before; (2) at times only short notice could be given to carriers of molasses shipments as a result of inadequate storage facilities and unpredictable production quantities; (3) there were several incidents when Wilcox was unable to reach Molasses Haulers at the time transportation of molasses was required; (4) there were plans for increased capacity at the Nebraska facilities and the potential for an increased customer base east of U.S. Highway 83, the current geographic boundary authorized for Molasses Haulers; (5) the need existed for the potential flexibility of having a carrier that could handle both interstate and intrastate shipments; and (6) there was enough transportable molasses volume for two carriers.

A certificate of public convenience and necessity is required to engage in common carrier intrastate transportation of

property on Nebraska highways. There is an exemption, not relevant here, for statutorily defined property.

> A certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found after notice and hearing that the applicant is fit, willing, and able properly to perform the service proposed, and to conform to the provisions of sections 75-301 to 75-322.01 and the requirements, rules, and regulations of the commission thereunder and that the proposed service, to the extent to be authorized by the certificate, whether regular or irregular, passenger or property, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied.

Neb. Rev. Stat. § 75-311 (Reissue 1986).

In its order entered July 19, 1988, the PSC found that Kilthau was fit, willing, and able to properly perform the proposed service, and to conform to the applicable statutes, rules, and regulations. However, the PSC denied the application because public convenience and necessity did not require the granting of the authority requested. The PSC held:

> The evidence does not show that public convenience and necessity requires an additional carrier of molasses in the territory in question. Protestant showed that it is operating at only half the capacity that it has operated in the recent past. Authorization of an additional carrier would further diminish the traffic available to protestant thereby impairing its economic well being. The evidence shows that the molasses hauling business is highly seasonal, and the protestant has structured its service to accomodate [sic] the seasonal aspects of the requirements of the supporting shipper. The supporting shipper, according to its testimony, veiws [sic] the applicant "a backup". Naturally it is in the shipper's best interest to have more than one carrier in the field. [I]t has nothing to lose by supporting an additional carrier. The evidence does not show that protestant has fallen short in any significant degree to perform the transportation requirements of the supporting shipper. The application

should be denied.

Following an order entered September 13, 1988, whereby the PSC overruled Kilthau's motion for rehearing, Kilthau timely appealed to this court.

Kilthau's seven assignments of error combine to allege that the PSC finding that public convenience and necessity do not require an additional carrier is contrary to the evidence.

Whether this court agrees or disagrees with the decision of the PSC is immaterial. It is not the province of this court to weigh or resolve conflicts in the evidence or the credibility of witnesses. The Supreme Court does not act as an appellate public service commission but will sustain the action of the PSC if there is evidence in the record to support the findings. *In re Application of Koch Service*, 228 Neb. 631, 423 N.W.2d 767 (1988).

That the PSC acted within the scope of its authority in deciding Kilthau's application is beyond question. The PSC has original jurisdiction and sole power to grant, amend, deny, revoke, or transfer common carrier certificates of public convenience and necessity, and such proceedings are administrative and legislative in character. See *Preisendorf Transp., Inc. v. Herman Bros., Inc.*, 169 Neb. 693, 100 N.W.2d 865 (1960). The determination of issues of public convenience and necessity is one peculiarly within the province of the commission. *In re Application of Amsberry, Inc.*, 220 Neb. 353, 370 N.W.2d 109 (1985).

The final issue is whether the PSC'S order is reasonable and was not arbitrarily made. In determining public convenience and necessity, the deciding factors are (1) whether the operation will serve a useful purpose responsive to a public demand or need, (2) whether this purpose can or will be served as well by existing carriers, and (3) whether it can be served by the applicant in a specified manner without endangering or impairing the operations of existing carriers contrary to the public interest. *Id.*; *Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp.*, 186 Neb. 261, 182 N.W.2d 648 (1971). The issues of public convenience and necessity are ordinarily issues of fact, and where there is evidence in the record to sustain the PSC's order, this court cannot find the order

unreasonable and arbitrary. *In re Application of Amsberry, Inc., supra.*

Of the three public convenience and necessity factors, not all need to be addressed, because an affirmative response to the second factor negates any response to the first factor. Regarding public demand or need, the question of adequacy of service of existing carriers is implicit in the issue of whether public convenience and necessity demand the service of an additional carrier in the field. The existence of an adequate and satisfactory service by motor carriers already in the area is complete negation of public need and demand for added service by another carrier. *Id.*; *Schmunk v. West Nebraska Express*, 159 Neb. 134, 65 N.W.2d 386 (1954); *In re Application of Canada*, 154 Neb. 256, 47 N.W.2d 507 (1951).

The PSC found that Molasses Haulers had not fallen short in any significant degree in performing the transportation requirements of Western. There is no evidence in the record of any substantial shipper of molasses other than Western in the area under consideration.

In support of his application, Kilthau first submitted evidence that there were several times when Western's storage tanks had overflowed because of a failure to move a sufficient quantity of molasses the day before. Wilcox, who testified about these incidents, did not claim that she had requested Molasses Haulers to move a sufficient quantity of molasses the day before any incident to prevent an overflow or that Molasses Haulers failed to perform as requested. She testified that an overflow was not unheard of and would not disappear if Kilthau's or anyone else's application were granted. Both Scholl and Foy testified that Wilcox never held Molasses Haulers responsible for the overflows. Wilcox testified that it was her responsibility to determine how many loads of molasses should be removed from a tank each day.

Wilcox also testified that there were a few times when she could not reach Molasses Haulers at the times she tried, but the consequences of that failure are not clear. Two overflows occurred at night. Wilcox said that on one of those occasions there was an hour's advance notice. She also said that with night overflows, she is not informed until the next morning, after the

tanks have overflowed. No inference may be drawn that Molasses Haulers failed to respond to short notice regarding the two night overflows. Wilcox testified the third incident occurred on Thanksgiving Day or on another holiday. Wilcox testified that she had had difficulty reaching someone from Molasses Haulers and consequently the tank overflowed. She testified that there had been no notice that the tank would overflow as a result of a problem at the plant that caused an overproduction of molasses. Both Scholl and Foy testified that they were available on Thanksgiving Day. It is implicit in the denial of Kilthau's application that the PSC found that appellant's evidence does not show that the overflows were a direct result of Wilcox's failure to reach Molasses Haulers or that the overflows could be attributed to any fault on the part of Molasses Haulers.

Finally, Kilthau introduced evidence to show that there was existing and future business that Molasses Haulers could not handle. In regard to existing business, Wilcox testified that had she had the flexibility of an interstate/intrastate carrier, that carrier would have been used. In regard to future business, Anderson testified that Western could foresee a need for transportation of molasses to feedlots east of Highway 83. He testified there were no signed contracts for that business.

The PSC's order points out that Molasses Haulers, at the time of the hearing, was transporting only half the previous volume of molasses it had transported for Western. The record reflects that during the 1986-87 season, Molasses Haulers received approximately $200,000 gross revenue from its operations, and only $93,000 during the 1987-88 season. The testimony did not include the specific increases in volume anticipated by Western. In the past 3 years, when Western's molasses capacity went up 25 percent, Molasses Haulers' revenue went down. The record further reflects that Western had made no inquiry into the availability of other carriers, nor had it ever requested that Molasses Haulers add more equipment.

The final factor is whether the purpose can be served by an applicant without endangering or impairing the operations of existing carriers contrary to public interest. The PSC

specifically found that an additional carrier would impair the economic well-being of Molasses Haulers, an existing carrier. In its order, the PSC found that Molasses Haulers was operating at only half its capacity and that it had structured its service to accommodate the seasonal aspects of Western's requirements. As previously noted, the record shows that the gross revenue for Molasses Haulers fell more than 50 percent from 1986-87 to 1987-88. At the hearing, Scholl testified that 99 percent of Molasses Haulers' business originates at Western and that its equipment is specifically leased for the molasses season. The result of a loss in Western traffic would be a loss of jobs to Molasses Haulers employees, according to Scholl.

Kilthau failed in his burden of proof to show that public convenience and necessity requires an additional carrier of molasses in the area specified in the application. The order of the PSC is reasonable and not arbitrarily made and is therefore affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. BRUCE R. MAHLIN, APPELLANT.
464 N.W.2d 312

Filed January 4, 1991. No. 89-316.

1. **Rules of Evidence: Trial: Appeal and Error.** Error may not be predicated on a ruling which admits evidence unless a substantial right of a party is affected and a timely objection appears of record, stating the specific ground of objection, if a specific ground was not apparent from the context. Neb. Evid. R. 103(1)(a) (Neb. Rev. Stat. § 27-103(1)(a) (Reissue 1989)).
2. **Criminal Law: Motions to Suppress: Search and Seizure: Appeal and Error.** When a motion to suppress evidence has been overruled, the defendant must make a specific objection at the trial to the offer of the evidence which was the subject of the motion to suppress in order to preserve the issue of an illegal search and seizure for review on appeal.
3. **Criminal Law: Investigative Stops: Police Officers and Sheriffs: Probable Cause.** An investigative stop of a vehicle is justified where a law enforcement officer has a reasonable suspicion founded upon articulable facts which indicate that a crime has been committed or is being committed by occupants of the vehicle.

4. _____: _____: _____: _____. In determining whether facts known to a law enforcement officer at the time of an investigatory stop provided a reasonable basis for the stop, the totality of the circumstances must be considered, including all of the objective observations and considerations, as well as the suspicions, drawn by a trained and experienced law enforcement officer by inference and deduction that the individual stopped is, has been, or is about to be engaged in criminal behavior.
5. _____: _____: _____: _____. An officer must have a particularized and objective basis for suspecting the person stopped of criminal activity. A finding of a reasonable suspicion is to be determined on a case-by-case basis.
6. **Motions for New Trial: Appeal and Error.** The granting or refusal of a motion for a new trial is within the discretion of the trial court, and in the absence of an abuse of discretion, the determination will not be disturbed on appeal.
7. **Motions for New Trial.** In order for a new trial to be granted, it must be shown that a substantial right of the defendant's was adversely affected and that the defendant was prejudiced thereby.
8. **Motions for New Trial: Jury Misconduct: Records: Appeal and Error.** There is reversible error if the record affirmatively shows that the defendant has been prejudiced by private communication between the trial court and the jurors; a new trial should be granted where the record is silent as to the possibility of prejudice, although reversal is not required if the record affirmatively shows that the communication had no tendency to influence the verdict.

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

David J. Warnemunde, of Moyer, Moyer, Egley, Fullner & Warnemunde, for appellant.

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

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

BOSLAUGH, J.

After trial to a jury, the defendant, Bruce R. Mahlin, was found guilty of possession of a controlled substance, cocaine, and of operating a motor vehicle to avoid arrest, and was sentenced to 3 years' probation. He has appealed and assigned as error that the trial court erred in (1) overruling his pretrial motion to suppress and (2) communicating orally with the jury after submission of the case.

The record shows that on March 12, 1988, five officers of the Columbus Police Department and Platte County Sheriff's

Department were on special assignment in and near the parking lot of Wishbones, a nightclub near Columbus, Nebraska. The officers were looking for minors in possession of alcohol and had had complaints about drugs' being used there.

Officers Maschmeier and Kayl observed two persons in a gold Corvette parked in the parking lot. The passenger kept bending up and down. When sitting up, he looked around, and appeared to be rolling a cigarette. The officers then saw a white cylindrical object in the passenger's hand, which object he lighted and from which he then took a drag. He then passed it to the defendant, who put it in his mouth and drove off.

When the Corvette drove away, Officers Maschmeier and Kayl followed it and radioed two other officers who were stationed in the parking lot to drive in front of the Corvette so it could not get away. Both police cars were unmarked.

The Corvette proceeded at a normal rate of speed to a stop sign at the edge of the parking lot. When the Corvette stopped at the stop sign, the police cars parked on either end of the Corvette. The officers, who were in plain clothes, left their cars and ran toward the defendant's car, displaying their badges and shouting to the driver and passenger to stop and get out of the car. The officers identified themselves as law enforcement officers.

After the defendant saw one officer's badge pressed against his car window, he maneuvered his car to leave. At that time, Officer Maschmeier smashed out the driver's window of the Corvette with his flashlight in an attempt to reach in and shut off the ignition.

The defendant proceeded west on U.S. Highway 81 for approximately one-half to three-quarters of a mile from the nightclub until he was forced to stop by a marked patrol car, which had activated its overhead lights. Officer Mayer, who was driving the marked patrol car and was involved in the special assignment, had been notified by the other officers to stop the defendant.

The defendant and the passenger got out of the Corvette, and a brief search of the car was made. The smell of burned marijuana was detected, and a marijuana "roach" was found. The defendant and the passenger were handcuffed and taken to

the Platte County Sheriff's Department, along with the Corvette. While at the sheriff's office, the defendant was searched, and a glass vial which is used to "snort" cocaine was found in his coat pocket. A rolled-up dollar bill with white crystal particles in its creases was found in his wallet. These items were placed in sealed bags and sent to the Nebraska State Patrol crime lab for analysis. The crystal particles were found to be cocaine.

Officer Maschmeier, who had received training in the identification of drugs and paraphernalia used when taking drugs, testified at the hearing on the defendant's motion to suppress. Officer Kayl testified as to his background in narcotics training and corroborated Officer Maschmeier's testimony. Based on his experience and training, Kayl thought the passenger in the Corvette was rolling a marijuana cigarette.

Brad Rutledge of the crime lab testified regarding the analyses performed on the vial and the dollar bill and stated that cocaine was found on both exhibits.

Over the defendant's objection to the offer of the vial and dollar bill on the bases of "foundation, irrelevant, immaterial, chain of custody not established," the exhibits were received.

Regarding the first assignment of error, the defendant contends the evidence of the vial and the dollar bill should have been suppressed because the stop and search of the defendant's car were illegal; however, the only objections to the evidence which were made at the trial pertained to foundation, relevance, and chain of custody. The defendant did not object on the basis of an illegal stop or search.

Error may not be predicated on a ruling which admits evidence unless a substantial right of a party is affected and a timely objection appears of record, stating the specific ground of objection, if a specific ground was not apparent from the context. Neb. Evid. R. 103(1)(a) (Neb. Rev. Stat. § 27-103(1)(a) (Reissue 1989)); *State v. Roggenkamp*, 224 Neb. 914, 402 N.W.2d 682 (1987). This court has held that when a motion to suppress evidence has been overruled, the defendant must make a specific objection at the trial to the offer of the evidence which was the subject of the motion to suppress in order to preserve the issue of an illegal search and seizure for review on appeal.

See, *State v. Roggenkamp, supra*; *State v. Robinson*, 233 Neb. 729, 448 N.W.2d 386 (1989); *State v. Sock*, 227 Neb. 646, 419 N.W.2d 525 (1988).

Notwithstanding the defendant's failure to specifically object to the exhibits as the fruit of an illegal stop and search when they were offered at trial, the evidence from the suppression hearing and the trial shows that the stop was lawful. In *State v. Giessinger*, 235 Neb. 140, 145, 454 N.W.2d 289, 292-93 (1990), this court stated:

> [A]n investigative stop of a vehicle is justified where a law enforcement officer has a reasonable suspicion founded upon articulable facts which indicate that a crime has been committed or is being committed by occupants of the vehicle. . . . In determining whether facts known to a law enforcement officer at the time of the investigatory stop provided a reasonable basis for the stop, we must consider the totality of the circumstances, including all of the objective observations and considerations, as well as the suspicions, drawn by a trained and experienced law enforcement officer by inference and deduction that the individual stopped is, has been, or is about to be engaged in criminal behavior. The officer must have a particularized and objective basis for suspecting the person stopped of criminal activity. . . . A finding of a reasonable suspicion must be determined on a case-by-case basis.

(Citations omitted.)

In this case, when the officers saw that the passenger appeared to be rolling a cigarette, lighting and smoking it, and passing it to the driver, that provided a reasonable basis for believing that the crime of possession of marijuana was being committed. This provided sufficient justification for the stop of the Corvette, and the odor of burned marijuana in the car provided sufficient justification for the brief search of the automobile.

As to the defendant's second assignment of error, the only evidence submitted at the hearing on the motion for a new trial was the affidavit of his attorney, which alleged that after the case had been submitted to the jury, there were communications

in writing between the judge and jury which occurred outside the presence of counsel. The affidavit states that this information came to the attorney from court personnel who informed him that the jury had made written statements and inquiries directed to the court which were taken by the bailiff to the judge. According to the affidavit, the court's responses were delivered by the bailiff verbally to the jury, without notification of the prosecution or defense counsel. The defendant's attorney further stated that he did not know the exact nature of the jury's statements and inquiries, except that one of the statements made by the jury was that they could not reach a verdict on the flight to avoid arrest count. He did not know what the judge's response was to the alleged statements. The affidavit stated that the jury may have been told that the judge had set a deadline for deliberations.

The affidavit does not identify the persons who gave this information to the defendant's attorney. There are no affidavits or testimony by the bailiff or other court personnel to corroborate or explain the defendant's attorney's statements. The alleged written statements were not produced or offered.

The granting or refusal of a motion for a new trial is left to the discretion of the trial court, and in the absence of an abuse of that discretion, the determination will not be disturbed on appeal. *State v. Boppre*, 234 Neb. 922, 453 N.W.2d 406 (1990). Moreover, in order for a new trial to be granted, it must be shown that a substantial right of the defendant's was adversely affected and that the defendant was prejudiced thereby. *Id.*

In *State v. White*, 191 Neb. 772, 773-74, 217 N.W.2d 916, 917 (1974), this court stated:

> There is reversible error if the record affirmatively shows that defendant has been prejudiced by private communication between the trial court and jurors, and a new trial should be granted where the record is silent as to a possibility of prejudice, although reversal is not required if the record affirmatively shows communication had no tendency to influence the verdict.

In this case, the defendant presented no direct evidence that a communication in fact occurred and, apparently, made no effort to ascertain the facts by questioning court personnel or

members of the jury. The record does not show that a substantial right of the defendant's was adversely affected. Accordingly, the trial court did not abuse its discretion in refusing to grant a new trial based on the evidence presented.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES R. AYRES, APPELLANT.

464 N.W.2d 316

Filed January 4, 1991. No. 89-1145.

1. **Weapons: Words and Phrases.** For the purposes of Neb. Rev. Stat. § 28-1205(1) (Reissue 1989), a "deadly weapon" is any instrument which, in the manner used or intended to be used, is capable of producing death or serious bodily injury.
2. **Intent.** The intent with which an act is performed may be inferred from the conduct itself, the actor's language in reference to the conduct, and the circumstances surrounding the incident.
3. **Intent: Circumstantial Evidence: Proof.** The existence of an actor's intent is a question of fact and may be established through circumstantial evidence.
4. **Convictions: Appeal and Error.** When reviewing the sufficiency of the evidence to support a conviction in a criminal prosecution, 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. These are all matters for the trier of fact, and a conviction must be sustained if, viewing the evidence in the light most favorable to the State, there is sufficient evidence to support the conviction.
5. **Assault: Intent.** A person who intentionally or knowingly causes bodily injury to another by means of a dangerous instrument is guilty of assault in the second degree.
6. **Assault: Words and Phrases.** For the purposes of Neb. Rev. Stat. § 28-309(1)(a) (Reissue 1989), a "dangerous instrument" is any object which, because of its nature and the manner and intention of its use, is capable of inflicting bodily injury.
7. **Assault: Intent.** The intent required by Neb. Rev. Stat. § 28-309(1)(a) (Reissue 1989) is not an intent to cause bodily injury but, rather, an intent to use the dangerous instrument in the manner in which it was in fact used.
8. **Words and Phrases.** "Serious bodily injury" is 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.

9. **Weapons: Words and Phrases.** A "deadly weapon" is any instrument which, in the manner it is used or intended to be used, is capable of producing a bodily injury involving a substantial risk of (1) death, (2) serious permanent disfigurement, or (3) protracted loss or impairment of the function of any organ or body part. The weapon need not actually produce such injuries, but need only be used in a manner which makes it capable of producing them.
10. **Sentences: Appeal and Error.** The Nebraska Supreme Court will not disturb on appeal a sentence that is within the statutory limits, absent an abuse of discretion.

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

Kirk E. Naylor, Jr., for appellant.

Robert M. Spire, Attorney General, and Steven J. Moeller for appellee.

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

CAPORALE, J.

After a bench trial defendant-appellant, James R. Ayres, was adjudged guilty of second degree assault, in violation of Neb. Rev. Stat. § 28-309 (Reissue 1989); child abuse, in violation of Neb. Rev. Stat. § 28-707 (Reissue 1989); and using a weapon to commit a felony, in violation of Neb. Rev. Stat. § 28-1205 (Reissue 1989). He was sentenced to two terms of imprisonment for not less than 20 months nor more than 5 years on the assault and child abuse convictions, to be served concurrently, and to not less than 5 nor more than 10 years on the weapon conviction, to be served consecutively to the other sentences. Ayres does not challenge the adjudication of guilt on the child abuse charge, but appeals the adjudications of guilt on the assault and weapon charges. He asserts, with respect to those two offenses, that the district court erred in finding the evidence sufficient to support the adjudications. In addition, he asserts that each of the three sentences is excessive. We affirm in all respects.

The evidence presented at trial, when viewed in the light most favorable to the State, shows the following: Ayres was the guardian of the 10-year-old victim, Michael, and the victim's two older brothers, Scott and Billy. Ayres, the cousin of the

children's mother, was taking care of the children while their parents were imprisoned.

On the morning of May 30, 1988, Ayres returned to the trailer in which he and the children were living and discovered it in disarray, with a cabinet door knocked off its hinges. He asked Scott and Michael who had done the damage. Michael "swore to God" that he did not do it, which, based on his past experience, convinced Ayres of Michael's guilt. Ayres sent Scott to get the eldest brother, Billy, who was at a neighbor's.

When Billy arrived, Ayres was yelling at Michael. Ayres told Billy to fix the cabinet door, and then commenced beating Michael. This involved picking him up by the throat, tossing him against the cabinet, biting him on the chin, hitting him with fists, and kicking him with steel-toed boots. At some point Ayres started to hit Michael with a "spanking" board, described in the evidence as being approximately 12 inches long by 3 inches wide and about one-half of an inch thick, but which was actually 14 inches long and three-fourths of an inch thick. During the beating, the board broke lengthwise in two. According to Ayres, the beating lasted about 5 to 7 minutes. After he had finished beating the child, Ayres took him into the bathroom and forced him to eat a bar of soap. At this point Ayres' brother arrived, and the two left to rent a tuxedo for an upcoming wedding, leaving Michael alone with 15-year-old Billy. Later, two of Billy's friends stopped by and viewed Michael's injuries. A short time later, an unidentified person called the police.

The police took Michael to a hospital emergency room and arrested Ayres when he returned to the trailer. The physician who examined Michael testified that the child

> had numerous fresh bruises over a wide area of his body . . . . He had extensive fresh bruises across his buttocks on both sides, his anterior thighs, his cheek and jaw on both sides, his left ear, both on the ear itself and behind it. He also had bruises on his left forearm, his upper arm, his left shoulder, his right shoulder, and the back of his right hand.
>
> . . . .
>
> . . . He had some swelling about his jaw line and about

> his buttocks, especially on the left side. I found this to be remarkable in that most bruises are still flush with the surface of skin; but swelling to the degree that I saw, meaning a quarter inch to a half an inch away from where the normal skin line would be, would indicate a more severe injury.

No bones were broken. Although there was evidence of large amounts of hemoglobin in his urine, tests revealed no damage to Michael's kidneys. Because of his injuries, Michael was ordered hospitalized overnight but was kept an additional day beyond that, waiting to be picked up by Child Protective Services.

As to the sufficiency of the evidence to support the assault and weapon charges, a person who "[i]ntentionally or knowingly causes bodily injury to another person with a dangerous instrument" is guilty of assault in the second degree. § 28-309(1)(a). A person who uses a firearm or any other deadly weapon to commit a felony is guilty of using a weapon to commit a felony. § 28-1205(1). A "deadly weapon" is any instrument which, in the manner used or intended to be used, is capable of producing death or serious bodily injury. Neb. Rev. Stat. § 28-109(7) (Reissue 1989).

Ayres claims the evidence was insufficient to support a determination that he "possessed the necessary mental state to conclude a 'deadly weapon' or 'dangerous instrument' was used to commit the crimes alleged." Brief for appellant at 10. It is Ayres' position that his assault and weapon convictions are error because he did not use the spanking board either in a manner which would produce serious bodily injury or death or with the intention of using it in such a manner.

The intent with which an act is performed may be inferred from the conduct itself, the actor's language in reference to the conduct, and the circumstances surrounding the incident. The existence of this state of mind is a question of fact and may be established through circumstantial evidence. *State v. Meyer, ante* p. 253, 460 N.W.2d 656 (1990); *State v. Peterson, ante* p. 450, 462 N.W.2d 423 (1990); *State v. Swigart,* 233 Neb. 517, 446 N.W.2d 216 (1989). When reviewing the sufficiency of the evidence to support a conviction in a criminal prosecution, 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. These are all matters for the trier of fact, and a conviction must be sustained if, viewing the evidence in the light most favorable to the State, there is sufficient evidence to support the conviction. *State v. Fellman, post* p. 850, 464 N.W.2d 181 (1990); *State v. Johnson, post* p. 831, 464 N.W.2d 167 (1990); *State v. Clark, ante* p. 475, 461 N.W.2d 576 (1990). We will examine Ayres' claim as it relates to each charge separately.

We should begin by noting that, Ayres' position to the contrary notwithstanding, assault in the second degree does not require that the weapon in question be used in a manner, or with the intent, to cause serious bodily injury or death. As recited above, any person who intentionally or knowingly causes bodily injury to another by means of a dangerous instrument is guilty of assault in the second degree. This court has defined "dangerous instrument," for the purposes of this statute, as "any object which, because of its nature and the manner and intention of its use, is capable of inflicting bodily injury," *State v. Hatwan*, 208 Neb. 450, 454, 303 N.W.2d 779, 782 (1981), not serious bodily injury or death, just bodily injury. The intent mentioned in the definition of dangerous instrument is not an intent to cause bodily injury but, rather, an intent to use the instrument in the manner in which it was in fact used; hence, the language "manner and intention of its use." To read a specific intent requirement into the offense via this definition is to ignore the fact that second degree assault, like simple assault, is a general intent crime. *State v. Duis*, 207 Neb. 851, 301 N.W.2d 587 (1981).

With this in mind, we turn to the issue before us, namely, whether the object in question qualifies as a dangerous instrument. The manner in which the aforedescribed board was used was to repeatedly strike a 10-year-old child with sufficient force to split the board in two. The intent with which it was used can be inferred both from the manner in which it was used and from Ayres' own statements that it was his intent to spank Michael, that he knew he was striking the child, and that he "set out to . . . punish him." That the nature of the instrument, the

manner of its use, and the intent with which it was used made the board capable of inflicting bodily injury is eloquently attested to by the photographs of Michael's injuries, which illuminate the examining physician's words by depicting a child turned into a living welt. The first assignment of error, as far as it pertains to the second degree assault conviction, is therefore without merit.

Ayres next contends that the evidence is insufficient to support a finding that he used a deadly weapon within the meaning of § 28-1205 because he did not intend to use the board to inflict serious bodily injury or death, nor did he use the board in such a manner as to inflict serious bodily injury or death. Section 28-1205(1) provides:

> 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.

Under the earlier cited definition of deadly weapon, our inquiry becomes whether either the manner or intent with which Ayres used the board made it capable of producing death or serious bodily injury.

"Serious bodily injury" is "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." § 28-109(20). A deadly weapon is therefore any instrument which, in the manner it is used or intended to be used, is capable of producing a bodily injury involving a substantial risk of (1) death, (2) serious permanent disfigurement, or (3) protracted loss or impairment of the function of any organ or body part. The weapon need not actually produce such injuries, but need only be used in a manner which makes it capable of producing them. Cf. *State v. Swigart*, 233 Neb. 517, 446 N.W.2d 216 (1989) (actual infliction of harms described in § 28-109(20) not necessary for conviction of first degree assault; victim need

only be exposed to a substantial risk of these harms).

We have already discussed both the manner and the intent with which the board was used. The board was repeatedly used to strike a 10-year-old child about the buttocks, thighs, arms, back, and face, with blows sufficient to split a piece of wood three-fourths of an inch thick. The fact finder had before it the board and evidence of the manner in which it was used. It also had evidence of the injuries actually inflicted. From this evidence it could reasonably conclude that the manner in which Ayres used the board made it capable of inflicting serious bodily injury. When we combine this with our earlier determination that the evidence supports a finding that the board was used to commit the felony of assault in the second degree, we can only conclude that the evidence is sufficient to support the weapon conviction as well.

This brings us to the second and last assignment of error, the propriety of the sentences. Child abuse and second degree assault are both Class IV felonies, punishable by imprisonment for a period of up to 5 years. § 28-309; § 28-707; Neb. Rev. Stat. § 28-105 (Reissue 1985). The use of a weapon to commit a felony is a Class III felony, punishable by imprisonment of not less than 1 nor more than 20 years. § 28-1205; § 28-105. Section 28-1205(3) requires that the sentence for use of a weapon to commit a felony be consecutive to any other sentence imposed. It is a well-established rule that this court will not disturb on appeal a sentence that is within the statutory limits, absent an abuse of discretion. *State v. Clark, ante* p. 475, 461 N.W.2d 576 (1990).

Recognizing that each of the sentences imposed is within the applicable statutory limits, Ayres' contention, framed both in terms of due process and in reliance upon Nebraska statutory and case law, essentially is that the district court abused its discretion because it failed to consider anything other than his crime. To support this position, Ayres places great weight on the fact that the sentencing court commented on the seriousness of his crimes and made no indication that it considered Ayres' unique situation. We note that the sentencing court is not required to express the reasons for imposing a sentence, even though doing so would simplify our review. *State v. Jallen*, 218

Neb. 882, 359 N.W.2d 816 (1984).

After reviewing the record, including the presentence report, we find no abuse of discretion. The beating Ayres inflicted was brutal and savage, and this fact is not lessened by the financial and health-related stresses he was under. Ayres was aware of his inability to handle stress, since that inability was the basis of his being discharged from the military service, yet he volunteered to take over the care of three adolescent boys, a stressful task even at the best of times and under the best of circumstances.

There being no merit to either of Ayres' assignments of error, we affirm.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DANNY B. JOHNSON, APPELLANT.

464 N.W.2d 167

Filed January 4, 1991. No. 89-1212.

1. **Verdicts: Appeal and Error.** A verdict in a criminal case will not be disturbed on appeal if the evidence, viewed most favorably to the State, is sufficient to support that verdict.
2. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to sustain a conviction, it is not the province of the Supreme Court to resolve conflicts in evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence; such matters are for the fact finder.
3. **Rules of Evidence: Hearsay: Witnesses.** As a general rule, the exercise of a privilege not to testify renders the witness unavailable to the extent of the scope of the privilege.
4. **Rules of Evidence: Hearsay: Witnesses: Waiver.** Ordinarily, it is necessary for the party seeking to invoke the spousal privilege exception to the hearsay rule to first call the witness and ask the questions, thereby compelling the spouse to make a formal claim of privilege. However, where it is obvious that a witness will not testify because the court has been informed that the privilege will not be waived, it is not necessary to go through the formalities of actually calling the witness.
5. **Rules of Evidence: Hearsay.** The fact that a wife's statement might tend to incriminate her husband, thereby exposing him to criminal prosecution and possible incarceration to the extent that the wife will lose the support previously

provided by the husband, is not a statement against her pecuniary interest within the meaning of Neb. Rev. Stat. § 27-804 (Reissue 1989).

6. _____: _____. As a general rule, the possibility that a statement might implicate the declarant in criminal activity is within the criminal liability exception to the hearsay rule.
7. **Aiding and Abetting.** Aiding and abetting involves some participation in the criminal act and must be evidenced by some word, act, or deed. No particular acts are necessary, nor is it necessary that any physical part in the commission of the crime is taken or that there was an express agreement therefor. Mere encouragement or assistance is sufficient.
8. **Jury Instructions: Appeal and Error.** All of the jury instructions given must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating a reversal.
9. **Sentences: Appeal and Error.** A sentence imposed within the statutory limits will not be disturbed on appeal in the absence of an abuse of discretion on the part of the sentencing court.

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

Chris M. Arps, of Arps & Schirber Law Offices, for appellant.

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

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

HASTINGS, C.J.

Following a jury trial, defendant, Danny B. Johnson, was convicted of burglary, a Class III felony, in violation of Neb. Rev. Stat. § 28-507 (Reissue 1989). He was sentenced to a term with the Nebraska Department of Correctional Services for 18 months to 3 years.

The defendant has appealed, assigning as error (1) the insufficiency of the evidence, (2) the admission of hearsay statements, (3) the admission of statements made by defendant's wife in violation of the spousal privilege, (4) the giving of certain instructions, and (5) the excessiveness of the sentence. We affirm.

During the nighttime hours of February 12, 1989, Bellevue Transmission, located in Bellevue, Nebraska, was broken into

and two vending machines containing candy, nuts, and coins were removed from the premises. Investigating officers found one broken-out window and one cut-out window through which access to the building could be had.

There had been a fresh snow that night, and the officers found two sets of footprints outside the building. One set of prints was made by hiking boots of the "wafflestomper" variety, and another set was made by rubber hunting or fishing boots. One of the officers followed these two sets of tracks, which paralleled each other. In the vicinity of a shed located at 2105 Fairview were impressions in the snow made by objects which the police officer said matched exhibits 11 and 13, a vending machine and a stand that were two of the items removed from Bellevue Transmission. The footprints were followed to the address of 2104 Tulip Lane. Matching footprints were then discovered leading from 2104 Tulip back to the scene of the break-in.

Police officers of the Bellevue Police Department then made contact with the people living at 2104 Tulip and were admitted to the house. Officer Monnier, who had been the officer following the tracks, noticed a pair of rubber boots standing by the door. He picked up one of the boots, and he looked at the print of the sole and visually matched it with one of the set of prints which he had followed. The boots appeared wet. Monnier asked to whom the boots belonged, and the defendant admitted they were his. Both the defendant and his brother Randy said there were no other boots in the house. The officers asked defendant for permission to look around the house, and it was denied. A decision was made by the officers to obtain a search warrant and to leave two officers at the residence to provide security.

The police checked with their communication center and discovered an outstanding felony warrant on defendant's brother Randy. While the officers were waiting for the search warrant, the defendant and his brother exited the premises fully dressed, wearing winter outerwear, and Randy was placed under arrest on the felony warrant. The defendant then "hurried" back into the house. During the wait for the warrant, Officer Monnier continued to monitor the premises from the

outside and noticed lights being turned off and the defendant peeking out. The officers heard the clanging of what sounded like change hitting the floor in the garage.

Eventually, Officer Strachota appeared with the search warrant, and the officers knocked at the west door. It was a couple of minutes before anyone showed up to let them in. Strachota searched the residence while Monnier visited with the defendant's wife, Belinda Johnson. Over the objection of "hearsay, in violation of 27-505," Monnier was permitted to testify as to what Mrs. Johnson finally told him. Monnier's answer was that

> [s]he told me that Randy, who had been staying with Belinda and Danny at the house there, had left the residence that evening, approximately 8 p.m., and a short time later returned. And at that time Randy got Danny, left the residence with intentions of committing a burglary near Philadelphia Place.

In the meantime, Officer Strachota found a number of quarters inside the garage and also found some wafflestomper boots hidden behind a partition near the water heater. Monnier and Strachota, followed by defendant's wife, went into the upper level of the house.

Officer Strachota testified to finding $12.50 worth of coins in the garage. He also told about finding the hiking boots, which he said were "real wet." He also testified to finding the vending machines upstairs and some nuts from one of the vending machines. In connection with the description of the nuts, Strachota was asked what Mrs. Johnson said about them, but an objection as to hearsay was sustained. The State then made the following offer of proof:

> State would make an offer of proof that if allowed to answer, the witness would testify that she stated that the peanuts were taken in the burglary. And the State's offered them, she's unavailable to me as a witness because of a spousal privilege. And given the fact that she knows everything in the burglary, it exposes her to criminal liability, so it's an exception to the hearsay rule for being in possession of stolen goods.

Following argument outside the presence of the jury, the trial

court changed its ruling and overruled the hearsay objection, allowing testimony that Mrs. Johnson said to the officer that the peanuts were removed from the vending machine.

Strachota further testified that later in the morning, Cheryl Bland, the mother of defendant's wife, called him, which caused him to return to the premises. Bland then showed him a stand for one of the stolen vending machines and a blue peanut-vending machine, both of which had been hidden behind a couch. Following additional conversation with Bland, Strachota found some quarters and the stand for the other vending machines. The stand was found underneath the downstairs kitchen table, and the quarters were found wrapped in a towel on a counter in the downstairs kitchen.

As part of the defense, defendant's brother Randy testified that he committed the burglary by himself. He admitted that he was wearing mountain boots, or wafflestompers. He said that following the break-in, he took two vending machines and carried them to Taco John's. This was approximately 400 feet to the north. He said that he thought he made two trips from the scene of the burglary to Taco John's because there were two machines. He then carried one of the vending machines to the defendant's house, changed boots, and went back to get the other vending machine.

Randy denied that his brother, the defendant, had anything to do with the burglary. The witness further said that he took the peanuts out of the machine and put them in a bowl and that he took the money and wrapped it in a rag in the kitchen. He stated that he took the stands off the machines, taking one off in the kitchen and one off in the garage.

Defendant's wife testified that her husband had been home all evening. However, she also said that she and her husband did not sleep in the same room that night. She assumed he was in bed all that time until she heard a noise and came out into the hallway. According to a statement which she had given in her own handwriting to the police, she was awakened by a noise, came out into the hallway, and was asked by Randy and Danny to go back to bed. She said that she did not see anything, but that later the police came to the door and asked questions of Randy, Danny, and her and then came back with a search

warrant.

Mrs. Johnson testified that although she wrote the statement herself, the facts stated therein were not true. However, according to her testimony on redirect examination, apparently the only thing that was incorrect about the statement was that Randy would never have told her to go back to bed or she "probably would have decked him." She did admit that she came out into the hall where Randy and Danny were located after hearing a noise and then went back to bed, following which time the police came, left to get a search warrant, and returned.

The defendant, in his testimony, said that his wife went to bed and then he went to bed and that his brother Randy was still at the house. He mentioned hearing the noise and said that Randy told him that he had fallen down. The defendant then testified that he told his wife to go back to bed; that he saw some lights flashing; and that he saw some police officers on his driveway, one of whom waved to him to come outside, which he did. The officers talked to the defendant about a burglary and also talked to his brother Randy. They asked permission to search the house, which request the defendant denied, he said, because he was confused. Defendant went on to testify that the police officers told his brother they were investigating a burglary and that some footprints led to the house, that the officers asked Randy if he knew anything about the burglary, and that Randy said no. Defendant also testified that the officers saw his rubber snow boots where he had left them by the front door, picked them up and looked at the bottoms, and then set them back down. Although the boots actually belonged to Randy, the defendant told the officers they were his. Defendant stated that he had used the boots that night. Contrary to the testimony of the police officers, the defendant testified that only his brother left the house while the officers were getting the search warrant and that his brother was immediately arrested on a Douglas County warrant.

There was further testimony from the defendant that the officers returned with a search warrant and that later he was arrested for burglary.

On rebuttal, Officer Monnier testified that at one point in

time when he was in the Johnson house, he found the defendant's wife in her bedroom, curled up in a fetal position, complaining that her stomach hurt. He asked her if she was all right, and according to Monnier, she stated that "her stomach hurt so bad from worrying about the stress of what Danny and Randy had done." A defense objection of relevancy, hearsay, foundation, and improper rebuttal was overruled.

At the conclusion of all of the evidence, a defense motion for a directed verdict was overruled. The jury returned a verdict of guilty.

Regarding the first assignment of error—the insufficiency of the evidence—a verdict in a criminal case will not be disturbed on appeal if the evidence, viewed most favorably to the State, is sufficient to support that verdict. *State v. Thomas, ante* p. 568, 462 N.W.2d 618 (1990); *State v. Williamson,* 235 Neb. 960, 458 N.W.2d 236 (1990). In determining the sufficiency of the evidence to sustain a conviction, it is not the province of the Supreme Court to resolve conflicts in evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence; such matters are for the fact finder. *State v. Thomas, supra*; *State v. Saltzman*, 235 Neb. 964, 458 N.W.2d 239 (1990).

The evidence of the two sets of distinctive footprints is practically irrefutable. They were followed from the scene of the burglary, through the Village Inn parking lot between the Village Inn and the Best Western Motel, to the south end of Taco John's, and eventually to the residence of the defendant. The prints matched the two pairs of boots found at the defendant's residence, one pair of which the defendant said he had worn the evening of the burglary while clearing snow from his driveway, although they belonged to his brother Randy. Although the brother testified that he had carried the two vending machines to Taco John's and then had carried one home, had changed boots, and had gone back to Taco John's to pick up the second machine, this testimony the jury apparently found not believable. He could not possibly have made the second set of tracks from the scene of the burglary to Taco John's because he did not go back to the scene after supposedly changing his boots. Also, he testified that he had made two trips

from the burglary scene to Taco John's, but this would have been before he allegedly changed his boots, and the two distinctive sets of prints were found between the burglary scene and Taco John's.

Furthermore, the fruits of the crime were found in various places throughout defendant's house. Defendant's so-called alibi—that his wife saw him go to bed at the same time that she did—was refuted in part by her own testimony and that of the defendant. The defendant testified that he went to bed after his wife did and that his brother was still in the house. When Mrs. Johnson was awakened by some noise, she went out into the hall and both her husband and his brother were there, and she was told to go back to bed, which she did. It was after this that the police showed up for the first time to interview the two brothers.

One of the police officers testified that while awaiting the arrival of the search warrant, both the defendant and his brother came out of the house—in an obvious effort to escape. This was denied by the defendant, but it made for a legitimate question of fact.

Certainly, there was sufficient evidence, if believed, for a jury to have found the defendant guilty. There is no merit to the first assignment of error.

Defendant's second and third assignments of error relate to the testimony of Officers Strachota and Monnier as to two different statements made to them by the defendant's wife, which it is claimed violated both the hearsay rule and the spousal immunity rule. Because the assigned errors are interrelated, they will be considered together. As previously stated, one statement was that Mrs. Johnson said that defendant and his brother left the house with the intention of committing a burglary. The other statement related to some nuts that were found in a bowl in the cupboard, and the officer claimed that Mrs. Johnson said that they were removed from one of the vending machines.

The first statement was objected to as hearsay and "in violation of 27-505." The second statement was objected to on the grounds of hearsay.

However, Neb. Rev. Stat. § 27-804 (Reissue 1989) provides

as follows:

> (2) Subject to the provisions of section 27-403, the following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> . . . .
>
> (c) A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true.

Section 27-804(1) provides: "Unavailability as a witness includes situations in which the declarant: (a) Is exempted by ruling of the judge on the ground of privilege from testifying concerning the subject matter of his statement . . . ."

Neb. Rev. Stat. § 27-505 (Reissue 1989) provides in part as follows: "(2) During the existence of the marriage, a husband and wife can in no criminal case be a witness against the other. This privilege may be waived only with the consent of both spouses."

The testimony proscribed by § 27-505 would tend to incriminate the defendant, and therefore his wife could not be a witness against him without the consent of both her and her husband. During a sidebar conference before the statement relating to the peanuts was sought to be elicited, the court inquired of defense counsel if the defendant and his wife were consenting to her testimony, and he replied, "No, of course not."

As a general rule, the exercise of a privilege not to testify renders the witness unavailable to the extent of the scope of the privilege. See McCormick On Evidence § 253 (E. Cleary 3d ed. 1984). Ordinarily, it is necessary for the party seeking to invoke the privilege exception to the hearsay rule to first call the witness and ask the questions, thereby compelling the spouse to make a formal claim of privilege. *Commonwealth v. DiPietro*, 4 Mass. App. 845, 356 N.E.2d 269 (1976). This would seem to require in most instances that the proponent of the hearsay statement make a reasonable effort to determine that the witness will claim the privilege. See *State v. Jordan*, 229 Neb. 563, 427

N.W.2d 796 (1988).

However, where, as here, the court asked defendant's counsel if the privilege would be waived and received a negative answer, it was not necessary for the State to go through the formalities of actually calling the witness in this instance. Therefore, in our judgment the State had established the unavailability of the witness.

It is then necessary for us to determine whether the alleged statements were made against the witness' pecuniary interest.

The State argues that because she knew that her statements would implicate her husband, possibly causing him to be sentenced to a term of imprisonment, his unavailability to work and provide income for her and her family would be against her pecuniary interest. No authority is cited in support of this proposition, and we have been unable to find any. This contention is without merit.

As to the claim that the statements would subject the witness, Mrs. Johnson, to criminal liability, we find it unnecessary to decide. Assuming, without deciding, that the statements violated the hearsay rule and should not have been admitted, we find that the remaining evidence of defendant's guilt was so overwhelming that the admission of such statements was harmless beyond a reasonable doubt. *State v. Baltimore, ante* p. 736, 463 N.W.2d 808 (1990).

The fourth assignment of error relates to the court's jury instructions Nos. 3 and 10. However, it is obvious from reading the instructions and from the defendant's argument that he is referring to instruction No. 9 rather than instruction No. 10.

Instruction No. 3 is as follows:

> Regarding the charge of burglary, the elements of the State's case are:
>
> (1) The defendant broke and entered, or aided and abetted in such breaking and entering, property at 304 Galvin Road North in Bellevue, Nebraska;
>
> (2) That such breaking and entering was done willfully, maliciously, and forcibly;
>
> (3) That it was done with the intent to steal property or commit some other felony while within the structure;
>
> (4) The act took place on or about February 12, 1989;

and

(5) The act took place in Sarpy County, Nebraska.

If you decide that the state proved each element beyond a reasonable doubt then you must find the defendant guilty. Otherwise, you must find the defendant not guilty.

Instruction No. 9 is as follows:

The defendant can be guilty of the crime charged even though he personally did not commit every act involved in the crime so long as he aided someone else to commit it. The defendant aided someone else if:

(1) the defendant in some way intentionally encouraged or helped another person to commit the crime; and

(2) the defendant knew that the other person intended to commit the crime; and

(3) the crime in fact was committed by that other person.

The state must prove beyond a reasonable doubt that the crime was committed and that the defendant either personally did all the acts necessary to commit it or aided someone else to commit it.

(Emphasis in original.)

Section 28-507 defines burglary as follows: "(1) A person commits burglary if such person willfully, maliciously, and forcibly breaks and enters any real estate or any improvements erected thereon with intent to commit any felony or with intent to steal property of any value. (2) Burglary is a Class III felony."

It is apparent that instruction No. 3 correctly defines the elements of burglary. The defendant does not contend the contrary, but argues that by the insertion of a reference to the words "aided and abetted," the jury would be confused as to "when the aiding took place." Brief for appellant at 15. The question then becomes one as to the validity of instruction No. 9, defining aiding and abetting.

This court has consistently held:

> Aiding and abetting involves some participation in the criminal act and must be evidenced by some word, act, or deed. No particular acts are necessary, nor is it necessary that any physical part in the commission of the crime is taken or that there was an express agreement therefor.

Mere encouragement or assistance is sufficient.

(Citations omitted.) *State v. Bennett*, 219 Neb. 601, 606, 365 N.W.2d 423, 426-27 (1985).

A cursory reading of instruction No. 9 makes it abundantly clear that the jury was told that in order to aid another to commit a crime, the defendant must intentionally encourage another "to commit the crime" and must know that the other person "intended to commit the crime" and the "crime in fact [must be] committed by that other person." The two instructions when read together fully and fairly instructed the jury on the elements of the crime. *Denesia v. St. Elizabeth Comm. Health Ctr.*, 235 Neb. 151, 161, 454 N.W.2d 294, 302 (1990), provides: "All of the instructions given must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating a reversal."

Finally, the defendant insists that the sentence imposed upon him was excessive. It is beyond dispute that in Nebraska a sentence imposed within the statutory limits will not be disturbed on appeal in the absence of an abuse of discretion on the part of the sentencing court. *State v. Johnson*, 234 Neb. 110, 449 N.W.2d 232 (1989); *State v. Willett*, 233 Neb. 243, 444 N.W.2d 672 (1989).

The statutory penalty for this offense is imprisonment for not less than 1 year nor more than 20 years. It is quite apparent that the court took into account that the defendant's record was less serious than that of his brother, as the latter was sentenced to a term of 2 to 5 years, as compared to 18 months to 3 years with credit for time served before conviction, which sentence the defendant received. There was no abuse of discretion.

The judgment of the district court is affirmed.

AFFIRMED.

ALLEN WAGNER, APPELLANT, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLEE.

464 N.W.2d 175

Filed January 4, 1991. No. 89-1384.

1. **Administrative Law: Appeal and Error.** In an error proceeding to review an administrative agency decision, both the district court and the Supreme Court review the decision of the administrative agency to determine whether the agency acted within its jurisdiction and whether the decision of the agency is supported by sufficient relevant evidence.
2. **Administrative Law: Evidence: Appeal and Error.** Evidence supports an administrative agency's decision reviewed in an error proceeding if the agency could reasonably find the facts for the agency's decision on the basis of the relevant evidence contained in the record before the agency.
3. **Administrative Law: Appeal and Error.** In an error proceeding to review an administrative agency's decision, the reviewing court is restricted to the record before the administrative agency and does not reweigh evidence or make independent findings of fact.
4. _____: _____. A proceeding in error removes the record from an inferior tribunal to a superior tribunal in order for the superior tribunal to determine whether the judgment or final order of the inferior tribunal is in accordance with law.
5. **Appeal and Error.** In the absence of plain error, where an issue is raised for the first time in the Supreme Court, it will be disregarded inasmuch as the district court cannot commit error in resolving an issue never presented and submitted for disposition.
6. **Constitutional Law: Appeal and Error.** If questions of constitutionality have not been raised properly in the district court, generally they will be considered to have been waived.
7. **Police Officers and Sheriffs: Arrests.** Under the provisions of Neb. Rev. Stat. § 28-1412 (Reissue 1989), a police officer in making an arrest must use only reasonable force, which is that amount of force which an ordinary, prudent, and intelligent person with the knowledge and in the situation of the arresting police officer would have deemed necessary under the circumstances.
8. **Administrative Law: Words and Phrases.** Arbitrary and capricious action has been defined by this court with reference to administrative agencies as action taken, in disregard of the facts or circumstances of the case, without some basis which would lead a reasonable and honest person to the same conclusion.
9. **Appeal and Error.** This court does not substitute its judgment for that of the trial court regarding matters of evidence such as credibility of the witnesses or disputes and conflicts in testimony of the witnesses.
10. **Administrative Law: Evidence: Appeal and Error.** This court reviews, on appeal, the evidence to determine if the evidence is sufficient to support the decision of the agency and the action taken.
11. **Evidence: Words and Phrases.** Competent evidence is evidence that tends to establish the fact in issue.

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

Daniel W. Ryberg for appellant.

Herbert M. Fitle, Omaha City Attorney, and Kent N. Whinnery for appellee.

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

PER CURIAM.

Allen Wagner, an Omaha police officer, received a 15-day suspension by the public safety director of the City of Omaha for excessive use of force in the performance of his duties. On appeal to the Omaha Personnel Board, following an evidential hearing, the order of suspension was modified to 4 days, and, as modified, the order of suspension was affirmed. Wagner filed a petition in error in the district court, following which the order of the personnel board was affirmed. Wagner now appeals to this court.

Error is assigned in that the trial court (1) based its decision on an unconstitutional standard of review, (2) erred in failing to determine that the decision of the personnel board was based on an erroneous interpretation of the law on use of force, and (3) erred in failing to determine that the personnel board misapplied the law to the facts and, therefore, the decision was arbitrary and capricious. We affirm.

In an error proceeding to review an administrative agency decision, both the district court and the Supreme Court review the decision of the administrative agency to determine whether the agency acted within its jurisdiction and whether the decision of the agency is supported by sufficient relevant evidence. *Olson v. City of Omaha*, 232 Neb. 428, 441 N.W.2d 149 (1989); *Wadman v. City of Omaha*, 231 Neb. 819, 438 N.W.2d 749 (1989); *Trolson v. Board of Ed. of Sch. Dist. of Blair*, 229 Neb. 37, 424 N.W.2d 881 (1988). "Evidence supports an administrative agency's decision reviewed in an error proceeding if the agency could reasonably find the facts for the agency's decision on the basis of the relevant evidence contained in the record before the agency." *Wadman v. City of Omaha,*

supra at 820, 438 N.W.2d at 751. In an error proceeding to review an administrative agency's decision, the reviewing court is restricted to the record before the administrative agency and does not reweigh evidence or make independent findings of fact. *Olson v. City of Omaha, supra*; *Wadman v. City of Omaha, supra*; *Coffelt v. City of Omaha*, 223 Neb. 108, 388 N.W.2d 467 (1986).

Wagner has 5 years' experience on the Omaha police force. In addition to his regular duties as a uniformed officer, he is specially trained and certified as a member of the emergency reaction unit, which is designed to handle hostage, barricaded gunmen, and other major threat situations. During his 4 months as a member of that special force, he had been observed to conduct himself with restraint and control in hostage and barricaded gunmen situations. As part of his training, he was certified in the use of a "PR-24," which is a type of nightstick. It differs from a regular nightstick in that it has a perpendicular handle about one-third of the way from the end of the stick and is used to jab rather than to club. The jabs are to be to areas of the body, such as the abdomen, which "deflate" the suspect and make such suspect more amenable to control.

During the early morning hours of February 10, 1989, Billy Higgins, an Omaha police officer, was in pursuit of a vehicle in the area of 38th and Webster Streets. Wagner heard a call over the police radio of this pursuit, and he joined in the chase.

In the meantime, the occupants of the vehicle being chased abandoned the vehicle, and Higgins continued the chase on foot. Higgins caught up with one of the suspects, placed him under arrest, and started to handcuff him. He then noticed another suspect, who was the victim of the claimed use of excessive force by Wagner. Higgins handcuffed the arrested suspect to a steel fence and ran after the other suspect. He caught that suspect and was bringing him back to the location of the handcuffed suspect. Both the officer and the person he had caught were winded from the chase. Higgins had no other handcuffs to use.

About that time, Officer Gary Nimps arrived at the scene and saw that Higgins and the second suspect were standing close together and both were leaning forward with their hands

on their knees, apparently trying to catch their breath. Higgins told Nimps to handcuff the second suspect. While Nimps was in the process of bringing the victim suspect's left arm behind him, Wagner arrived at the scene, observed Higgins bending forward, and saw the victim suspect standing nearby, but did not see Nimps. Wagner yelled at the victim suspect to drop to the ground, but Nimps had just told the victim suspect to put his hands behind his back. Wagner ran toward the victim suspect and poked him at least once in the abdomen with his nightstick, and the victim suspect went down on his knees. Wagner and Nimps then completed handcuffing the victim suspect.

None of the officers, including Wagner, contended that the victim suspect exhibited any provocative conduct toward any of them which required the use of force.

Two civilians witnessed this event, and both testified that they could see no reason for the use of force toward the victim suspect. Their version of what happened was substantially similar to that of the police officers, although one witness said that Wagner hit the victim suspect at least four times.

Wagner's first assignment of error is a trifle difficult to follow. He seems to be saying that the district court based its decision on an unconstitutional standard of review because it decided the matter on the basis of error appearing in the record. He then points to *Meier v. State*, 227 Neb. 376, 417 N.W.2d 771 (1988), in which opinion, he says, this court implied that an appeal from a state agency can be brought either by appeal for review or by a petition in error. Thus, he argues, a law enforcement officer employed by the state could choose his or her standard of review, whereas a city police officer is limited in a review to error proceedings. However, at the time this proceeding was filed in the district court, May 31, 1989, the standard of review for the district court was whether the agency acted within its jurisdiction and whether the decision of the agency was supported by sufficient relevant evidence.

We need not answer the question. Wagner chose his method of review, an error proceeding, and the district court, as well as this court, is limited to the same standard of review earlier stated. A proceeding in error removes the record from an inferior tribunal to a superior tribunal in order for the superior

tribunal to determine whether the judgment or final order of the inferior tribunal is in accordance with law. See *Hammann v. City of Omaha*, 227 Neb. 285, 417 N.W.2d 323 (1987). Thus, in an error proceeding, the district court and this court review the administrative agency's decision with the same standard of review.

Also, Wagner's claim of unconstitutionality is not reviewable under the circumstances. He did not plead, brief, or argue the constitutionality issue in the district court. This court stated in *State v. Thomas, ante* p. 355, 358, 461 N.W.2d 513, 515-16 (1990):

> " 'In disposing of an appeal the Supreme Court considers only those errors which are properly assigned and presented to this court. [Citation omitted.] Where a cause has been appealed to the Supreme Court from a district court exercising appellate jurisdiction, only issues properly presented to and passed upon by the district court may be raised on appeal to this court. In the absence of plain error, where an issue is raised for the first time in the Supreme Court, it will be disregarded inasmuch as the district court cannot commit error in resolving an issue never presented and submitted for disposition. [Citation omitted.]' "

If questions of constitutionality have not been raised properly in the district court, generally they will be considered to have been waived. *State v. Thomas, supra.*

Wagner's second and third assignments of error will be reviewed together, since they question the interpretation of the law and the application of that law to the facts by the administrative agency.

As to the law governing the standard of conduct to be employed by police officers, Wagner cites only Neb. Rev. Stat. § 28-1412(1) (Reissue 1989), which provides as follows:

> Subject to the provisions of this section and of section 28-1414, the use of force upon or toward the person of another is justifiable when the actor is making or assisting in making an arrest and the actor believes that such force is immediately necessary to effect a lawful arrest.

This particular section has not been construed by this court

as to the meaning of "the actor believes that such force is immediately necessary to effect a lawful arrest." However, in *Landrum v. Moats*, 576 F.2d 1320 (8th Cir. 1978), the U.S. Court of Appeals for the Eighth Circuit was concerned with Neb. Rev. Stat. § 28-839 (Reissue 1975), which contained language nearly identical to that of Neb. Rev. Stat. § 28-1412 (Reissue 1989) and was its predecessor. That case involved a suit against a police officer by the mother and special administratrix of the estate of her son, who was shot and killed by the police officer during the course of an attempted arrest. The court approved of an instruction which the trial court gave which stated in part that " '[i]n making an arrest, a police officer may use whatever force is reasonably necessary. Reasonable force is generally that amount of force which an ordinary, prudent and intelligent person with the knowledge and in the situation of the police officer would have deemed necessary under the circumstances. . . .' " *Landrum v. Moats, supra* at 1329-30.

We believe this is a correct statement of the law. We therefore hold that under the provisions of § 28-1412, a police officer in making an arrest must use only reasonable force, which is that amount of force which an ordinary, prudent, and intelligent person with the knowledge and in the situation of the arresting police officer would have deemed necessary under the circumstances.

We now turn to the action taken by the personnel board. On a petition in error the agency's decisions are reviewed to determine whether the agency acted within its jurisdiction and whether the evidence is sufficient as a matter of law to support the agency's decision. *Meier v. State*, 227 Neb. 376, 417 N.W.2d 771 (1988). Wagner has not challenged the jurisdiction of the Omaha Personnel Board, thus the court will assume that the agency has acted within its jurisdiction.

Wagner alleges that the trial court erred in failing to determine that the Omaha Personnel Board's decision was based on an erroneous interpretation of the law on the use of force and that the Omaha Personnel Board misapplied the law and, therefore, its decision was arbitrary and capricious.

Arbitrary and capricious action has been defined by this court with reference to administrative agencies as "action

taken, in disregard of the facts or circumstances of the case, without some basis which would lead a reasonable and honest person to the same conclusion." *In re Appeal of Levos*, 214 Neb. 507, 514, 335 N.W.2d 262, 267 (1983) (quoting *Ind. Civil Rights Comm. v. Sutherland Lumber*, 182 Ind. App. 133, 394 N.E.2d 949 (1979)). This court does not substitute its judgment for that of the trial court regarding matters of evidence such as credibility of the witnesses or disputes and conflicts in testimony of the witnesses. *In re Appeal of Levos, supra.* Rather, this court reviews the evidence to determine if the evidence is sufficient to support the decision of the agency and the action taken. *Meier v. State, supra*; *In re Appeal of Levos, supra.* This court concluded in *In re Appeal of Levos* that the tribunal conducting the hearing is more able to judge the credibility of the witnesses and evaluate the evidence submitted at the hearing.

Thus, the court needs to determine if competent evidence supports the determination of the agency. Competent evidence has been defined as " 'evidence that tends to establish the fact in issue.' " *In re Appeal of Levos, supra* at 515, 335 N.W.2d at 267 (quoting *Shepherd v. City of Omaha*, 194 Neb. 813, 235 N.W.2d 873 (1975), overruled to the extent that it says the city must establish by a preponderance of the evidence "good cause" for discharging an employee).

While it may be true that Wagner misperceived the situation and believed that the force he used was necessary, that belief may have been unreasonable under the circumstances. None of the other officers at the scene noticed any provoking conduct requiring force. The board could also have concluded that Wagner escalated his use of force too quickly without determining the facts surrounding the apprehension of the victim suspect.

The evidence before the board was conflicting; however, the credibility of the witnesses was a question for the board. There was competent evidence to sustain the findings and order of the Omaha Personnel Board that the use of force by Wagner was excessive.

The judgment of the district court in affirming the order of the personnel board is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MARC M. FELLMAN, APPELLANT.

464 N.W.2d 181

Filed January 4, 1991. No. 89-1408.

1. **Constitutional Law: Standing: Statutes.** To have standing to challenge the federal or state constitutionality of a statute, the contestant must be one who is, or is about to be, adversely affected by the language in question and must show that as a consequence of the alleged unconstitutionality, the contestant is deprived of a constitutionally protected right.
2. **Constitutional Law: Initiative and Referendum: Statutes.** Statutes prohibiting one from falsely swearing that she or he circulated an initiative petition and that each signature on the petition was signed in the circulator's presence are not overbroad.
3. _____: _____: _____. Statutes prohibiting one from falsely swearing do not impinge on the rights embodied in Neb. Const. art. I, §§ 5, 19, and 22, and art. III, §§ 1, 2, and 4.
4. **Statutes.** While repeals of statutes by implication are not favored and a statute will not be considered so repealed unless the repugnancy between the new enactment and the former statute is plain and unavoidable, where such a repugnancy exists, the new enactment will be deemed to have repealed the former statute by implication.
5. **Statutes: Legislature: Intent.** A construction of a statute which, in effect, repeals another statute will not be adopted unless such a construction is made necessary by the evident intent of the Legislature.
6. **Statutes.** A legislative act which is complete in itself and is repugnant to or in conflict with a prior law repeals the prior law by implication to the extent of the repugnancy or conflict.
7. **Trial: Waiver.** While a party in a case tried to a court without a jury is entitled to a ruling on a proffered objection, one who does not insist on such a ruling waives the objection.
8. **Trial: Evidence: Presumptions.** In a case tried to a court without a jury, there is a presumption that in reaching its decision the trial court considered only evidence that is competent and relevant.
9. **Aiding and Abetting.** Aiding and abetting involves some participation in the criminal act and must be evidenced by some word, act, or deed. No particular acts are necessary, nor is it necessary that any physical part in the commission of the crime is taken or that there was an express agreement therefor. Mere encouragement or assistance is sufficient.
10. _____. Aiding and abetting involves some participation in the criminal act or some conscious sharing in the criminal act, as in something that the accused wishes to bring about, in furtherance of the common design, either before or at the time that the criminal act is committed, and it is necessary that he seeks by his action to make it succeed.
11. **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.

12. **Verdicts: Appeal and Error.** On a claim of insufficiency of the 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.
13. **Criminal Law: Appeal and Error.** Factual findings of a judge who serves as the trier of fact in a criminal case will not be disturbed on appeal unless clearly wrong.
14. **Convictions: Circumstantial Evidence.** A criminal conviction may be based on circumstantial evidence.
15. **Motions for New Trial: Evidence.** Newly discovered evidence offered in support of a motion for new trial must be so potent that, by strengthening the evidence already offered, a new trial would probably result in a different verdict; the newly discovered evidence must be relevant and credible and not merely cumulative.
16. **Motions for New Trial: Appeal and Error.** A motion for new trial on the basis of newly discovered evidence is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.

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

James Martin Davis and Martin J. Kushner for appellant.

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

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

CAPORALE, J.

I. INTRODUCTION

This is yet another case arising from the attempt to place on the 1986 general election ballot an initiative measure to amend the state Constitution so as to permit a state-run lottery. See, *State v. Radcliffe*, 228 Neb. 868, 424 N.W.2d 608 (1988); *State v. Pappas*, 228 Neb. 861, 424 N.W.2d 604 (1988); *State v. Katzman*, 228 Neb. 851, 424 N.W.2d 852 (1988); *State v. Monastero*, 228 Neb. 818, 424 N.W.2d 837 (1988).

Following a bench trial, the defendant in this case, Marc M.

Fellman, was adjudged guilty of aiding, abetting, procuring, or causing another to falsely swear to a signature on an initiative petition, in violation of Neb. Rev. Stat. §§ 32-705 (Cum. Supp. 1986) and 32-713 (Reissue 1984). He was thereafter sentenced to 2 years' probation, fined $2,000, and ordered to complete 300 hours of community service. His six assignments of error on appeal may be summarized as claiming that (1) §§ 32-705 and 32-713 are unconstitutional in a variety of respects, (2) the trial court erred in certain evidential rulings, (3) there was insufficient evidence to support the conviction, and (4) the trial court erred in failing to grant a new trial for newly discovered evidence. We affirm.

II. FACTS

On July 2, 1986, Fellman, a part owner of an Omaha, Douglas County, Nebraska, business known as Lottery Consultants of Nebraska, Inc., met in Lincoln, Lancaster County, Nebraska, with a group of models who had been hired to circulate lottery initiative petitions in the latter city. These models returned their petitions to Fellman at about 4 p.m. the same day. Fellman had two of the models, Vicki Shoemaker and Anne Steyer, sign this group of petitions as the circulators thereof, despite the fact that they had not circulated all they so signed. Nor were these signatures notarized in the presence of Shoemaker or Steyer.

At trial, Shoemaker identified two documents as petitions that Fellman had her sign as circulator on July 2, 1986. These documents now bore Kimberly Peters' signature as circulator over Shoemaker's signature, which had been "whited out," or obliterated, apparently with typewriter correcting fluid.

Steyer identified four documents as petitions Fellman had her sign as circulator, again on July 2, 1986. At trial, three of these documents also bore Peters' signature as circulator over Steyer's signature, which had been similarly whited out.

Lisa Harley, another model who circulated petitions on July 2, 1986, also identified a document as one she had circulated but had not signed. At trial, this document bore Peters' July 3, 1986, signature as circulator.

Angelia Rohwer circulated petitions given to her at Fellman's

Omaha business address on July 2 and 3, 1986, and returned them to Fellman's place of business on July 3, 1986, leaving the circulator signature line unsigned. At trial, Rohwer identified one of these petitions, which then bore Peters' signature as circulator.

Fellman also had asked Michelle Penix to distribute lottery petitions. She returned those she had circulated to Fellman in a south Omaha building and signed them as circulator. At trial, Penix identified two documents as petitions she had circulated and so signed, which then bore Peters' signature as circulator.

On July 3, 1986, Kathy Paradise, a part-time employee of Walter H. Radcliffe, one of the petition drive organizers, was working on lottery-related activities in Lincoln. Fellman, carrying a manila envelope, went to the office where Paradise was working, and she showed him to then Sen. James E. Pappas' office in the State Capitol Building.

Peters, who served as Pappas' administrative assistant, had become a bonded circulator and had told Radcliffe that she would sign, as circulator, lottery petitions that she had in fact not circulated. Radcliffe telephoned Peters on July 3, 1986, saying that he was sending someone over with some petitions for her to so sign. She remembered that Paradise and a man she could not identify brought petitions to Pappas' office for her to sign as circulator and to be notarized. Peters signed petitions which had been circulated but not signed by a circulator and used typewriter correcting fluid to white out the circulator's signature on other petitions, writing in her own name as circulator. She specifically admitted signing as circulator the petitions previously identified by Shoemaker, Steyer, Harley, Rohwer, and Penix.

Allen J. Beermann, Secretary of State of the State of Nebraska, testified that the petitions identified by Shoemaker, Steyer, and Harley were among those filed with his office shortly before closing time on July 3, 1986.

III. ANALYSIS

1. Constitutional Issues

In connection with the first summarized assignment of error, Fellman makes a multifaceted constitutional challenge. He

asserts that the scheme embodied in Neb. Rev. Stat. §§ 32-705 through 32-713 (Reissue 1984 & Cum. Supp. 1986) is overbroad, thereby violating the 1st, 5th, 9th, and 14th amendments to the Constitution of the United States; that the scheme restricts and chills the initiative process, thereby violating the rights guaranteed by Neb. Const. art. I, §§ 5, 19, and 22, and art. III, §§ 1, 2, and 4; and that the scheme is vague, thereby violating the due process clauses of the 5th and 14th amendments. Before the analysis of those constitutional issues can proceed, we must determine whether Fellman has standing to mount such attack.

(a) Standing

To have standing to challenge the federal or state constitutionality of a statute, the contestant must be one who is, or is about to be, adversely affected by the language in question and must show that as a consequence of the alleged unconstitutionality, the contestant is deprived of a constitutionally protected right. *State v. Crowdell*, 234 Neb. 469, 451 N.W.2d 695 (1990); *State v. Monastero*, 228 Neb. 818, 424 N.W.2d 837 (1988); *In re Estate of West*, 226 Neb. 813, 415 N.W.2d 769 (1987).

The defendants in *Monastero, supra*, made many of the same challenges to this state's statutory scheme for placing initiative measures on a general election ballot. This court held therein that inasmuch as the defendants had been charged only with violating the false swearing provisions of § 32-713, they had standing to challenge only those provisions of that statute. Thus, Fellman has standing to challenge only those provisions of §§ 32-705 and 32-713 which relate to false swearing.

Accordingly, the relevant portion of § 32-705, which includes the warning provision, reads:

> Every sheet of every petition mentioned in sections 32-702 to 32-704 containing signatures shall have upon it and below the signatures an affidavit in substantially the following form:
>
> STATE OF NEBRASKA)
>) ss.
> COUNTY OF_____)

_____, being first duly sworn,
Name of Circulator

deposes and says that he or she is the circulator of the foregoing petition containing _____ signatures . . . that each person whose name appears on the petition sheet personally signed the petition in the presence of affiant. . . . Every sheet of every petition mentioned in sections 32-702 to 32-704 containing signatures shall have upon it and above the signatures a statement in substantially the following form:

WARNING: Any person . . . who falsely swears to any signature upon any such petition . . . shall be guilty of a felony and shall, upon conviction thereof, be punished by a fine not exceeding five hundred dollars, by imprisonment in the Department of Correctional Services adult correctional facility not exceeding two years, or by both such fine and imprisonment.

The pertinent part of § 32-713 is the penalty provision, which states that any "person who shall falsely swear to any signature upon any such petition . . . shall be guilty of a Class IV felony." Neb. Rev. Stat. § 28-105 (Reissue 1985) states that such a felony is punishable by imprisonment for a period of up to 5 years, a fine of $10,000, or both such imprisonment and fine.

Notwithstanding the language of § 32-705, every petition involved in this case contained a provision which read, in pertinent part: "WARNING ANY PERSON . . . WHO SHALL FALSELY SWEAR TO ANY SIGNATURE UPON ANY SUCH PETITION . . . SHALL BE GUILTY OF A CLASS IV FELONY UPON CONVICTION THEREOF."

(b) Overbreadth and Initiative Rights

State v. Monastero, supra, determined that prohibiting one from falsely swearing that she or he circulated an initiative petition and that each signature on the petition was signed in the circulator's presence is not overbroad. The same reasoning compels the conclusion that neither does prohibiting one from falsely swearing impinge on the various rights of initiative embodied in the Constitution of this state.

(c) Vagueness

Fellman claims "[t]he entire statutory scheme involved in

this prosecution is impermissibly vague. It is vague as to definitions, it is vague as to what conduct is proscribed, and it is vague as to penalties." Brief for appellant at 22.

The *Monastero* court dealt directly with claims of vagueness in §§ 32-705 and 32-713 as those statutes relate to the crime of false swearing and resolved the issue adversely to Fellman:

> By reading §§ 32-713 and 32-705 together, a petition circulator has adequate and fair notice of the subject matter of the falsity regarding a petitioner's signature placed on an initiative petition or the conduct condemned and prohibited at the peril of punishment.
>
> . . . .
>
> Thus, we conclude and hold that *falsely*, as used in § 32-713, means deliberately or intentionally and refers to an act, "to swear," done with the actor's knowledge. *Falsely*, as used in § 32-713, specifies the element of deliberate or intentional untruth or deceit regarding a circulator's swearing to a petitioner's signature on an initiative petition, that is, the circulator's false swearing must be an intentional or deliberate act.
>
> Section 32-713, defining the crime of "false swearing" in reference to an initiative petition, is not unconstitutional for vagueness.

(Emphasis in original.) *State v. Monastero*, 228 Neb. 818, 834, 836-37, 424 N.W.2d 837, 848-49 (1988).

However, Fellman's argument concerning the vagueness allegedly resulting from the conflicting, or repugnant, language in the warning provision of § 32-705 and the penalty provision of § 32-713 requires closer analysis.

Review of the evolution of §§ 32-705 and 32-713 discloses how the repugnancy came into existence. In 1913, the precursor to § 32-713, which defined the crime of and punishment for false swearing, stated:

> Any person . . . who shall falsely certify to any signature upon any such petition . . . shall be deemed guilty of a felony and upon conviction thereof shall be punished by a fine not exceeding five hundred dollars, or by imprisonment in the penitentiary not exceeding two years, or by both such fine and imprisonment.

Rev. Stat. § 2349 (1913). Section 32-705 did not contain a warning provision until 1965, when the statute was amended to read, in pertinent part:

> Every sheet of every petition mentioned in sections 32-702 to 32-704 containing signatures shall have upon it and above the signatures a statement in substantially the following form:
>
> WARNING. Any person . . . who shall falsely swear to any signature upon any such petition . . . shall be deemed guilty of a felony and shall, upon conviction thereof, be punished by a fine not exceeding five hundred dollars, or by imprisonment in the Nebraska Penal and Correctional Complex not exceeding two years, or by both such fine and imprisonment.

§ 32-705 (Cum. Supp. 1965).

Thus, the relevant language in § 32-705 had been made consistent with the pertinent language of § 32-713, the latter defining the crime of and punishment for false swearing. See § 32-713 (Cum. Supp. 1965).

This parallel between the warning provision of § 32-705 and the relevant language of § 32-713 continued until 1977, when the criminal code was revised. During the 1977 revision, the penalty language of § 32-713 was changed to the following: "Any person . . . who shall falsely swear to any signature upon any such petition . . . shall be guilty of a Class IV felony." § 32-713 (Supp. 1977). The classification of felonies and their penalties was created in 1977 as well. See § 28-105 (Supp. 1977). The Class IV felony, which encompassed the crime of false swearing, was the lowest class of felony created, providing for the penalty described earlier. No change was made to the warning provision of § 32-705 at this time, thus creating the repugnancy which continued until 1988, when the Legislature deleted any reference to punishment in the warning language of § 32-705. See 1988 Neb. Laws, L.B. 716.

While repeals of statutes by implication are not favored and a statute will not be considered so repealed unless the repugnancy between the new enactment and the former statute is plain and unavoidable, where such a repugnancy exists, the new enactment will be deemed to have repealed the former

statute by implication. *State v. Retzlaff*, 223 Neb. 811, 394 N.W.2d 295 (1986); *State v. Roth*, 222 Neb. 119, 382 N.W.2d 348 (1986). However, a construction of a statute which, in effect, repeals another statute will not be adopted unless such a construction is made necessary by the evident intent of the Legislature. *State v. Roth, supra*; *Sarpy Co. Pub. Emp. Assn. v. County of Sarpy*, 220 Neb. 431, 370 N.W.2d 495 (1985). Nonetheless, a legislative act which is complete in itself and is repugnant to or in conflict with a prior law repeals the prior law by implication to the extent of the repugnancy or conflict. *American Fed. S., C. & M. Emp. v. County of Lancaster*, 200 Neb. 301, 263 N.W.2d 471 (1978).

The defendant in *Retzlaff* had pled guilty to motor vehicle homicide in violation of Neb. Rev. Stat. § 28-306 (Reissue 1985), which provided that one unintentionally causing the death of another while operating a motor vehicle in a reckless manner, contrary to the provisions of Neb. Rev. Stat. § 39-669.01 (Reissue 1984), committed a Class IV felony. Such a felony was then punishable as in this case, and Retzlaff was imprisoned for a period of 3 years. He thereafter moved for vacation of his sentence, claiming that he should have been sentenced under the provisions of Neb. Rev. Stat. § 39-669.20 (Reissue 1984), which provided that one convicted of motor vehicle homicide was to be fined not more than $500, imprisoned in the county jail for not more than 6 months, or be both so fined and imprisoned. Section 28-306 was enacted in 1977 as part of the revision of the criminal code. Section 39-669.20, on the other hand, had last been amended in 1972. We concluded that because of the plain and unavoidable repugnancy between the two sections and the specificity with which § 28-306 dealt with motor vehicle homicide, its later enactment impliedly repealed those provisions of § 39-669.20 which related to motor vehicle homicide, and we thus affirmed the district court's refusal to vacate Retzlaff's sentence.

The warning provision of § 32-705 and the penalty provision of § 32-713 as they read at the time in question were plainly and unavoidably repugnant to each other. While neither statute was of more specific application than the other, there is no suggestion that the Legislature intended to make the offense of

falsely swearing to signatures on an initiative petition a crime without a penalty. We must therefore conclude that the 1977 revision of § 32-713 repealed by implication the penalty provision then contained in § 32-705, a conclusion which, as evidenced by the warning language used, the drafter of the initiative petitions in question appears to have shared. The Legislature's 1988 removal of any reference to punishment from the warning provision of § 32-705 merely confirmed what it had done by implication in its 1977 change to the penalty provision in § 32-713.

2. Evidential Rulings

That brings us to the remaining summarized assignments of error, in connection with the first of which, that is, the second summarized assignment, Fellman contends that the trial court committed reversible error by admitting certain evidence over his objection. However, in each of the six instances concerning which Fellman complains, the trial court chose not to rule on Fellman's objection but to instead inform the parties that it would only consider properly admissible evidence. Indeed, the trial court's memorandum recites that it "did not consider any inadmissible evidence" in reaching its decision.

While Fellman was entitled to a ruling, he made no request for such, electing instead to allow the trial court's preference not to rule to stand unchallenged. The longstanding axiom is that a party who fails to insist upon a ruling to a proffered objection waives that objection. *State v. McClanahan*, 194 Neb. 261, 231 N.W.2d 351 (1975).

Moreover, in a case tried to a court without a jury, there is a presumption that the court below acted precisely as it says it did, i.e., that in reaching its decision it considered only evidence that is competent and relevant. *State v. Zaritz*, 235 Neb. 599, 456 N.W.2d 479 (1990).

3. Sufficiency of Evidence

The third summarized assignment of error challenges the trial court's implicit conclusion that the evidence supports the adjudication of guilt.

Neb. Rev. Stat. § 28-206 (Reissue 1989) provides that one "who aids, abets, procures, or causes another to commit any

offense may be prosecuted and punished as if he were the principal offender." We have said that aiding and abetting involves some participation in the criminal act and must be evidenced by some word, act, or deed. No particular acts are necessary, nor is it necessary that any physical part in the commission of the crime is taken or that there was an express agreement therefor. Mere encouragement or assistance is sufficient. *State v. Johnson, ante* p. 831, 464 N.W.2d 167 (1990); *State v. Schreck,* 224 Neb. 650, 399 N.W.2d 830 (1987). However, aiding and abetting involves some participation in the criminal act or some conscious sharing in the criminal act, as in something that the accused wishes to bring about, in furtherance of the common design, either before or at the time that the criminal act is committed, and it is necessary that he seeks by his action to make it succeed. *State v. Douglas,* 217 Neb. 199, 349 N.W.2d 870 (1984); *State v. Alvarez,* 189 Neb. 276, 202 N.W.2d 600 (1972).

It is also the rule that 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. *State v. Ayres, ante* p. 824, 464 N.W.2d 316 (1990); *State v. Grantzinger,* 235 Neb. 974, 458 N.W.2d 461 (1990). Moreover, on a claim of insufficiency of the 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. *Id.* Additionally, factual findings of a judge who serves as the trier of fact in a criminal case will not be disturbed on appeal unless clearly wrong. *Id.* Finally, a criminal conviction may be based on circumstantial evidence. *State v. Zitterkopf, ante* p. 743, 463 N.W.2d 616 (1990); *State v. Oldfield, ante* p. 433, 461 N.W.2d 554 (1990).

Keeping these standards in mind, it cannot be said that Fellman's conviction is not supported by sufficient evidence.

The evidence was such that an impartial finder of fact could find beyond a reasonable doubt that Fellman was part of an organized effort to garner initiative petition signatures and that he knowingly secured Peters' fraudulent signature as circulator of the several petitions admitted into evidence. That Peters failed to remember Fellman is irrelevant, for the appropriate standard makes Fellman's assistance in the delivery of the petitions to Peters for false swearing on July 3, 1986, sufficient to establish that he consciously participated in procuring her fraudulent signatures and did thereby aid, abet, procure, or cause Peters to swear falsely.

4. NEW TRIAL MOTION

Finally, in the fourth summarized assignment of error, Fellman claims he should have been granted a new trial because of newly discovered evidence. He asserts that Radcliffe, who had similar charges pending against him during Fellman's trial, is now available to testify on Fellman's behalf and that had the motion been granted and Radcliffe called to testify, the evidence "might have changed the outcome of the trial." Brief for appellant at 29. In resolving this issue, it must be remembered that the newly discovered evidence offered in support of a motion for new trial must be so potent that, by strengthening the evidence already offered, a new trial would probably result in a different verdict; the newly discovered evidence must be relevant and credible and not merely cumulative. *State v. Batiste*, 231 Neb. 481, 437 N.W.2d 125 (1989). Such a motion is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed. *Id.*

In support of the claim that he was entitled to a new trial, Fellman offered not Radcliffe's but his own affidavit, reciting that Radcliffe was out of town during Fellman's trial and unavailable as a witness because of Radcliffe's fifth amendment rights, that Radcliffe could now be called to testify that Fellman knew nothing of the arrangement between Radcliffe and Peters, that Fellman had not met or talked with Peters prior to trial, that Radcliffe asked Fellman to take an envelope to Pappas' office and deliver it to his secretary without further

identification or instruction, and that Radcliffe had assured Fellman everything he was being asked to do was legal. Fellman obviously could not know, of his own knowledge, that Radcliffe would have asserted his fifth amendment rights had Fellman called him as a witness, nor could he know, of his own knowledge, what Radcliffe's testimony would be were he to testify. It thus cannot be said that it was an abuse of discretion on the part of the trial court to deny Fellman a new trial.

IV. DECISION

Accordingly, the judgment of the trial court is affirmed.

AFFIRMED.

ROBERT BARTELS AND SCHOOL DISTRICT NO. 17 OF DOUGLAS COUNTY, NEBRASKA, ALSO KNOWN AS MILLARD SCHOOL DISTRICT, APPELLANTS, V. JOE LUTJEHARMS, NEBRASKA COMMISSIONER OF EDUCATION, APPELLEE.

464 N.W.2d 321

Filed January 4, 1991. No. 89-1493.

1. **Actions: Public Officers and Employees: Statutes: States: Immunity.** An action against a state officer, attacking the constitutionality of a statute and seeking to enjoin its enforcement by such officer or to otherwise obtain relief from an alleged invalid act, ordinarily is not a suit against the state and is not prohibited under the general principles governing the immunity of the state from suit.
2. **Public Lands: States: Trusts.** The school lands are held in trust by the state for educational purposes, and as trustee of the lands and the income therefrom, the state is subject to the standards of law applicable to trustees acting in a fiduciary capacity.
3. **Constitutional Law: Public Lands: States: Trusts.** The state's status as a trustee of school lands is established by the Constitution, and a violation of its duty as trustee is a violation of the Constitution itself.
4. **States: Trusts.** The state, as trustee, has the duty to deal with all beneficiaries impartially.
5. **Constitutional Law: Legislature: Public Lands: Schools and School Districts: States: Trusts: Taxation.** It was within the power of the Legislature, pursuant to Neb. Const. art. VII, § 9, to establish in-lieu-of-tax payments to fulfill the state's duty as trustee to deal with the beneficiaries of the trust impartially so that school districts containing school lands are relieved of any detriment they would

otherwise suffer by reason of the fact that such lands are not taxable while school districts containing no school lands are able to benefit from a greater tax base.

6. **Public Lands: Schools and School Districts: States: Trusts.** The provision in Neb. Rev. Stat. § 79-1303 (Reissue 1987) requiring use of 143 percent of the valuation in calculating in-lieu-of-tax payments to school districts is a violation of the duty of the state as trustee to treat all beneficiaries of the trust fairly and impartially and is invalid.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed in part, and in part reversed and remanded with directions.

Malcolm D. Young and Jeff C. Miller, of Young & White, for appellants.

Robert M. Spire, Attorney General, and Harold I. Mosher for appellee.

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

BOSLAUGH, J.

The plaintiffs, Robert Bartels, a resident and taxpayer in School District No. 17 of Douglas County, Nebraska, also known as the Millard School District, and School District No. 17, brought this action to obtain a judgment declaring Neb. Rev. Stat. §§ 79-1302 and 79-1303 (Reissue 1987) unconstitutional and to enjoin the defendant, Joe Lutjeharms, as Commissioner of Education, from making in-lieu-of-tax distributions under §§ 79-1302 and 79-1303.

The trial court found that §§ 79-1302 and 79-1303 were not unconstitutional and dismissed the petition of the plaintiffs. The plaintiffs have appealed.

As a preliminary matter, the defendant contends that the action is in effect a suit against the State of Nebraska and that the state has not waived its sovereign immunity and consented to be sued.

An action against a state officer, attacking the constitutionality of a statute and seeking to enjoin its enforcement by such officer or to otherwise obtain relief from an alleged invalid act, ordinarily is not a suit against the state and is not prohibited under the general principles governing the

immunity of the state from suit. *Rein v. Johnson*, 149 Neb. 67, 30 N.W.2d 548 (1947). See, also, *Xerox Corp. v. Karnes*, 217 Neb. 728, 350 N.W.2d 566 (1984); Annot. 43 A.L.R. 408 (1926).

The controversy in this case involves the distribution of the income from the school lands granted to the state by the federal government. By § 7 of the Enabling Act of 1864, the federal government granted certain lands to the State of Nebraska for the support of the common schools of the state. Generally, these lands included Sections 16 and 36 of each township. See 13 Stat. 47, 49 (1866).

In some parts of the state, most of the school land has been sold. School districts in which the school land has been sold are able to receive tax revenue from the land which was formerly school land but is no longer exempt from taxation. School districts which contain school land which has not been sold are unable to levy taxes against such land. In order to equalize the distribution of income from the rental of school lands and income earned from the investment of the proceeds from school land which has been sold, the Legislature has provided that in-lieu-of-tax payments shall be made to districts which contain school land that has not been sold. See Education Committee Hearing, L.B. 572, 87th Leg., 2d Sess. 22A (Jan. 19, 1982). After the in-lieu-of-tax payments have been made, the balance of the income available for distribution is distributed to all school districts pro rata according to the enumeration of children between the ages of 5 and 18 years in each school district. School District No. 17 contains no unsold school lands and does not receive an in-lieu-of-tax distribution.

Pursuant to §§ 79-1302 and 79-1303, the defendant annually apportions and distributes the annual income from a school trust. The income consists of rents and profits from leased school lands and interest and income from school trust funds.

Section 79-1302(1) provides that the Commissioner of Education shall make the apportionment as follows:

> From the whole amount there shall be paid to those districts in which there are school or saline lands and to the nonresident high school fund of the county an amount in lieu of tax money that would be raised if such lands were

> taxable, to be fixed in the manner prescribed in section 79-1303; the remainder shall be apportioned to the counties according to the pro rata enumeration of children between the ages of five and eighteen years in each county last returned from the county superintendent.

Section 79-1303 provides that the in-lieu-of-tax payments shall be ascertained as follows:

> The county superintendents shall certify to the Commissioner of Education the tax levy for school purposes of each school district and the nonresident high school tuition levy of the county wherein such school land or saline land is located, and the last appraised value of such school land which value shall be one hundred forty-three per cent of the appraised value for the purpose of applying the applicable tax levy for each district in determining the distribution to the counties of such amounts.

In determining the in-lieu-of-tax distributions, § 79-1303 provides that the applicable school levy of each district shall be applied to 143 percent of the last appraised value of the school trust lands in the district. The last appraised value of the school trust lands which is used to calculate the in-lieu-of-tax distributions consists of each parcel's annual rental capitalized at the rate of 4 percent. Rentals are determined by surveying private-sector rental rates.

The in-lieu-of-tax payments made by the defendant in 1988 totaled $5,435,983.31. The 1988 pro rata distributions made by the defendant totaled $13,989,226.60. The total state 1989 school age census of 5- to 18-year-olds in eligible school districts was 339,215, resulting in a pro rata distribution, after the in-lieu-of-tax payments had been made, of $41.24 per student.

The total school age census of 5- to 18-year-old students in School District No. 17, as reported for the 1988 pro rata distribution, was 17,290. If the amounts distributed by the defendant as in-lieu-of-tax payments and pro rata distributions were distributed to the counties and school districts on a pro rata basis only, the per pupil distribution would have been $57.27 in 1988, and School District No. 17 would have received an additional allocation of $277,158.70.

The plaintiffs contend that the statutes providing for the in-lieu-of-tax payments are unconstitutional and in violation of the Enabling Act because the districts containing school lands receive a special benefit in the form of the in-lieu-of-tax payments to the detriment of the school districts which do not have school lands. This argument is based on the correct principle that the school lands are held in trust by the state for educational purposes, and as trustee of the lands and the income therefrom, the state is subject to the standards of law applicable to trustees acting in a fiduciary capacity. *State v. Jarchow*, 219 Neb. 88, 362 N.W.2d 19 (1985). Since the state's status as a trustee is established by the Constitution, a violation of its duty as trustee is a violation of the Constitution itself. *State ex rel. Ebke v. Board of Educational Lands and Funds*, 154 Neb. 244, 47 N.W.2d 520 (1951).

Fundamental trust law imposes on the state, as trustee, the duty to deal with all beneficiaries impartially. See, Restatement (Second) of Trusts § 183 (1959); 76 Am. Jur. 2d *Trusts* § 324 (1975).

However, those school districts which receive in-lieu-of-tax payments, if the payments are calculated correctly, do not receive a special benefit to the detriment of school districts which do not contain school lands. The purpose of the in-lieu-of-tax payments is to place all school districts on an equal basis by compensating for the fact that those school districts which contain tax-exempt school lands may not tax the school land. The other school districts, which do not contain school land, may tax all nonexempt lands in the district, including former school lands, to raise the revenue necessary to finance their schools. The in-lieu-of-tax payments are valid and lawful to eliminate the special detriment school districts containing tax-exempt school lands would otherwise suffer as compared to school districts which do not contain unsold school land.

The Constitution of 1875 provided in article VIII, § 7, that "[p]rovision shall be made by general law for an equitable distribution of the income of the fund set apart for the support of the common schools, among the several school districts of the state . . . ." The Constitution now provides that the funds

shall be exclusively used for the support and maintenance of the common schools in each school district "as the Legislature shall provide." Neb. Const. art. VII, § 9.

We believe it was within the power of the Legislature, pursuant to Neb. Const. art. VII, § 9, to establish in-lieu-of-tax payments to fulfill the state's duty as trustee to deal with the beneficiaries of the trust impartially so that school districts containing school lands are relieved of any detriment they would otherwise suffer by reason of the fact that such lands are not taxable while school districts containing no school lands are able to benefit from a greater tax base.

The plaintiffs further contend that even if some form of in-lieu-of-tax payments is constitutional, the method by which the school lands are valued is unconstitutional because private-sector land has been assessed for tax purposes below actual market value.

There is some evidence in the record that rural property in Nebraska has not been assessed for tax purposes at its market value. It has been assessed at 60 to 65 percent of actual value and sometimes at as much as 50 percent below market value.

The method used for valuing school lands for in-lieu-of-tax payments is capitalizing annual rentals at 4 percent. This does not necessarily result in the valuation of school lands at actual value or at values comparable to land in the district which is taxable. Properly applied, either the income approach or the market approach to appraising real estate should yield similar results as to actual value.

Lloyd Jay Gildersleeve, the deputy director of the Board of Educational Lands and Funds, testified that long-term capitalization rates for rural agricultural property are 4 to 5 percent. He also testified that for tax purposes a capitalization rate of 9.6 percent was used for valuing rural property.

The use of a lower rate of capitalization for valuing school lands results in higher in-lieu-of-tax payments than if school lands were valued on a comparable basis to land which is taxable.

The plaintiffs argue that the differences in valuation result in in-lieu-of-tax payments being 35 to 40 percent higher than the tax revenues which the school lands might generate if they were

on the tax rolls, thereby conferring a special benefit on the school districts which contain school lands.

However, none of this is of importance so far as this case is concerned. Neither § 79-1302 nor § 79-1303 provides the method of how school lands shall be valued for the purpose of in-lieu-of-tax payments. Consequently, the plaintiffs are not entitled to any relief on this basis.

The plaintiffs' final contention is that even if in-lieu-of-tax payments are otherwise valid, they cannot be based upon 143 percent of the last appraised value because this formula yields an amount equal to the *total* tax which would be imposed upon the school land if it were taxable, thus conferring a substantial benefit upon the school districts with school lands to the detriment of the school districts without trust lands, which receive only a percentage of the total tax imposed on taxable property.

The result of this provision in § 79-1303 is to give school districts with school lands an additional amount from the trust income equal to the amounts other political subdivisions would receive if school lands were taxable.

Because the use of 143 percent of the valuation yields an amount which is equal to the total tax which would be imposed on the school land if it were taxable, school districts with school lands receive more under the in-lieu-of-tax scheme than they would receive if the lands were taxable. The use of 143 percent of the valuation factor thus confers a benefit or bonus upon the school districts with school lands to the detriment of the school districts without trust lands.

The statutory provision requiring use of 143 percent of the valuation in calculating in-lieu-of-tax payments to school districts is a violation of the duty of the state as trustee to treat all beneficiaries of the trust fairly and impartially and is, therefore, invalid. This portion of the statute was added by amendments in 1982 and 1983 and is severable. See, 1982 Neb. Laws, L.B. 572; 1983 Neb. Laws, L.B. 39.

That part of the judgment of the district court is, therefore, reversed and the cause remanded with directions to enter a judgment declaring that the statutory provision requiring the use of 143 percent of the valuation of school lands in

determining in-lieu-of-tax payments is unconstitutional and enjoining the defendant, Lutjeharms, as Commissioner of Education, from distributing in-lieu-of-tax payments upon the basis of 143 percent of the last appraised value of the school lands. The judgment in all other respects is affirmed.

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

STATE OF NEBRASKA, APPELLEE, V. DOUGLAS H. JENSON, APPELLANT.

464 N.W.2d 326

Filed January 4, 1991. No. 90-008.

1. **Criminal Law: Statutes: Sentences.** Where a criminal statute is amended by mitigating the punishment after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature has specifically provided otherwise.
2. _____: _____: _____. An amendment to a criminal statute that does not reduce the penalty but merely changes the proof which can be used to establish the offense is not a mitigation of the punishment for the offense.
3. **Courts: Appeal and Error.** It is a fundamental principle of law that on remand the district court has no alternative except to obey and perform the mandate of the Supreme Court.
4. _____: _____. Public interests require that an end shall be put to litigation, and when a given cause has received the consideration of this court, has had its merits determined, and then has been remanded with specific directions, the court to which such mandate is directed has no power to do anything but obey the mandate.
5. _____: _____. The district court's only power and jurisdiction upon receipt of the Supreme Court's mandate is to enter judgment in accordance with that mandate and, if it served as an intermediate court of appeals, to issue its own mandate directing the inferior court to act in accordance with the district court's mandate.

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.

Glenn A. Shapiro, of Gallup & Schaefer, for appellant.

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

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

PER CURIAM.

Upon a plea of no contest to operating a motor vehicle while under the influence of alcoholic liquor, third offense, the defendant, Douglas H. Jenson, was sentenced to jail for 90 days and fined $500, and his operator's license was suspended for 15 years. Upon appeal to the district court, the judgment was affirmed. The judgment was affirmed by this court on June 2, 1989, in *State v. Jenson*, 232 Neb. 403, 440 N.W.2d 686 (1989). The mandate of this court was issued on August 9, 1989.

After the mandate of the district court had been filed in the trial court, the defendant, on September 11, 1989, filed a "Motion to Review Sentence and Judgment of the Court" under Neb. Rev. Stat. § 29-2308.01 (Reissue 1989). The motion alleged that since the sentencing, the defendant had been a model citizen, had been to inpatient treatment, and had rehabilitated himself to such an extent that he should be considered for probation, and the defendant prayed that his sentence be reduced to probation. Jenson argued also that the 1988 amendments to Neb. Rev. Stat. § 39-669.07 (Reissue 1988) should apply to his sentence.

This motion was overruled on September 21, 1989, and the order was affirmed in the district court on December 15, 1989. The defendant has now appealed from that judgment to this court.

In this court, the defendant bases his appeal on § 39-669.07, which was amended effective July 9, 1988, while his prior appeal was pending in this court.

The amended statute provides that convictions more than 10 years prior to the date of the current conviction may not be considered for the purpose of enhancement of the sentence.

Since all but one of the defendant's prior convictions were more than 10 years old, Jenson contends that under the amended statute he can be sentenced in this case for only a second offense, not a third offense.

Jenson argues that where a criminal statute has been amended by mitigating the punishment after commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature has specifically provided otherwise, and that the phrase "before final judgment" includes cases on appeal. See *State v. Randolph*, 186 Neb. 297, 183 N.W.2d 225 (1971).

Section 39-669.07(c) (Reissue 1988) provided, in pertinent part, as follows:

> If such person (i) has had *two or more convictions under this section in the ten years prior to the date of the current conviction*, (ii) *has been convicted two or more times* under a city or village ordinance enacted pursuant to this section *in the ten years prior to the date of the current conviction* . . . such person shall be guilty of a Class W misdemeanor, and the court shall, as part of the judgment of conviction, order such person not to drive any motor vehicle . . . for any purpose for a period of fifteen years . . . .

(Emphasis supplied.)

Prior to the 1988 amendment, the statute permitted the use of any prior conviction no matter how remote in time for the purpose of enhancement. Cf. § 39-669.07 (Supp. 1987).

The problem with the defendant's contention is that the 1988 amendment to § 39-669.07 did not reduce the penalty for third-offense driving while under the influence, but merely changed the proof which can be used to establish that the offense is a third offense. Consequently, the rule stated in *State v. Randolph, supra*, does not apply.

There is a further reason why the defendant is not entitled to a reduction in his sentence in this case. After this court affirmed the judgment in his prior appeal and issued its mandate, the district court and the trial court could not consider a reduction in the sentence on a theory that the sentence, which had been affirmed, was erroneous or illegal.

As we said in *State v. Rolling*, 219 Neb. 800, 801-02, 366 N.W.2d 441, 442-43 (1985):

> It is a fundamental principle of law that on remand the district court has no alternative except to obey and

> perform the mandate of the Supreme Court. *Jameson v. Nelson*, 216 Neb. 26, 341 N.W.2d 596 (1983); *Muller Enterprises, Inc. v. Gerber*, 180 Neb. 318, 142 N.W.2d 593 (1966). In *Jurgensen* [*v. Ainscow*, 160 Neb. 208, 211, 69 N.W.2d 856, 858 (1955)], we said: " 'When a particular judgment is directed by the appellate court, the lower court is not acting of its own motion, but in obedience to the order of its superior. What that superior says it shall do, it must do, and that alone. Public interests require that an end shall be put to litigation, and when a given cause has received the consideration of this court, its merits determined, and then remanded with specific directions, the court to which such mandate is directed has no power to do anything but to obey the mandate; otherwise, litigation would never be ended, and the supreme tribunal of the state would be shorn of that authority over inferior tribunals with which it is invested by our fundamental law. . . .' "
>
> Rolling does not contend that the sentences imposed by the district court do not conform to our opinion in *Rolling III* [*State v. Rolling*, 218 Neb. 51, 352 N.W.2d 175 (1984)]. Rather, he raises for the first time issues concerning alleged violations of his constitutional rights. Specifically, Rolling argues that the imposition of the lawful sentences imposed by the district court pursuant to our mandate violates his fifth, eighth, and fourteenth amendment rights guaranteed by the Constitution of the United States. In effect, Rolling is appealing this court's decision in *Rolling III* and not the judgment on the mandate. This, of course, he cannot do.

In *State v. Horr*, 232 Neb. 380, 441 N.W.2d 139 (1989), we said:

> The district court's only power and jurisdiction upon receipt of the Supreme Court's mandate is to enter judgment in accordance with that mandate and, if it served as an intermediate court of appeals, to issue its own mandate directing the inferior court to act in accordance with the district court's mandate.

(Syllabus of the court.) See, also, *Flowers v. United States*, 86

F.2d 79 (8th Cir. 1936).

In *Lampley v. State*, 308 So. 2d 87 (Miss. 1975), the Supreme Court of Mississippi held that the defendant was not entitled to be resentenced under a statute which was amended so as to reduce the penalty for rape where his sentence had been affirmed by the Supreme Court on March 4, 1974, his petition for rehearing had been denied on April 8, 1974, and the amendment to the statute had been approved by the Governor on April 23, 1974. The court held that the judgment of the trial court became final as of April 8, 1974, the date his petition for rehearing was denied by the Supreme Court, and the defendant was not entitled to the benefit of the statute as amended, which became effective after his sentence had become final.

The judgment of the district court is affirmed.

AFFIRMED.

CHARLES A. McDOUGALL, APPELLEE, V. PAULA L. McDOUGALL, APPELLANT.

464 N.W.2d 189

Filed January 4, 1991. No. 90-204.

1. **Modification of Decree: Words and Phrases.** In dissolution of marriage cases, a material change in circumstances means that something has occurred which, had the dissolution court known of it at the time of the initial decree, would have persuaded it to decree differently.
2. **Child Custody.** In determining child custody issues, the courts look to the moral fitness of the parents, including their sexual conduct; the respective environments each offers; the emotional relationship between the child and the parents; the age, sex, and health of the child and parents; the effect on the child as the result of continuing or disrupting an existing relationship; the attitude and stability of each parent's character; and the capacity of each parent to provide physical care and to satisfy the needs of the child.
3. **Child Custody: Appeal and Error.** Child custody determinations are entrusted to the discretion of the trial judge and, absent an abuse thereof, will be upheld on the Nebraska Supreme Court's de novo review of the record.
4. _____: _____. Where in child custody cases the evidence is in conflict, the Nebraska Supreme Court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Reversed and remanded with direction.

Carole McMahon-Boies, of Pepperl & McMahon-Boies Law Offices, 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.

PER CURIAM.

The trial judge, upon application of the 32-year-old father, appellee Charles A. McDougall, modified the joint custody originally decreed as part of the dissolution of the parties' marriage by awarding sole custody of their 6- and 3 1/2-year-old sons to the father, thereby implicitly dismissing the counter-application of the 27-year-old mother, appellant Paula L. McDougall, for sole custody. The modification order also terminated the father's prior responsibility to pay $450 per month in child support and ordered the mother to pay $260 per month in child support. The mother was granted reasonable rights of visitation, including those specified in an exhibit said to be attached to the order but which is not part of the transcript.

The mother, in a brief which generates more heat than light and which, contrary to the requirements of Neb. Ct. R. of Prac. 9D(1)f (rev. 1989), makes few references to the record, claims that the trial judge erred in (1) finding that there has been a change of circumstances, (2) placing custody with the father, and (3) finding the amount of the father's income.

The first assignment of error is easily seen to be without merit. The joint custody arrangement was decreed based upon the agreement of the parties. Both now concede that joint custody is not working, and the mother herself says that the arrangement is unsettling to the boys, for which reason she seeks sole custody. A material change in circumstances means that something has occurred which, had the dissolution court known of it at the time of the initial decree, would have persuaded it to decree differently. *Huffman v. Huffman, ante*

p. 101, 459 N.W.2d 215 (1990).

The relationship between the parties is perhaps best illustrated by the fact that the father asked one of his acquaintances, who worked at a bar, on at least one occasion when the children were present, to try to get the mother into trouble by calling the police when she had enough to drink so that she would get arrested and to spread the rumor that she had a venereal disease. According to the mother, she did contract a venereal disease before her marriage at a time when she was only with the father.

There can be no reasonable doubt but that if the dissolution court had known the parents could not cooperate sufficiently to make the joint custody arrangement work to the best interests of the children, it would have granted sole custody to one parent or the other.

The second summarized assignment of error is more complex. The parties met in 1979 at an alcohol treatment center at a time when the mother was 15 years of age. According to her, she had admitted herself on a voluntary basis "to meet [her] emotional needs." The father was there because he had been convicted of driving while intoxicated.

The parties have continued to drink. The mother likes to dance and goes to bars where, she says, she drinks on occasion, having a couple of beers and then switching to soft drinks or water. However, a police officer who had been called to the parties' home by the mother after a disagreement with the father testified that on that occasion the mother appeared slightly intoxicated.

According to the mother, the father drinks frequently to the point that he stumbles when he walks. Indeed, he was required, as part of his reemployment by Burlington Northern after a layoff, to attend Alcoholics Anonymous meetings and did not drink during that 6-week or so period. The mother says he started drinking again the next week.

The father admits that he drinks, but states he does not get intoxicated. According to the mother, he has smelled of alcohol when picking up the boys. She described one occasion when the younger boy was having some tubes inserted in his ears at a hospital that the father arrived late and smelled of alcohol. The

father denies being late or having been drinking. However, in October 1989 he did run his pickup truck into a pole after he had been drinking. Although he was then in arrears in his child support obligation, he nonetheless purchased a new truck by using $15,000 in insurance proceeds and borrowing an additional $2,700.

The father admits that he has used marijuana in the past and indeed tested positive in September or October 1987. The mother first became aware of his use in October 1987 when the father left his wallet at home and she found some smoking papers in it. The father admits that the mother found some marijuana prior to August 1988 in a drawer he used at home. He explained that he got it from a friend to share with the mother in celebration of her birthday, had she wished. The mother denies using any marijuana since the birth of her children.

Both parties believe in corporal punishment. While the mother claimed at trial that she never, with a "full swing," hit any child in the face, in a prior deposition taken June 13, 1989, she admitted that she slapped the older boy in the face at least five times and on occasion left red marks on his face. At trial, she said the red mark on the boy's face was the result of accidentally striking him with a toy while she was picking it up. She also testified at that same deposition that while she no longer uses "sticks or devices" in disciplining, she had in the past. While she denied at trial that she yelled or screamed at the children, claiming instead to address them in an "authoritive [sic] voice," she, in the same deposition, admitted to occasionally yelling and screaming at her children. At another deposition, taken August 16, 1988, she admitted occasionally losing control while yelling and screaming at the children. She has taken some parenting classes and has had some counseling concerning disciplining methods. One witness testified seeing a handprint on the younger boy's buttocks.

The father cut some tendons and nerves in his left hand in December 1987 and as a result did not work from March to August 1989 and then from October 1989 through the day of trial, January 29, 1990, and thus was free to take physical care of his children. He received $696 per month in sick benefits.

The father filed his application but 7 months after entry of the decree. This was shortly after the mother had left the children with him for a longer period than was customary, which she did in order to save some child-care costs and because the father had volunteered to take care of them longer, being, as noted earlier, behind in his child support payments. The mother had lost her day job and had taken night employment until she again obtained day employment.

According to the mother, the children seem withdrawn when taken to stay with their father. Others, however, testified that the children interact well with both parents and with each other. The mother lives with the children's maternal grandmother, and both women work. The mother had placed the older boy in a preschool program, which he attended 3 days a week at the church she and the boys attend and for which placement the mother paid. She also paid some medical bills which the father had not paid as obligated.

The trial judge recited in his order that he did not believe the mother, pointing specifically to the variance between her trial and deposition testimony concerning her method of disciplining the children. He also noted that this was not the only "glaring inconsistency" in her testimony, but he stated that he was not discounting her testimony entirely.

The rules applicable to the resolution of this summarized assignment of error are well known. Neb. Rev. Stat. § 42-364 (Reissue 1988) states that custody shall be determined on the basis of the best interests of the children, an inquiry which includes, but is not limited to, a consideration of the relationship of the children to each parent and the general health, welfare, and social behavior of the children. We have said that we also look to the moral fitness of the parents, including their sexual conduct; the respective environments each offers; the emotional relationship between the child and the parents; the age, sex, and health of the child and parents; the effect on the child as the result of continuing or disrupting an existing relationship; the attitude and stability of each parent's character; and the capacity of each parent to provide physical care and to satisfy the needs of the child. *Von Tersch v. Von Tersch*, 235 Neb. 263, 455 N.W.2d 130 (1990), quoting *Christen*

v. Christen, 228 Neb. 268, 422 N.W.2d 92 (1988). These determinations are entrusted to the discretion of the trial judge and, generally, absent an abuse thereof, will be upheld on our de novo review of the record. *Pournazari v. Pournazari, ante* p. 260, 460 N.W.2d 661 (1990); *Ritter v. Ritter*, 234 Neb. 203, 450 N.W.2d 204 (1990). Moreover, where the evidence is in conflict, 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. *Beran v. Beran*, 234 Neb. 296, 450 N.W.2d 688 (1990).

We share the trial judge's obvious concern with the manner in which the children have been disciplined, but must bear in mind that both parents believe in the use of corporal punishment. Although the mother's testimony as to her method of punishment is, as the trial judge properly noted, not consistent, and her testimony that she resorts to the use of her authoritative voice strikes us as a notion implanted in her mind by some outside source, the fact of the matter is that the record does not demonstrate the children have been physically injured. Without a description of those other factors which led the trial judge to find as he did, we, on de novo review, cannot come to the conclusion that he did not abuse his discretion in awarding custody to the father.

Although neither parent can be described as unfit in a legal sense, neither can they be described as ideal parents. Nonetheless, the record portrays to us a mother who has striven to do the best she knew how to care and provide for her children and a father who took advantage of circumstances in order to first ignore and later minimize his financial obligation to his children. We find merit in the second assignment of error and conclude that the judgment below must be reversed and sole custody of the children placed in the mother.

In view of the foregoing, the third assignment of error need not be addressed, for there must be further proceedings consistent with this opinion, at which time the trial judge will consider and adjudicate the matters of child support and visitation in light of the circumstances then prevailing.

REVERSED AND REMANDED WITH DIRECTION.

PAULA E. ROBINSON, APPELLANT, V. KENNETH S. ROBINSON, APPELLEE.
464 N.W.2d 193

Filed January 4, 1991. No. 90-386.

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

Frederick D. Stehlik and Jeffrey P. Heineman, of Stehlik, Klinker & Van Sant, for appellant.

Clarence E. Mock, of Johnson and Mock, for appellee.

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

PER CURIAM.

The petitioner, Paula E. Robinson, has appealed from the judgment of the district court in a proceeding for the dissolution of a marriage. The assignments of error relate to the failure of the trial court to appoint a guardian ad litem for the minor child of the parties and to the award of the custody of the minor child to the respondent, Kenneth S. Robinson.

The appointment of a guardian ad litem for a minor child in a dissolution proceeding is a matter within the discretion of the trial court. *Ritter v. Ritter*, 234 Neb. 203, 450 N.W.2d 204 (1990). Matters of custody are initially entrusted to the discretion of the trial court, which matters, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of discretion. *Parsons v. Parsons*, 219 Neb. 736, 365 N.W.2d 841 (1985).

From our de novo review of the record, we find no abuse of discretion by the trial court. The judgment is, therefore, affirmed.

AFFIRMED.

EDWARD W. LARSEN ET AL., APPELLEES AND CROSS-APPELLANTS, V. RALSTON BANK, A NEBRASKA BANKING CORPORATION, ET AL., APPELLEES, FIRST WESTSIDE BANK, A NEBRASKA BANKING CORPORATION, APPELLANT AND CROSS-APPELLEE.

464 N.W.2d 329

Filed January 11, 1991. No. 88-1013.

1. **Judgments: Appeal and Error.** In the absence of a judgment or order finally disposing of a case, the Supreme Court has no authority or jurisdiction to act, and in the absence of such judgment or order the appeal will be dismissed.
2. **Final Orders: Words and Phrases.** To be final, an order must dispose of the whole merits of the case and must leave nothing for the further consideration of the court. Thus, when no further action of the court is required to dispose of a pending cause, the order is final. However, if the cause is retained for further action, the order is interlocutory.
3. **Final Orders.** If a party's substantial rights are not determined by the court's order and the cause is retained for further action, the order is not final.
4. **Summary Judgment: Final Orders.** Whether a partial summary judgment is a final and appealable order depends upon its effect.
5. **Judgments: Words and Phrases.** Ambiguity exists in an instrument when a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.

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

William E. Morrow, Jr., of Erickson & Sederstrom, P.C., for appellant.

Steven M. Watson, P.C., of Marks & Clare, for appellees Larsen et al.

Paul F. Prentiss, of Schmid, Mooney & Frederick, P.C., for appellee Ralston Bank.

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

HASTINGS, C.J.

First Westside Bank has appealed from an order of the district court which entered a partial summary judgment in favor of Ralston Bank. We order the appeal dismissed as premature, there being no final, appealable order.

The plaintiffs, Edward W. Larsen, Carmelita A. Larsen,

Candice Marie Larsen Ishii, Dennis E. Larsen, and Linda Marie Larsen (Larsens), filed a second amended petition for declaratory judgment, naming as the defendants Ralston Bank (Ralston), First Westside Bank (Westside), Roger L. Hass, and Financial Services Company. The petition alleged that on August 16, 1982, Hass was indebted to Westside and granted Westside a security interest in a note in the principal amount of $159,052.50. The note was made by Financial Services Company and was payable to Roger L. Hass, Inc. The Larsens alleged that they owned 50 percent of the common stock of Roger L. Hass, Inc., and that Hass held the other 50-percent interest in the common stock.

The petition further alleged that in 1982, substantially all of the assets of Roger L. Hass, Inc., were sold to Financial Services Company. Hass, individually, received as consideration a $20,000 option payment and a $30,000 downpayment, as well as the promissory note in the amount of $159,052.50. According to the Larsens, Hass never did deliver their 50-percent share of the proceeds.

Hass, according to the allegations by the Larsens, was indebted to Westside, and as security for that indebtedness Westside took a written assignment of the promissory note and a written security interest in the promissory note from Hass. Upon becoming aware of this transaction, the Larsens entered into a junior pledge agreement for security with Hass, Roger L. Hass, Inc., and Westside.

The petition goes on to allege that Hass, in 1986, attempted to borrow money from Ralston, that Ralston obtained the payoff figure from Westside on its loan to Hass, that Westside delivered a written assignment of its interest in the promissory note to Ralston notwithstanding the existence of the junior pledge agreement for security and the prior assignment from Hass to the Larsens, and that Ralston thereafter obtained a written assignment from Hass of his interest in the promissory note and obtained a written security agreement from Hass using the promissory note as collateral.

After alleging that there were several wrongful acts on the part of Westside in its delivery of the promissory note to Ralston and that Ralston was not a good faith purchaser

without notice, the Larsens state that a dispute exists between the Larsens and Ralston as to who has a prior perfected security interest in the note—the Larsens by filing a security instrument or Ralston by its possession of the note. The Larsens conclude their petition with a prayer for judgment declaring the Larsens to be the legal titleholders of the promissory note; declaring and adjudicating the respective rights, priorities, and duties of all the parties; declaring that Ralston is not a good faith purchaser without notice; and determining the status of the parties in respect to the promissory note.

In its answer, Ralston admits the transactions in general, but denies that it ever had notice of the Larsens' alleged interest in the promissory note by reason of the junior pledge agreement. Ralston also denies that the promissory note is a general intangible under the Uniform Commercial Code, as alleged by the Larsens, but asserts that the promissory note was a negotiable instrument. Ralston prays that the Larsens' petition be dismissed. Ralston then filed a motion for summary judgment requesting the court order summary judgment "declaring that plaintiffs take nothing by their petition."

Westside, apparently without filing an answer, filed a motion for summary judgment generally moving the court for judgment in its favor.

The district court first entered an order dated October 6, 1988, finding that the promissory note was not a negotiable instrument as defined by the Uniform Commercial Code, granting Westside's motion for summary judgment, and denying the motion of Ralston. On November 4, 1988, the court reconsidered that portion of the October 6 order which denied Ralston's motion for summary judgment, and determined that the promissory note was an "instrument" under the Uniform Commercial Code and that Ralston was entitled to summary judgment based on its prior perfected security interest. Finally, on November 22, 1988, the court entered an order nunc pro tunc, which among other things concluded as follows:

> IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED BY THE COURT, that the Court's docket entry of November 4, 1988, is corrected to read as

> follows: On reconsideration the Court vacates the Order of October 6, 1988, which denies Ralston Bank's Motion for Summary Judgment, and grants the First Westside Bank's Motion for Summary Judgment. That the Court finds *only* that the July 3, 1982, Promissory Note at issue is an "instrument" under Nebraska U.C.C. § 9-105(1)(i) and that Ralston Bank is entitled to summary judgment *in this respect* based on its prior perfected security interest in the instrument. The First Westside Bank's Motion for Summary Judgment is denied. All remaining legal and factual issues are to be determined at trial incorporating the Court's determination of the Promissory Note as an "instrument".

(Emphasis supplied.)

Before addressing the merits, this court must raise on its own motion the question of jurisdiction over this purported appeal.

In the absence of a judgment or order finally disposing of a case, the Supreme Court has no authority or jurisdiction to act, and in the absence of such judgment or order the appeal will be dismissed. *Lewis v. Craig, ante* p. 602, 463 N.W.2d 318 (1990).

To be final, an order must dispose of the whole merits of the case and must leave nothing for the further consideration of the court. Thus, when no further action of the court is required to dispose of a pending cause, the order is final. However, if the cause is retained for further action, the order is interlocutory. *Brozovsky v. Norquest*, 231 Neb. 731, 437 N.W.2d 798 (1989). Furthermore, if a party's substantial rights are not determined by the court's order and the cause is retained for further action, the order is not final. *Lewis v. Craig, supra*; *Martin v. Zweygardt*, 199 Neb. 770, 261 N.W.2d 379 (1978).

The mere fact that an appeal was prosecuted from an order sustaining a partial summary judgment is not determinative of this case. Whether a partial summary judgment is a final and appealable order depends upon its effect. *Blankenship v. Omaha P. P. Dist.*, 195 Neb. 170, 237 N.W.2d 86 (1976). In that case the action was brought as a class action, and the partial summary judgment challenged the plaintiff's right to bring such an action as representative of the class. The trial court sustained

the motion for summary judgment and ordered the action *dismissed* without prejudice to the right of the plaintiff to sue on his own behalf. In holding that the order appealed from was a final order, this court stated: "It was a final order in this case because the summary judgment determined the merits of the plaintiff's claim to represent the class and hence directly affected much of the relief for which he prayed." *Id.* at 174, 237 N.W.2d at 89.

The real problem in this case is to ascertain what the court's order determined. Appellant Westside seems to concede that by finding that the promissory note was an "instrument," a judgment dismissing the action as to Ralston was mandated. That may be, but no such order was entered by the trial court. It would have been a simple matter for the court to conclude its order by directing that the action be dismissed as to Ralston. It did not do so. There may be a factual issue as to Ralston's standing as a good faith purchaser without notice. At least before this court undertakes to rule on the action of the trial court, it is entitled to know the extent of the ruling.

Although not directly on point, the following language is instructive:

> Without clarifying language, such as "based on the evidence presented at trial, the court finds," or "due to the parties' failure to comply with the court's order concerning written closing arguments, the court finds," the 1987 dismissal order is susceptible to the two reasonable interpretations suggested by the parties. On one hand, the 1987 dismissal order may be interpreted as a sanction for noncompliance with the trial court's progression order for disposition of the case, while, on the other hand, the order, entered after conclusion of all the evidence, may have been a disposition on the merits. "Ambiguity exists in an instrument when a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings."

Kerndt v. Ronan, ante p. 26, 31, 458 N.W.2d 466, 470 (1990).

We hold that the order as it appears is not a final order and is not appealable and that this court is without jurisdiction to hear

the matter. Accordingly, the appeal is ordered dismissed.

APPEAL DISMISSED.

CAPORALE, J., concurring.

I write separately to express two concerns. First, whatever the second order entered by the district court may be, it is not an "order nunc pro tunc." The office of such an order is to correct clerical errors, not to correct judicial errors or otherwise change judicial determinations, even if unintended. *Interstate Printing Co. v. Department of Revenue, ante* p. 110, 459 N.W.2d 519 (1990); *IAFF Local 831 v. City of No. Platte*, 215 Neb. 89, 337 N.W.2d 716 (1983); *Continental Oil Co. v. Harris*, 214 Neb. 422, 333 N.W.2d 921 (1983). It is obvious the second order did not correct a clerical error; it merely reflected a change in the district court's mind. While the district court has the right, under such circumstances, to modify or vacate its interlocutory rulings in a pending action, it may not properly do so through the guise of a purported order nunc pro tunc. *Interstate Printing Co. v. Department of Revenue, supra; IAFF Local 831 v. City of No. Platte, supra; Continental Oil Co. v. Harris, supra.*

That having been written, I turn to my other, and perhaps more important, concern. Whatever the second order may be, First Westside Bank had to deal with it. While I agree with the determination that the order is not appealable, I certainly understand that Westside would resolve any doubt it may have had in that regard in favor of making this particular trip, for although a litigant suffers no legal harm by arriving at this tribunal early, it forever forfeits its right to appellate review if it arrives late. See, *In re Interest of K.D.B.*, 233 Neb. 371, 445 N.W.2d 620 (1989); *Sederstrom v. Wrehe*, 215 Neb. 429, 339 N.W.2d 74 (1983).

Thus, I wonder what happened to the time-honored practice of permitting a motion for new trial relating to orders of questionable appealability to pend until adjudication of all remaining aspects of the case, at which point all questions were appealed? Such a practice not only saved judicial time, it spared the litigant's purse.

I am not unmindful that in an effort to prod the few dilatory members of our profession, on either side of the bench, to

timely action, this court adopted case progression standards and requires judges to report and explain matters under submission for more than 90 days. See Canon 3 and Appendix A of the Code of Judicial Conduct (1987). This circumstance does not, however, provide me with an understanding of how delaying a questionable appeal with respect to a limited aspect of a case delays resolution of the entire case. Indeed, the opposite is true. The notice of appeal removing jurisdiction over this litigation to this court was filed on December 12, 1988. During the 2 years intervening between that filing and the filing of the majority's opinion, the world, so far as this litigation is concerned, stood still. What an expensive waste!

A legitimate variation from a standard can be explained and, thus, the progression rules applied thoughtfully in a manner which will achieve, rather than frustrate, their purposes. I suggest we revisit our old practice.

IN RE ESTATE OF BEULAH L. ZIEMER, DECEASED.
RONALD ZIEMER, APPELLANT, V. ROBERT HOHL, PERSONAL REPRESENTATIVE OF THE ESTATE OF BEULAH L. ZIEMER, DECEASED, APPELLEE.

464 N.W.2d 333

Filed January 11, 1991. No. 89-071.

Appeal from the District Court for Saunders County, WILLIAM H. NORTON, Judge, on appeal thereto from the County Court for Saunders County, EVERETT O. INBODY, Judge, upon the recommendation of the Appellate Division of the District Court, CLARK, GITNICK, and CARLSON, District Judges. Judgment of District Court affirmed.

Robert E. Sullivan, of Haessler & Sullivan, 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.

Having considered the briefs, record, and recommendation of the Appellate Division of the District Court, we affirm the judgment of the district court. Appellee's request for attorney fees, under Neb. Rev. Stat. § 25-824 (Reissue 1989), for a frivolous appeal because of the failure of appellant's attorney to appear, is denied.

AFFIRMED.

NANCY DIANE DAVIS, APPELLANT, V. RICKIE JAMES BLUM, APPELLEE.

464 N.W.2d 334

Filed January 11, 1991. No. 89-343.

Appeal from the District Court for York County, BRYCE BARTU, Judge, upon the recommendation of the Appellate Division of the District Court, MCGINN, CORRIGAN, and WITTHOFF, District Judges. Reversed and remanded with directions.

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

No appearance for appellee.

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

PER CURIAM.

Upon consideration of the record, briefs, and recommendation of the Appellate Division of the District Court, we find that the trial court erred as a matter of law in overruling the motion of the appellant for determination and assessment of interest on delinquent child support payments against the appellee. Accordingly, the judgment of the district court is reversed, and the cause is remanded with directions to sustain the appellant's motion.

REVERSED AND REMANDED WITH DIRECTIONS.

THOMAS G. STENDER, APPELLANT AND CROSS-APPELLEE, V. MAUREEN STENDER, APPELLEE AND CROSS-APPELLANT.
464 N.W.2d 335

Filed January 11, 1991. No. 89-414.

Appeal from the District Court for Seward County, BRYCE BARTU, Judge, upon the recommendation of the Appellate Division of the District Court, MCGINN, CORRIGAN, and WITTHOFF, District Judges. Affirmed as modified.

Deborah K. Long for appellant.

David L. Kimble, of Souchek & Kimble, for appellee.

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

PER CURIAM.

From a review of the record, briefs, and recommendation of the Appellate Division of the District Court, we modify the decree of the district court to provide that appellee pay to the appellant toward the support of the minor children of the parties the sum of $10 per month per child during the minority of each child, and, as modified, the judgment of the district court is affirmed.

AFFIRMED AS MODIFIED.

MICHAEL R. YAGER, APPELLANT, V. BELLCO MIDWEST, APPELLEE.
464 N.W.2d 335

Filed January 11, 1991. No. 90-175.

1. **Workers' Compensation: Appeal and Error.** 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 and will not be set aside on appeal unless clearly wrong.
2. **Workers' Compensation.** Whether an injured worker is entitled to vocational rehabilitation is ordinarily a question of fact to be determined by the Workers' Compensation Court.
3. **Workers' Compensation: Appeal and Error.** An order based on findings of fact

made by the compensation court may be reversed if those findings do not support the court's order. Neb. Rev. Stat. § 48-185(4) (Reissue 1988).

4. _____: _____. To determine whether findings of fact made by the compensation court support an order granting or denying vocational rehabilitation benefits, the Supreme Court must consider the findings of fact in light of the statute authorizing vocational rehabilitation benefits, Neb. Rev. Stat. § 48-162.01 (Reissue 1988).
5. _____: _____. The Nebraska Supreme Court is obligated in workers' compensation cases to make its own determinations as to questions of law.
6. **Workers' Compensation.** A finding that a workers' compensation claimant currently maintains a minimum-wage job is not, in and of itself, sufficient to support a denial of vocational rehabilitation benefits.
7. _____. Loss of earning capacity or earning power is relevant only to impairment of the body as a whole. Impairment to a scheduled member is measured on the basis of loss of physical function. Neb. Rev. Stat. § 48-121 (Reissue 1988).

Appeal from the Nebraska Workers' Compensation Court. Affirmed in part, and in part reversed and remanded for further proceedings.

Dennis C. Magnuson, of Gast & Peters, for appellant.

Jon S. Reid, of Kennedy, Holland, DeLacy & Svoboda, for appellee.

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

GRANT, J.

Plaintiff, Michael R. Yager, appeals from an order on rehearing by the Workers' Compensation Court. The order reduced certain awards made by the court on first hearing. We reverse and remand on the issue of rehabilitation benefits and affirm in certain other respects.

Plaintiff was employed by defendant-appellee Bellco Midwest as a construction worker. At the time of the accident in this case, plaintiff was 28 years old. He had dropped out of high school after the 10th grade and had received a GED in 1988 without the necessity of classroom work. He had worked in "warehousing" in loading and unloading trucks and, at one time, had been an assistant supervisor. He had also worked in a packinghouse and for other construction companies, as well as for Bellco. He had been employed by Bellco for over a year as of

the date of the accident. He had also served about a year in the U.S. Navy.

Plaintiff was injured at defendant's construction site on July 29, 1985, when a section of wall he was helping to lift into place broke loose and fell on his leg. The accident resulted in a fractured right femur and internal derangement of the right knee. Plaintiff's recovery was slow because of a delayed union of the femur. On September 10, 1985, Dr. Chester Waters performed a closed intramedullary rodding operation on plaintiff. Intramedullary rodding was required to achieve stability in the leg. On September 19, plaintiff was discharged from the hospital. For a period of over 9 months, plaintiff needed either a wheelchair or crutches to get around. On April 17, 1986, arthroscopic surgery was performed on plaintiff's right knee.

In a July 30, 1986, letter concerning plaintiff, Waters estimated "a permanent partial impairment to the right lower extremity of approximately 40-50 percent based on quadriceps adhesion and resulting loss of knee motion from his femur fracture . . . ." In a report dated November 5, 1986, Waters summarized plaintiff's injuries as "a closed fracture of the right femur, and post traumatic tibial articular chondromalacia." He set out certain limitations and stated that no further treatment was recommended and that "[w]ork capacity restrictions are permanent." He stated in a corrected report that this resulted in a 45-percent permanent partial physical impairment to the right lower extremity. Waters made no reference to any back injury. He released plaintiff "for work activity" effective November 1, 1986.

Plaintiff testified that after the period of time when he was on crutches or in a wheelchair, he began to experience pain in his lower back. He testified that he had told Waters and others in Waters' office of his back problem, but that they did not record the complaints. Nothing in the reports of Waters found in the record before this court shows any indication of back problems.

On February 20, 1987, plaintiff saw Dr. Timothy Fitzgibbons. Fitzgibbons' report of that date is the first recorded evidence of plaintiff's back trouble. Over the course

of the next year Fitzgibbons treated plaintiff's back. Fitzgibbons stated that plaintiff reached maximum medical improvement on May 2, 1988, and stated that plaintiff had a permanent impairment rating of 5 percent for his back strain, in addition to his right leg impairment.

During the 3 years following his accident, plaintiff participated in a variety of different tests, analyses, and evaluations, both through the Nebraska Division of Rehabilitation Services and through a private rehabilitation consultant hired by defendant. Due to disagreements between the parties, and because of plaintiff's frustration at not being able to begin a rehabilitation program, plaintiff hired his own rehabilitation consultant.

On August 18, 1988, plaintiff filed this petition seeking temporary total disability, permanent partial disability, and rehabilitation benefits because of his leg and back injuries. Defendant denied there was a back injury, denied that plaintiff was entitled to rehabilitation benefits, and alleged that all expenses incurred due to the leg injury had been paid.

At the first hearing, the one-judge compensation court found compensable injuries to plaintiff's leg and back. The court awarded temporary total disability benefits from July 29, 1985, through November 21, 1988, and awarded 50 percent temporary partial disability thereafter for an indeterminate period. The court also awarded rehabilitation benefits in the form of a 2-year business management training program.

Defendant appealed. On rehearing, on July 12, 1989, evidence was adduced on the rehabilitation issue, and plaintiff testified that in November 1988, he obtained employment at a gas station as a "drive attendant" for 31 hours per week at $3.35 per hour. At the time of the rehearing in July 1989, plaintiff held the same job.

At the hearing John Greene, an expert in vocational rehabilitation who had been employed by defendant and its insurance carrier, testified that plaintiff "had average learning capabilities on the testing, so he could have participated in a number of different [vocational rehabilitation] programs."

Another witness, who was an employee of the Nebraska Division of Rehabilitation Services, testified that plaintiff "had

the ability to handle a two-year training program" and that such programs were available at Metropolitan Community College. This witness further testified that these plans were denied by defendant's insurance company and not implemented.

Another of plaintiff's witnesses testified that the proposed 2-year plan in business management would help in obtaining jobs and in obtaining promotions in such jobs.

Greene, when called as an expert witness by defendant, testified that plaintiff has "some reasonable skills to work with. I don't see any problems with really rehabilitating him." This witness further testified:

> Q Now, the jobs you just talked about, what's the entry level pay on a job like that?
>
> A As I remember, it was about $5.50- to $8.20-an-hour, which would be after a training program was completed.
>
> . . . .
>
> Q Would a training program like that increase his ability to gain access to the labor market?
>
> A Sure, any time that we develop employable skills for him, that's going to increase his marketability.

This witness had some questions about the advisability of the 2-year business management program, and further testified on the question of the possible length of plaintiff's rehabilitation:

> Q Is it true that a large part of that disagreement was also with the length of the program involved to rehabilitate Mike?
>
> A Well, it wasn't on my part as far as looking at some kind of option. Iowa Mutual had asked us to look at six-month programs, but I had previously indicated a report that even up to two-year training programs would be appropriate for helping Mike.
>
> Q So it's true that, while it was not necessarily your opinion that a six-month program would be best for Mike, that limitation was placed on your efforts by Iowa Mutual?
>
> A They had requested that I explore six-month training programs. I didn't take it as a hard-and-fast rule that I couldn't go above six months. I took it more as, "Were

there reasonable alternatives that would prepare him for employment using a six-month training approach?"

In its award on rehearing, the three-judge panel did not mention or allow any benefits for the back injury, shortened temporary total disability benefits to end November 1, 1986, and determined there was a 45-percent permanent partial disability to plaintiff's right leg. The court also refused to grant vocational rehabilitation, stating in part:

IV.

One of the issues listed in the Pretrial Order is whether plaintiff is entitled to rehabilitation services. The evidence is that plaintiff got a job on November 21, 1988, which he still retains. Therefore, he is not entitled to rehabilitation benefits.

. . . .

VII.

Another issue listed by the parties in the Pretrial Order is whether plaintiff failed or refused rehabilitation services offered by the defendant without reasonable cause and as a consequences [sic] thereof whether compensation benefits otherwise payable should be suspended reduced or limited. The Court finds that defendant has failed to prove this allegation.

Plaintiff timely appealed and in this court sets out the following assignments of error, contending the compensation court erred (1) in holding plaintiff's obtaining of a minimum-wage job was sufficient ground for denial of vocational rehabilitation benefits; (2) in finding that plaintiff's back injury was not work related, and by ignoring the undisputed testimony of plaintiff's treating physician as to the causation of such injury; (3) in not determining the loss of plaintiff's earning power or capacity due to his injuries; (4) in reducing the duration of plaintiff's temporary total disability benefits; and (5) in failing to award plaintiff statutory penalties and attorney fees.

In our review, 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 and will not be set aside on appeal unless clearly wrong. *Way v. Hendricks*

Sodding & Landscaping, Inc., ante p. 519, 462 N.W.2d 99 (1990); *Binkerd v. Central Transportation Co., ante* p. 350, 461 N.W.2d 87 (1990).

We have also held: "Whether an injured worker is entitled to vocational rehabilitation is ordinarily a question of fact to be determined by the Workers' Compensation Court." *Hernandez v. Farmland Foods*, 227 Neb. 629, 632, 418 N.W.2d 765, 767 (1988); *Hewson v. Stevenson*, 225 Neb. 254, 404 N.W.2d 35 (1987). An order based on findings of fact made by the compensation court may be reversed, however, if those findings do not support the court's order. Neb. Rev. Stat. § 48-185(4) (Reissue 1988); *Bituminous Casualty Corp. v. Deyle*, 225 Neb. 82, 402 N.W.2d 859 (1987).

To determine whether findings of fact made by the compensation court support an order granting or denying vocational rehabilitation benefits, we must consider the findings of fact in light of the statute authorizing vocational rehabilitation benefits, Neb. Rev. Stat. § 48-162.01 (Reissue 1988).

Section 48-162.01(1) provides in part:

> One of the primary purposes of the Nebraska Workers' Compensation Act shall be restoration of the injured employee to gainful employment.

Section 48-162.01(3) provides in part:

> When as a result of the injury an employee is unable to perform work for which he or she has previous training or experience, he or she shall be entitled to such vocational rehabilitation services, including retraining and job placement, as may be reasonably necessary to restore him or her to suitable employment.

Section 48-162.01(6) provides for vocational rehabilitation

> [w]henever the Nebraska Workers' Compensation Court or judge thereof determines that there is a reasonable probability that with appropriate training, rehabilitation, or education a person who is entitled to compensation for total or partial disability which is or is likely to be permanent may be rehabilitated to the extent that he or she will require less care and attendance or to the extent that he or she can become gainfully employed or increase his or

her earning capacity and that it is for the best interests of such person to undertake such training, rehabilitation, or education . . . .

In considering these statutory provisions, this court has affirmed denials of vocational rehabilitation where the compensation court found that the claimant suffered no "disability which is or is likely to be permanent," *Snyder v. IBP, Inc.*, 222 Neb. 534, 385 N.W.2d 424 (1986); where claimant was able "to perform work for which he or she [had] previous training or experience," *Evans v. American Community Stores*, 222 Neb. 538, 385 N.W.2d 91 (1986); and where vocational rehabilitation was found not "for the best interests" of the injured worker, *Pollock v. Monfort of Colorado*, 221 Neb. 859, 381 N.W.2d 154 (1986).

The compensation court in this case offers none of these justifications to support its award. The court merely states: "The evidence is that plaintiff got a job on November 21, 1988, which he still retains. Therefore, he is not entitled to rehabilitation benefits."

This order by the compensation court might be construed to comport with the language in § 48-162.01(3), which gives the compensation court authority to deny rehabilitation to the claimant if it is not "reasonably necessary to restore him or her to suitable employment." This depends upon what is meant by the terms "restore" and "suitable employment" in § 48-162.01(3), and the related term "gainful employment" in § 48-162.01(1). The proper construction and application of statutory terms is a question of law. *In re Estate of McFayden*, 235 Neb. 214, 454 N.W.2d 676 (1990). This court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Elrod v. Prairie Valley*, 214 Neb. 697, 335 N.W.2d 317 (1983).

Although this court has never defined the terms in question, definitions from other jurisdictions are instructive. In *Ex Parte Beaver Valley Corp.*, 477 So. 2d 408 (Ala. 1985), the Alabama Supreme Court interpreted the phrase "restore the employee to gainful employment" in that state's workers' compensation statute, stating:

"Restore" means to put back. The ability to be gainfully

> employed must be put back or restored through vocational rehabilitation. Gainful employment means employment similar in remuneration to that earned prior to the injury. Implicit in this is that the gainful employment sought to be restored must be "suitable." By "suitable" we mean employment which is compatible with the employee's pre-injury occupation, age, education, and aptitude. . . . If the employee has lost the ability to obtain suitable gainful employment due to a compensable injury, then, barring any other reasonable basis to deny vocational rehabilitation, he should be entitled to have the ability restored through an appropriate plan of vocational rehabilitation.

Id. at 412. See, also, *Solo Cup Co. v. Brown*, 660 P.2d 655, 657 (Okla. App. 1982) (where the court refused to adopt an employer's "apparent" contention that "if a crippled worker can sell apples or pencils in the town square or perform some type of boring routine task on, say, an assembly line, he is not entitled to vocational rehabilitation regardless of his pre-injury or postinjury interests, aptitudes or abilities"); *Walker v. New Fern Restorium*, 409 So. 2d 1201, 1203-04 (Fla. App. 1982) ("[t]o refuse rehabilitation benefits because of the availability of any employment, no matter how ill-suited to the particular individual, would be counter to the statutorily expressed goal of rehabilitation—to return the individual to '*suitable* gainful employment' " (emphasis in original)); *Frame v. Crown Zellerbach*, 63 Or. App. 827, 665 P.2d 879, 881 (1983) ("[t]here is no requirement that a worker who has been offered *any* job paying *something*, even minimum wage, is gainfully employable and therefore ineligible for retraining" (emphasis in original)).

The consensus which may be derived from these opinions is that an injured claimant cannot be denied vocational rehabilitation benefits solely because he or she has accepted some kind of employment. We hold as a matter of law that accepting a job paying minimum wage does not automatically "restore" a claimant to "suitable" or "gainful" employment pursuant to § 48-162.01, where the claimant's previous employment was at a significantly higher wage. At the time of

his injury, plaintiff was earning $220 per week and was an able, strong construction worker, with possibilities of progressing in that type of manual labor. In working for defendant for 1 year, his hourly wage had increased from $5 to $5.85. For a different construction employer, he had earlier earned $10 per hour. He was not able to return to that type of work.

It is inappropriate to hold, from the mere fact that the injured worker has accepted a job resulting in a $104 weekly wage, that, by that act alone, he has foreclosed himself from some training that would enable him to return to the approximate level of the salary he was earning when he was injured. The difference between the wages earned before and after the injury is only $116 per week, but proportionately it is a large difference. To ignore such a difference is to ignore the statutory goal of returning the worker to suitable, that is, comparable, employment. A finding that claimant currently maintains a minimum-wage job is not, in and of itself, sufficient to support a denial of vocational rehabilitation benefits. Plaintiff's first assignment of error has merit, and the cause is remanded for further proceedings on that issue. In that connection, we note that the appropriateness of certain employment for plaintiff might be affected by *State v. Yager, ante* p. 481, 461 N.W.2d 741 (1990).

Plaintiff alleges in his second assignment of error that the compensation court erred in finding plaintiff's back injury was not work related. The first answer to this allegation is that the compensation court made no finding at all concerning a back injury, despite the fact that the compensability of this injury was an important point at the rehearing. It is true, as plaintiff alleges, that the testimony of Dr. Fitzgibbons was not refuted as to the existence or causation of a back injury to plaintiff. Dr. Waters' report did not mention such an injury one way or the other, nor was Waters asked any questions in that regard. The compensation court is not bound by the testimony of an expert, nor is this court to determine the weight and credibility of such evidence. *Mutual of Omaha v. Broussard*, 233 Neb. 916, 448 N.W.2d 600 (1989). In our review, we cannot say the compensation court erred in this regard. Apparently, that court chose not to believe the undisputed testimony of plaintiff's

medical witness, but this court cannot say that decision was erroneous as a matter of law. Plaintiff's second assignment of error does not require reversal.

Plaintiff alleges in his third assignment of error that the compensation court erred in not computing his loss of earning capacity due to his injuries. This court has held that loss of earning capacity or earning power is relevant only to impairment of the body as a whole. *Nordby v. Gould, Inc.*, 213 Neb. 372, 329 N.W.2d 118 (1983); *Snyder v. IBP, Inc.*, 222 Neb. 534, 385 N.W.2d 424 (1986). Impairment to a scheduled member, such as plaintiff's leg, is measured on the basis of loss of physical function. See, Neb. Rev. Stat. § 48-121 (Reissue 1988); *Nordby v. Gould, Inc., supra*. The compensation court did not find that plaintiff suffered impairment to his body as a whole. This assignment of error is without merit.

In his fourth assignment of error, plaintiff contends that the compensation court erred in determining that his "temporary total disability should not continue up to and including May 8, 1988." The determination as to the length of temporary total disability is one of fact. We make no determination in this area, because the situation will have to be reevaluated in view of the remand herein.

Finally, plaintiff assigns as error the refusal of the compensation court to assess statutory penalties and attorney fees. The three-judge rehearing panel agreed with the defendant's contention that no fees are allowable because the employer obtained a reduction in the award.

The award of attorney fees under the Workers' Compensation Act is governed by Neb. Rev. Stat. § 48-125 (Reissue 1988). That statute says in part:

> 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, and the Supreme Court shall in like manner allow the employee a reasonable sum as attorney's fees for the proceedings in the Supreme Court.

We have held that when the employer files an application for rehearing from a one-judge award and obtains a reduction and the Supreme Court affirms the reduction on appeal by the employee, no attorney fees may be assessed against the employer. See *Butler v. Midwest Supply Co.*, 212 Neb. 421, 322 N.W.2d 815 (1982). We have also held that when the employer appeals from an award on rehearing and the employer receives a reduction in the Supreme Court, the employer may not be taxed for the employee's attorney fees for the proceedings before the Supreme Court. See *Hare v. Watts Trucking Service*, 220 Neb. 403, 370 N.W.2d 143 (1985). In *Goers v. Bud Irons Excavating*, 207 Neb. 579, 300 N.W.2d 29 (1980), we held that when the employer has obtained a reduction on rehearing but then appealed to the Supreme Court and did not receive a further reduction, the employee's attorney fees before the Supreme Court would be taxed as costs against the employer.

In this case, the employer filed an application for rehearing from the first hearing before the compensation court and obtained a reduction on rehearing. The employee then appealed to this court from the award on rehearing and obtained a reversal and remand for further proceedings from this court, as set out above in this opinion.

The case most analogous to the situation in the present case is *Akins v. Happy Hour, Inc., supp. op.* 209 Neb. 748, 311 N.W.2d 518 (1981). In *Akins*, the employer filed an application for rehearing after an award of a single judge of the compensation court. On rehearing, the full compensation court disallowed the award. The employee then appealed to the Supreme Court, and we reinstated the original award.

The employee in *Akins* argued that he was entitled to attorney fees for both appeals. This court held that the statute did not authorize fees for either appeal, relying on *Rexroat v. State*, 143 Neb. 333, 9 N.W.2d 305 (1943). In *Rexroat*, under a fact situation similar to that in *Akins*, the court held that the right to attorney fees in compensation cases is purely statutory and that the statute did not authorize fees under the situation presented.

Three dissenting judges in *Akins* opined that fees should have been awarded. They contended that to award fees in a

situation where an employer twice failed to obtain a reduction, but not to award fees in a situation where the net result was the same, merely because of an erroneous intervening reduction, constituted an unduly technical reading of the statute.

Whether one applies the rationale of the majority opinion or the dissent in *Akins*, no attorney fees may be granted in this case for either the rehearing or this appeal, because this case differs factually from *Akins*. As far as the record before us discloses, the employer has obtained a net reduction from the original one-judge award, based primarily on the compensability of plaintiff's back injury, despite our remand on the rehabilitation issue. Because this disposes of the fee issue, we need not determine whether reversal for reconsideration of the issue of rehabilitation may constitute an "award" under § 48-125.

Statutory penalties are not allowed. Plaintiff's attorney has not directed us to, nor does our search of the record disclose, any evidence that any amounts relating to plaintiff's leg injury were not timely paid.

The decision of the Workers' Compensation Court is in part affirmed and is in part reversed, and the cause is remanded for reconsideration of the issue of vocational rehabilitation benefits in accord with this opinion.

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

PAMELA RITCHIE SHERARD, APPELLEE, V. BETHPHAGE MISSION, INC., A CORPORATION, DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLEE, STATE OF NEBRASKA, SECOND INJURY FUND, THIRD-PARTY DEFENDANT, APPELLANT.

464 N.W.2d 343

Filed January 11, 1991. No. 90-260.

1. **Workers' Compensation: Second Injury Fund: Proof.** To recover from the Second Injury Fund, see Neb. Rev. Stat. § 48-128 (Reissue 1988), a claimant must prove by a preponderance of evidence (1) a prior permanent partial disability, (2) a second or subsequent injury which is compensable, causing

permanent disability, and (3) the combination of permanent disabilities existing after such second or subsequent injury is substantially greater in degree or percentage than permanent disability from the second or subsequent injury, considered by itself and not in conjunction with the prior permanent disability.

2. **Workers' Compensation: Second Injury Fund: Words and Phrases.** "Disability," in the context of Neb. Rev. Stat. § 48-128 (Reissue 1988), means an employee's diminution of employability or impairment of earning power or capacity.
3. **Workers' Compensation: Second Injury Fund.** Whether a combination of permanent disabilities, within the purview of Neb. Rev. Stat. § 48-128 (Reissue 1988), is substantially greater than permanent disability from a second or subsequent compensable injury is a question of fact.
4. **Workers' Compensation: Rules of Evidence.** The Nebraska Evidence Rules do not apply to proceedings before the Nebraska Workers' Compensation Court.
5. **Workers' Compensation: Rules of Evidence: Due Process.** Although the Nebraska Evidence Rules are inapplicable to proceedings in the Nebraska Workers' Compensation Court, due process requirements may control the type of evidence in a trial of a workers' compensation case.
6. **Workers' Compensation.** Under the Nebraska Workers' Compensation Act, an employee's disability as a basis for compensation is determined by the employee's diminution of employability or impairment of earning power or earning capacity, and is not necessarily determined by a physician's evaluation and assessment of the employee's loss of bodily function.
7. _____. An employee who is injured to the extent that the employee cannot perform services other than those which are so limited in quality, dependability, or quantity that a reasonably stable market for the services is nonexistent may be classified as totally disabled.
8. _____. The test for a worker's employability after a compensable injury is whether the worker can compete in the open and normal labor market for the worker's services.
9. _____. Whether a claimant has sustained disability which is total or partial and which is temporary or permanent is a question of fact.
10. _____. Whether vocational rehabilitation is for an employee's best interests is a question of fact and is a statutory prerequisite to an order for vocational rehabilitation.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Robert M. Spire, Attorney General, and Lynn A. Melson for appellant.

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

Walter E. Zink II and Jill Gradwohl Schroeder, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellee Bethphage.

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

SHANAHAN, J.

The State of Nebraska, Second Injury Fund (Fund), appeals from an award for Pamela Ritchie Sherard on rehearing by the Nebraska Workers' Compensation Court which apportioned between the Fund and Bethphage Mission, Inc. (Bethphage), Sherard's employer, liability for payment of compensation benefits on account of Sherard's disability. We affirm.

STANDARD OF REVIEW

> "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. . . . 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. . . . Factual determinations by the Workers' Compensation Court will not be set aside on appeal unless such determinations are clearly erroneous. Regarding facts determined and findings made after rehearing in the Workers' Compensation Court, § 48-185 precludes the Supreme Court's substitution of its view of facts for that of the Workers' Compensation Court if the record contains evidence to substantiate the factual conclusions reached by the Workers' Compensation Court. . . . 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."

Heiliger v. Walters & Heiliger Electric, Inc., *ante* p. 459, 460-61, 461 N.W.2d 565, 568 (1990) (quoting from *Fees v. Rivett Lumber Co.*, 228 Neb. 617, 423 N.W.2d 483 (1988)). See Neb. Rev. Stat. § 48-185 (Reissue 1988).

CLAIM AGAINST THE SECOND INJURY FUND

The focal point in this appeal is the Fund. See Neb. Rev. Stat. § 48-128 (Reissue 1988), which, pertinent to this appeal, provides:

> If an employee who has a preexisting permanent partial disability whether from compensable injury or otherwise, which is or is likely to be a hindrance or obstacle to his or her obtaining employment or obtaining reemployment if the employee should become unemployed and which was known to the employer prior to the occurrence of a subsequent compensable injury, receives a subsequent compensable injury resulting in additional permanent partial or in permanent total disability so that the degree or percentage of disability caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability. For the additional disability, the employee shall be compensated out of a special trust fund created for that purpose, which sum so set aside shall be known as the Second Injury Fund.

BACKGROUND FOR SHERARD'S CLAIM

Sherard's Medical History.

In May 1976, Dr. Paul Goetowski diagnosed the condition of Sherard, then 15 years old, as "spondylolysis with possibly a spondylolisthesis, Grade I," and a "bilateral pedicle defect," a congenital defect in the back portion of a vertebra. Spondylolisthesis is the slippage or displacement of one vertebra on another. Dr. Goetowski cautioned Sherard against her participation in activities which "are apt to produce a progression or a slipping forward" of the fifth lumbar vertebra on the first sacral vertebra. In Dr. Goetowski's opinion, "if symptoms are severe enough . . . fusion is considered." In February 1980, Dr. Goetowski noted an increase in Sherard's spondylolisthesis of "L5 on S1" after she had fallen twice. Although he had prescribed back-brace support and flexion exercises for Sherard, when Sherard's lumbosacral instability increased and resulted in low back pain, Dr. Goetowski

performed a lumbosacral fusion, "L4-5 to S1," in March 1980.

In July 1982, Sherard again injured her back, when she was assaulted while working as a waitress. After this injury, Sherard experienced low back pain, as well as muscle spasms and leg cramps that would last "[d]ays at a time." Sherard's pain increased to a point where "to walk was very difficult," forcing her to take "very small steps" and requiring her "to use a cane sometimes to get around." Dr. Goetowski at that time described Sherard's low back pain as a chronic, recurrent, and permanent problem.

Dr. Goetowski performed a refusion of L4-5 to S1 in February 1983 and a right sacral iliac fusion in September 1983. In February 1984, Dr. Goetowski formed the opinion that Sherard had "approximately 50% permanent partial residual anatomically of her back now and for the foreseeable future."

Sherard's Injuries at Bethphage.

After Sherard's unsuccessful efforts to obtain employment in 1984, the Nebraska Job Service placed Sherard in an on-the-job training program with Bethphage Mission, an institution for mentally disabled adults, in Lincoln, Nebraska. Bethphage's file on Sherard contained documentation that Bethphage knew about Dr. Goetowski's treatment of Sherard's back condition, including the vertebral fusions. Sherard's job responsibilities at Bethphage were mainly physical assistance to patients in their daily activities, such as bathing, feeding, walking, and exercising. While working, Sherard slipped on Bethphage's dining room floor on August 9, 1985, fell, struck her back on a chair, and was off work until September 12, 1985.

Sherard was again injured at Bethphage on January 14, 1986, when she was attempting to restrain a patient who was striking other patients and staff members. The patient lunged and caused Sherard to fall into a wall. Before this injury, Sherard "had never experienced [pain] going clear to [her] foot and making [her] foot numb." After this accident, Sherard perceived "throbbing, aching, shooting, hot pain" through her lower back and right leg. In April 1986, Dr. Gene Lewallen, an orthopedic surgeon who treated Sherard after Dr. Goetowski's retirement, performed a refusion of "L4-5" on Sherard and, in

February 1987, estimated Sherard's permanent physical impairment at 50 percent of the body as a whole.

As a result of the 1986 accident, Sherard was unable to return to her employment at Bethphage. At the request of Bethphage's insurance carrier, Sherard met with James Kincaid, a rehabilitation specialist, in the summer of 1987. After Sherard consulted with Kincaid in 1987, she began a college course in a sign language program, but prolonged sitting in a classroom caused Sherard to develop sacral decubitus, commonly known as a pressure spot or bedsore. In light of Sherard's persistent decubitus, her physician, Dr. George Walcott, recommended that Sherard withdraw from the signing class because "[s]o far as application of vocational training, it would appear as though it's going to be difficult for her to sit for any length of time over an hour." In April 1988, Sherard moved to Arizona, where she lived until May 1989, when she returned to Nebraska. While in Arizona, she was treated by Dr. Andre Matthews, an orthopedist, who, on August 5, 1988, estimated Sherard's permanent impairment to be 61 percent of the body as a whole.

REHEARING IN WORKERS' COMPENSATION COURT

Evidence.

In her testimony at the rehearing in the Nebraska Workers' Compensation Court, Sherard described her vocational background before the injuries at Bethphage and her physical difficulties after the accident in 1986. Sherard was trained, and obtained state certification, as an emergency medical technician and has served on the staff of an intermediate care facility for mentally disabled persons. Most of Sherard's work history has involved "totally" physical work, such as manually lifting disabled people. However, after the 1986 accident, she experienced almost constant back pain, which was exacerbated by everyday physical exertion, and was unable to do any task which required bending, stooping, lifting, or standing for any protracted period. Several orthopedists testified concerning Sherard's physical limitations after the 1986 accident and expressed their opinions on her disability on account of the 1986 injury. Sherard was "markedly limited in her ability to move" and was unable to lift over 25 pounds. Sherard exhibited

"considerable limitation in the range of motion of her back," demonstrated limited flexion and extension in her "extremely stiff back," and was unable to return to "gainful employment." One orthopedist testified: "I don't think [Sherard is] capable of any kind of work. . . . [H]er back hurt. It bothered her when she'd walk, it bothered her when she'd sit. I doubt if she'd be very good employment for anyone."

Kincaid, the rehabilitation specialist, testified that, based on Sherard's medical history, which included Dr. Goetowski's 1984 evaluation that Sherard had permanent partial disability of 50 percent to the body as a whole, Sherard had an 80-percent "vocational disability" and permanent loss of earning capacity in 1984 due to the "very severe restrictions" imposed by Dr. Goetowski, such as Sherard's wearing a back brace during ordinary physical activities. These medical restrictions hindered Sherard's obtaining employment. During cross-examination of Kincaid, the following occurred:

> [Bethphage's lawyer:] And based upon the medical records that you reviewed and your interviews with Mrs. Sherard and your skill, training, education and experience, do you have an opinion as to whether her accident of January of 1986 resulted in additional permanent loss of earning capacity above that which existed on February 27th of 1984?
>
> [Kincaid:] Yes.
>
> [Fund's lawyer:] I'm going to object, no sufficient foundation . . . .

After the court overruled the Fund's objection, Kincaid answered: "I felt at that time that she had an additional 15 percent vocational disability as a result of . . . this injury of [January] '86."

Later during Kincaid's cross-examination, Bethphage's lawyer asked: "[D]o you have an opinion as to whether the combined losses of earning capacity present before January of 1986 and the additional loss of earning capacity resulting from the accident of January of 1986 is greater than what would have resulted from the accident of January 1986 considered alone?"

The Fund's lawyer interjected: "Again, I'll object, no sufficient foundation."

When the court overruled the preceding objection, Kincaid responded that Sherard's January 1986 accident at Bethphage resulted in an additional 15-percent permanent loss of earning capacity or "vocational disability" above Sherard's 80-percent permanent loss of earning capacity which existed in 1984, a combination of disabilities which rendered Sherard "unemployable."

Dr. Matthews, responding to the question whether "the combined effect of Mrs. Sherard's disability which preexisted August of 1985 and the disability which resulted from the accident of January of 1986 . . . was substantially greater than what resulted from the injury of January of 1986 considered alone and of itself and without the presence of the preexisting disabilities," answered, "[Y]es."

Findings by Workers' Compensation Court.

The Nebraska Workers' Compensation Court found that before Sherard's injuries at Bethphage, she "was suffering a preexisting disability greater than 25 percent" and that Bethphage had written notice of Sherard's preexisting condition, but retained her in its employ. The court's majority found that "the accident of January 13, 1986 standing alone and of itself would have produced a 15% permanent partial disability to [Sherard's] body as a whole." Based on Bethphage's liability for 15 percent of Sherard's permanent partial disability, the court's majority then allocated liability for payment of weekly compensation benefits to Sherard, including the Fund's liability for 85 percent of the benefits for Sherard's permanent partial disability and benefits for total disability "so long in the future" as Sherard remains totally disabled. The Nebraska Workers' Compensation Court made no reference to vocational rehabilitation for Sherard.

ASSIGNMENTS OF ERROR

The Fund's several assigned errors may be summarized as four, namely, the Nebraska Workers' Compensation Court erred in (1) finding that Bethphage sustained its burden under § 48-128 to prove that Sherard's preexisting permanent partial disability, combined with her subsequent disability from the 1986 accident, resulted in a disability substantially greater than

that which would have resulted from the 1986 injury, "considered alone and of itself"; (2) overruling the Fund's foundation objections to Kincaid's testimony regarding Sherard's loss of earning capacity; (3) finding that Sherard is totally disabled; and (4) failing to order vocational rehabilitation for Sherard.

RECOVERY AGAINST SECOND INJURY FUND

> To recover from the Second Injury Fund, § 48-128, a claimant must prove by a preponderance of evidence (1) a prior permanent partial disability, (2) a second or subsequent injury which is compensable, causing permanent disability, and (3) the combination of permanent disabilities existing after such second or subsequent injury is substantially greater in degree or percentage than permanent disability from the second or subsequent injury, considered by itself and not in conjunction with the prior permanent disability.

Norris v. Iowa Beef Processors, 224 Neb. 867, 875-76, 402 N.W.2d 658, 665-66 (1987).

> For the combination of permanent disabilities necessary to sustain a claim against the Second Injury Fund, the prior permanent partial disability or disabilities must interact with the effects of the second or subsequent compensable injury and enhance the permanent disability that otherwise results from the later compensable injury alone. . . .
>
> As expressed in 2 A. Larson, The Law of Workmen's Compensation § 59.32(g) at 10-477 (1986): "Although the prior impairment need not combine with the compensable injury in any special way, it must add something to the disability before the Special Fund [Second Injury Fund] can become liable. In other words, it is not enough to show that the claimant had some kind of handicap, if that handicap contributed nothing to the final disability."

Norris, supra at 880-81, 402 N.W.2d 668-69.

Therefore, the main issue in the present appeal is whether, as a factual matter, Sherard's disability before her 1986 accident at Bethphage, when combined with her disability from the 1986

accident, resulted in disability substantially greater in degree or percentage than would have resulted from Sherard's 1986 Bethphage injury, considered alone.

"Disability," in the context of § 48-128, means an employee's diminution of employability or impairment of earning power or capacity. *Norris, supra.* Cf. *Heiliger v. Walters & Heiliger Electric, Inc., ante* p. 459, 461 N.W.2d 565 (1990) (employee's total or permanent partial disability as a basis for compensation under Neb. Rev. Stat. § 48-121 (Reissue 1988), except disability from "schedule" injuries described in § 48-121(3)).

"Whether a combination of permanent disabilities, within the purview of § 48-128, is substantially greater than permanent disability from a second or subsequent compensable injury is a question of fact." *Norris, supra* at 876, 402 N.W.2d at 666.

Kincaid, the rehabilitation specialist, estimated Sherard's permanent loss of earning capacity at 80 percent in February 1984, with an additional 15-percent loss of earning capacity after Sherard's 1986 accident. Simple arithmetic evidences a 95-percent loss of earning capacity, or, in all practicality, a total loss of earning capacity, from Sherard's combined disabilities, with 15 percent of the loss attributable to the 1986 accident, considered alone. With Kincaid's assessment of Sherard's loss of earning capacity, before and after Sherard's injury at Bethphage, the opinions from Kincaid and Dr. Matthews supplied a basis for the conclusion that Sherard's loss of earning capacity before 1986, combined with her additional loss of earning capacity from the January 1986 accident, was greater than the loss which would have resulted from the January 1986 accident, considered alone.

Under the standard of review for this court, we cannot conclude that the Nebraska Workers' Compensation Court, as the sole judge of witness credibility and weight to be given a witness' testimony, was clearly erroneous in its finding that the Fund is liable for Sherard's compensation benefits payable pursuant to § 48-128.

KINCAID'S TESTIMONY

The Fund argues that Kincaid's opinions as an expert

regarding Sherard's loss of earning capacity, before and after Sherard's 1986 accident at Bethphage, were without foundation.

First, we note that the Nebraska Evidence Rules do not apply to "proceedings before the Nebraska Workers' Compensation Court . . . ." Neb. Evid. R. 1101(4)(d), Neb. Rev. Stat. § 27-1101(4)(d) (Reissue 1989); *Harpham v. General Cas. Co.*, 232 Neb. 568, 441 N.W.2d 600 (1989). See, also, Neb. Rev. Stat. § 48-168 (Reissue 1988) (Nebraska Workers' Compensation Court is not bound by "common-law or statutory rules of evidence"). Cf., *Fite v. Ammco Tools, Inc.*, 199 Neb. 353, 258 N.W.2d 922 (1977) (Nebraska Workers' Compensation Court cannot utilize evidential standards more restrictive than the Nebraska Evidence Rules); *Friedeman v. State*, 215 Neb. 413, 339 N.W.2d 67 (1983) (Nebraska Workers' Compensation Court may receive evidence inadmissible under the Nebraska Evidence Rules).

Although the Nebraska Evidence Rules are inapplicable to proceedings in the Nebraska Workers' Compensation Court, due process requirements may control the type of evidence in a trial of a workers' compensation case. *Harpham v. General Cas. Co., supra.* See, also, 3 A. Larson, The Law of Workmen's Compensation § 79.80 (1989) (evidence rules based on "fair play" in trials).

The Fund does not contend that reception of Kincaid's opinions contravenes the constitutional safeguard of due process, but contends that its foundation objections were "erroneously overruled by the rehearing panel." Brief for appellant at 13. Since the Nebraska Evidence Rules were inapplicable to the rehearing in Sherard's case, we need not evaluate the Fund's objections in relation to the Nebraska Evidence Rules. Kincaid's testimony was properly before the Nebraska Workers' Compensation Court for its consideration and use in disposing of the issues in Sherard's case.

However, even if the Nebraska Evidence Rules were applicable, the Fund's objections were invalid. First, the Fund's objections were interposed to questions which merely sought to establish that the expert had an opinion about a particular subject. An expert's possession of an opinion can hardly be

objectionable, although an expert's expression of that opinion before a fact finder may be objectionable under the Nebraska Evidence Rules. Second, an objection on the ground of insufficient foundation is a general objection. See *Kennedy v. Woods*, 131 Neb. 217, 267 N.W. 390 (1936). "The objection 'lack of foundation' is employed at trial in reference to many different situations." M. Graham, Handbook of Federal Evidence § 611.9 at 528 (2d ed. 1986). "If a general objection is overruled the objecting party may not complain on appeal unless: (1) The ground for exclusion was obvious without stating it, or (2) the evidence was not admissible for any purpose." *Gateway Bank v. Department of Banking*, 192 Neb. 109, 112, 219 N.W.2d 211, 213 (1974).

In Sherard's case, the ground for exclusion is unspecified, unclear, and may have related to qualifications of an expert witness or some other aspect in the introduction of opinion evidence. Kincaid's opinions had probative value regarding a fact of consequence, namely, Sherard's disability or loss of earning capacity. There is no merit to the Fund's contention concerning Kincaid's opinions presented to the trier of fact, the Nebraska Workers' Compensation Court.

SHERARD'S TOTAL DISABILITY

The Fund alleges that the Workers' Compensation Court erred in finding that Sherard is totally disabled.

Under the Nebraska Workers' Compensation Act, an employee's disability as a basis for compensation "is determined by the employee's diminution of employability or impairment of earning power or earning capacity, and is not necessarily determined by a physician's evaluation and assessment of the employee's loss of bodily function." *Heiliger v. Walters & Heiliger Electric, Inc.*, *ante* p. 459, 470, 461 N.W.2d 565, 573 (1990). See § 48-121.

> In relation to "total disability" under § 48-121(1) and "disability partial in character" under § 48-121(2), "temporary" and "permanent" refer to the duration of disability, while "total" and "partial" refer to the degree or extent of the diminished employability or impairment of earning power or earning capacity.

> As Professor Arthur Larson observes: "[T]otal disability may be found in the case of workers who, while not altogether incapacitated for work, are so handicapped that they will not be employed regularly in any well-known branch of the labor market. The essence of the test is the probable dependability with which claimant can sell his services in a competitive labor market, undistorted by such factors as business booms, sympathy of a particular employer or friends, temporary good luck, or the superhuman efforts of the claimant to rise above his crippling handicaps." 2 A. Larson, The Law of Workmen's Compensation § 57.51(a) at 10-164.68, 164.68(18)(1989).

Heiliger, supra at 470-71, 461 N.W.2d at 573-74. An employee who is injured to the extent that the employee cannot perform services other than those which are so limited in quality, dependability, or quantity that a reasonably stable market for the services is nonexistent may be classified as totally disabled. *Lee v. Minneapolis Street Railway Co.*, 230 Minn. 315, 41 N.W.2d 433 (1950). Also, according to Professor Arthur Larson, "Compensable disability is generally defined as inability, as the result of a work-connected injury, to perform or obtain work suitable to claimant's qualifications and training." 2 A. Larson, The Law of Workmen's Compensation § 57.22(a) at 10-129 (1989). Hence, the test for a worker's employability after a compensable injury is whether the worker can compete in the open and normal labor market for the worker's services.

Whether a claimant has sustained disability which is total or partial and which is temporary or permanent is a question of fact. *Parker v. St. Elizabeth Comm. Health Ctr.*, 226 Neb. 526, 412 N.W.2d 469 (1987); *Ceco Corp. v. Crocker*, 216 Neb. 692, 345 N.W.2d 20 (1984).

Restatement of all the evidence bearing on the question of Sherard's disability or her loss of earning capacity would serve no useful purpose. Suffice it to say, the evidence supports the compensation court's finding concerning Sherard's disability, its degree, and duration under the circumstances.

VOCATIONAL REHABILITATION

The Fund also contends that the Workers' Compensation Court erred in failing to determine whether Sherard should enter a program of vocational rehabilitation.

Neb. Rev. Stat. § 48-162.01 (Reissue 1988), which specifically addresses vocational rehabilitation, provides:

> (3) . . . When as a result of the injury an employee is unable to perform work for which he or she has previous training or experience, he or she shall be entitled to such vocational rehabilitation services, including retraining and job placement, as may be reasonably necessary to restore him or her to suitable employment. If such services are not voluntarily offered and accepted, the Nebraska Workers' Compensation Court or any judge thereof on its or his or her own motion, or upon application of the employee or employer, and after affording the parties an opportunity to be heard by the compensation court or judge thereof, may refer the employee to a qualified physician or facility for evaluation and report of the practicability of, need for, and kind of service, treatment, or training necessary and appropriate to render him or her fit for a remunerative occupation . . . .
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> . . . .
>
> (6) Whenever the Nebraska Workers' Compensation Court or judge thereof determines that there is a reasonable probability that with appropriate training, rehabilitation, or education a person who is entitled to compensation for total or partial disability which is or is likely to be permanent may be rehabilitated to the extent that he or she will require less care and attendance or to the extent that he or she can become gainfully employed or increase his or her earning capacity and that it is for the best interests of such person to undertake such training, rehabilitation, or education . . . .

Whether vocational rehabilitation is for an employee's best interests is a question of fact and is a statutory prerequisite to an order for vocational rehabilitation. *Pollock v. Monfort of Colorado*, 221 Neb. 859, 381 N.W.2d 154 (1986). Although the compensation court's silence on vocational rehabilitation for

Sherard might be interpreted as the court's conclusion that vocational rehabilitation is pointless at the present, especially in view of Sherard's physical condition and her previous unsuccessful efforts at rehabilitation, we need not remand to the Nebraska Workers' Compensation Court for an express finding on the question whether vocational rehabilitation is in Sherard's best interests. If the Fund believes that vocational rehabilitation is still an issue in Sherard's case, § 48-162.01(3) provides a procedure if rehabilitation services "are not voluntarily offered and accepted." Consequently, the Fund may apply to the Nebraska Workers' Compensation Court for a specific and express determination of the vocational rehabilitation question regarding Sherard. Our remand to the Nebraska Workers' Compensation Court for consideration of Sherard's vocational rehabilitation would be nothing more than an order for additional proceedings which are already available pursuant to the Fund's application under § 48-162.01(3). Hence, in the present appeal we need not consider any question regarding vocational rehabilitation.

ATTORNEY FEES

In *Pollard v. Wright's Tree Service, Inc.*, 212 Neb. 187, 195, 322 N.W.2d 397, 403 (1982), this court stated:

> In this court it is contended that no attorney fees can be allowed to plaintiff's attorney because only the Second Injury Fund appealed and the statute refers only to the "employer." The Second Injury Fund, within the meaning of § 48-125, is an employer, and if, on appeal to this court, it fails to obtain any reduction in the amount of the award of the Workmen's Compensation Court on rehearing, the employee is entitled to a reasonable sum as attorney fees in this court, to be assessed against the Second Injury Fund.

Since the Fund has failed to reduce the amount of Sherard's award reviewed in this appeal, we order the Fund to pay Sherard $1,500 to be applied toward the fee of Sherard's lawyer for services in this court. See Neb. Rev. Stat. § 48-125(1) (Reissue 1988) (attorney fee for employee when employer appeals and fails to obtain a reduction of an award to the employee).

CONCLUSION

The award of the Nebraska Workers' Compensation Court is supported by the evidence, is not clearly erroneous, and is, therefore, affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. HAROLD LAMONT OTEY, APPELLANT.

464 N.W.2d 352

Filed January 11, 1991. No. 90-289.

1. **Homicide: Sentences: Death Penalty: Aggravating and Mitigating Circumstances.** Whether a defendant convicted of first degree murder receives life imprisonment or the death penalty shall be based upon three considerations: (1) whether sufficient aggravating circumstances exist to justify imposition of a sentence of death; (2) whether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances; or (3) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.
2. **Postconviction: Proof.** 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. The movant has the burden of establishing the basis for such relief, and a conviction will not be set aside in the absence of a showing of actual prejudice.
3. **Postconviction: Appeal and Error.** The findings of the postconviction hearing court will not be disturbed unless they are clearly wrong.
4. _____: _____. 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.
5. **Postconviction.** A defendant is entitled to bring a second proceeding for postconviction relief only if the grounds relied upon did not exist at the time the first motion was filed.
6. **Sentences: Death Penalty: Aggravating and Mitigating Circumstances.** The balancing of aggravating circumstances against mitigating circumstances is not merely a matter of number counting but, rather, requires a careful weighing and examination of the various factors.
7. **Homicide: Death Penalty: Aggravating and Mitigating Circumstances.** Aggravating circumstance Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1989) literally, and as interpreted by this court, describes in the disjunctive two

separate circumstances which may operate in conjunction with or independent of one another. The first circumstance is that the murder was especially heinous, atrocious, or cruel. The second circumstance pertains to the state of mind of the actor.

8. **Homicide: Death Penalty: Aggravating and Mitigating Circumstances: Proof.** The State needs to prove only the first prong of Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1989) for that aggravating circumstance to exist. To constitute an aggravating circumstance under the first prong of § 29-2523(1)(d), the murder must be especially heinous, atrocious, or cruel.
9. _____: _____: _____: _____. "Especially heinous, atrocious, [or] cruel" is limited to cases where torture, sadism, or the imposition of extreme suffering exists, or where the murder was preceded by acts performed for the satisfaction of inflicting either mental or physical pain or that pain existed for any prolonged period of time.
10. **Postconviction: Right to Counsel.** Where the record fails to present a justiciable issue of law and fact to the court in a postconviction action, it is not an abuse of discretion to fail to appoint counsel for an indigent.
11. **Constitutional Law: Postconviction: Death Penalty: Right to Counsel.** As a matter of federal constitutional law, neither the eighth amendment nor the due process clause requires states to appoint counsel for indigent death row inmates seeking state postconviction relief.
12. **Postconviction.** 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 under the Nebraska Postconviction Act when (1) the motion for postconviction relief does not contain sufficient factual allegations concerning a denial or violation of constitutional rights affecting the judgment against the movant, or (2) notwithstanding proper pleadings 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.

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

Jerry L. Soucie for appellant.

Robert M. Spire, Attorney General, and Sharon M. Lindgren for appellee.

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

PER CURIAM.

In his second postconviction relief motion, Harold Lamont Otey, who was convicted of first degree murder and sentenced to death more than 12 years ago, asks this court to examine

issues which were, or could have been, raised in his direct appeal or in his first postconviction relief motion, both of which were decided adversely to him by this court.

While the issues raised in Otey's second postconviction relief motion are procedurally barred, we have, nevertheless, reweighed the aggravating and mitigating circumstances applicable in this death sentence case and find that Otey's latest postconviction motion to vacate his conviction of first degree murder and his death sentence is without merit.

The pertinent facts surrounding the murder are set forth in *State v. Otey*, 205 Neb. 90, 91-92, 287 N.W.2d 36, 38-39 (1979) (*Otey I*):

> The murder was committed during the early morning hours of June 11, 1977, in Omaha, Nebraska. The defendant entered the apartment of the victim and took a stereo set which he placed behind a garage nearby. This stereo was later identified and traced back to the defendant.
>
> The victim awakened when the defendant reentered the apartment. The defendant told the victim that he was going to rob her and that he would rape her. When she resisted he inflicted a knife wound across the top of her forehead. The defendant then sexually assaulted the victim. After the sexual assault the defendant and the victim went to the second floor of the apartment to get her money. There the defendant stabbed the victim a number of times inflicting deep wounds, struck her about the head with a hammer, and strangled her with a belt. The evidence shows that the victim died from the multiple wounds and strangulation inflicted upon her by the defendant.
>
> The defendant was apprehended in Florida in January 1978. On January 28, 1978, he was interviewed there by two Omaha police officers and after proper warnings gave a voluntary statement which was a full confession.

Following a jury trial, during which he was represented by a Douglas County public defender, Otey was convicted of first degree murder while in the perpetration of a first degree sexual assault, which is punishable by life imprisonment or a sentence of death. See Neb. Rev. Stat. §§ 28-303 (Reissue 1989) and

28-105 (Reissue 1985). Pursuant to Neb. Rev. Stat. § 29-2520 (Reissue 1975), a three-judge panel was convened to determine the sentence to be imposed on Otey.

Neb. Rev. Stat. § 29-2522 (Reissue 1989) now provides in substance that whether a defendant convicted of first degree murder receives life imprisonment or the death penalty shall be based upon three considerations: (1) whether sufficient aggravating circumstances exist to justify imposition of a sentence of death; (2) whether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances; or (3) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Neb. Rev. Stat. § 29-2523 (Reissue 1989) defines aggravating and mitigating circumstances as follows:

> (1) Aggravating Circumstances:
>
> (a) The offender was previously convicted of another murder or a crime involving the use or threat of violence to the person, or has a substantial history of serious assaultive or terrorizing criminal activity;
>
> (b) The murder was committed in an apparent effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of a crime;
>
> (c) The murder was committed for hire, or for pecuniary gain, or the defendant hired another to commit the murder for the defendant;
>
> (d) The murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence;
>
> (e) At the time the murder was committed, the offender also committed another murder;
>
> (f) The offender knowingly created a great risk of death to at least several persons;
>
> (g) The victim was a law enforcement officer or a public servant having custody of the offender or another; or
>
> (h) The crime was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws.
>
> (2) Mitigating Circumstances:

(a) The offender has no significant history of prior criminal activity;

(b) The offender acted under unusual pressures or influences or under the domination of another person;

(c) The crime was committed while the offender was under the influence of extreme mental or emotional disturbance;

(d) The age of the defendant at the time of the crime;

(e) The offender was an accomplice in the crime committed by another person and his participation was relatively minor;

(f) The victim was a participant in the defendant's conduct or consented to the act; or

(g) At the time of the crime, the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental illness, mental defect, or intoxication.

After an evidentiary hearing, the sentencing panel found that "the murder was committed 'to conceal the identity of the perpetrator of a crime' and that 'the murder was especially heinous, atrocious, cruel, and manifested exceptional depravity by ordinary standards of morality and intelligence.' " *Otey I, supra* at 96, 287 N.W.2d at 41. The panel found specifically that this latter aggravating circumstance existed in its entirety and to a great degree in this case. As will be discussed later, the panel's finding under § 29-2523(1)(d) that the murder "manifested exceptional depravity by ordinary standards of morality and intelligence" is the second prong of aggravating circumstance (1)(d) and constituted mere surplusage. The panel further found that none of the mitigating circumstances set out in § 29-2523(2) existed. After concluding that sufficient aggravating circumstances existed to justify the imposition of the death penalty, the panel sentenced Otey to death.

In connection with his direct appeal, Otey filed a pro se motion in this court (see transcript in *Otey I*) to have his trial counsel removed because the defendant "intends to raise substantial issues going to the question of the competency of trial counsel . . . ." Otey's motion was granted, and S.J.

Albracht was appointed to represent the defendant on his direct appeal to this court. Albracht filed a direct appeal brief and argued the case in this court. In his direct appeal to this court, Otey assigned as error that the trial court erred in

> 1. . . . failing to grant the defendant's Motion for Continuance filed on the 31st day of March, 1978.
>
> 2. . . . failing to sustain the plaintiff's Motion to have the defendant declared a sexual sociopath pursuant to the Reissue Revised Statutes of the State of Nebraska 29-2909.
>
> 3. . . . failing to declare Section 29-2519 et seq. Reissue Revised Statutes of Nebraska unconstitutional, null and void.
>
> 4. . . . imposing the death penalty under the circumstances of this case.
>
> 5. . . . failing to sustain the defendant's Motion in Limine prohibiting evidence and testimony of a subsequent assault, alleged to have taken place approximately thirty (30) days after the commission of the crime for which the defendant stood charged.
>
> 6. . . . failing to sustain defendant's Motion for Mistrial after the Court discharged a sworn juror.

Brief for appellant in *Otey I* at 3. There was no assignment of error that the evidence was insufficient to convict Otey.

More specifically, Otey argued on direct appeal that § 29-2523 was unconstitutional because, in part, the aggravating and mitigating factors are so vague and subjective as to make consistent and uniform application impossible. See brief for appellant in *Otey I* at 34-35. By way of example, Otey further asserted, "Men, including judges, may have widely varying conceptions as to what constitutes 'exceptional depravity.' " *Id.* at 35. Finally, Otey contended that the proportionality requirement prescribed in 1978 Neb. Laws, L.B. 711, was not being followed, since similar cases did not result in a sentence of death. See brief for appellant in *Otey I* at 51-53.

On December 18, 1979, this court affirmed Otey's conviction and sentence. See *Otey I*. The U.S. Supreme Court denied Otey's petition for a writ of certiorari on June 2, 1980. See *Otey*

v. Nebraska, 446 U.S. 988, 100 S. Ct. 2974, 64 L. Ed. 2d 846 (1980).

On September 23, 1980, Otey filed his first motion for postconviction relief in the district court for Douglas County. After conducting an evidentiary hearing, at which Otey's deposition was received in evidence, the motion was denied on September 24, 1981.

Otey appealed the trial court's denial of his first postconviction motion to this court, where he was represented by Michael L. Schleich. The assigned errors on the postconviction relief appeal were that the district court committed error in "1. . . . denying the defendant's Motion to Vacate Sentence and finding that the defendant received the effective assistance of counsel [and] 2. . . . denying the defendant the right to personally appear at the hearing on his Motion to Vacate Sentence." Brief for appellant in *State v. Otey*, 212 Neb. 103, 321 N.W.2d 453 (1982) (*Otey II*), at 2-3.

In connection with his first assignment of error, Otey claimed that he was denied effective assistance of counsel because his trial counsel failed to adequately prepare for trial, failed to request that all stages of the proceedings be recorded and transcribed, advised the jury that Otey would testify in his own behalf, and failed to object to prejudicial photographs. See brief for appellant in *Otey II* at 10-18.

On July 2, 1982, this court, after discussing each of the defendant's assigned errors and his arguments in connection therewith, affirmed the denial of Otey's first postconviction relief motion. See *Otey II*. Otey's second petition for a writ of certiorari was denied by the U.S. Supreme Court on December 6, 1982. See *Otey v. Nebraska*, 459 U.S. 1080, 103 S. Ct. 502, 74 L. Ed. 2d 641 (1982).

On December 15, 1982, Otey filed a petition for a writ of habeas corpus in the U.S. District Court for the District of Nebraska. So far as is relevant here, among the 31 claims in that petition for habeas relief were:

> 21. The Petitioner was denied his rights under the Eighth and Fourteenth Amendments to the United States Constitution when the Sentencing panel found that the Petitioner had a significant history of prior criminal

activity and based that finding solely on charges against Petitioner [in New Jersey] of which he had not been convicted and uncorroborated admissions of the Defendant.

22. The Petitioner was denied his rights under the Eight [sic] and Fourteenth Amendments to the United States Constitution when the sentencing panel in Petitioner's case specifically limited its consideration of mitigating circumstances to those set forth in § 29-2523 R.R.S. Neb.

23. Nebraska Revised Statutes § 29-2523 is unconstitutional on its face and as applied in this case because it limits the mitigating factors that may be considered by the court to certain factors listed in the statute itself.

. . . .

28. The Nebraska death sentencing statutes, as interpreted by the Nebraska Supreme Court and applied in this case, are unconstitutional because the Nebraska Supreme Court has affirmed death sentences, including this one, despite the specific legislative command of LB 711 (R.R.S. Neb. § 29-2521.01, et seq.) that a death sentence be reversed if it is greater than the sentence imposed in other cases with similar circumstances so that Petitioner's sentence was imposed in contravention of the applicable statutory authority, in violation of the Eighth and Fourteenth Amendments of the Constitution of the United States. . . .

29. The Nebraska death sentencing statute (Neb. Rev. Stats. § 29-2523) is unconstitutionally vague in its enumeration of aggravating and mitigating circumstances, including such aggravating circumstances considered in this case as the existence or nonexistence of a "substantial history of serious assaultive or terrorizing criminal activity" and "heinous, atrocious and cruel", neither of which requires sufficient constraint on the sentencing decision to comport with the requirements of the Eighth and Fourteenth Amendments to the Constitution of the United States.

. . . .

> 31. The death penalty is in fact administered and applied discriminatorily in the United States and in the State of Nebraska against poor males who are accused of killing caucasians and upon the sole ground of race, poverty and sex, and Petitioner's sentences of death were imposed pursuant to this pattern and practice, in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

Otey v. Black, No. CV82-L-665, petition for writ of habeas corpus at 5-7 (D. Neb. Dec. 15, 1982).

In an exhaustive and detailed report and recommendation, the federal district court's magistrate determined that although claims regarding the consideration of the pending New Jersey charges, statutory limitation of mitigating factors, and discriminatory imposition of the death penalty on minority males had not been presented to the Nebraska Supreme Court, state court remedies were nonetheless exhausted. See *Otey v. Black*, No. CV82-L-665, U.S. Magistrate's report and recommendation at 1-2 (D. Neb. Feb. 3, 1987). He then determined that Otey had waived some of those claims and that he was not actually prejudiced by the Nebraska Supreme Court's failure to address the merits of those claims. *Id.* at 13-19. See, *Wainwright v. Sykes*, 433 U.S. 72, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977); *Smittie v. Lockhart*, 843 F.2d 295 (8th Cir. 1988) (explaining that a federal court may not entertain a federal habeas corpus action if state court remedies are not exhausted unless the petitioner shows cause and prejudice). With respect to Otey's arguments concerning the proportionality review and vagueness of § 29-2523(1)(d), the magistrate determined that the claims had been presented to the Nebraska Supreme Court and that they had no merit. See *Otey v. Black*, No. CV82-L-665, U.S. Magistrate's report and recommendation, *supra* at 40-44. The U.S. District Court for the District of Nebraska adopted the report and recommendation by the magistrate and denied Otey's petition for habeas corpus relief. See *Otey v. Grammer*, No. CV82-L-665, memorandum of decision (D. Neb. Apr. 7, 1987).

On October 13, 1988, a panel of the U.S. Court of Appeals for the Eighth Circuit affirmed the district court's denial of

Otey's petition. See *Otey v. Grammer*, 859 F.2d 575 (8th Cir. 1988). In that opinion, the panel discussed at length only Otey's ineffectiveness of counsel claims which he had previously raised in his first postconviction relief motion before this court. Parenthetically, we note that Otey was cognizant of any ineffectiveness of trial counsel when he requested, and was granted, different counsel to represent him at the time of his direct appeal. Concerning Otey's other assertions, the U.S. Court of Appeals panel concluded: "We have carefully reviewed the other issues raised by Otey and find them to be without merit. They have been thoroughly ventilated by the Magistrate in his lengthy and comprehensive report and recommendation and do not warrant further discussion here." *Id.* at 580. The court of appeals refused Otey's petition for rehearing en banc on March 14, 1989. See *Otey v. Grammer*, 869 F.2d 1137 (8th Cir. 1989). Otey's third petition for a writ of certiorari was denied by the U.S. Supreme Court on June 28, 1990. See *Otey v. Grammer*, ____ U.S. ____, 110 S. Ct. 3288, 111 L. Ed. 2d 796 (1990).

Utilizing the provisions of Neb. Rev. Stat. §§ 29-3001 to 29-3004 (Reissue 1989), Otey filed his second postconviction motion in the district court for Douglas County, Nebraska, on June 22, 1989. He asserted the following in that postconviction motion:

1. Inaccurate and incorrect information was contained in the presentence report and was relied upon by the sentencing panel in imposing the sentence of death, in violation of U.S. Const. amends. VIII and XIV and Neb. Const. art. I, §§ 1, 3, and 12.

2. The death penalty is being applied to Otey in violation of the separation of powers clause set forth in Neb. Const. art. II because of the judicial branch's refusal to follow and apply the requirements under 1978 Neb. Laws, L.B. 711.

3. The death sentence statutes, as applied to Otey, were in violation of U.S. Const. amends. VIII and XIV because at the time of Otey's sentencing hearing, the mitigating factors available to Otey were expressly limited to the seven factors set forth in § 29-2523(2).

4. The death sentence imposed on Otey is unconstitutional because the sentencing panel relied upon the aggravating

circumstance prescribed in § 29-2523(1)(d), and said aggravating circumstance is unconstitutionally vague, in violation of U.S. Const. amends. VIII and XIV and Neb. Const. art. I, §§ 1, 3, and 12.

5. The sentencing panel used an improper and unconstitutional standard in depriving Otey of the benefit of the mitigating circumstance set forth in § 29-2523(2)(c) by focusing solely on § 29-2523(2)(g) to dismiss his psychiatric evidence, in violation of U.S. Const. amends. VIII and XIV.

6. The sentence of death is unconstitutional under Neb. Const. art. I, § 1, as amended by initiative 403, and the State may not deprive a person of his or her life.

7. The death penalty as administered in Nebraska and imposed on Otey is done in an ad hoc, arbitrary, capricious, and freakish manner, in violation of U.S. Const. amends. VIII and XIV and Neb. Const. art. I, §§ 1, 3, and 12. Death sentences are systematically and disproportionately imposed on indigent minority male defendants accused of killing white women.

Without appointing counsel or granting an evidentiary hearing, the district court denied the motion on February 23, 1990. See § 29-3001 and parts III and IV of this opinion. On appeal to this court, Otey, represented by Jerry Soucie, in substance presents the same arguments listed above, except that he omits in his assignments of error and does not brief the contentions set forth in numbers five and six. Otey contends in his sixth and seventh assignments of error that the district court erred in (1) failing to appoint counsel to represent him, under the terms of § 29-3004, and (2) refusing to hold an evidentiary hearing on the motion.

I. INTRODUCTION

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. *State v. Nearhood*, 233 Neb. 767, 448 N.W.2d 399 (1989). See, also, § 29-3001. The movant has the burden of establishing the basis for such relief, and a conviction will not be set aside in the absence of a showing of actual prejudice. *Nearhood, supra.*

The findings of the postconviction hearing court will not be disturbed unless they are clearly wrong. *State v. Thomas, ante* p. 553, 462 N.W.2d 862 (1990).

II. PROCEDURAL BAR

"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." *Nearhood, supra* at 771, 448 N.W.2d at 403. A defendant is entitled to bring a second proceeding for postconviction relief only if the grounds relied upon did not exist at the time the first motion was filed. *State v. Luna*, 230 Neb. 966, 434 N.W.2d 526 (1989); *State v. Nance*, 227 Neb. 581, 418 N.W.2d 598 (1988). See, also, *State v. Meis*, 233 Neb. 355, 445 N.W.2d 610 (1989) (determining that second postconviction action not barred because grounds relied upon did not exist at the time of the filing of the first motion for postconviction relief). Judicial economy and finality of the litigation are evident policy considerations supporting the foregoing rule. Furthermore, in the absence of the rule, a defendant could eternally postpone a death sentence in a case such as this by the simple artifice of piecemeal litigation.

1. PENDING CHARGES

In determining not to apply the "no significant history of prior criminal activity" mitigating factor prescribed in § 29-2523(2)(a), the sentencing panel, Otey contends, improperly considered pending charges against him in New Jersey. A letter, dated February 27, 1989, from the Monmouth County, New Jersey, prosecutor stating that the New Jersey charges would be dismissed was attached to Otey's second postconviction motion. At oral argument, Otey, through counsel, asserted that the issue could not have been raised any earlier because the charges were not dismissed until 1989.

The issue of whether the sentencing panel could consider the pending charges is an issue that could have been raised in Otey's direct appeal. It was not necessary that the charges be dismissed before the issue was raised. Because Otey could have raised this issue on direct appeal and the grounds existed at the time of the first postconviction hearing, he is barred from raising this issue

in a subsequent postconviction action.

Even if we were to assume that the sentencing panel should have completely disregarded the charges levied against the defendant in New Jersey, Otey would still not be entitled to have his death sentence set aside. The sentencing panel specifically found that the New Jersey charges did not support any aggravating circumstance. Similarly, the sentencing panel held that Otey's statements that he had committed statutory rape and from 10 to 13 other rapes and terrorized victims could not be used to support any aggravating circumstance. As stated, whether the New Jersey charges or the defendant's other noncharged bad conduct could be utilized to deprive Otey of mitigating circumstance § 29-2523(2)(a) are issues that could have been raised in Otey's direct appeal, but they were not.

Completely disregarding the New Jersey charges and weighing anew the aggravating and mitigating circumstances in this case, as permitted by *Clemons v. Mississippi*, ____ U.S. ____, 110 S. Ct. 1441, 108 L. Ed. 2d 725 (1990), and *State v. Victor*, 235 Neb. 770, 457 N.W.2d 431 (1990), we conclude that there are present in this case two aggravating circumstances, § 29-2523(1)(b) and (1)(d), which have been proved beyond a reasonable doubt, and one mitigating circumstance, § 29-2523(2)(a). We further find beyond a reasonable doubt that the existing aggravating circumstances (1)(b) and (1)(d) outweigh mitigating circumstance (2)(a) to such a degree that Otey's death sentence remains appropriate and is not arbitrary.

In reweighing the aggravating and mitigating circumstances in this case, we have been guided by the rules of law reiterated in *State v. Victor, supra* at 794-95, 457 N.W.2d at 447:

> The balancing of aggravating circumstances against mitigating circumstances is not merely a matter of number counting but, rather, requires a careful weighing and examination of the various factors. *State v. Ryan*, 233 Neb. 74, 444 N.W.2d 610 (1989); *State v. Joubert*, 224 Neb. 411, 399 N.W.2d 237 (1986). As we observed in *State v. Stewart*, 197 Neb. 497, 518, 250 N.W.2d 849, 862 (1977), quoting *State v. Dixon*, 283 So. 2d 1 (Fla. 1973):
> " 'It must be emphasized that the procedure to be followed by the trial judges and juries is not a mere

> counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present. Review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case. No longer will one man die and another live on the basis of race, or a woman live and a man die on the basis of sex. If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great. Thus, the discretion charged in Furman v. Georgia, [408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972)], can be controlled and channeled until the sentencing process becomes a matter of reasoned judgment rather than an exercise in discretion at all.' "

Section 29-2523(1)(b) provides that when "[t]he murder was committed in an apparent effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of a crime," that constitutes an aggravating circumstance. The sentencing panel found that the evidence established beyond a reasonable doubt that the victim was murdered to conceal the identity of the perpetrator of a crime. In support of that finding of this aggravating circumstance, the sentencing panel found that Otey entered the rear door of the victim's house while either committing a burglary or making a felonious entry, that a stereo was stolen from the residence, and that the defendant sold this stereo to third parties. The panel concluded that it was established beyond a reasonable doubt that these crimes were committed. The panel further found that Otey's admission that he raped the victim was corroborated by the testimony of the examining pathologist and was proved beyond a reasonable doubt, and found that the defendant admitted that he had cut the victim across the forehead while she initially resisted his advances and before the rape and that this conduct was corroborated and proved beyond a reasonable doubt by the pictures of the victim and the testimony of the examining

pathologist. See the order of sentence in the transcript to *Otey I*. We agree that this aggravating circumstance, set forth in § 29-2523(1)(b), exists and was proved beyond a reasonable doubt in Otey's case.

In applying aggravating circumstance § 29-2523(l)(d), the sentencing panel found, among other things, (1) that the victim's murder was especially heinous, atrocious, and cruel; (2) that it involved torture, sadism, and sexual abuse and the imposition of extreme suffering; and (3) that it was a torture murder. In support of its finding that the aggravating circumstance § 29-2523(1)(d) exists, the sentencing panel recited in its sentencing order:

> The evidence in this case shows that defendant was out drinking with friends on June 10, 1977. In the early morning hours of June 11, defendant, while walking to his place of residence at Ak-Sar-Ben race track, looked through the window of the victim's house. He saw the victim sleeping on a sofa on the first floor of the house. Defendant entered the rear door of the house, went upstairs and stole a stereo which he carried outside.
>
> Defendant then re-entered the house and again went upstairs. On his way back down, the victim awakened and confronted defendant. Defendant told the victim that he was going to rob her. When the victim responded that she didn't have much money, defendant told her he was going to rape her. The victim then began to fight back at defendant. Defendant knocked her onto the sofa and pulled out his knife. The knife had an overall length of 11 inches with the blade being 6 inches in length and tapering in a slightly curved fashion from a width of 3/4 inch at the handle to a point. The defendant, in his own words, the "*** just took the knife and cut her on the forehead to show that I wasn't kidding." After this slash across the victim's forehead, again in the defendant's words, "She was easy to get along with, you know.", and "*** the rest was easy ***."
>
> Defendant then proceeded to rape the victim downstairs on the sofa, both vaginally and anally as shown by sperm in the vagina and anus. After defendant

finished raping the victim, he inquired if she had any money. The victim told defendant that she had a little bit of money upstairs. Thereupon, the defendant forced the victim to walk upstairs. The victim at this time was completely unclothed and was bleeding badly from the cut on her forehead, and left a trail of blood up the steps.

Upstairs, the victim gave defendant what money she had, and then started "crying and stuff."

The defendant stated that he then started stabbing the victim, who then pleaded with defendant to kill her. [The panel found the victim's plea was one for mercy.] In defendant's words, "I figured, well, it went that far, why not, so, I stabbed her or whatever." According to the pathologist's report, there were at least 15 major stabbed and lacerated areas, not counting the small lacerations on the hands and abdomen. Two of the stab wounds penetrated the victim's body two inches into her liver, indicating a total penetration of five inches. Examination of the photographs introduced at the trial, and the photographs introduced at the sentencing hearing, shows stabs and lacerations all over the victim's body including a stab wound at the base of the skull in the rear, laceration of the left breast, laceration around both eyes, lacerations on the victim's back, lacerations to the legs and knees, lacerations to the arms, and lacerations to the abdomen.

The photographs also show the victim's body covered with blood — with some of the blood flowing vertically down the body and some flowing horizontally around the body, establishing the fact that the victim was bleeding while erect and bleeding while lying on the floor.

In addition to the stabbings, defendant stated that he then took a hammer from the top of the victim's dresser and hit the victim on the head four or five times. The examining pathologist testified that his examination showed one wound in the head resulting from a blow with a blunt instrument, causing internal hemorrahging [sic].

Defendant then strangled the victim with her own belt that was on the bed. This fact was also confirmed by the pathologist in his examination of the victim's larynx.

> The cause of the victim's death was attributed to all of the factors set out above. Dr. Blaine Roffman, who conducted the autopsy, concluded, "That the cause of death was attributed to all of these findings as an entity, the stab wounds, the trauma to the head and the trauma to the larynx all contributed to the cause of death." *The panel finds that the victim died a substantial period of time after the inital* [sic] *stabbing*. [Emphasis supplied.]
>
> The appearance of the victim's body, after defendant had murdered her, is possibly best described in the defendant's own words, when in response to an inquiry why he had covered her face, he said, "I couldn't stand the sight."

See transcript in *Otey I*.

In his second postconviction relief motion, the defendant has not challenged the underlying factual findings of the sentencing panel but, rather, challenges the constitutionality of aggravating circumstance (1)(d).

Regarding § 29-2523(1)(d), in *State v. Moore*, 210 Neb. 457, 470, 316 N.W.2d 33, 41 (1982), this court stated:

> Aggravating circumstance (1)(d) of § 29-2523 literally, and as interpreted by this court, describes in the disjunctive two separate circumstances which may operate in conjunction with or independent of one another. The first circumstance is that the murder was especially heinous, atrocious, or cruel. We have said that this circumstance is directed to the "pitiless crime which is unnecessarily torturous to the victim" and to cases where torture, sadism, or the imposition of extreme suffering exists. *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977); *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867 (1977). . . . The second circumstance pertains to the state of mind of the actor. In *State v. Stewart, supra*, we said the second instance indicates a situation "where depravity is apparent to such an extent as to obviously offend all standards of morality and intelligence" . . . and in *State v. Holtan*, 197 Neb. 544, 250 N.W.2d 876 (1977), it indicates a state of mind "totally and senselessly bereft of any regard for human life" (syllabus of the court).

In *State v. Ryan*, 233 Neb. 74, 142, 444 N.W.2d 610, 652 (1989), we concluded:

> [T]his court has adopted a limiting construction on aggravating circumstance (1)(d), as shown in cases extending from 1977 to 1986. We have held that "especially heinous, atrocious, or cruel" is limited to cases where "torture, sadism, or the imposition of extreme suffering exists," *State v. Moore, supra* at 470, 316 N.W.2d at 41, or where the murder was preceded by acts "performed for the satisfaction of inflicting either mental or physical pain or that pain existed for any prolonged period of time," *State v. Hunt*, [220 Neb. 707, 725, 371 N.W.2d 708, 721 (1985)].

As recently as *State v. Victor*, 235 Neb. 770, 457 N.W.2d 431 (1990), we reiterated that the State needs to prove only the first prong of § 29-2523(1)(d) for that aggravating circumstance to exist, i.e., that the murder must be "especially heinous, atrocious, cruel."

We further declared in *State v. Victor, supra* at 788, 457 N.W.2d at 444:

> We conclude, as we did in *State v. Ryan, supra*, and *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984), that this court has adopted such a narrow construction of § 29-2523(1)(d) as to render the first prong of the Nebraska statute sound and in full compliance with the U.S. Constitution. See, also, *Harper v. Grammer*, 895 F.2d 473 (8th Cir. 1990); *State v. Reeves*, 234 Neb. 711, 453 N.W.2d 359 (1990). Such a narrow construction does not lead to arbitrary results.

It is painfully evident that the unchallenged facts of this case, hereinbefore recited, establish beyond a reasonable doubt that the victim's death falls squarely within the limited construction that this court has placed upon the first prong of § 29-2523(1)(d). We consider the sentencing panel's finding in regard to the second prong of § 29-2523(1)(d) harmless error beyond a reasonable doubt and, at most, mere surplusage, since only the first prong of (1)(d) need be proved beyond a reasonable doubt, and was so proved, for aggravating circumstance (1)(d) to apply.

2. LIMITATION OF MITIGATING CIRCUMSTANCES

Otey next claims that, at the time he was sentenced in 1978, a sentencing court was limited to the express mitigating factors set forth in § 29-2523. He argues that this prevented the sentencing panel from giving consideration to nonstatutory mitigating factors, such as his upbringing and psychiatric history.

In *Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978), a plurality of the U.S. Supreme Court held that the 8th and 14th amendments require that the sentencing court, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. In his brief, Otey acknowledges that *Lockett* was decided scarcely 13 days after he was sentenced to death. On January 15, 1980, in *State v. Holtan*, 205 Neb. 314, 318-19, 287 N.W.2d 671, 674 (1980), this court declared:

> Nothing in our statute precludes the court from considering *all* aspects of the defendant's character. To the extent there may be any question we now hold that the trial court shall . . . consider any matter relevant to the imposition of the sentence and receive any such evidence which the court deems to have probative value as to the character of the defendant and shall consider them as a mitigating factor. . . .

Assuming arguendo, but not deciding, that the sentencing panel was limited to the specific mitigating factors enumerated in § 29-2523(2) and assuming arguendo that the issue could not have been raised on direct appeal, it is clear that at the time Otey filed his first postconviction action on September 23, 1980, the grounds relied upon herein by the defendant existed. Otey did not raise that issue in his first postconviction relief motion. This claim is barred under this state's procedural rules.

3. DISCRIMINATORY APPLICATION

The essence of this claim is that an indigent minority male who is convicted of murdering a Caucasian woman is more likely to be sentenced to death than a defendant who is

Caucasian or of the same race as the victim. This issue could have been presented on direct appeal. It was not. Furthermore, the same issue could have been raised, but was not, in Otey's first postconviction relief motion. The procedural bar is likewise applicable to this claim.

But even if we were to reach the merits of this claim, Otey could not prevail. Otey merely argues crude statistical data. Such an argument and data do not support his proposition. See *McCleskey v. Kemp*, 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987).

4. OTHER CLAIMS

Otey asserts that this court, in violation of Neb. Const. art. II, has refused its statutory obligation to conduct a proportionality review of capital cases as mandated in 1978 Neb. Laws, L.B. 711, now codified as Neb. Rev. Stat. §§ 29-2521.01 to 29-2522 and 29-2524 (Reissue 1989). This issue was raised on direct appeal. See brief for appellant in *Otey I* at 51-53. Indeed, this court, in *Otey I*, expressly stated after making the proportionality analysis, "We find the sentence of death imposed in this case is not excessive or disproportionate to the penalty imposed in other cases, considering both the crime and the defendant." *Otey I* at 96, 287 N.W.2d at 41.

Section 29-2521.03 requires the Supreme Court to determine the propriety of the death sentence in a case in which it has been imposed by comparing the sentence with previous cases involving the same or similar circumstances.

We have determined that the purpose of that statute is to ensure that no sentence imposed shall be greater than those imposed in other cases with the same or similar circumstances and that the review should include only those cases in which the death penalty was imposed. *State v. Victor*, 235 Neb. 770, 457 N.W.2d 431 (1990). See, also, *State v. Joubert*, 224 Neb. 411, 399 N.W.2d 237 (1986); *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986).

Not only was this issue raised on direct appeal, but this court has again compared the facts and circumstances of this case with those of all the applicable cases in which the death penalty has been imposed. We find beyond a reasonable doubt that the

sentence imposed in this case is no greater than, nor disproportionate to, the sentence imposed in any other case with the same or similar circumstances.

Otey next argues that aggravating circumstance § 29-2523(1)(d) is unconstitutionally vague on its face. This issue was raised on direct appeal. See brief for appellant in *Otey I* at 34-35.

In an apparent attempt to avoid the procedural bar, Otey seems to argue that the language embodied in § 29-2523(1)(d) was narrowed by appellate review after his direct appeal and first postconviction hearing and that he was not given the benefit of this later interpretation. At the time of Otey's direct appeal, a limiting construction had already been applied to the first prong of § 29-2523(1)(d). In 1977, we held that the "especially heinous, atrocious, cruel" language is directed to the "pitiless crime which is unnecessarily torturous to the victim," *State v. Stewart*, 197 Neb. 497, 522, 250 N.W.2d 849, 864 (1977), and to murders involving "torture, sadism, sexual abuse, or the imposition of extreme suffering," *State v. Rust*, 197 Neb. 528, 538-39, 250 N.W.2d 867, 874 (1977). This was the very test that the sentencing panel applied.

In any event, these two claims are procedurally barred, since the issues were previously raised in Otey's direct appeal.

III. APPOINTMENT OF COUNSEL

"The district court *may* appoint not to exceed two attorneys to represent the prisoners in all proceedings under sections 29-3001 to 29-3004." (Emphasis supplied.) § 29-3004 (Cum. Supp. 1990). Otey argues that the district court abused its discretion in failing to appoint an attorney.

"Where the record fails to present a justiciable issue of law and fact to the court in a postconviction action, it is not an abuse of discretion to fail to appoint counsel for an indigent." *State v. Rehbein*, 235 Neb. 536, 545, 455 N.W.2d 821, 827 (1990). As the previous discussion demonstrates, since Otey's claims are procedurally barred and without merit, there was no justiciable issue of law or fact in this action. Furthermore, as a matter of federal constitutional law, neither the eighth amendment nor the due process clause requires states to

appoint counsel for indigent death row inmates seeking state postconviction relief. *Murray v. Giarratano,* 492 U.S. 1, 109 S. Ct. 2765, 106 L. Ed. 2d 1 (1989).

IV. EVIDENTIARY HEARING

In his final assignment of error, Otey complains of the district court's failure to conduct an evidentiary hearing on his postconviction motion.

> " '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 under the Nebraska Postconviction Act when (1) the motion for postconviction relief does not contain sufficient factual allegations concerning a denial or violation of constitutional rights affecting the judgment against the movant, or (2) notwithstanding proper pleadings 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.' "

Rehbein, supra at 538-39, 455 N.W.2d at 824.

As the claims raised by Otey were or could have been litigated in his direct appeal or were grounds which existed at the time his first postconviction motion was filed and have no merit, he has failed to show a denial or violation of his constitutional rights causing the judgment against him to be void or voidable.

Otey has been given fair and ample opportunity to present his claims, both in the courts of this state and in the federal courts. Justice demands finality of the litigation. Otherwise, Otey could continue his appeals in perpetuity, making a mockery of his death sentence. The Legislature has dictated capital punishment to be the public policy of this state.

The issues raised in Otey's second postconviction motion are without merit. The judgment of the trial court is affirmed.

AFFIRMED.

LARRY T. GRAY, APPELLANT, V. FUEL ECONOMY CONTRACTING COMPANY AND THE TRAVELERS INSURANCE COMPANY, APPELLEES.

464 N.W.2d 366

Filed January 11, 1991. No. 90-307.

1. **Workers' Compensation: Evidence: Appeal and Error.** In testing the sufficiency of the 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.
2. **Workers' Compensation.** When personal injury is caused to an employee by accident or occupational disease, arising out of and in the course of his or her employment, such employee shall receive compensation therefor from his or her employer.
3. **Workers' Compensation: Proof.** Provided an employee can demonstrate the requisite causal connection, he or she may recover for an employment-related stroke under the Nebraska Workers' Compensation Act.
4. _____: _____. This court has expressly disapproved of language in previous opinions which imposed an enhanced degree of proof by an employee with a preexisting disability or condition who is prosecuting a claim under the Nebraska Workers' Compensation Act.
5. _____: _____. For an award based on disability, a claimant need only establish by a preponderance of the evidence that the employment proximately caused an injury which resulted in disability compensable under the Nebraska Workers' Compensation Act.
6. **Workers' Compensation: Appeal and Error.** When the record presents conflicting medical testimony, the Supreme Court will not substitute its judgment for that of the Nebraska Workers' Compensation Court.
7. **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, he or she cannot recover.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

James E. Harris, of Harris, Feldman, Stumpf Law Offices, and Marc A. Humphrey, of Humphrey and Haas, P.C., for appellant.

Dennis R. Riekenberg, of Cassem, Tierney, Adams, Gotch & Douglas, for appellees.

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

FAHRNBRUCH, J.

Larry T. Gray appeals a finding by the Workers'

Compensation Court upon rehearing that he did not establish that a stroke he suffered during his lunch break arose out of and in the course of his employment with Fuel Economy Contracting Company (Fuel Economy).

We affirm the Workers' Compensation Court's dismissal of Gray's suit against his employer and its insurer, The Travelers Insurance Company.

Gray's four assignments of error combine to allege that the compensation court rehearing panel was clearly wrong in finding that his stroke did not arise out of and in the course of his employment with appellee Fuel Economy.

"In testing the sufficiency of the 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." *Way v. Hendricks Sodding & Landscaping, Inc., ante* p. 519, 521, 462 N.W.2d 99, 101 (1990).

On January 7, 1987, at 8:45 a.m., Gray, then 45 years of age, began his first day of employment with Fuel Economy at an Omaha plant. It was the first day on which Gray had worked in 3 years following a neck and back injury he had previously suffered. He was assigned to a three-man team, pulling horizontal tubes out of a boiler. The temperature in Gray's work area was estimated to be in excess of 100 degrees. Gray was dressed in a T-shirt, a flannel shirt, and coveralls. During the morning, Gray perspired heavily.

Gray was given one 15-minute scheduled break at 10 a.m. He testified that he may have had a cup of coffee at that time. Gray took a water break one other time. There was evidence that on about three occasions, Gray drank water when he left the area to secure tools. Gray testified that after his morning break, he began experiencing dizziness, so he stuck his head into a boiler room to cool himself from an updraft.

At 12:40 p.m., Gray went to the break room to eat his lunch. After eating part of his lunch, Gray sat down on a wagon and became increasingly dizzy. He was found slumped over, and he had difficulty expressing himself. Gray may have been unconscious for a brief time. At that time, Gray's clothing was "soaking wet."

Gray arrived at Immanuel Medical Center (Immanuel) in Omaha at 2 p.m., where it was determined that he had suffered a stroke. Prior to that time, Gray had never experienced dizziness or had a stroke or heart problems.

On January 12, 1987, Dr. David Friedgood, a neurologist, examined Gray at his Des Moines, Iowa, office. The following week, Gray entered Mercy Hospital Medical Center (Mercy) in Des Moines. A cerebral angiogram taken there revealed that Gray had a blocked blood supply in an arterial system in one part of his brain. Dr. Paul From was the medical director of a division at Mercy which performed diagnostic work. He testified that from Gray's cerebral angiogram, it could be inferred that there was a clot or something else in the brain which impeded Gray's blood flow.

There was evidence that at the time of his injury, Gray smoked 2 to 2 1/2 packs of cigarettes per day. The record reflects that he had smoked for 25 years. Dr. From testified that individuals who smoke cigarettes have a much higher risk of having a stroke. The record further reflects that since 1983 Gray had had a moderate to severe hypertensive condition. As Dr. From explained, hypertension, over time, can create plaque or blood clots, which can break free and cause an embolus or thrombus. Dr. From testified that Gray's activity level was a further risk factor for coronary atherosclerosis.

Gray had a family history of atherosclerotic vascular disease. His father passed away due to a heart attack, a stroke caused his mother's death, and one of his two siblings suffered from hypertension. Drs. From and Friedgood testified that these risk factors are not synonymous with actual vascular disease, but they nonetheless demonstrate a predisposition to that condition.

While Gray was at Immanuel and Mercy hospitals, a number of studies were performed on him in an attempt to determine if he had a neurological or a cardiovascular disease. There was evidence of atherosclerosis in Gray's internal carotid artery system. The medical expert witnesses disagreed concerning the severity of the disease. Dr. From did not believe that the minimal obstruction played any role in Gray's stroke, particularly in view of the absence of plaque. Dr. Friedgood

also concluded that Gray's arterial disease was not of a sufficient magnitude to have caused the stroke. Dr. Alan H. Fruin, an Omaha physician specializing in neurological surgery, testified that there was "lots of evidence of atherosclerotic vascular decease [sic]."

The appellees' medical expert witnesses found no causal connection between Gray's employment with Fuel Economy and his stroke. Dr. David J. Boarini, a neurosurgeon, testified that in the vast majority of strokes in younger people, the cause is usually unknown or due to small vessel disease. He further pointed to the presence of multiple risk factors in this case, such as hypertension, tobacco use, and family history. Dr. Fruin based his conclusion upon three factors: the type of stroke suffered by Gray is not related to physical activity or fatigue, the presence of several risk factors for vascular disease existing prior to the occurrence of the stroke, and the absence of any causal relationship between the stroke and Gray's employment.

At the time of rehearing, Gray testified that as a result of the stroke, he suffered from weakness in his right arm and numbness in his right hand and experienced some problems with his speech. After his stroke, Gray had been employed as an industrial sewing machine mechanic and as a truckdriver, but at the time of rehearing, he was unemployed. He was seeking employment as a truckdriver.

On January 6, 1989, Gray filed a petition in the Workers' Compensation Court, claiming benefits for his stroke under the Nebraska Workers' Compensation Act. Upon hearing before a single judge, the cause was dismissed because the court was "not persuaded that the plaintiff's exertion on the morning in question caused or contributed to cause his stroke of that date." Upon rehearing before a three-judge panel of the Workers' Compensation Court, the order of dismissal was unanimously affirmed.

"When personal injury is caused to an employee by accident or occupational disease, arising out of and in the course of his or her employment, such employee shall receive compensation therefor from his or her employer . . . ." Neb. Rev. Stat. § 48-101 (Reissue 1988). Provided an employee can demonstrate the requisite causal connection, he or she may

recover for an employment-related stroke under the Nebraska Workers' Compensation Act. See, e.g., *Smith v. Fremont Contract Carriers*, 218 Neb. 652, 358 N.W.2d 211 (1984).

Before directly addressing Gray's assignments of error, we first consider whether the compensation court panel imposed upon Gray an improper burden of proof. The compensation court panel found:

> In addition the plaintiff suffered from preexisting conditions in that he had a hereditary history of familial factors making him genetically susceptible to hypercoagulation and in addition was a smoker. Because of these preexisting conditions the plaintiff has an enhanced degree of proof to establish that an injury arose out of and in the course of employment. . . . The Court feels that the plaintiff has not met this enhanced burden of proof.

Gray argues that the compensation court panel misconstrued the medical testimony as to whether he had a preexisting condition or disease which enhanced the degree of proof necessary for him to prevail. Gray contends that while it was uncontroverted that he did have a number of risk factors which made him a more likely candidate for a stroke, none had resulted in any physiological changes in his body. Therefore, Gray asserts that it was error for the compensation court panel to apply an enhanced degree of proof.

This court has expressly disapproved of language in previous opinions which imposed an enhanced degree of proof by an employee with a preexisting disability or condition who is prosecuting a claim under the Nebraska Workers' Compensation Act. *Heiliger v. Walters & Heiliger Electric, Inc.*, *ante* p. 459, 461 N.W.2d 565 (1990). For an award based on disability, a claimant need only establish by a preponderance of the evidence that the employment proximately caused an injury which resulted in disability compensable under the Workers' Compensation Act. *Id.* See, also, *Way v. Hendricks Sodding & Landscaping, Inc.*, *ante* p. 519, 462 N.W.2d 99 (1990) (holding that the claimant must prove by a preponderance of the evidence that a claimed disability was caused by an accident arising out of and in the course of

employment). Thus, the critical question here is whether Gray established by a preponderance of the evidence that his employment with Fuel Economy proximately caused his stroke which resulted in disability compensable under the Workers' Compensation Act.

It is Gray's theory that his stroke was caused by his blood becoming hypercoagulated due to the exertion necessitated by his employment. Dr. Friedgood hypothesized that a hypercoagulable condition arises when a person becomes dehydrated and fluid from the blood is diverted to tissues. He further stated that as the bloodstream loses fluid, the blood becomes thicker, causing clots which lessen circulation to the brain. Dr. From hypothesized that Gray became dehydrated due to heavy perspiration, resulting in his hypercoagulable condition. Dr. From opined that Gray's thrombotic stroke occurred when his exertion reduced the ratio of water to blood cells in his blood. At that point, he believed, Gray's blood became hypercoagulable, which caused the blood to clot too easily.

While Gray was hospitalized at Immanuel, blood urea nitrogen (BUN) and electrolyte studies were performed. Dr. Fruin stated that these two tests would have been the most revealing tests for the existence of dehydration in Gray's body. The record does not disclose how a BUN study demonstrates dehydration. Dr. Fruin explained the method by which electrolyte studies disclose the level of potassium in a person's body. He testified that dehydration diminishes the level of potassium in the body because sodium is reabsorbed at the expense of potassium.

Dr. Fruin discounted the hypercoagulable theory because the BUN and electrolyte studies failed to show the existence of dehydration. From his testimony, it is clear that Dr. Fruin believed that the laboratory studies were performed at the time of Gray's admission to Immanuel. Although the first electrolyte reading was obtained at 2:15 p.m. on January 7, the record indicates that the BUN study was not conducted until 6:20 a.m. on January 8.

The compensation panel found:

> The embolic blood clot according to Dr. From, was the

> result of hypercoagulation which Dr. From felt was due to dehydration. *However, the Court finds the evidence is lacking that the plaintiff suffered from dehydration on the date of the accident which caused the hypercoagulation* based on the testimony of Dr. Fruin . . . who stated the plaintiff was not dehydrated because his electrolytes showed no dehydration and the BUN studies also showed no dehydration.

(Emphasis supplied.)

Gray argues that the compensation court panel was clearly wrong in its reliance on evidence concerning the BUN and electrolyte studies. It is Gray's contention that the BUN study is unreliable because it was not done until 17 hours after his stroke. By that time, Gray maintains, he had received intravenous solutions which would have normalized his BUN reading. Gray asserts that Dr. Fruin incorrectly concluded that the electrolyte studies performed at Immanuel disclosed a normal potassium reading, because later studies performed at Mercy revealed a higher level of potassium.

By attacking the evidence upon which the appellees' expert relied, Gray's contentions amount to nothing more than a disguised attempt to shift the burden of proof to the appellees. It must be kept in mind that, as the claimant, Gray had that burden of proof. The central premise to Gray's recovery is that the blood can become hypercoagulated due to dehydration from heavy perspiration, resulting in strokes. Yet, the record reflects that among the medical expert witnesses, there was disagreement whether dehydration could bring about a hypercoagulable state in the blood, by which the blood becomes more prone to clotting. When the record presents conflicting medical testimony, the Supreme Court will not substitute its judgment for that of the Workers' Compensation Court. *Binkerd v. Central Transportation Co., ante* p. 350, 461 N.W.2d 87 (1990).

Assuming arguendo the unanimous medical acceptance of the hypercoagulable hypothesis in this case, Gray has still failed to show as a factual matter that he was dehydrated, an essential condition for the theory's application. Four medical expert witnesses were deposed in this case. Drs. From and Friedgood

were Gray's expert witnesses. The appellees sought expert testimony from Drs. Boarini and Fruin. A letter from Dr. Ronald A. Cooper to Gray's counsel was also introduced into evidence.

Dr. From testified that at the time of his admission to Immanuel, Gray's "electrolyte levels were not increased to the point where we think of dehydration . . . ." Dr. From reviewed the records from both Immanuel and Mercy. He further stated that without any evidence of dehydration, it was speculative whether Gray's stroke was caused by a hypercoagulable condition. Dr. Friedgood testified, "I don't know that you can actually prove it [hypercoagulable condition] with a test. There is no specific test that can be done which will prove that this man has this type of situation. It's only something you can hypothesize and guess about." Acknowledging that the Immanuel tests could have indicated whether Gray was dehydrated, Dr. Friedgood continued, "I don't believe any of the information they obtained prove that in any way." Dr. Friedgood concluded that it was simple speculation on anyone's part as to whether Gray was dehydrated on January 7, 1987. Dr. Boarini, after reviewing medical records from Immanuel, testified that there was no evidence that Gray was dehydrated upon his admission to Immanuel. Dr. Fruin testified that Gray was not dehydrated when he arrived at Immanuel. Dr. Cooper wrote:

> When evaluating a relatively young person who has had a stroke, one looks for causes such as intracerebral hemorrhages, cardiac sources for emboli, problems with the blood vessel itself such as atherosclerosis or inflammatory conditions seen in certain forms of vasculitis, anomalies of blood vessels, and problems with the blood elements themselves or the coagulation system. When no abnormalities of these symptoms are definitely found, then one can only be speculative as to cause. *It is conceivable in Mr. Gray's case that with his physical exertion and the possible relative dehydration, that this could have induced a hypercoagulable state and predisposed him to stroke, though I have no way in definitely proving this.* The other possibility is that a

> sudden arrythmia of the heart during his activities could have set off a chain of events leading to stroke, but again this is purely speculative.

(Emphasis supplied.)

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, he or she cannot recover. *McMichael v. Lancaster Cty. Sch. Dist. 001*, 233 Neb. 603, 447 N.W.2d 35 (1989). Accord *Mutual of Omaha v. Broussard*, 233 Neb. 916, 448 N.W.2d 600 (1989) (asserting that a workers' compensation award may not be based on mere speculation or conjecture).

Not only is Gray's hypercoagulation theory just that, but he has failed to present any medical expert evidence that he was, in fact, dehydrated when he was admitted to Immanuel. Gray has failed as a matter of law to establish by a preponderance of the evidence that his employment on January 7, 1987, proximately caused his stroke, which resulted in disability compensable under the Workers' Compensation Act. See, *Bituminous Casualty Corp. v. Deyle*, 225 Neb. 82, 402 N.W.2d 859 (1987) (reversing compensation court's finding regarding average weekly wages because as a matter of law, the evidence failed to support the claim that the employee was receiving any compensation); *Caradori v. Frontier Airlines*, 213 Neb. 513, 329 N.W.2d 865 (1983) (determining that a physician's opinion that the accident "could have" caused the injury was insufficient as a matter of law to carry the employee's burden). For that reason, the compensation court panel's decision is affirmed.

AFFIRMED.

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